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VOL. VII. TORONTO, SEPTEMBER, 1861. No. 9.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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CONTENTS.

REMITTANCES.

W. S., Perth, $8. J. H., Kinmount, $2. T. J., for Tp. Raleigh Chatham, $1

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspaper in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of any Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. Wm. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 20th, 1860.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform; responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazzette, May 19th*, 1859.

UPPER CANADA LAW JOURNAL—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May*, 16*th* 1859.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto, $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co., King Street East, Toronto.

This is the first number of the Fifth Volume: and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged,—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ablility with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to sry much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorald Gazette, January* 27, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co., Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th., 1858.

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Majistrate and Municipal Officer. or would politicians find it unprofitable, to pursue its highly instru ive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

The *Law Journal* is beautifully printed on excellent paper, and, in deed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

UPPER CANADA LAW JOURNAL, Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised. We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make-mention.—*Whig, May*, 18*th* 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette.*

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law, Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy:—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful persual. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," is continued from the July number; it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors; and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &C.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol. 4.) commencing with January last. Its pages have been looked over by us with much interest, It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importanec to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual, it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister.s office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspasers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July* 7, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful persual. This work should be found in the office of every merchant and trader in the Province, being, in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.—June* 8, 1858,

U. C. Law Journal, August, 1858: Toronto Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August* 11*th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student; and carefully read, and referred to, by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August* 12*th*, 1858.

DIARY FOR SEPTEMBER.

1. SUNDAY..... 14*th Sunday after Trinity.*
2. Monday . .. Paper Day, Q.B. Last day for notice of trial in County Court.
3. Tuesday..... Paper Day, C.P. Chancery Exam. Term Toronto commences. Last day for notice for Sandwich and Whitby.
4. Wednesday ..... Paper Day, Q.B.
5. Thursday ..... Paper Day C.P.
7. Saturday ..... Trinity term ends.
8. SUNDAY..... 15*th Sunday after Trinity.*
10. Tuesday ..... Last day for notice for Chancery Examination, Chatham and Cobourg. Quarter Sessions and County Court Sittings in each County.
15. SUNDAY..... 13*th Sunday after Trinity.*
17. Tuesday ..... Chancery Examin. Term Sandwich and Whitby, commences. Last day for notice for London and Belleville. Last day for service of Writ for Toronto
22. SUNDAY..... 17*th Sunday after Trinity.*
24. Tuesday ..... Chancery Examin. Term. Chatham and Cobourg commences. Last day for notice for Chancery Examin. Term, Brantford and Kingston
27. Friday ..... Last day to declare for Toronto.
29. SUNDAY..... 18*th 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. Fitton & 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.

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

SEPTEMBER, 1861.

CERTIFICATE FOR FULL COSTS.

It is by section 328 of the Common Law Procedure Act enacted, that "In case a suit of the proper competence of a county court be brought in either of the superior courts of common law, or in case a suit of the proper competence of a division court be brought in either of such superior courts, or in a county court, the defendant shall be liable to county court costs, or to division court costs only (as the case may be), unless the judge who presides at the trial of the cause certifies in open court, immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the county court or division court (as the case may be), and if the judge does not so certify, so much of the defendant's costs, taxed as between attorney and client, as exceed the taxable costs of defence that would have been incurred in the county court or division court shall, in entering judgment, be set off and allowed by the taxing officer against the plaintiff's county court or division court costs to be taxed, and if the amount of costs so set off exceed the amount of the plaintiff's verdict and taxable costs, the defendant shall be entitled to execution for the excess."

We propose to make some remarks on this enactment. Though not obscure in its terms, it is in some places misunderstood. Examined by the light of adjudged cases we shall see that its meaning is throughout reasonably clear.

The superior courts of common law have an inherent jurisdiction over all causes, be they great or small. By the statute of Gloucester, damages, whether great or small, carry costs. The Legislature has appointed inferior courts for the trial and determination of smaller causes. Wherefore it is only proper that the time of superior courts should not be occupied in the trial of causes which can be more conveniently, cheaply and expeditiously determined in the inferior tribunals. It is, however, not only necessary to declare that such causes ought to be tried in the proper tribunal, but that the party carrying them to another court shall be punished, and to declare also the mode of punishment.

It is the design of the Legislature to effect, by the enactment under consideration in specific terms, that which we have in general terms mentioned.

The subject of the enactment is "a suit of the proper competence of a county court, or of the proper competence of a division court." It is not our purpose here to explain what suits are of the proper competence of the courts indicated. We refer the reader to Consol. Stat U. C., cap. 15, secs. 16, 17, and Consol. Stat. U. C., cap 19, sec. 55, which are the general enactments on the subject. If such a suit be brought in either of the superior courts of common law or in a county court, as the case may be, the defendant shall be liable to the costs of the inferior court only, unless the judge who presides at the trial of the cause certifies in open court, immediately after the verdict has been recorded, that it is a fit cause to be withdrawn from the inferior court and brought in the superior or county court.

The rule laid down is to take effect in all the cases specified, unless the judge, in his discretion, certify in the manner prescribed. The amount of the verdict in each case is *prima facie* against plaintiff's right to full costs. The burden is cast upon him to make out a proper case for a certificate. The verdict without the certificate (if the subject matter of the suit be of the proper competence of the inferior court) is, under the statute, conclusive against plaintiff's right to full costs. (See *Gardner* v. *Stoddard*, Dra. Rep. 101; *King* v. *Such*, 5 U. C., O. S., 81; *Washburn* v. *Longley*, 6 U. C., O. S., 217; *Hinds* v. *Denison*, 1 U. C. Ch. R., 194; *Hamilton* v. *Clarke*, 2 U. C. Pra. R. 189.

Some persons—relying upon English cases, which are not always applicable—suppose that the amount of the verdict is conclusive so as to prevent the giving of a certificate.

There can be no greater mistake. So to read our enactment would be to make it absurd and inconsistent. If a plaintiff, in good faith and on probable grounds, seek to recover an amount beyond that which the jury award him, he has a right to the exercise in his favor of the discretionary power vested in the judge. The object of the enactment is not to inflict injustice, but to punish wilful contravention. Wherever it appears to the satisfaction of the judge that the plaintiff did sincerely urge, and upon reasonable grounds, a demand for a debt or damages greater than could be recovered in the inferior court, although the jury may have given a verdict for a sum within the jurisdiction of the inferior court as to amount, it is usual for the judge to certify. Where there is no precise computation to be formed on the evidence, and where the evidence would have warranted a verdict beyond the mark as well as below, it would be hard indeed that the plaintiff should be compelled, at the peril of losing his costs, to relinquish a large portion of what he may fairly claim, lest the jury, preferring the testimony of one witness to another, or forming an arbitrary estimate of their own, may bring his verdict within the lower jurisdiction. The Legislature never intended to work such hardship. So to construe the act is to convert a remedial measure into one of oppression.

Take a case for example: a plaintiff sues to recover damage, in trespass for a horse taken from him, and having given $60 for the horse, and honestly valuing him at that price brings his action in a county court. The jury, upon contradictory evidence as to value, or from lenity to the defendant, chose to give him only $40. Would it not be hard that he should lose his costs, when if the jury had chosen to value the horse one shilling higher it would have shewn him to have resorted to the proper tribunal; and when the valuation of the horse at $60 might have been more consistent with the evidence than the valuation at $40? The verdict of $40 may be correct; plaintiff, rather than have further litigation, may be satisfied with it; but to refuse him a certificate for costs would be, in all probability, as we shall hereafter show, to deprive him of every farthing of his verdict.

Take another case. A builder brings his action upon an agreement for a specified price which would entitle him to $120. He proves the agreement and the work done under it, and thus makes out a case which he could not, without abandoning the excess, have proved in a division court. Having, therefore, necessarily brought his action in a higher court, it may happen that defendant calls a witness to declare his opinion that the work is ill done or the materials bad, and then make out a claim to a reduction in the value. The plaintiff's witnesses swear the contrary. The matter is left to the determination of the jury. Upon evidence which would warrant a determination either way they think fit to reduce the price, and give a verdict for $80. Ought it to follow in such a case that the plaintiff must lose his costs, because he did not foresee that the defendant would produce such witnesses, and that the jury would believe them in preference to his own? It may in truth be rather hard that the decision should be against him upon the point of damages; but to say that he should be prohibited from advancing his claim and producing his witnesses would be hard indeed; and yet it must be so, if the judge in the case supposed should refuse a certificate for county court costs!

It seems reasonable that the plaintiff should lose his costs only where there is good reason to suppose that he proceeded unnecessarily in the higher court for a demand which he might have recovered in the lower jurisdiction. The enactment, we repeat, is directed against cases of wilful contravention, not cases of accidental verdicts. The very power to certify is granted by the Legislature for the protection of the plaintiff who, in good faith and with reasonable grounds of success, enters a demand for more than he recovers. We can well understand why a plaintiff suing in a county court upon a promissory note for $80, should be deprived of his costs, but fail to see any analogy between such a case and the cases of the nature above supposed. (See remarks of Robinson, C. J., in *Stratford* v. *Sherwood*, 5 U. C., O. S., 169.)

In some cases rules have been laid down for the exercise of the discretionary power to certify. If a debt exceeding the jurisdiction (as to amount) of a county or division court is reduced below that amount before action brought, it is usual to refuse a certificate: (*Donnelly* v. *Gibson*, 5 U.C., O. S., 704.) But if the proof of the payments involve matters of difficult investigation, or if made after action brought, it is usual for the judge to set the matter right by granting his certificate: (*Mearns* v. *Gilbertson*, 6 U. C., O. S., 573; *Turner* v. *Berry*, 5 Ex., 858; *Kilborn* v. *Wallace*, 3 U. C., O. S., 17.) So if the jurisdiction of the inferior court be doubtful, (*Fisher et al* v. *The City of Kingston*, 4 U. C. Q. B., 213), or there be no judge to preside over the court, (*Jennings* v. *Dingman*, T. T., 405 Vic., M. S., R. & H. Dig., Costs, I [1] 13; *Willis* v. *Merriton*, *Ib.*, Costs, I [1] (14), or a judge who is a party to the cause, (*Jones et al* v. *Wing*, 3 U. C., O. S., 36; *Holland* v. *Vincent*, 20 L. & Eq., 470), or, as to Division Courts, if it be necessary to issue a commission to examine witnesses (*Comstock* v. *Leary*, 3 U. C. L. J. 13). But it would seem that it is not of itself a ground for a certificate that defendant's set-off could not be tried in the inferior court, or involved difficult matters of investigation (*Gooderham* v. *Chilver*, 5 U. C., O. S., 493.)

The exercise of discretion cannot be reviewed by the court. All that the court can do is to inquire whether the case was a proper one for the exercise of discretion. (See *Barker* v. *Hollier*, 8 M. & W. 513; *Shuttleworth* v. *Cocker*, 1 M. & G. 829.)

It is provided that the certificate shall be given "immediately after the verdict has been recorded." By this is meant "within a reasonable time:" (*Page* v. *Pearce*, 8 M. & W., 677.) Whether the judge may certify after another trial has been commenced has not yet, we believe, received judicial determination: (Marshall on Costs, 18) Clearly it is too late after other causes have not only been commenced but tried: (*McKee* v. *Irwine*, 1 U. C. Q. B., 160.) He may, however, certify on the same day, and before the trial of another cause, notwithstanding an adjournment of the court, (*Thompson* v. *Gibson*, 8 M. & W. 287), and even after the jury in the next succeeding cause have been partially sworn: (*Nelmes* v. *Hedges*, 2 Dowl, N. S., 350.) But he cannot certify after the lapse of several days: (*Gillet* v. *Green*, 7 M. & W., 347.) It has been held that the judge has power to examine witnesses for the purpose of satisfying his mind as to the propriety of granting the certificate: (*Handcock* v. *Bethune*, 2 U. C. Q. B., 386.)

The certificate when granted should be to the effect that the cause is "a fit cause to be withdrawn from the county court or division court (as the case may be) and brought in the the superior court or a county court (as the case may be)." The word "withdrawn" cannot be taken literally. It must mean "not instituted" as if enacted that "the cause is a fit cause to have been instituted in the superior court." (Per Macaulay J., in *Gardner* v. *Stoddard*, Dra. Rep. 102.) The word "withdrawn" is scarcely appropriate. The intention would perhaps have been better expressed by the word "withheld" than "withdrawn" for that is the real meaning of the word as used in the enactment. (Ib. per Robinson C. J.)

The judge is to certify not only that the cause was a fit one to be "withdrawn" from the county or division court, but "brought" in the superior or county court By this is meant, that unless the judge of the superior or county court (as the case may be) in which the cause has been tried shall certify that the cause was properly commenced in the court in which commenced, the defendant shall only be liable to the inferior court costs. It is not intended to enable the judge to give the costs of the intermediate court where the cause has been improperly brought in the highest court Thus, where a cause had been improperly brought in a superior court and a verdict rendered for an amount with in the division court jurisdiction, it was held that the judge had no power to order county court costs, the suit not having been commenced in the county court, (*Cameron* v. *Campbell* 11 U. C. Q. B. 159).

Where a cert ficate is necessary and no certificate granted, the act is express that "the defendant shall be liable to county court costs or division court costs *only* (as the case may be), and that "so much of the defendant's costs taxed as between attorney and client as exceed the taxable costs of defence which would have been incurred in the county court or division court, shall in entering judgment be set-off and allowed by the taxing officer against the plaintiff's county court or division court costs." The excess of costs to which defendant by the improper proceeding of plaintiff is subjected, is thus made the subject of set-off, but so far as we have quoted a set-off only against the plaintiff's county court or division court costs;" but the section proceeds, "and if the amount so set off exceeds the amount of the plaintiff's *verdict and taxable costs*, the defendant shall be entitled to execution for the excess." It will be observed that no express provision is made for those cases in which it may happen, that the excess of costs of defence exceeds the plaintiff's taxed costs against the defendant, and yet does not also exceed the whole amount of his verdict. Still the intention is palpable. It is that the defendants should receive from the plaintiff any excess above his costs, whether such excess shall cover a part or the whole of the plaintiff's verdict or more. (*Cameron v. Campbell* 1 U. C. Prac. R. 170. Ib. 12 U. C. Q. B. 159.)

TRINITY TERM, 1861.

The following gentlemen, having passed the necessary examination, were on the first day of Term called to the degree of Barrister-at-Law:—

George Hemings, Toronto; John Michael Tierney, London; William Ralph Meredith, London; William Stephens Senkler, Brockville; Warren Rock, Welland; Alexander Robert Morris, Kingston; William Nicholas Miller, Galt: William Douglass, Chatham; Nicholas Monsarrat, London; George Edward Moore, London; Peter O'Reilly, jr., Kingston; William Pryor Atkinson, St. Catharines: Edmund John Hooper, Kingston; Henry Robertson, Barrie; William Oliver Meade King, London; F. A. Stayner, Toronto; William Fuller Alves Boys, Barrie.

EDWIN JAMES.

We observe by our Exchanges that this well known but now much disgraced English barrister is in New York.

MR HARRISON'S DIGEST.

Mr. Harrison's Digest having been at length completed by the Editor, is now in the hands of the Publisher, H. Rowsell, and its publication is being rapidly pushed forward.

JUDGMENTS IN ERROR AND APPEAL.

On Thursday, 23rd August, the Court of Error and Appeal met for the delivery of Judgments.

The following Members of the Court were present:—Robinson, C. J.; Draper, C. J.; Burns, J.; Esten, V. C.; Spragge, V. C.; Richards, J.; Hagarty, J.

The following is a list of cases in which judgments were delivered:—

Topping, appellant, and Joseph, respondent.—This was an appeal by Topping, one of several defendants, against a decree of the Court of Chancery. The question involved was one of marshalling assets. ROBINSON, C J.—Appeal ought to be dismissed without costs. DRAPER, C. J.—Appeal ought to be dismissed on terms mentioned by the Chief Justice. BURNS, J., of same opinion. SPRAGGE, V. C.—Appeal ought to be affirmed. RICHARDS, J., concurred with BURNS, J. HAGARTY, J.—Appeal ought to be dismissed. *Per Cur.*—Bill dismissed as against Topping, without costs.

Robertson et al., appellants, Moffatt, respondent.—This was an appeal from a decision of the Court of Queen's Bench. The action was brought by respondent against the apellants as the respective maker and indorser of a promissory note. The plea was a joint one. One of the defendants proposed to call the other as a witness, but his evidence was rejected. On an application for a new trial, the Queen's Bench held that the rejection of evidence was improper and that a new trial should be granted. So, per DRAPER, C. J., SPRAGGE, V. C., and HAGARTY, J., concurred. *Per Cur.*—Judgment reversed without costs, and new trial ordered.

Corporation of the Town of Dundas, appellants, Great Western Railway Company, respondents.—This was also an appeal from Queen's Bench. DRAPER, C J.—Appeal should be dismissed with costs. ESTEN, V. C., concurred. SPRAGGE, V. C., concurred. ROBINSON, C J., concurred. *Per Cur.*—Judgment affirmed, and appeal dismissed with costs.

Macdougall, appellant, McCoy, respondent. Per Cur.—Appeal dismissed with costs.

Mountjoy, appellant, and The Queen, respondent.—This was an appeal from a *pro forma* judgment of Queen's Bench. The question raised was as to the width of East North Street where it passes the Church Block in London. According to decision of Queen's Bench, in conformity with that of Common Pleas, East North Street should at the point indicated be 120 feet wide. Defendant, contending that East North Street should be only 100 feet wide, appealed. ROBINSON, C. J.—Appeal must be dismissed. DRAPER, C. J.—Appeal ought to be dismissed. *Per Cur.*—Appeal dismissed. HAGARTY, J., dissentiente.

Quinlan, appellant, Gordon et al., respondents.—This was an appeal from Court of Chancery. A loan on mortgage had been made after 16 Vic. c. 80, and before 22 Vic, c. 85. The question was whether apellant, having taken notes for excess of interest beyond 6 per cent. and been paid same, was entitled to enforce payment of his mortgage security with 6 per cent. interest, or whether the excess should go in reduction of principal. The Court of Chancery held the affirmative. Plaintiff appealed. ROBINSON, C. J.—Appeal allowed ESTEN, V. C., delivered no judgment. SPRAGGE, V. C, dissentiente.—Appeal ought to be dismissed. *Per Cur.*—Appeal allowed.

On Monday, 9th September, the Court met and delivered judgment in *Norton, appellant, Smith, defendant*—An action for dower. The question raised was as to right of widow to dower when deed and mortgage made same day. *Held* that widow was entitled to recover.

Smith & Henderson, appellants, Greaves, respondent.—Stands over.

FALL CIRCUITS.

EASTERN CIRCUIT.

The Hon. Mr. JUSTICE McLEAN.

Brockville	Tuesday,	1st October.
Perth	Tuesday,	8th October.
Ottawa	Tuesday,	15th October.
L'Orignal	Thursday,	24th October.
Cornwall	Tuesday,	29th October.

MIDLAND CIRCUIT.

The Hon. Mr. JUSTICE RICHARDS.

Whitby	Monday,	30th September.
Peterborough	Monday,	7th October.
Cobourg	Friday,	11th October.
Belleville	Monday,	21st October.
Picton	Wednesday,	30th October.
Kingston	Monday,	4th November.

HOME CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Owen's Sound	Tuesday,	1st October.
Milton	Monday,	7th October.
Niagara	Monday,	14th October.
Welland	Tuesday,	22nd October.
Barrie	Monday,	28th October.
Hamilton	Monday,	4th November.

OXFORD CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Brantford	Tuesday,	1st October.
Cayuga	Wednesday,	9th October.
Simcoe	Monday,	14th October.
Woodstock	Monday,	21st October.
Stratford	Monday,	28th October.
Berlin	Monday,	4th November.
Guelph	Monday,	11th November.

WESTERN CIRCUIT.

The Hon. SIR J. B. ROBINSON, BART., CHIEF JUSTICE.

Goderich	Tuesday,	1st October.
Sarnia	Tuesday,	8th October.
St. Thomas	Monday,	14th October.
London	Friday,	18th October.
Chatham	Monday,	4th November.
Sandwich	Monday,	11th November.

TORONTO AND COUNTIES OF YORK AND PEEL.

The Hon. CHIEF JUSTICE DRAPER.

County of the City of Toronto,	Monday,	30th September.
United Counties of York and Peel	Monday,	14th October.

LAW SOCIETY OF UPPER CANADA.

TRINITY TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. Will the discharge of an indorser of a bill or note discharge any other, and if so, what parties to the instrument? Give your reasons.

2. When a forged cheque is paid by a banker, has the banker any remedy against his customer, whose signature has been forged? Is there any exception to this rule?

3. How far is an auctioneer the agent of the vendor and vendee respectively, so as to make a contract binding within the Statute of Frauds, and what, if any, difference does the fact of the auctioneer suing the purchaser in his own name, make in this respect.

8. What is the distinction between the common law liability of a carrier of passengers and goods.

WILLIAMS ON REAL PROPERTY.

1. Distinguish between executory interests and contingent remainders, and give examples of each.

2. In what manner can executory interests be created?

3. What is meant by "tenant by the courtesy?"

4. State the rule in Shelly's case.

5. What are the rights of aliens with respect to the ownership of real property?

6 What is meant by an "equitable estate in fee simple?"

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between "mistake and "accident" and give examples of each.

2. Under what circumstance will a verbal contract as to lands be enforced in equity?"

3. Mention some matters in which the courts of law and of equity have concurrent jurisdiction.

4. Explain the maxim that equity follows the law.

5. What is meant by constructive fraud? How far is fraud of this nature affected by Provincial Statute.

BLACKSTONE'S COMMENTARIES, VOL I.

1. What are the common law duties of a coroner, and what additional duty has the Statute law of Canada imposed on coroners

2 What is meant by rights of persons, as distinguished from rights of things; and what is the distinction between absolute and relative rights of persons?

3. In what light is marriage considered by the law of England?

STATUTES AND PRACTICE.

1. Where provisions of the Consolidated Statutes differ in effect from the statutes for which they are substituted, which provisions are to prevail?

2. In what, if any, cases can a writ of replevin issue without an order of a judge?

3. What is the rule with regard to costs of an issue found for the plaintiff, upon which judgment is arrested?

4. What is the proper mode of enforcing the attendance of witnesses before an arbitrator, when the submission has been made a rule of court?

5. When some instalments only of the mortgage money are due, can a foreclosure suit be instituted?

6. By what process can subsequent incumbrancers obtain a decree for sale when a prior incumbrancer prays for a decree of foreclosure?

7. By what process is a guardian *ad litem* appointed?

8. How is a decree registered.

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What are the principal interests of a personal nature arising out of real estate?

2. What is meant by "covenants running with the land?" and give examples.

3. What are the rules of descent as to real property in cases of intestacy?

4. Distinguish between a "use" and a "trust," and between a "joint-tenancy," and a "tenancy in common?"

5 How are estates tail created, and how barred?

6. Are words of limitation necessary, in order to create an estate in fee simple?

STORY'S EQUITY JURISPRUDENCE.

1. What is meant by "constructive frauds?" and state the ground of the interference of Courts of Equity in cases of this kind.

2. How far are such frauds affected by Provincial Statutes?

3. Mention the principal incidents of "suretyship?"

4. What are the various grounds of defence to a suit for specific performance?

5. Under what circumstances will a verbal contract relating to lands be enforced?

PRACTICE AND STATUTES.

1. Give the provisions of the provincial statute, which is commonly known as the "dormant equities act?"

2. How are corporations, foreign and domestic, served with process in Chancery?

3. What effect has the receipt of rents and profits during the progress of a foreclosure suit before the final order is obtained?

4. When some instalments only of the mortgage nearly are due can a foreclosure suit be instituted?

5. When two or more mortgages became united in one mortgagee can the mortgagor redeem one or both at his option? and give reasons for your opinion.

6. What is the proper course to be taken by a plaintiff when an equitable plea is pleaded which cannot properly be dealt with by the court?

7. What is judgment *non obstante veredicto*, and in what cases is it granted

8. In what cases, in which an appeal lies from the common law courts, is it necessary to obtain leave to appeal?

9. What is the effect of demurring to evidence?

TAYLOR ON EVIDENCE.

1. In what case, if any, is *hearsay* admissable as evidence?

2. What are the two main classes of presumptions? give an instance of each.

3. In what cases is secondary evidence of an instrument admissible? and mention what is necessary to be done in each case to entitle the party relying on it to offer it.

4. *When, if at all do the declarations of co-conspirators become* admissible against each other?

5. When a contract has been made by a broker, what constitutes the contract to satisfy the statute of frauds?

BYLES ON BILLS.

1. What is the effect of the gift of a bill note, first, as to the donees right to sue the donor upon it; second, as to his right to retain it against the donor; third, as to his right to sue other parties upon it.

2. What must a notice of dishonour contain?

3. Upon what principle does the discharge of a drawer and indorser for want of notice of dishonour respectively depend?

4. What is the effect in an action by the holder of a bill against the acceptor, of the bill having been paid by the drawer.

SMITH'S MERCANTILE LAW.

1. What is the distinction between a voyage and a time policy as regards any implied warranty of sea-worthiness?

2. What is stoppage in transitu; does it *revest* the property in the goods in the vendor?

3. *What is the distinction between a factor* and broker, and what is a *del credere* agent?

ADDISON ON CONTRACTS.

1. Enumerate the contracts required by the *Statute of Frauds* to be in writing. To what extent has this been extended by subsequent statute?

2. What is the difference, in its effect, upon a contract, of the *consideration* being partly legal and partly illegal, and the *contract itself* (for a valid consideration) being partly legal, and partly illegal?

3. Where a contract is made by parties residing in different places, by the medium of letters, what determines the *locus contractus.*

EXAMINATION FOR CALL WITH HONORS.

DART'S VENDORS AND PURCHASERS.

1. What are the requisites of an agrement relating to real estate, which equity will specifically enforce.

2. Can a purchaser who has been let into possession pending a discussion as to the title be sued for use and occupation if the contract go off through defect in the title? and give reasons for your answer.

3. If no no time is fixed for the completion of the purchase, is the purchaser liable to pay interest?

4. What are the requisites of a "perfect abstract" of title?

5. By what representations is a vendor bound?

6. Is marriage any part performance of a parol agreement entered into previously but in contemplation of it? give your reasons for your answer.

COOTE ON MORTGAGES.

1. In what respects do mortgages of real property, of ships, of chattel property, and of property consisting both of realty and personalty differ: and what are the necessary formalities of each of these kinds of mortgages?

2. Distinguish between "legal" and "equitable" mortgages?

4. How far do registered judgments partake of the the nature of mortgages?

4. What are the rights and remedies of a mortgagee against a tenant in possession of the mortgagee after default?

5. Is the mortgagor entitled to the benefit of an insurance effected by the mortgagee, when called upon to pay the mortgage debt? and give reasons for your answer.

JARMAN ON WILLS.

1. Does a will in all cases speak only from the decease of a testator?

2. Is a will of realty executed abroad under a power governed by the *lex domicilii* or the *lex loci rei sitæ?*

3. How far does "domicile" effect a testamentary disposition?

4. What are the statutory provisions affecting wills in Upper Canada?

5. Can extrinsic evidence be referred to either as to the execution or interpretation of wills?

6. What are estates by "implication," and when do they arise?

JTSTINIAN'S INSTITUTES.

1. In what manner was the contract of mandate (*mandatum*) formed?

2. Distinguish between "Obligatio ex contractu," "obligatio quasi ex contractu," and give examples of each.

3. What was the "lex Aquila"? Was it in any, and if so in what manner affected by the "lex Cornelia?"

4. *Distinguish between the right of use and of usufruct?*

5. Explain the term "familia?"

STORY'S CONFLICT OF LAWS.

1. What is meant by the *lex loci contractus, lex fori, lex loc solutionis;* and when do they respectively apply.

2 What two things are necessary for the *acquisition* of a domicile? Is residence necessary for *retaining* a domicile once required?

3. By the law of what country is the descent of real and personal property respectively governed?

4. Can the same person be in any way liable to the *criminal* laws of two countries at the same time? If so, how.

5. What is the position in this country of a child born in Scotland before marriage, whose parents subsequently marry, as regards the right to inherit property?

RUSSELL ON CRIMES.

1. What is the *common law* definition of forgery? Is it a felony or misdemeanor? How has the statute law with regard to forgery of the several instruments therein mentioned altered it in this respect?

2. If a person is acquitted on an indictment bad on the face of it, can he plead such acquittal as bar to a subsequent indictment for the same offence? Give your reasons.

3. What is the distinction between robbery and larceny from the person? Is it necessary to constiute robbery that the goods should be actually taken from the person? If not what taking is sufficient?

4. How many kinds of homicides, justifiable and excusable, or culpable are there?

5. How many kinds of crime are there in which one witness is not sufficient for a conviction? Does this depend upon *statute* or *common law* in each case.

STORY ON PARTNERSHIP.

1. If the firm of A. B. C. make a promissory note, payable to the firm of B. E., (the two firms having a common partner), can the firm of B. E. sue upon the note? Does this apply to indorsers of the latter firm? Upon what technical rules does this depend?

2. Is the right of one partner to bind another by negotiable instruments a legal incident to the existence of a partnership? If so, in what cases does it not exist?

3. Mention some instances in which a firm may be liable for the tort of a single partner.

4. Distinguish between the right of partners in partnership property and—1st, of that of joint tenants; 2nd, of tenants in common in the property held under their respective tenures, where joint tenants of property agree to embark the joint property in trade. Are their interests those of partners or joint tenants?

PLEADING SEVERAL MATTERS.

From "The Pittsburgh Legal Journal."

At a recent term of the Supreme Court in Bangor, the case of *Newcomb* v. *Inhabitants of Newburg*, for damages for alleged defect in the highway, came up for trial, when the defendants put in the following specifications of defence:

1. No such town as Newburg.
2. No such man as Newcomb.
3. No road.
4. No hole in the road.
5. No horse injured.
6. Horse injured did not belong to the plaintiff.
7. Plaintiff's finger not hurt.
8. Plaintiff's finger injured two years before.
9. Plaintiff injured his own finger by pounding it with a rock two years previous to the alleged cause of action against town.

NEW ORDER IN CHANCERY.

Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any other proceeding before the court (or before the judge in chambers), shall shew the means of knowledge of the person making such statement.

Wednesday, 10th July, 1861.

SELECTIONS.

THE LATE LORD CAMPBELL.

(From "The Jurist.")

Several biographies of the late Lord Chancellor have appeared in the newspapers since his decease. We do not propose to follow this example, but shall merely direct attention to that part of his chequered career in which he appears as a legislator; in order to see how far, in that respect, he has redeemed *the debt which*, according to Lord Bacon, every man owes to his profession.

There are several statutes known in the Profession by the title of "Lord Campbell's Acts," namely, the 6 & 7 Vict. c. 96, relative to defamation; the 9 & 10 Vict. c. 93, for compensating the families of persons killed by accidents; and the 14 & 15 Vict. c. 100, the Administration of Criminal Justice Improvement Act. Of these statutes it may fairly be said, that although not long, they, and especially the two first, have introduced new *principles* into our law. The first relates to the law of defamatory words and libel, which before that statute was certainly in a state anything but satisfactory. Its objects are declared by the preamble to be, "for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty." With these views, the statute (*inter alia*) allows the defendant in any action for defamation to give an apology in evidence in mitigation of damages; and where the action is for a libel in any public newspaper or periodical publication, he may plead that it was inserted without actual malice or gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted an apology, and may pay money into court as amends. The 6th section, putting an end to the absurd and immoral dogma, "the greater the truth, the greater the libel," enacts, that on criminal proceedings for libel the truth may be pleaded, with an averment that it was for the public benefit that the facts should be published; and the court, in passing sentence, shall take into consideration the truth or falsehood of these facts. Another very beneficial enactment is contained in sec. 7, that in criminal proceedings for libel the defendant may rebut a *prima facie* case of publication by an agent. Previous to this statute, if the servant of a bookseller sold in his shop a libellous publication, without either the knowledge of, or carelessness in the master, he was nevertheless criminally responsible for the publication; and the common opinion was, that he could not by any evidence remove that responsibility. (See Ph. & Am. Ev. 466.)

The second of these acts (9 & 10 Vict. c. 93) introduced into our law a principle previously unknown. By the ancient law, when a person was killed *per infortunium*, the instrument which caused his death was forfeited, which forfeiture was in after times commuted for a sum of money. This species of forfeiture was called a "deodand;" which, according to Mr. Justice Blackstone (1 Bl. Com. 300), "seems to have been designed, in the blind days of Popery, as an expiation for the souls of such as were snatched away by sudden death, and for that purpose ought properly to have been given to holy church, in the same manner as the apparel of a stranger, who was *found dead*, was applied to purchase *masses for the good of* his soul." With the Reformation this of course came to an end, but the practice of inflicting a nominal deodand still continued. It is, however, worthy of observation, that for some short time before the abolition of deodands by a statute of the same session, the 9 & 10 Vict. c. 62, juries had begun to impose deodands to a real, and often serious, amount. That statute abolishes them altogether, the Legislature probably deeming that all that was really valuable in the system was more effectually attained by the provisions of the 6 & 7 Vict. cap. 93.

Previous to the 9 & 10 Vict. c. 93, if a party received personal injury from the carelessness of another, he might bring his action, and recover damages; still, as that action died with the person, and did not survive to the personal representative, the relatives of the deceased, whose position and prospects were injured by his death, were without remedy. The two following reasons for this are assigned by Parke, B., in *Armsworth* v. *The South-Eastern Railway Company* (11 Jur. 758), which was, we believe, the first decided case under the statute: "First, because the law provided a remedy for such mischiefs only as affected rights; and a man has not such a legal right in the life of his parent as he has in his own—the relation between parents and their children giving rise merely to what moralists call 'imperfect obligations.' Another reason was, that it was considered impossible to form an estimate of the value of human life, either to a man himself, or to others connected with him."

The statute in question, the principle of which was probably taken from the law of Scotland, enacts, "Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." It then goes on to provide, that the damages recovered "shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought." It provides also "that the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."

In the construction of this statute, the difficulty, or rather the impossibility, of ascertaining the value of a man's life has been avoided. For instance, in the case already referred to, Parke, B., told the jury, "You cannot estimate the value of a person's life to his relatives. No sum of money could compensate a child for the loss of its parent. . . . . You must *estimate the damage by the same principle as if a wound had* been inflicted. Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life. . . . . I therefore advise you to take a reasonable view of the case, and give what you consider a fair compensation."

The remaining statute (14 & 15 Vict. c. 100) was passed for the purpose of improving the administration of the criminal law, chiefly by removing technical difficulties, which frequently operated most seriously to the defeat of justice. With this view, powers of amendment are given to the court; the extreme particularity required in describing the crime in the indictment—as, for instance, in the description of the form and mode of death in cases of murder—is abolished; the old law of the merger of offences is considerably modified, perhaps we might say recast, &c.

Lord Campbell's name is also connected with the great constitutional question raised in *Stockdale* v. *Hansard* (9 Ad. & El. 1), relative to the privilege claimed by the House of Commons to publish libellous matter, if deemed by that House to be for the public good. Out of that case arose the great and most unseemly contest between the Court of Queen's Bench and the House of Commons, which resulted in the statute 3 & 4 Vict. c. 9. As a member of the House of Commons, he seems to have believed that the Court of Queen's Bench would allow the privilege; and as Attorney-General he argued the question before that court most ably, and at great length, though unsuccessfully.

Lord Campbell made some efforts at legislation which were not successful. Among these was a bill, introduced by him into the House of Peers in March, 1859, to abolish the rule requiring unanimity in the verdicts of juries. How far this project had its origin in his Scotch views and sympathies is not easy to say. The bill was ably discussed on both sides, chiefly by the law lords, but rejected by the very decisive majority of twenty-three to seven.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 178.)

To some extent, magistrates are made the sole judges as to the fitness or expediency of things upon which they are authorized to act; but, like all other judges, they must be governed by a sound discretion in the exercise of this authority; and should they act corruptly, a criminal information would lie. (See Cole on Criminal Information, 26.)

Moreover, as the power conferred is for the public benefit—relates to the administration of justice—in case of neglect to use it within the time prescribed, or within a reasonable time, where the statute is silent on the point, a mandamus would be granted, and the courts would compel the execution of the duty imposed. (See Tapping on Mandamus, 9.) Should magistrates exceed their authority, or use it in an unauthorized manner, a writ of prohibition would lie in certain cases; but the peculiar and appropriate remedy would be to quash the order of sessions. (Archbold's Crown Office, 178.)

This, there can be no doubt, the superior courts of common law would do, if an order was made without jurisdiction, or if the conditions precedent to an order, as set down in the statute, were not properly complied with.

Magistrates cannot *acquire*, any more than they can *exceed*, the jurisdiction given in respect to the Division Courts, their authority in respect to these courts being purely statutory. (Stone's Petty Sessions, 11.)

The proper mode of quashing an improper order of sessions would seem to be, by writ of certiorari to bring up the order, with a view to its being quashed—a rule to show cause being first issued, calling upon the justices to show cause why the writ should not issue. (Archbold's Crown Office. 178, 188.)

At common law, every court must have a style and seal, and such style and seal must be necessarily used in all acts of the court; and process under the wrong style of the court is void, and the officer executing it a trespasser, and therefore *a fortiori* if there be none at all. (*Grant* v. *Morley*, 1 G. & D. 275; and see Finch's Law, 436.) The style and seal of the several Division Courts, however, is

expressly provided for in the act. When a court is called into existence by the establishment of a division, with appointed limits and numbered, the style given by the 9th section of the act attaches, and the court is to be called "The (First) Division Court of the County of X (or, if a union of counties), "The United Counties of X and Y" (secs. 9 & 1)—the number in the title of the several courts of course corresponding with the number given to the division. The statute also expressly provides as to a seal. Sec. 4 enacts, that every court shall have a seal, with which every process of the court shall be sealed or stamped; * and that such seal shall be paid for out of the fee fund. Although authority is not, in so many words, conferred on the judge to appoint the seal, yet, as a necessary incident to giving due effect to his jurisdiction, and for carrying out the provisions of sec. 4, he has, no doubt, by implication of law, power to make the seal (2 Roll Abr. 277), and this power has been acted on throughout Upper Canada.

The design of the seal the judge determines; but whatever may be the device, the style of the court should appear on each seal, so as to distinguish it from that of any other court. *

In providing seals, the proper course would seem to be an order by the judge, making and appointing each seal as the seal of a particular court, the orders in duplicate, one to be filed with the clerk of the court, the other to be retained by the judge. It is usual also to communicate the style of seal to the Provincial Secretary.

Sec. 3 of the "Act respecting forgery and perjury" (cap. 101 U. C. Consol.), enacts that any person who forges the seal of any process of a Division Court, or serves or enforces any such forged process, knowing the same to be forged; or who delivers or causes to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of any court, knowing the same to be false, or who acts or professes to act under any false colour or pretence of the process of any such court, is guilty of felony. This enactment is taken from sec. 57 of the Imperial Act (cap. 95 of 9 & 10 Vic.), relating to County Courts, and is nearly a verbatim copy of that provision.

In a scientific division of our subject, the matters embraced in the 3rd section of the Forgery and Perjury Act might come under a separate head; but it will be more convenient to notice here some of the decisions upon the corresponding English enactment; for on this, as on many other provisions relating to the Division Courts, the judicial decisions on analogous statutory provisions, will throw much light on the matter treated of.

The main object of the enactment is to prevent fraud and oppression being practised on persons ignorant of legal documents—in the words of Lord Campbell, C. J., "to protect a class of persons, who, being poor and illiterate, are very liable to be imposed upon, against demands made upon them under pretence or colour of process." "I bear in mind," said Erle, J., "that these tribunals are intended for the poor and illiterate classes; and the object of the enactment is to protect from extortion, by means of pretended process, those who have very little knowledge of business, still less of law, and are very much exposed to such imposition."

These are the objects which our Legislature has sought to carry out in sec. 3 of the act relating to forgery and perjury, by providing against the following offences: 1st, the forgery of the seal or process of a Division Court; 2nd, the service or enforcement of forged process knowing the same to be forged; the delivery of any paper falsely purporting to be a copy of a process, knowing the same to be false; and, 4th, the acting or professing to act under any false colour or pretence of the process of any such court.

The first and second offences provided for in the section, fall more particularly under general criminal law, and shall not be noticed. Several convictions have taken place in England for forgery, under the English act. The distinct offences under the third and fourth divisions of sec. 3 have undergone judicial investigation. The case of *R.* v. *Castle* (7 Cox, C.C. 375), was a prosecution for an offence under the third division—delivering a paper purporting to be county court process. It was decided in the Court of Criminal Appeal, in a case from the Leicestershire Court of Quarter Sessions. A paper in the following words was the document delivered to the prosecutor's wife:

"In the County Court of Leicestershire, at Melton Mowbray.

Castle, Plaintiff, and Charles, Defendant.

Take Notice, That you are required to produce at the above Court, on the trial of this cause, on the 17th day of September, instant, the several accounts and memoramdums given to you, or to your wife, by the above Plaintiff, at various times.

Dated this 3rd day of September, 1857.

By the Plaintiff.

To Mr. Thomas Charles, the above Defendant.
Balance of account, 3s. 5½d.

It was proved that no such cause was in the court, and there was evidence given to show that the document did resemble County Court process, but differed in many particulars from a summons to a witness to produce documents (of which process, it was contended, it purported to be a copy), as in the signature, omitting the penalty and number

* An impression in ink, made by means of a wooden block, is sufficient as a seal to an order of sessions. (*R.* v. *Inhabitants of St. Paul's*, 7 Jurist, 443.)

* A variety of devices have been adopted in the several counties—a beaver—the maple leaf—a crown; and one ardent admirer of Lord Brougham has a bust of the great law reformer engraved on the seals of every court in his judicial district

of plaint, also the want of seal. The indictment charged "that W. C feloniously caused to be delivered to T. C. a certain paper, falsely purporting to be a certain process of the County Court of Leicestershire, holden at Melton Mowbray, in the county of L.; he the said W. C. well knowing the same to be false, contrary to the form of the statute," &c. It was objected that this count was bad for uncertainty, and that the document in question did not purport to be a copy of process. The case was reserved, and argued before the Court of Criminal Appeal, when the following decision was given:

Crompton, J: "This is not a summons to a witness, but a notice to a party." Cockburn, C. J.: "To support this count of the indictment, the paper must 'purport to be a process of the court,' and it is not enough that the prisoner may have intended it to be thought so. This is nothing but an ordinary notice to produce, and cannot purport to be the process of the court." The other judges concurred, and the conviction was reversed.

(To be continued.)

We have again to thank Mr. Durand for his very useful and well considered letter subjoined, and at the same time to apologize for its non-insertion in our last number, owing to the absence of both of the Editors from Upper Canada. While we cannot agree in one or two of Mr. Durand's views, we quite admit that he brings strong reasons to his support—has in fact well argued out the opinions expressed. Again we say, and we cannot too often repeat it, if professional men took more interest in the doings of the Division Courts, it would be better for the public, and more to the advantage of the profession. The desire for local administration of justice is every day gaining strength, and we are much mistaken if next session of Parliament will not produce legislation increasing the jurisdiction of the Local Courts. We cannot but think that changes in the law are best made by experts, by law-givers, conversant with the the evils they attempt to remedy by legislation. Now, unless *they* take the matter in hand, by at least suggesting remedies, *others* less capable will attempt it, and make things worse.

We do not make these remarks entirely on the matter of Mr. Durand's communication, but take occasion to observe that if others would do as he has done, and is doing, infinite service might be rendered to the cause of uniform and sound administration. Some of the evils resulting from conflicting decisions may be remedied without recourse to the Legislature; for the 63rd section of the Act makes it the duty of the board of judges to frame rules, amongst other things, "in relation to the provisions of the act, or any future act, as to which doubts have arisen or may arise, or as to which there *have been or may be conflicting decisions in any of the courts.*" We feel assured that if each county judge would communicate to the Board a brief statement of points coming within the clause, and requiring to be settled, it would be conclusive proof of the necessity for a meeting of the Board.

In the meantime we gladly receive communications from well informed parties, such as that from Mr. Durand. We promise at an early day a notice of all the topics embraced in Mr. Durand's letter, for all deserve more attention than we can at present give them. Some of the decisions referred to are palpably unjust and indefensible on any ground—we had almost said absurd. It would seem that this "equity and good conscience" is a much misunderstood, if not a much abused power. It should not depend upon the individual notions of any judge, what character the law should assume. He best decides who draws his law from his books, rather than from his brains or his feelings. Let other members of the bar in other localities do as Mr. Durand has done, and a step is gained towards effecting a cure when the nature and extent of the evil is known.

We look for much benefit from the treatise now in course of publication in our pages, "The Law and Practice of the Division Courts" It is the work of an able and experienced law-giver, and one who has been conversant with the Division Courts for upwards of twenty years. Such communications as Mr. Durand's, we trust, will not escape his attention when he comes to treat of the subject dilated upon. They will serve to show the necessity for a clear statement of the rule of law bearing upon the points, upon which it would appear there now exists such unfortunate conflict of decision. Uniformity is the very life of the Division Courts; and with honest, educated and pains-taking judges, there can be no difficulty in securing it. The means of intercommunication available in this journal will largely aid to the attainment of this most desirable object.

CONFLICT OF DECISIONS AMONG THE DIVISION COURT JUDGES.

To the Editors of the Law Journal.

GENTLEMEN,—I now fulfill my promise, made through your columns some months ago, to make a few remarks on the subject at the head of this letter. Uniformity of decisions on legal points arising in the Division Courts, seems to me as necessary as in the higher courts. Although the sums involved are smaller, yet they are equally important to suitors, who are generally of the poorer classes, affected by small judgments as much as rich men would be by large judgments.

Professional men are also very often consulted about suits in Division Courts, especially in country places, and in giving their opinions to clients base them on the well established principles of the law. If judges of the smaller courts differ

so essentially as they do in some respects, how are lawyers to guide their clients?

I will only allude to the more prominent points in question. Knowing the variety of subjects you have to discuss, and the necessity there is, in a journal like yours, to keep a variety of interesting law news before your readers, I regret that the following remarks are so long.

1st. A question often arises as to the jurisdiction of judges over certain classes of cases. The difficulty arises in actions for newspaper debts; on notes made in the country, but payable in the city; on property sent from one county, but contracted for in another; and in cases of assumpsit, where the law from certain facts presumes a promise—such as where a man, by ill-treatment of his wife, compels her to leave his house, and seek shelter with some friend in another county, and the friend sues him for the board of the wife.

The words of our Act are nearly similar to the English County Court Act, and there have been decisions in England which bear on the question of the meaning of the words "cause of action." The 71st section of our Division Court Act says: "Any suit may be entered and tried in the court holden for the division in which *the cause of action arose*, or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought," &c. Late cases in England decide that the whole cause of action is here meant; that if the cause of action arose partly in one division or county and partly in another, then the action can be brought in neither, unless the defendant reside in one or the other; but if he reside in neither county, then the action must be brought in the county where the defendant actually resides at the time. So if a note be made in Barrie, payable in Toronto at a bank, for £20, with the words "payable there, and not elsewhere," thus making it presentable at the bank, part of the cause of action being in Barrie and part in Toronto, the defendant must be sued in the place where he actually resides. A case somewhat similar is given in an English decision (*Hernaman* v. *Smith*), January 27, 1855 (see vol. 29, English Law and Equity Reports, 426, Court of Exchequer cases). There an action was brought for £20, to recover the amount of reward promised on the conviction of a thief. The promise to pay the reward and the apprehension were made in one county; the conviction took place in another; the latter being a part of the cause of action. Thus the cause of action arising partly in one county, where the promise was made, and partly in another, where the thief was convicted with the property, it was held that the judge could not try the case in the latter, but only where the defendant resided. So in *Borthwick* v. *Walton*, 24 *Law Journal*, Jan. 22, 1855 (a County Court appeal case to the Common Pleas), the question of jurisdiction arose on a contract for goods. Goods were ordered in Oxford, of an agent of a manufacturer in Manchester. The defendant gave a verbal order for goods in Oxford; the goods were afterwards sent from Manchester by rail to the defendant. It was held in this case that he could not be sued in Manchester, although a part of the cause of action arose there—an essential part, the order having been given in Oxford. See also *Carnes* v. *Marshall*, 21 *Law Jour.* (N. S.), Q. B. 388; *Buckley* v. *Ham*, 5 Exchequer Rep. 43. It is easy to see how this decision applies to newspaper cases. A man gives an order for a paper in Barrie, published in Toronto, which is sent to him for a year. He is then sued in Toronto, where he does not reside. Now it has been held by some judges, that in such a case he can be sued in Toronto—by others that he cannot. The same question would arise of course in every town or city where a paper is published, if the party be sued out of his county, the place where he gave the order. The English decision would go to show that he must be sued where he resides. I knew the Judge of the United Counties of Northumberland and Durham to give judgment against a defendant on a note payable at Cobourg, but made in Peterboro'. On the other hand, the Judge of the Division Court of Toronto refuses to give judgment for the plaintiff upon notes made out of the county or division, but payable in Toronto. He is governed by this English decision, and, it seems to me, properly so. In *Peacock* v. *Bell*, 1 W. Saunders, 74 A. (1), it is said that "in actions in superior courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction." Many judges, to my knowledge, hold that notes may be sued where they are made payable, without reference to the place of contract. A curious question arose at Streetsville, county of Peel. The mother of a woman (wife of A.) sued A. for her board. A. lived in Brant, and the woman left him there, she said, for ill-usage, and came to her mother in Peel. A. made no contract to pay the mother, but the law implies the liability of the husband to support his wife, if he expels her by his own conduct. On this implication the mother sued. The judge held (and justly, in my opinion), that the man should be sued in the county where he lived, because the fact and proof of the ill-treatment—a necessary ingredient in the evidence to support the action—arose in Brant.

Dogs Killing Sheep.—Another class of cases often arises among our rural population—one too of great importance to farmers—actions involving the liability of the owners of dogs that destroy sheep. By the strict rules of law, as lawyers well know, it is necessary to prove in an action against the owner of a dog that has killed the sheep of another person, a knowledge in the owner of the previous vicious habit of the dog—in other words, that the owner knew that the dog had been in the habit of killing sheep. Otherwise, the law says, he is not responsible. Now, at first view, nothing appears more repugnant to true equity than this rule. Consequentiy it is the almost universal sentiment of farmers, that wherever a dog kills sheep the owner of the dog should pay for them. Some of our County Court Judges take the same view. The late Judge Phillpotts almost granted a new trial where a jury gave a verdict against the rule of law. On the other hand his successor, Judge Boyd, thinks the rule should yield to equity, and the owner of the dog should pay for the sheep even if the "Scienter," as it is technically called, be not proved. Judge Harrison, on the other hand, held the strict rule should prevail. I have no doubt other Judges differ in the same way. If there be any case at all where the strict rule of law should yield to equity, this, in my opinion, is one. It must be remembered in all these cases that the dog is a trespasser. The sheep are killed generally at night in the farmer's fold. No fence ordinarily made can keep out dogs, and the owners can easily fasten them at night. The raising of sheep, as well for their flesh as their wool, is of the utmost importance to our country. Yet there are strong arguments in favor of the rule of law. One of our oldest Division Court Judges insists (he is an Englishman and of course favorable to the old English prejudice about dogs) that the *scienter* should be proved; yet he relaxes the strict rules of law in other cases.

Notice to Endorsers.—The commercial law says that the endorser of a promissory note of hand or bill of exchange shall not be held liable, unless notice be given to him on the third day of grace of the non-payment thereof by the maker. In courts of law, in the absence of any waiver of this notice, such want of notice is always held a good defence for the endorser. If this rule be applied to courts of record there must be wisdom in it. If such a rule be unjust it ought to be repealed. Why then should a different view of the law be taken in Division Courts? A. is sued in the County Court for $101 as endorser, he pleads the want of this notice, proves it, and goes free. The holder then throws off $2 and sues in the Division Court, and A. has to pay the note. Or an entirely new case may arise. Now some of our division court judges hold that in strict equity the rule may be relaxed, and if no injury has been sustained by the endorser, although a month

or more or less has elapsed after the maturity of the note, yet the endorser should be liable on getting notice of the default of the maker. In the Division Courts of York and Peel both Judge Boyd and Judge Harrison hold to this view. It has always seemed to me that there is a good commercial reason for the strict rule. The endorser is considered, and often is, a mere friend, who puts his name on the note for accommodation. He, if a business man, knows that his liability only attaches in the event of the non-payment by the holder and legal notice of such default. It is to be considered that this was his view, and that otherwise he would not have put his name on the note. Then to omit giving the notice and yet make him liable casts a double burden on him. The delay may cause him to fail in his resort to the maker, or put him to the proof of proving a negative, (which commercially he never contemplated,) that is, that he has sustained injury, as against contrary proof, by the maker. Why should he be put to this trouble, and why should not the maxim "*Vigilantibus non dormientibus jura subveniunt*" be applied?

I have known very great injustice done to endorsers by the relaxation of this rule. They have actually been made to prove many months after the maturity of the note (no notice having been given to them) that special damages were sustained by them by want of notice, casting the whole burden of the case on them, whereas the default of the maker is entirely passed over.

The argument used by those who would relax this rule of law in small causes is, that country people do not understand it, and consequently omit to give the legal notice. But ignorance of the law excuses in no case.

SHOULD THE PLAIN RULES OF LAW BE VARIED?—There are some judges who favor the doctrine that in division courts the rigid rules of the common and statute law should not be adhered to, that it should be left discretionary with the judges to apply them or not. I look upon this as a very dangerous doctrine. The rules of our law are founded upon justice and reason, and the equity views of any particular judge should never be allowed to set aside these well acknowledged rules. I will just mention two or three cases that came under my own observation, showing how badly the discretionary equity power works as applied to different cases. A. owned a horse and it was seized for B.'s debt, A. claiming it, the bailiff interpleaded;—whereupon it became necessary for A. five clear days before the court day to file with the clerk a statement of his claim and the grounds thereof. He made out his claim, but in ignorance of the law, left it with the bailiff instead of the clerk. On the court day the judge dismissed the claim, although A. urged the hardship of the thing, and put forward by his counsel rule 45 of the division court rules as a reason why the judge should allow an adjournment or re-service. No, it would not do, his ignorance was no excuse and A. lost his horse. Now, before the same judge, C. was sued for the debt of D., which he had verbally said he would pay, but was not legally obliged to pay. C. urged that it was hard for him to pay because D. would not pay him, and he was not legally liable, and the law required a written promise to pay the debt of another. The judge says, no, strict equity requires you to pay, and you must do so. Now it is easy to see that strict equity at all events, if not rule 45, would have warranted the judge in saving the horse of A., but he could not see the equities alike!!

So A. bought $50 worth of goods of B. but received none of them, and paid nothing, B. sued A. in the division court and the judge, notwithstanding the statute of frauds was pleaded, allowed B. to recover. This was in the face of the statute. Then before the same judge C. sues D. for fixtures in a saw mill which he had put there, and which D. had agreed to pay for if C. was not allowed to remove them; but it was held as this promise concerned real estate the fixtures could not be legally removed, and that C. could not recover. Could any one distinguish between the equities in the two cases? In both the law stood in the way.

Take one more case: A. is sued for the wages of B., a servant who was hired for a year certain, but left at nine months, without any legal excuse. B. had received three months of his wages but six months were due from his master. The judge held that the rigid rule of law made him lose the six months wages. But again: C. had agreed with D. to send him a newspaper for a year for which he was to be paid $2. C. published his paper three months and sent it to D. for that period and then failed, sending no more papers. C. sued D. for the three months, and the judge held D. liable and made him pay 50 cents debt and $3 costs!! Can any one see wherein the equities of the two cases differ? Why should not B. get his six months wages if C. got his 50 cents and costs for his paper? But apply the rigid rules of law in all such cases and you have something for the public to depend on. Either decide in all cases according to equity, or apply, where it is clear, the well established principles of law. Any other mode of administering the division court law is very unjust, if not tyrannical.

A rule of law should be upheld until it is repealed. No judge should set up a code of morals or equity of his own, which perhaps his successor or neighbor of another county would not observe.

When it is said that decisions in the division courts should be given according "to equity and good conscience," it by no means should be understood to warrant the setting aside of the statute or common law. I apprehend that what should be understood by this, is that, in view of all the facts and evidence, what manifestly appears to be justice, should be done, setting aside matters of form, judging between probabilities and weight of evidence.

It is well known that in all cases over £10 in the division courts the parties can remove the causes into the superior courts, and there have the law administered. Why should smaller causes be the mere puppits of the equity views of judges, that may be varied according to the state of the bile, or the temper of the mind in certain seasons. An old English maxim had it "that equity in the chancery court depended upon the length of the Lord High Chancellor's big toe." It may have been so many hundreds of years ago, but now that court, like common law courts, is governed by established precedents.

Truly yours,

CHARLES DURAND,
Barrister.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

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

QUINLAN v. GORDON.

The defendant gave plaintiff a mortgage on certain freehold property, conditioned to pay £375 with interest, meaning, according to the statutes then in force (16 Vic. cap. 80), six per cent. Afterwards the defendant agreed to pay further interest for forbearance each year, and gave notes for such extra interest, which were paid. In taking the account of moneys due to the plaintiff, the Court of Chancery credited the defendant with such payments as on the mortgage, and six per cent. Whereupon the mortgagee appealed, and it was

Held, that the mortgagor, not being entitled to recover money voluntarily paid on an illegal contract, should not have been so credited: that the account should be taken without reference to the moneys so paid. *Stimson* v. *Kerby* and *Brown* v. *Oakley* (7 Grant, 510, 514), commented upon, and the former overruled.

Held, further, that the act 19 Vic. cap. 80, allowed parties to lend money at any rate of interest, but rendered it incompetent for them to recover in any action or suit more than six per cent.

This was an appeal from the Court of Chancery. The facts appear in the judgment of the court.

Burton for appellant. In *Stimson* v. *Kerby* (7 Grant. 510) and the cases there cited, the law considers that the party was oppressed, and advantage taken of him; that he was entitled to be restored to

his original position. These were cases under the usury laws, which prohibited more than a certain rate, but our act 16 Vic. cap. 80, recited that it is expedient to abolish all prohibitions, and only provides that extra interest shall not be enforced Here notes were given, and voluntarily paid. In *Smith* v. *Cuff*, referred to in a note to *Gibson* v. *Bruce* (5 M. & G. 403), it appeared that notes had been enforced by a third party. He also referred to *Wilson* v. *Ray* (10 A. & E 82); *Bradshaw* v. *Bradshaw* (9 M. & W. 29); *Horton* v. *Riley* (11 M. & W. 492).

Strong, contra, contended that the law was the same, notwithstanding the act abolishing prohibitions. That act only removed the penalties, but left the rule against excessive interest as it was. He cited *Smith* v. *Bromley* (Doug. 697); *Bosanquet* v. *Dashwood* (cases temp. Talbot, 38).

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

We do not see the mortgage in this case; but it was stated, and not denied, in the argument, that the sum of £375, secured by it, is made payable "with interest," which, under the laws then in force (16 Vic. cap. 80, sec. 3), must be taken to mean six per cent.

The parties, however, had agreed between themselves, that besides this ordinary and legal rate of interest—which must be taken to be the rate agreed upon when no other is specified—there should be paid £29 1s. 4d. as additional interest, or, as the plaintiff termed it upon his examination as a witness, a premium for forbearance for a year.

For this sum the defendant gave his promissory notes to the plaintiff, payable at three, six, nine and twelve months, each note being for £7 5s. 4d.; and as the years came round he gave similar notes for the same sums, for the years respectively following the 19th June, 1856, '7, '8 and '9; and on the 19th June, 1859, he gave four notes for £8 8s. 9d each, payable in three, six, nine and twelve months, which made up the increased rate of interest year to £35 15s. or nine per cent. on the £375. This was upon a new agreement, made in June, 1859.

The plaintiff seems to have stated the transaction with perfect candour, not hesitating to avow the excessive rate of interest which he had exacted.

"The notes," he says, "were for the excess of interest beyond six per cent. The first four were for the first year. When the year expired, I took four notes for another year for the excess, and when they expired I took four others for another year for the excess. The extension of the mortgage was from year to year; and unless Gordon had agreed to pay the excess in interest, I should not have extended the mortgage. I entered into a new agreement at the end of each year, and took these notes in pursuance of it. There is no doubt these notes did not include any part of the six per cent. secured by the mortgage. I made a new agreement for the excess in interest at the end of each year, and the notes were taken accordingly. The extension was from year to year."

This account of the transaction was confirmed by another witness, the plaintiff's solicitor.

All the notes have been paid up by the defendant Gordon,—the other defendant, Mills, being a subsequent mortgagee of the same premises; and on the 19th May, 1860, he (Mills) tendered to the plaintiff the principal, £375, none of which had been paid; but the plaintiff declined to receive it, because he did not tender also the six per cent. interest secured by the mortgage, none of which had been paid, nor indeed demanded, till July 1858, after which the plaintiff swears he did several times demand it.

After answer by the two defendants, it was referred to the Master to take an account of what was due on the mortgage; and he reported, on the 23rd October, 1860, that on that day there was legally due to the plaintiff on the mortgage only £362 12s. 8d.

The Master further certified, that he had taken the account upon the basis that all the payments which appeared in the account as credits to the defendant (that is, the sums paid on the several notes), should go in discharge of interest at six per cent. upon the £375, though it was contended for the plaintiffs that those payments (admitted as being in excess of six per cent.) should not be brought into the account in any way.

The plaintiff appealed against that report of the Master, which appeal was dismissed by the Court of Chancery without costs, and the plaintiff has appealed against that judgment.

The question brought up by this appeal may affect a large number of cases of loans made, as the one in this case was, after the statute 16 Vic. cap. 80, and before the 22 Vic. cap. 85. The latter statute leaves no room for any such question in regard to transactions subsequent to its passing (unless possibly under particular circumstances); for it repeated the 3rd section of 16 Vic. cap 80, which disabled parties from enforcing payment of any amount of interest beyond six per cent., though it made it no longer an offence to receive or contract for any such excess of interest.

The plaintiff Quinlan insists that he is entitled to enforce the ordinary legal interest of six per cent. secured by his mortgage, notwithstanding the notes have been paid up which were given for the excess of interest above six per cent., and for that only.

The defendant insists, on the other hand, that he cannot enforce payment of the six per cent. under the mortgage, because he has already received more than six per cent. interest upon the loan, through payment of the notes which were given for a premium for forbearance—in other words, for interest, and for that only; that he has already had all the law can give him, and more; and that, besides being unable to enforce the six per cent in addition to the money he has already received, he is bound, in equity at least, to account for—in other words, to refund the excess above six per cent. which has been paid to him; and that it is right, therefore, to make that go in reduction of the principal, as is done by the Master's report.

For all that appears, the money paid upon the notes was voluntarily paid, by which I mean not under any compulsion. The notes, if negotiable, did not get into the hands of any third party for value; against whom the defence, that they were given for a consideration that was illegal and void, could not have been urged. There is no evidence of fraud, or imposition, or of oppressive conduct on the part of the plaintiff, otherwise than it seems oppressive to exact such an interest as fourteen or fifteen per cent., by refusing to forbear except on such terms.

The question, therefore, amounts to this, whether the mortgagee can reclaim the excess, having paid it, for all that appears, illegally, and without resistance, and without remonstrance.

The point has engaged the attention of the Court of Common Pleas in *Kames* v. *Stacey* (9 U. C. C. P. p. 355), and afterwards in *Jarvis* v. *Clark* (10 U. C. C. P. 480).

Before these two decisions, the case of *Stimson* v. *Kerby* (7 Grant, 510) arose in the Court of Chancery, in which reference was made to a judgment of Vice-Chancellor Esten, in a case of *Brown* v. *Oakley*, which is stated in a note to the former case, p. 514.

The Court of Chancery, in *Stimson* v. *Kerby*, decided in accordance with *Brown* v. *Oakley*, that in taking the account in a foreclosure suit, any excess of interest that had been paid above six per cent., on an agreement to pay a higher rate, should be allowed to go in reduction of the principal; and they came to that conclusion under the conviction that an action for money had and received would lie, in any such case, to recover back the excess of interest.

In two cases in the Common Pleas, on the other hand, the defendant claimed a right to recover back the interest which he had voluntarily paid, by setting it off in an action brought for the debt and interest.

The court determined against his right so to recover back the money which he had voluntarily paid, and not, as it appeared to them, on any illegal consideration, such as would give a right to the person paying to recover it back.

We have to dispose of that question after these conflicting decisions. I have considered the able judgments delivered in the Common Pleas by Mr. Justice Richards, in *Kames* v. *Stacey*, and that afterwards delivered by the Chancellor in *Stimson* v. *Kerby*. They set out very clearly the arguments used on one side and the other. The question is so far new to me, that I have not hitherto been called upon to give an opinion upon it. All turns upon the objec and legal effect of the 2nd and 3rd clauses of 16 Vic. cap. 80.

The 2nd clause enacts, "That no contract to be thereafter made in any part of this Province, for the loan or forbearance of money or money's worth, at any rate of interest whatsoever, and no payment in pursuance of such contract, or payment liable to any loss,

forfeiture, penalty or proceeding, civil or criminal, for usury—any law or statute to the contrary notwithstanding."

The 3rd reads thus: "Provided always, nevertheless, and be it enacted, that any such contract, and every security for the same, shall be void so far, and so far only, as relates to any excess of *interest thereby made payable* above the rate of six pounds for the forbearance of one hundred pounds, for a year; and the said rate of six per cent. interest, or such lower rate of interest as may have been agreed upon, shall be allowed and recovered in all cases where it is the agreement of the parties that interest shall be paid."

The first clause of the act is merely a repeal of some former enactments respecting interest, and the only other clause (the 4th) exempts from the operation of the statute all banks and insurance companies, and any corporation or association that had been theretofore authorized by law to lend or borrow money at a higher rate of interest than six per cent.

All, therefore, that requires to be considered, is the effect of the 2nd and 3rd clauses, which I have just given literally, and the preamble of the statute, which is in these words: "Whereas it is expedient to abolish prohibitions and penalties in the lending of money at any rate of interest whatever, and to enforce, to a certain extent and no further, all contracts to pay interest on money lent, and to amend and simplify the laws relating to the loan of money at interest."

Our Interpretation Act, cap. 5, Con. Stats. U. C. sec. 6, 28, provides, "That the preamble of every (public) act shall be deemed a part thereof, intended to assist in explaining the purport and object of the act; and every such act, and every provision or enactment thereof, shall be deemed remedied, whether its immediate purport to direct the doing of any thing which the Legislature deems to be for the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the act, and of such provision or enactment, according to their true intent, meaning and spirit."

It is clear, I think, from the preamble, if we were to judge by that alone, that the intention of the Legislature was, that individuals should be thenceforth free to lend their money not merely at the rate of interest of six per cent., to which they had before been limited, but any rate of interest whatsoever; but with this qualification only, that the lender should not be able to enforce, by by judgment of a court of justice, a higher rate of interest than six per cent. And the 2nd and 3rd clauses do in fact carry out precisely that intention; first, by abolishing all penalties against usury, and providing that no party contracting for any interest, however high, for the forbearance of money, or paying any money in pursuance of such contract, shall incur any loss, forfeiture or penalty, or be liable to any proceeding, civil or criminal, for usury.

After this enactment there could be no longer such an offence as usury in transactions between any individuals; for usury, properly speaking, consisted in extorting a rate for money beyond what was allowed by positive laws. Interest for money, but not exceeding the settled rate, being the lawful gain, and usury being the extortion of unlawful gain, so long as the statute was in force no rate could be said to be unlawful, the avowed intention of the act being to abolish prohibitions against lending money at any rate of interest whatever.

Still it is quite true, as observed in the Chancellor's judgment, that the Legislature did not intend to exclude by this act all protection from the borrower. They provided for him this protection, that whatever rate of interest he might engage to pay, no contract to pay interest should be enforced against him to a greater extent than for six per cent by the year.

This seemed to him a *locus pœnitentiæ*, that if he agreed to pay any higher rate than six per cent., and if the lender should attempt to enforce more, he must fail; for under the 3rd clause, the borrower's contract to pay will be held void for the excess.

One effect of this law is very plain, namely, that for all interest above six per cent., the parties, while that act was in force, must have dealt (so to speak) upon leave; and if the lender was not content to run the risk of the borrower repudiating his contract, as he certainly might do, he had to take care to get his bonus or extra interest in advance. But the defendant in this case contended that that is not the whole effect of the provision, for that the lender, who has received the payment of interest beyond the six per cent., may be made to refund the excess as money paid upon a venal contract. In *Stimson* v. *Kerby*, the Court of Chancery held that he could sue for it back again, and recover it on the same principle that the borrower could recover back usurious interest which he had paid while the laws against usury were in full force. If the borrower could so recover back the excessive interest, then undoubtedly in taking the account in this case before us, it would be right to give credit to the mortgagor for all the excessive interest he had paid as so much money paid by him held by the mortgagee to his use.

If it is meant by that, that the mortgagor in this case, when he had paid any of his notes, which were given exclusively to secure the excess of interest and that only, could have brought an action against the mortgagee and recovered the money back, I cannot take such a view of the statute, for that would completely nullify the provision which legalizes the payment of any rate of interest whatever, that is, permits it, though it withholds the aid of law for enforcing any contract to pay more than six per cent.; and it would limit the effect of the act to the abolition of penalties, and to securing the lender against the loss of his principal, and of all interest upon it, by taking or agreeing to take, above six per cent.

But I think it is plain, upon the whole statute, that the intention was to go further, and to permit the payment of any rate of interest that the parties might agree upon, and to divest such payment of the charge of illegality, in the absence of fraud, such as would upon general principles invalidate a contract in law or equity. I do not see on what principle an excess of interest, voluntarily paid under a contract made since this statute passed, can be restrained.

In *Smith* v. *Bromley* (Douglas, 696), Lord Mansfield thus narrated the action which was then brought for money had and received on the ground that the plaintiff had paid it upon an illegal consideration: "It was iniquitous and illegal," he said, "in the defendant to take the forty pounds, and therefore it was so to detain it." But it was not illegal, though it might be unreasonable and oppressive, for the mortgagee in this case to keep the amount which had been paid to him in the notes, for the law being in force did not prohibit any amount of interest being paid by a borrower, and I do not see how we can hold the lender bound to refund money which he was at liberty to receive without violating any prohibition; for the statute in terms says that it was intended to abolish all prohibition, and without rendering himself liable to any loss, forfeiture, penalty or proceeding, civil or criminal, for usury.

I think that there can be no distinction drawn between this case and *Dawson* v. *Remnant* (6 Esp. 26), which turned upon the statute 24 Geo. II., cap. 60, sec. 12, which prohibits any action from being brought for a debt deemed to be due for spirituous liquors sold to him in less quantities than twenty, and so to get back his money; but Lord Mansfield said, "A set-off is in the nature of a payment. Had the defendants paid money on account of this demand, could he have recovered it back again? No; it would be a payment of a demand which by law perhaps could not be enforced, but which he having paid through a motive of wrong, the law will not allow it to be recovered back." The statute of 24 Geo. II., it is true, does not say, in so many words, that the contract to pay for liquors so sold shall be void, while the 3rd clause of the statute which we are now considering does make the contract void for the excess; but there is no substantial defence. Both contracts are void in this sense, but they could not be enforced first, as a contract not in writing to pay the debt of another is void without a consideration.

There is no such general principle as that money voluntarily paid upon a void or upon a legal consideration, can always be recovered back. In *Fulham* v. *Down* (6 Esp. 26, note), Lord Kenyon is reported to have said that "where a voluntary payment has been made of an illegal demand, the parties knowing the demand to be illegal, it is not the subject of an action for money had and received In law, if so held, it would subject all accounts and settlements between parties to revision."

The case of *Philpott* v *Jones* (2 Ad. & Ell. 41) bears very strongly, I think, against what the defendants contended for in this suit, and also *Wilson* v. *Ray* (10 Ad. & Ell. 82), in which latter case, the plaintiff having given his bill to the defendant for

a consideration clearly illegal (and in that respect stronger than the present case), being asked for payment at first resisted, but afterwards paid it, and then sued to recover the money back. The court were unanimous in opinion that he must be nonsuited. "This plaintiff," the Chief Justice said, "might have refused payment; and if the drawer had brought his action upon the bill, he had the opportunity of defending himself by the illegal action of the consideration. He waived the advantage, and voluntarily paid the bill, with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable."

The money paid in this case in excess of interest, was paid expressly upon the notes which had been given, and there can therefore be no question now about any right of the mortgagee to impute them to any other course of action. In *Bradshaw* v. *Bradshaw* (9 M & W. 34), Erle and Bramwell, in argument, make this admission: "No doubt, however void the transaction was, if the money were paid by the debtor at a time when he might have resisted the payment, he cannot recover it back; but here they say the payment was made because the plaintiff had no defence against the holder of the bills." The case was a *bona fide* holder for value; the court took the same view.

I must say it seems to me perfectly clear that the Court of Common Pleas were right in holding as they did in the case of *Kaines* v. *Stacey* and *Jarvis* v. *Clark*—that the money paid in excess of six per cent. interest upon a contract made after 16 Vic. cap. 80, cannot be recovered back, and that the mortgagor has no claim on that ground to have the money paid in this case to take up the notes which were given for such excess set to his credit against the six per cent. interest secured by the mortgage and against the principal.

There is apparently more force, as it seems to me, in the clear ground which the mortgagor may take under the 3rd clause, namely, that if the plaintiff in this suit (the mortgagee) be allowed to recover his debt, together with the legal rate of interest secured by the mortgage, after having received much more than six per cent. for interest through payment of the notes, he will be in effect receiving the aid of the Court of Equity to recover an excess of interest above six per cent, contrary to the spirit if not to the letter of the 3rd clause. In considering this case, that view of it has at times struck me so forcibly, that I have sometimes thought that if my brothers, or a majority of them, were satisfied to concur in the judgment of the Court of Chancery on that ground, I would not differ from them, though I confess that the leaning of my mind has always been the other way; for, by applying the statute in that manner, we should in fact be compelling the plaintiff to refund the excess of interest, though that would not be consistent, I think, with the intention of the statute, which is expressed to be to abolish all prohibiting against "lending money at any rate of interest whatever;" and besides, the very words of the 3rd clause makes the contract void "so far, and so far only, as relates to any excess of interest thereby made payable above the rate of six pounds," &c.

Now the contract which the plaintiff comes to enforce is the covenant in the mortgage, which is, to pay £375 "and interest," which, when no other rate is mentioned, must mean six per cent. There is no higher rate made payable thereby—that is, by the mortgage—and therefore there is no authority under the act for stopping short of the full sum which by it the mortgagor promised to pay; and that is all the plaintiff wants, for the mortgagor has paid him without resistance all the interest, which he could not have been compelled to pay by legal proceedings.

And this, I think, is just what the Legislature meant; for the statute says, in effect, to lenders, "You may take whatever the borrower will agree to give you; but you can only compel him by action to pay you six per cent.; for all beyond that, a court will hold your contract void."

The lender, in this case, can truly say to the court: "As to the agreement beyond six per cent., there is no question, for I have received it, and legally received it, though the borrower was not bound to pay it. I only come to you to enforce payment of what I can legally recover, which I have not yet got."

To set off the payments made in discharge of the extra interest, against the contract for the debt and legal interest contained in the mortgage, would be carrying the power which disables the lender from enforcing at law any contract for more than six per cent., further than the Legislature seems to have intended. The effect of this view of the statute would, it is true, enable the lender to recover the legal interest in addition to the illegal, which he has received; and he thus would get in all about fourteen per cent. Whatever may be our private opinion as to such a result being reasonable or desirable, we cannot look upon it other than as the Legislature can have meant it; for they have since, by a statute that admits of no doubt, enabled lenders not only to receive but to enforce any rate of interest that borrowers may agree to pay—thus doing away with the slight check upon exorbitant interest which they had provided by the other act. No one, I think, who has seen such instances of the unfeeling abuse of this license as frequently comes to light in courts of justice, can avoid having grave doubts of the wisdom and propriety of so entire a departure from the laws of restraint of usury; but we must administer the law as we find it.

A good deal of stress was laid, in the argument, on Lord Talbot's judgment in *Bosanquet* v. *Dashwood:* but that was a case decided while the laws against usury were in full force, and is not applicable to such a state of the law as was created by our statute 16 Vic. cap. 80, which made it lawful to receive, and, as I think, to retain, any amount of interest.

In my opinion, the judgment of the court sustaining the Master's report should be reversed; and the Master should be directed to report what is due for principal and for interest under the contract, without reference to what the mortgagee received in payment of the notes.

SPRAGGE, V. C., *dissentiente.*

QUEEN'S BENCH.

Reported by CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*

IN THE MATTER OF TABER AND THE CORPORATION OF THE TOWNSHIP OF SCARBOROUGH.

By-law to levy rate for schoolhouse—Extrinsic objections—Refusal to quash—How the desire of rate-payers must be expressed—Consol. Stats. U. C., Ch. 64, sec 84. sec. 27, sub-sec. 10.

The Township council, by resolution, agreed to lend to the school trustees, out of the clergy reserve fund, a sufficient sum to build a schoolhouse, taking as security their debentures. This arrangement was made by the trustees without any reference to the ratepayers, but at the next annual school meeting, at which the applicant was present, the matter was discussed, and the contract and plans for the building examined. The council subsequently, on the requisition of the trustees, passed a by-law to raise a sum for school purposes, which was required to pay the interest of these debentures and redeem one of them. The applicant moved to quash this by law, objecting that the loan effected by the trustees without the consent of the ratepayers was illegal; but it appeared that the schoolhouse had been finished and occupied, many of the ratepayers swore that they were satisfied with what had been done, and the affidavits were contradictory as to how far the applicant had acquiesced in the proceedings.

The by-law not being illegal on the face of it, the court under these circumstances refused to interfere.

Quære, whether under Consol. Stats. U. C., ch. 64, sec. 29, sub-sec. 10, and sec. 34, the concurrence of the freeholders and householders required to enable the trustees to call upon the council to levy money for the purchase of a school site, &c., can be expressed at the annual school meeting, without notice that the question will then be brought up.

(Easter Term 24 Vic.)

H. B. Morphy obtained a rule *nisi* to quash a by-law passed to levy money required for school purposes.

Hellmuth shewed cause. *Burns* supported the rule.

The application depended upon affidavits, being grounded upon objections not apparent on the face of the by-law, and the facts of the case sufficiently appear in the judgment.

BURNS, J., delivered the judgment of the court.

It seems from the affidavits, which are very numerous, that in the year 1857 the inhabitants of school section No. 9 desired to change the site of the schoolhouse, and a special meeting was called of the freeholders and householders of the section to decide the point. A site was determined upon, and the trustees instructed to build the schoolhouse at the earliest opportunity. The acre of land then selected was paid for and conveyed to the trustees, and the deed of conveyance registered. I do not understand the complaint of the relator to attack those proceedings, but what was done afterwards.

In the fall of the year 1859, the then trustees made an arrangement of this kind with the council of the township. The council

agreed by resolution of the 15th of October, 1859, to loan from the proportion of the clergy reserve fund a sum sufficient to build the schoolhouse, taking in security debentures to be issued by the school trustees, redeemable at stated times. The trustees immediately advertised for tenders. A contract was entered into to to have the building erected and completed by the 1st of August, 1860.

An the annual general school meeting in January, 1860, the proceedings of the trustees were made known to those present, among whom was the complainant. The contract for the building of the schoolhouse was read, the plans exhibited and examined, and the matter discussed. On the one side it is asserted that the complainant assented to the report of the trustees, and on the other that is denied.

After this the trustees made a requisition to the council to levy by rate on the ratepayers of the section the sum of $550 for school purposes. Part of this sum was for the purpose of the interest falling due on the debentures, and to redeem the first one.

The applicant swore that the application was not made from any malicious or vindictive motive, but solely that he, and the other ratepayers and householders of the school section, might have at some special meeting, or at the annual meeting in January, 1861, an opportunity of being heard in the matter.

The council of the township on the 20th of August, 1860, in accordance with the requisition of the trustees, passed a by-law assessing the school-section for the sum of $550.

It is this by-law which is attacked and sought to be quashed in this application. The rule for that purpose was granted in Michaelmas Term last, and was answered during last term.

It is evident, we think, the chief ground of complaint made against the proceedings of the trustees, is that they have expended more money upon the schoolhouse than some of the ratepayers thought need have been done, and now the complainant falls back upon the ground that the act of the trustees in raising money by means of the loan from the clergy reserve fund to build the schoolhouse, without the sanction of the ratepayers of the section, was illegal, and contrary to the provisions of the school act.

The 30th section of ch. 64, of the Consolidated Acts of U. C., enacts that no steps shall be taken by the trustees for procuring a school site on which to erect a schoolhouse, or changing the site, without calling a special meeting to consider the matter. This was complied with in 1857, and the site settled.

By section 34 the township council is authorised to levy by assessment upon the ratable property in the school section for the erection of a school house, such sum or sums as may be required by the trustees in accordance with the desire of the majority of the freeholders and householders, expressed at a public meeting called for that purpose, as authorised by the 27th section of the act, sub-section 10.

Now when we turn to sub-section 10 of section 27, we find the provision to be, that for the purpose of providing salaries of teachers and all other expenses of the school, it may be done in such manner as may be desired by the majority of the freeholders and householders of such section, at the annual school meeting, or at a special meeting called for the purpose.

We need not discuss the point whether the mode of raising the amount necessary to erect the school house could be done at the annual meeting without first giving notice that it would be brought up at such meeting. The 34th section seems to contemplate that a meeting must be called for the purpose, and I have no doubt, if notice has been properly given before-hand, then the annual meeting might be looked upon as a meeting for that purpose, as well as for the ordinary business to be transacted at such meeting. But I can see room for argument that notice of such a matter as providing funds for the erection of the school house should be given before the annual meeting takes place, so as to constitute it one for that purpose as well, or that a special meeting should be called for the purpose, because without such notice before the annual meeting the freeholders and householders may not suppose that any other business than the election of trustees and the ordinary business will be then transacted. The procuring of a site for a school house, or change of one, is treated as something more than ordinary. The 34th section is wider in extent, embraces more matters than mentioned in sub-section 10 of section 27, and does not use the expression as in the other, that a majority of the freeholders and householders may express a desire for the purposes under the 34th section *at the annual meeting*, but it is at a meeting called for the purposes mentioned in the section; and therefore it would seem to be something more than the ordinary business which would take place at the annual meeting which was contemplated. The 10th sub-section mentioned speaks of salaries of teachers and all other expenses of the school, no mention being made of providing the means of erecting the school house.

Be that however as it may, in this case it is not shewn that the subject matter of raising funds to build this school house was taken up or discussed, or submitted to the annual meeting held in January, 1859, and it is not pretended that any meeting was called for that purpose anterior to the arrangement the trustees made with the council of the township to borrow money from the clergy reserve fund, and give the debentures of the corporation of school trustees for the money, and the resolution of the council to that effect of the 15th of October, 1859. In pursuing the course the trustees did it is quite clear they were not conforming to the provisions of the school act. They were depriving the freeholders and householders of any voice in the matter.

The school house has been finished and occupied, and a great many of the ratepayers now make affidavits, stating they are perfectly satisfied with what has been done by the trustees; and as it would now throw every thing into confusion to quash this by-law, we must see what has been done since the 15th of October, 1859, and what part the complainant took in such proceedings, in order to discover whether any thing has occurred which would disqualify him from now complaining.

Mr. Wheeler, the reeve of the township, in his affidavit states that at the annual meeting in January, 1860, he presided as chairman: that it was explained to the meeting with what funds the school house was to be built: that the contract with the builder was read, and the plans shown: that "Mr. Taber was present at this meeting, and took an active part in discussing the several questions before it. And the said complainant did not then object to any thing connected with said building, which had been done by the trustees, or which was contemplated by them to be done, neither was any objection offered by any other person, but the meeting seemed to be to deponent, as he verily believed at the time, unanimous for building the said schoolhouse in the manner proposed by the said trustees."

Some five other persons, ratepayers of the section, who were present at the meeting in 1860, confirm the statement of the reeve. There are no less than 26 of the ratepayers of the section who swear that they are satisfied with what has been done. And further, it is shewn that at the meeting held last January, since one of the debentures has been redeemed with the money levied last year, and the same appearing in the account of the trustees for the year, the report of the trustees was sanctioned and confirmed. It is said that this last meeting was the largest that has been held in the section, and that only the complainant and some two or three of his friends found fault with the item of paying that debenture by means of the assessment.

In reply to the acquiescence and consent stated in the different affidavits of the proceedings which took place at the meeting of January, 1860, the complainant has filed the affidavits of himself and another person, stating that the complainant did strongly protest that the mode adopted by the trustees for raising the money was illegal, and that they had no right to do it, as they did, without the sanction of the majority of the ratepayers at a meeting to be called for that purpose.

It is impossible for us to dispose of the matter satisfactorily to ourselves upon such contradictions as presented in the affidavits, and we have no mode of ascertaining which of them be the true statement, and therefore we must draw inferences from other matters which are not in dispute. For instance, this complaint is not made until after the school house has been finished, and the complainant with other ratepayers has been called upon to pay his proportion. He well knew at the meeting in January, 1860, of the mode proposed to build the school house, and it was then in his power to have stopped proceedings by applying to quash the resolution of the council of the 15th of October, 1856, but he waited until that was followed up by a by-law to levy a rate to pay the

first of the debentures granted by the trustees. He must have well known that such a course to redeem the debt must be resorted to, and yet he does nothing, even giving credit to what he says, but protest that they were not acting rightly, because no public meeting was convened for the purpose.

There appears to be nothing illegal upon the face of the by-law, and the question therefore is whether the court is bound to quash a by-law for an irregularity in the proceedings made out by extraneous evidence. This court has already held that it is not compulsory on it to quash a by-law thus attacked. See *Stanley and The Municipality of Vespra and Sunnidale* (17 U. C. Q. B. 69), *Ianson and the Corporation of Reach* (19 U. C. Q. B. 591).

We think the rule should be discharged.

Rule discharged.

REGINA v. FITZGERALD.

Quarter sessions—New trial—C. S. U. C. ch. 113

Defendant was convicted of an assault, at the quarter sessions, and fined; but during the same sessions he obtained a new trial, on his own affidavit, and was acquitted at the following sessions. *Held*, that the quarter sessions had authority to grant such new trial, and that this court could not interfere.

[Q. B., E. T., 24 Vic., 1860.]

An indictment was found at the general quarter sessions, held at Perth, for the United Counties of Lanark and Renfrew, in March, 1860, against the defendant, for an assault and battery, alleged to have been committed on the 1st December, 1859. The defendant was convinted on the 14th March, 1860, and the same day sentenced to pay a fine of one shilling and the costs, and to stand committed until the fine and costs were paid. On the second day after the senteuce was pronounced, the defendant made an application to the sessions for a new trial, upon his own affidavit stating that he was not guilty of having committed the assault, and complaining that the evidence offered against him was contradicted, and that the jury did not properly weigh the evidence. The court set aside the conviction, and ordered a new trial, with costs to abide the event. The defendant was again tried at the sessions, held in June, 1860, and was then acquitted.

These proceedings having been removed by the Crown, upon a writ of *certiorari*, into this court, *R. A. Harrison* moved on behalf of the Crown for a rule calling upon the defendant Fitzgerald to show cause why all the proceedings subsequent to the judgment and sentence of the court, which took place at the March sessions, 1860, should not be quashed and set aside as illegal, and why he, the defendant, should not be remanded to the custody of the sheriff of the United Counties of Lanark and Renfrew, to be detained in the common gaol of the said United Counties, under the judgment and sentence of March, 1860, until he should be therefrom discharged by due course of law, or why the defendant should not be otherwise dealt with as to this court might seem meet and proper.

BURNS, J., delivered the judgment of the court.

Until the passing of the statute 20 Vic. cap. 61, a new trial could not be granted in any criminal case in Upper Canada, tried at a court af oyer and terminer and general gaol delivery, or quarter sessions. Under that act, now continued by the Consolidated Acts for Upper Canada, cap. 113, a person convicted at or before a court of oyer and terminer or gaol delivery, may make application to one of the superior courts of common law for a new trial, provided he does so not later than the last day of the first week of the term next succeeding the court of oyer and terminer or gaol delivery at which the conviction took place. The evident meaning of the Legislature was, that the court of oyer and terminer or gaol delivery should perform all its functions with regard to judgment and sentence following a conviction, with due respect to circumstances in each case; for the power of entertaining the application for a new trial is vested in another court, to which is not confided by the act the power of giving the judgment or passing the sentenco.

With respect to the court of quarter sessions, the power to entertain the application is vested in the same court; and the question therefore is, at what time the application should be entertained, or when is it limited, seeing that the act itself is silent with regard to it. It is quite clear that the sessions possess the same power that the superior courts do of altering their judgments during the same sessions or term; and for that purpose the sessions, as a term, is all looked upon as but one day. (*The Inhabitants of St. Andrews, Holborn, v. St. Clement Danes*, 2 Salk. 606.) The judgment and sentence, therefore, pronounced in the present case, was no obstacle against the sessions entertaining an application for a new trial at the same sessions, which was the case in this instance.

Then with regard to the grounds upon which the new trial was ordered, it is said that was done upon the affidavit of the defendant, and therefore was contrary to the decisions of this court (see *Regina v. Crozier*, 17 U. C. Q. B. 275; *Regina v. Oxentine*, ib. 295), and also of the Common Pleas, upheld in appeal in the case of *The Queen v. Grey*. The construction given to the act is, that the power of moving for a new trial is confined to points of law and questions of fact arising upon the evidence given at the trial, and not upon what may be alleged upon affidavits supplied afterwards; and no doubt the courts of quarter sessions ought to be governed by the decisions upon the subject. We must suppose in general those courts do so, and in the case before us it may have been so acted upon; for although the affidavit be returned to this court, it is not shown that the court of sessions made the order for a new trial solely upon the affidavit. The evidence given at the trial does not appear before us in any way, and it may be that a question of fact arose upon that evidence sufficient to satisfy the court that it was right to order a new trial; and if that be so, the filing and using the defendant's affidavit would amount to nothing. No authority has been vested in this court to review the judgment of the quarter sessions where a new trial has been ordered. It is only where the sessions have confirmed the conviction, that the convicted party may appeal.

As the case stands at present, there is no ground for saying that it clearly appears the sessions have transgressed their jurisdiction; it is only surmised that they have not followed the rule established in the superior courts of not granting new trials in criminal cases upon affidavits merely, and this comes now before us very nearly a year after the defendant was acquitted upon the new trial granted to him. There should be no rule.

Rule refused.

COMMON PLEAS.

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

STREET v. THE CORPORATION OF THE COUNTY OF KENT.

Crown lands—Un-patented—Assessments on.

Plaintiff in the year 1853 purchased certain Crown lands through the Crown lands agent at Chatham, taking a receipt for the first instalment then paid, which stated, among other things, that in case any other person should have any claim for improvements, the sale should be cancelled; also, that no timber was to be cut on the premises in question excepting for the improvement thereof without the consent of the Crown land agent or first paying the purchase money in full.

In January, 1854, the commissioner of Crown lands, in supposed compliance with stat. 16 Vic., ch 182, sec. 48, transmitted a list to the registrar of the county, (in the statement of case set out)

Plaintiff paid all the instalments on the lands as they became due, but no patent lease or license of occupation has been granted for the lands, and the title thereto has always been vested in Her Majesty. The only right in plaintiff being that evidenced in the receipt, &c. The lands have never been in the actual possession or occupation of any person whomsoever, and the plaintiff has always resided out of the county in which they are situate.

In the years from 1854 to 1859 inclusive, the lands were assessed for taxes, which not being paid, the treasurer issued his warrant, and they were advertised accordingly. To prevent the sale beidg carried out, the plaintiff, under protest, paid the amount claimed for the assessments.

Held, 1st, that statute 16 Vic., ch. 159, sec. 24, (Con. Stat. ch. 22, sec 27) (since repealed,) was not intended for Upper Canada.

2nd, that sec. 13 Con. Stat. U. C., ch. 22, was mandatory and not permissive, and that a license of occupation should be issued to every person wishing to purchase, lease or settle on any Crown land.

3rd, that the lands in question were not subject to assessment as they were vested in the Crown, no license of occupation, lease or patent thereof having been granted by the Crown.

(Easter Term, 24 Vic.)

SPECIAL CASE.

In the year 1853, certain clergy reserve lands in the township of Tilbury East in the county of Kent, in all 1715 acres, the title to which was vested in Her Majesty, were purchased by the plaintiff from the Crown lands agent for the county of Kent on the

terms mentioned in a receipt giving to the plaintiff at the time of purchase by the said Crown lands agent at Chatham, where they were sold, of which receipt the following is a copy:

Chatham 29th Sept. 1853.

"Received of Thos. C. Street. Esq., *the sum of fifty-five pounds* in payment of the first instalment and inspection fees on the clergy reserve lands included in the foregoing list, and containing by admeasurement 1715 acres, be the same more or less. This sale is, however, made with the express understanding that no claim to the said land exists on the part of any other person on account of improvements or otherwise, and that should such a claim be established to any of the said lots, the sale, so far as they are concerned, will be cancelled, And further, that no timber is to be used on the said premises excepting for the improvement thereof without first arranging with the agent or paying up the whole of the purchase-money, of which an instalment of one-tenth and interest from day of purchase becomes due on the first day of January in each year, without reference to date of sale.

"Signed,

J. B. WILLIAMS, Agent."

Annexed to said receipt is a list of the lands referred to in the receipt.

During the month of January, 1854, the commissioner of Crown lands transmitted to the treasurer of the said county of Kent, in supposed compliance with the 16 Vic., ch. 182. sec. 48, a list in the following form, the heading of which was all printed in the original, excepting the words in italics. Under the column headed "name of lessee, patentee, or purchaser," the plaintiff's name was inserted, following which the lots were mentioned, upon which the taxes in question were imposed; and under the column headed "remarks" the word "*clergy*" was set after them to distinguish them from *Crown* lands.

"Statement of lands granted or leased, or in respect of which a license of occupation has issued during the year 1853, in the Townships of *the County of Kent.*"

Sale. No.	Name of Lessee, Patentee, or Purchaser	Part.	Lot.	Gore.	Acres.	Remarks.

The plaintiff has paid all the instalments of the said purchase money and interest on the said lands on the days they respectively became payable. No patent, lease, or license of occupation was ever granted or issued for the said lands, or any of them. The title to said lands has always since date of the said receipt been vested, and still is vested, in Her Majesty. The only right the plaintiff has or ever had to the said lands is what was acquired under the purchase evidenced only by the said receipt and the payment of the subsequent instalments, and such rights the plaintiff still possesses. No person has ever been in actual possession of, or resided on, or ever occupied the said lands, or any of them, or any part thereof. The plaintiff has never been a resident in, or had a legal domicile or place of business in the said township of Tibury East, or the said county of Kent, but has always resided in the county of Welland.

The said lands in the years 1854, 1855, 1856, 1857, 1858, and 1859, were, (for the first time) assessed and returned by the assessors of the said township of Tilbury, and were designated on the assessment rolls for said years respectively as lands of non-residents, without the name of any owner or occupant. During each of the said years they have been rated for county purposes, but no part of the taxes having been paid, a warrant was issued by the county treasurer for the sale of the said lands, and they were duly advertised for sale by the sheriff of the county of Kent. The plaintiff, under compulsion and to prevent the sale of the said lands, but protesting against the right to assess or tax the said lands, paid the defendants the amount of the said taxes, £160 10s. 9d., on the 18th November, 1860.

On the first day of May 1855, the treasurer of the county added 10 per cent. to the amount of the tax remaining due for 1854. On the 1st day of May in each subsequent year the treasurer added 10 per cent. to the amount remaining due for taxes, computing not only on the taxes for the previous year, but also on the 10 per cent. imposed or added in the preceding year.

The questions for the opinion of the court were:

1st. Were the lands on the facts stated legally liable to be assessed and taxed for county municipal purposes.

2nd, in adding the 10 per cent. to the amount of tax due on the 1st of May in each year, was it legal to compute and add the 10 per cent. not only on the tax, but also on the per cent. added on the 1st of May of the preceding year.

If the court should be of opinion in the affirmative thereof, then the plaintiff agreed that a judgment should and might be entered against him of *nolle prosequi* immediately after the decision of this case, or otherwise, as the court might think fit, but if the court should be of opinion in the negative thereof on the first question, then the defendants agreed that judgment should be entered against them by confession for £160 10s. 9d., with interest from the 13th of November, 1860, immediately after the decision of this case: but if the court should be of opinion in the affirmative on the first question, but in the negative on the second; then the defendants agreed that judgment should be entered against them by confession for £2 8s. 2d., with superior court costs of suit immediately after the decision of this case, or otherwise as the court might direct, and that judgment should be entered accordingly.

In Hilary Term last *Richards*, Q. C., argued the case for the plaintiff, and cited 16 Vic., ch. 182, sec. 48; *Henderson* v. *McLean*, 6 U. C. Q. B. 530; *Alexander* v. *Bird*, 8 U. C. C. P. 539.

Wilson, Q. C., for defendants, cited 16 Vic., ch. 159; sec. 6.

DRAPER, C. J.—According to the facts stated in the special case, the plaintiff was not the grantee or lessee of the lands in question, nor was there any license of occupation granted to him in respect thereof.

The Commissioner of Crown Lands might perhaps, under 16 Vic., ch. 182, sec. 48, have returned these lots as ungranted lots, of which no person had received permission to take possession, though from the language of the receipt for the first instalment of the purchase money, "that no timber should be used upon the premises except for the improvement thereof," without first arranging with the agent for Crown lands or paying up the whole of the price; it may be well inferred, that the purchaser, in taking possession, would not be an intruder on the Crown domain. But it would appear that the return as actually made by the Commissioner of Crown Lands, in which he sets down the name of the plaintiff as purchaser, is not within the terms of the 48th section of the assessment law of Upper Canada.

It has been argued that the 24th section of the public lands act (Consol. Stat. of Canada, ch. 22, sec. 27, since repealed) is applicable to this case. This section required the Commissioner of Crown Lands to transmit in January in each year "to the registrar of every county or registration district, and secretary-treasurer of any municipality in Lower Canada," a list of the clergy and Crown lands theretofore or thereafter sold, or for which licences of occupation had been granted in such country or registration district, and upon which a payment had been made, which said lands should "liable to the assessed taxes in the townships in which they respectively lie, from the date of such license or sale."

I think it clear that this enactment was not intended to apply to Upper Canada. The assessment act for that part of the province declared what lands should be taxable, and provided for a return to the treasurer of every county therein of lands granted or leased, or in respect of which a license of occupation had issued, and the 9th Vic., ch. 84, (Consol Stat. U. C., ch. 89, sec. 80,) required a return from time to time, to each registrar in Upper Canada, of the names of all persons to whom Crown grants for lands in the respective counties had been issued. Without these enactments I should have thought the plain construction of the sentence made the words "Lower Canada" applicable as well to the registrars as to the secretary-treasurer, and with them I think there is no room for reasonable doubt.

At the same time I think there may be reason for concluding that the 6th section of the public land act (sec. 13 of the Consol. Stat.) was mandatory and not merely permissive, and that a license of occupation should be issued to every person wishing to purchase and become a settler on any public land. It is needless to enquire whether the Commissioner of Crown Lands might not have read the word "and" as if it were "or," or have assumed that every purchaser intended to be a settler, since the last act, 23 Vic., ch. 2, sec. 16, removes all doubt in this respect, though

it follows the form of language used in the previous acts, that the Commissioner of Crown Lands *may* issue the license of occupation.

Subject to certain exceptions all land in Upper Canada is liable to municipal taxation. One of these exceptions is, all estate and property belonging to, or vested in, Her Majesty, and this exception is qualified by an enactment that the occupant of any land belonging to Her Majesty shall be liable to taxation for the land, (provided he does not occupy in some official character,) but the land shall not be chargeable for the same.

For the purposes of assessment the motive for requiring a return to the treasurers of lands granted or leased, or for which a license of occupation has been granted is self-evident. And the license of occupation, which for the licensee's benefit is declared to be *primâ facie* evidence of possession, is no doubt, for the purpose of assessment, evidence that he is occupant.

But the case shewed that the plaintiff is not occupant in fact, nor has he a license of occupation; and the land is neither granted nor leased to him. I do not see that by the fact that the Commissioner of the Crown Lands has made a return of his name in a manner not pointed out by the act, he can subject him as occupant to be taxed for this land The land itself was evidentally not chargeable, and the plaintiff was not occupant, grantee, or lessee, the tax was not lawfully imposed, and the plaintiff should have judgment on the first question submitted.

We have not overlooked the 29th section of 16 Vic., ch. 159, referring to locations or sales made prior to that act, three months subsequent to the passing whereof this sale was made. Section 14 of Consol. Stat. Canada, ch. 22, also refers to sales made *prior* to the 14th of June, 1853.

Per cur.—Judgment for plaintiff.

SMITH v. THE CORPORATION OF THE CITY OF TORONTO.

By-law—Tavern license, action for breach of—Forfeiture.

Action for illegally depriving plaintiff of his tavern license.

The defendants pleaded that that plaintiff carried on business under a by-law, the provisions of which he had infringed, and thereby his license became forfeited Demurrer, that defendants had no power to pass such a by-law.

Held, that no action can be brought for the infringement of a by-law till one month after it has been quashed.

Writ issued the 6th of September, 1860.

1st count of declaration stated that defendants wrongfully deprived plaintiff of his tavern license.

2nd. That defendants assaulted and imprisoned plaintiff, &c.

To which defendants pleaded: that plaintiff carried on his business as an innkeeper, under license from defendants, under by-law No. 5, passed on the 14th of February, 1859; and by said license plaintiff was bound to obey and fulfil the provisions of said by-law No. 5, one of which was that no intoxicating liquors should be sold on Sundays, and another that on conviction of breach of aforesaid condition, that in addition to the penalty thereby imposed, the party so convicted should absolutely forfeit his license; that during the continuance of said license, and while plaintiff kept such inn under it, he, the plaintiff, was convicted of a breach of the said by-law No. 5, and fined in the sum of $40, and did thereby forfeit his said license under said by-law, which is the deprivation alleged in the first count of the declaration. To which plea plaintiff demurred, on the grounds that the defendants had no power according to law to pass such by-law, or to deprive plaintiff of his license for the alleged offence.

Joinder in demurrer.

Hallinan, for plaintiff, referred to Consol. Stat. U. C., cap. 126, secs. 1, 9, 16, 20, p. 991; *Whitfield* v. *S. E. Ry. Co.*, 4 Jur. N.S. 688, Q. B.; 27 Law Jour., Q. B. 229.

Adam Wilson, Q. C., for defendants, referred to Con. Stat. U.C. cap. 54, sec. 254, *et seq.*

DRAPER, C.J.—No exception has been taken to this declaration. The only question raised before us is, whether the plea justifying what is complained of is sufficient—in other words, whether the defendants had legal authority to pass the by-law set out in the plea.

But there is no averment by plaintiff in reply to the plea that the by-law has been quashed; and conceding, for the argument's sake, that it was *ultra vires*, still, by sec. 202, no action can be brought until one month after the by-law, "illegal in whole or in part," has been quashed.

If the by-law is legal, it does not authorize the defendants to deprive the plaintiff of his license, but it absolutely forfeits the license by its own inherent force, on certain facts being established. This forfeiture is the thing complained of in the declaration, for that is the only meaning I can place on it. The necessary facts are averred, and the plaintiff admits them.

If the by-law is illegal, but not quashed, the action would not be maintainable under the 202nd section, above referred to. The plea, it is true, does not aver that the by-law was in force when the defendants did the act complained of, but sets up that the plaintiff got his license under a certain by-law, and by his license bound himself to obey the provisions of that by-law, and shows that it absolutely forfeits the license under certain circumstances. So that either way the demurrer fails.

Mr. Hallinan, in support of the demurrer, referred to the Con. Stats. U. C. cap. 126. The defendants are the Corporation of the City of Toronto, which corporation is not a justice of the peace, nor an officer, nor a person fulfilling a public duty arising out of the common law, or imposed by act of Parliament, so far as the subject matter stated in the declaration is concerned. And it does not appear to me that the 12th section of Consol. Stats. U. C. cap. 2, which enacts that the word "person" shall include any body corporate or politic, or party, "*to whom the context applies*," affects this question, for I think the whole frame of cap. 126 excludes its application to the case of a corporation.

Per cur.—Judgment for defendant.

MUIR v. LAWRIE ET AL. (Executors.)

Promissory notes—Bond given by executors on an accounting for balance due on certain promissory notes made by testator—How far an extinguishment of the original debt.

Declaration on three promissory notes given by testator in his life time for £21 5s., £55, and £40 16s., respectively.

Plea, that after testator died and the notes fell due, the plaintiff and defendants, accounted together and struck a balance, for which, the defendants gave their bond to pay out of the first moneys they should receive from the estate within eighteen months.

Held bad, as not shewn to be given in satisfaction of the notes or of cross-demands and cannot therefore be pleaded for more than a payment *pro tanto* for the amount of it.

(E. T., 24 Vic.)

Declaration against executors on three promissory notes made by testator, one for £21 5s., payable twenty-four months after date, (1st January, 1855,) the second for £55, with interest, payable twelve months after same date. The third for £40 16s, with interest, payable twelve months after date, 11th February, 1859.

Plea, that after the testator died and the notes fell due, defendants, as executors, and plaintiff accounted together, of and concerning the said notes and divers sums of money then due, and to become due, from defendants as such executors to plaintiff, and of and concerning divers sums of money received by plaintiff on account of the said notes. And upon such accounting the defendants were found to be indebted to the plaintiff in £100. And thereupon it was agreed that defendants should give to plaintiff their bond for payment of the said sum, out of the first moneys that should come to their hands within eighteen months after the making of the said bond, and thereupon defendants did become bound by their writing obligatory sealed with their seals, and now in plaintiffs custody, to pay plaintiff the said money that should come to their hands within eighteen months as aforesaid.

Averment, that the eighteen months have not expired, and that the bond is in full force.

Demurrer.—That the plea does not aver that it was ever agreed that the plaintiff should take the bond in satisfaction of the causes of action declared on, and that neither accord nor satisfaction is alleged in the said plea.

R. A. Harrison supported the demurrer. The plea does not shew cross-accounts—it does not shew any satisfaction of the notes, or any other bar, and if the bond was intended as a satisfaction, it does not shew that plaintiff accepted it as such. The plaintiff is placed in no better condition than before. The plea is bad in form. The bond is not the personal bond of defendants The accounting is all on one side, and is therefore no bar. There is no consideration

shewn for the accounting, and the declaration shews a larger sum due than the plea meets. He cited *Smith* v *Page*, 15 M. & W. 683; *Callander* v *Howard*, 10 C. B. 290; *Perry* v. *Attwood*, 6 E. & B 691; *Flockton* v *Hall*, 14 Q. B. 380, and S. C. in error, 16 Q. B. 1029; *Brown* v. *Jones*, 17 U. C. Q B. 50.

J. Bell, (Toronto,) contra, cited *Fearn* v. *Cochrane*, 4 C B. 274; *James* v. *Williams*, 13 M. & W. 828; *Evans* v. *Powis*, 1 Exch. 601.

DRAPER, C. J.—The plea is pleaded in bar, and if it contains a good defence, it must be to the whole action, for if it be a suspension of the right to sue upon these notes, it will, I apprehend, be an extinguishment of the claim altogether (See *Bottomley* v. *Nuttall*, 5 C. B. N. S. 122; *Ford* v. *Beech*, 11 Q. B. 852, and the cases there referred to.)

In substance the plea amounts only to this, that in consideration that the defendants, who are executors of Alexander Muir, and are sued in that character, on three promissory notes given by the testator, gave their bond for payment of a certain sum, alleged to be the balance due after deducing certain payments, out of whatever moneys they should receive from the testator's estate within eighteen months after the bond was given, the plaintiff should give time for the eighteen months. If no moneys are received from the testator's estate during that period the bond will be of no value to the plaintiff, and the defendants will be under no personal liability. It is a merely conditional undertaking of the defendants as individuals, and gives the plaintiff no other or higher remedy against the testator's estate.

It is not set up by this plea that the bond was given and accepted as a *satisfaction* of the original demand. But it is introduced by a statement that the defendants, as executors, and plaintiff accounted together of and concerning the said notes, and of and concerning divers sums of money due, and to become due, from defendants as executors to the plaintiff, and of and concerning divers sums of money received by plaintiff on account of these notes; that a balance was struck and thereupon defendants agreed to give this bond.

It is not very easy to understand on what ground the defence is really meant to be rested—whether that the striking a balance as set forth gave a new cause of action founded on that stating of accounts, and the implied promise of the defendants to pay the ascertained balance, or that the plaintiff took this bond as a security for the original demand payable at a future day, and cannot, until this security is due and unpaid, sue for the original demand.

It does not appear to me sustainable on either ground. There is no averment of an accounting respecting cross-*demands* of the defendants against the plaintiff; for the accounting respecting *payments* made upon the notes, or any of them, would not fall under that category, and could furnish only a defence *pro tanto*, and not operate to extinguish the right of action on the notes, and the authorities referred to apply to negotiable securities, which, being accepted for the original demand, may be deemed *pagment* for the time, a conclusion which never can be drawn from the giving and accepting such a bond as the plea states. I think the plaintiff is entitled to judgment on this demurrer.

IN CHANCERY.

(*Reported by* RICHARD SNELLING, *Esq*, *Student-at-Law*)

HERRICK v. THE GRAND TRUNK RAILWAY COMPANY.

Grand Trunk Railway Company—Rights of preference bondholders.

Held, 1. That under Provincial Statutes 12 Vic., cap. 29, 18 Vic. cap 174, and 19 & 20 Vic. cap 111, the preference bondholders of the Grand Trunk Railway Company are in the position of preferred creditors, having a lien on the road and all the works and property of the railway.

2. That the rights of the preference bondholders, thus created, are not impaired by any subsequent enactments, and, if anything, confirmed by stat, 22 Vic. c 52

3. That the bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the acts.

4. That the bondholders, having a lien, are not obliged to submit to payment of past debts which the directors neglected to pay.

(Monday, 17th June, 1861)

The bill in this cause was filed by George Herrick (on behalf of himself and all other shareholders in the Grand Trunk Railway Company of Canada, excepting the defendants hereinafter named, who are such shareholders), against the Grand Trunk Railway Company of Canada:—The Hon. John Ross, Thomas E. Blackwell, Sir Etienne Taché, Thomas E. Campbell, The Hon. James Ferrier, The Hon. George Crawford, James Beaty, Thomas Gibbs Ridout, William Cayley, and The Hon. John Hillyard Cameron.

The plaintiff, as a shareholder in the Grand Trunk Railway Company of Canada, claimed to be entitled to all the powers and privileges of a shareholder, having twelve shares in the undertaking. The prayer of *his bill* was as *follows*:

1st. That it may be declared that under the circumstances in the bill mentioned, the weekly and other earnings of the said road should be applied, after the payment of the ordinary and current expenses of managing, maintaining and working the said road, in and towards the purchase and acquisition of such rolling stock, plant, stores, and other appliances, as may be requisite for the more efficient working of the said railway, and in and towards the payment and discharge of the floating debt of the said company, in preference to and before any payment in respect of the preferential bonds, or the interest thereon, or any part of the funded debt of the company.

2nd. That the defendants, the directors of the company, may be restrained from any other application or appropriation of the earnings.

3rd. That (if necessary) for the purposes aforesaid, all proper directions may be given, and accounts taken.

4th. That the plaintiff may have such further and other relief in the premises as the nature and circumstances of the case may require, and to the court shall seem meet.

Galt, for plaintiff, submitted that 12 Vic. cap. 29, was largely referred to in all the subsequent acts relating to the Grand Trunk, and argued that it was most important to be considered in reference to the plaintiff's case, urging upon the court that particular attention should be given to its provisions. Referring to the first section, he argued that the payment of the interest guaranteed by the Province should be the first charge upon the tolls and profits of the company; and particular stress was laid upon the circumstance, that by the provisions of this act, the fund out of which the interest on sums guaranteed was to be paid, was out of the "tolls and profits" of the company, and to secure this a lien was given on the "property" in the following terms of this section:

"That the Province shall have the first hypothec, mortgage and lien, upon the road tolls and property of the company, for any sum paid or guaranteed by the Province."

He also referred to 14 & 15 Vic. cap. 73, secs. 19, 20, 22, 24, commenting at length on their provisions.

He then referred to secs. 2 & 3 of 18 Vic. cap. 74.

He next contended that as the charge, hypothec, and lien in favor of the Crown, by 18 Vic., shall have the same preference and privilege, and shall be subject to the same incidents as to redemption and otherwise as the charge, hypothec and lien in favor of the crown for claims arising out of the Provincial guarantee, and that such payments were to be paid out of the profits. As to what are "profits," he referred to *Corry* v. *The Londonderry and Enniskillan Railway Company*, 7 Jur. N. S. 508. In this case it was held that debts incurred by a railway company for rails, stations, and the like, and which, if there had been funds, would have been paid at the time they were incurred, form a first charge upon the profits of the company; and that guaranteed preference shareholders are entitled to be paid arrears of dividends, without interest in priority to those shareholders over whom they have a preference.

ESTEN, V. C.—Do you contend that this case intends to refer to all debts incurred in the past, and to be incurred in the future, for working the road, and for the purchase and payment of rolling stock, &c.?

Galt.—Yes, most unquestionably, that is our contention.

ESTEN, V. C.—A bond to *complete* the undertaking—would it be a *debt* referred to in this judgment?

Galt.—No, I suppose not. I refer to section 3 of the act of 1856, 19 & 20 Vic. cap. 111, and particularly to 20 Vic. cap. 11, sec. 4.

Mr. Galt continued. You will observe that the Province foregoes all interest on its claim against the company until the "*earnings and profits*" *of the company shall be sufficient to do certain* things; and, first, *all* expenses of managing, working and maintaining the works and plant of the company are to be paid.

Esten, V. C.—All expenses must be previously deducted before the Government postponed its lien. It seems to imply that unless the Government made this concession, they were entitled to receive interest, but they forego the interest. The Government, as I understand it, Mr. Galt, concede nothing.

Mr. Galt referred to 22 Vic. *cap. 53, secs. 4 & 5, and continued:* I refer you with confidence to these sections. The company may issue any amount of bonds it pleases. I contend that the Province has not transferred any right to the preference bondholders; and all the Province has done in the matter of preference bonds is just this: The Province has said, "When there is anything to pay us, you, preference bondholders, shall have it." But when reference is made to that act to which I have referred, as to the order of appropriation of the earnings—when regard is had to the deductions made by the Legislature—I say it was intended by the Legislature, by those deductions for expenses of managing, working and maintaining, to provide for the creditors of the company. And if this were not so, all I can say is, that the Legislature have appropriated the earnings of the company for all time to come, and have left no fund whatever for the payment of creditors I refer to *Russell* v. *The East Anglian Railway Company*, 6 Railway Cases, 541.

Spragge, V. C.—Do you understand that floating debt means every unsecured debt?

Galt—Yes; I presume it is so.

Esten, V. C.—As I understand your argument, there are three classes of debt which you contend should be paid *before* the interest is paid on the preference bonds. 1st. The debts for constructing the line, which were incurred before the act authorizing the issue of the preference bonds had passed. 2nd. The expenses of managing, working and maintaining, in arrear, and also incurred before the said act had passed. 3rd. Similar debts incurred, and to be incurred since the said act had passed.

Galt.—That is our contention.

Spragge, V. C.—What are the costs of construction, when the rails are down, or when the road commences running?

Galt.—I cannot say what may be said to be the costs of construction; nor does it much matter, as the debts for construction are almost all paid. I suppose if a bridge break down, the company would be bound to repair it, and the costs for doing so would be a proper charge to be paid as expenses of managing, working and maintaining.

Esten, V. C.—I really don't know what the Legislature may have meant to say—I do know what it has said.

Adam Crooks next addressed the court on the part of the plaintiff, and called attention particularly to the frame of the suit. He referred to 23 Beavan, 212, & Drewry's Equity Pleader, 57, and contended that the bill was properly framed, and that the plaintiff, *quâ* a shareholder, had a right to the relief sought by the bill. He referred to *Corry* v. *The Londonderry and Enniskillen Railway Company*, and directed attention to the consideration that the Grand Trunk preference bondholders' rights were in the nature of a lien on the "profits" of the railway, and argued that there was no difference between preference bondholders and preference shareholders; that a railway mortgage was in the nature of a Welsh mortgage; that while the dry right to have a receiver remained to the bondholder or mortgagee, yet he could neither sell nor foreclose. *Mr. Crooks* also remarked on the circumstance that no sinking fund was provided for the payment of the principal of these preference bonds.

Esten, V. C.—I suppose it was intended that the company should start free and clear of debt, and that, the interest being regularly paid, little trouble would ensue. It is remarkable, however, and somewhat important, that a sinking fund was not provided for.

Spragge, V. C.—The bonds are payable on a day certain.

Crooks.—Yes, in twenty years. I refer to *Crawford* v. *North Eastern*, 4 K. & J., 23 Jur. 1093.

Alex. McDonald appeared for the directors and the company. The company, he considered, were *quasi* trustees of the earnings of the road, and they desired to dispense those earnings strictly in accordance with the acts of Parliament. He said that trustees were entitled to come to this court for advice and relief when threatened by actions. The company being trustees for the distribution of the earnings of the road, the question is, where are they to begin? There is no difficulty when a starting point has been obtained, but the difficulty is to arrive at a correct starting point, and hence the desirability of a decision of this court upon the subject. The directors of the company have a plan which they *are prepared to act upon.* *Mr. McDonald* argued that this bill was sustainable, and it would have been equally so if filed by the company or the directors, as it has been by a shareholder. As to the preference bondholder who is a party, Mr. McDonald contended that the decree to be pronounced in this suit would certainly bind him. If the decree should be that the defendant Cameron is to be paid, then he (Mr. Cameron) would no doubt be strenuous in his contention to support such a decree; but if, on the other hand, the decree should be that the debts of the company must be first paid, then, without doubt, Mr. Cameron will be bound.

Esten, V. C.—Mr. Cameron is a holder of preference bonds resident in this country. Can he represent those in England? Cannot a bondholder resident here have views and wishes in which those resident in England may not agree?

McDonald.—I think not If the principle of representation is applicable, the other parties resident in England must be bound by any decree made against Mr. Cameron.

Esten, V. C—This court will not make a decree which can be upset next week.

McDonald.—The company and its directors desire that the decision to be pronounced in this suit shall be final. Mr. McDonald then referred to the act of 1857, 20 Vic. cap. 11, and reading sec. 4, contending that the true construction of that section was, that all the earnings of the company should go to pay debts in the first instance.

Esten, V. C.—As I have before observed, Mr. McDonald, the Legislature supposed, and, we may take it, intended, that the road started clear of all debt; and if this had been a fact, the construction of this act, 20 Vic. cap. 11, sec. 4, would be easy enough; and there being no sinking fund provided, it seems to me as if the preference bonds were in fact perpetual annuities.

McDonald.—But again, I do not know that I need trouble you with further reference to those acts which have been so frequently mentioned in the course of this argument. I think we get over all difficulty by refering to an act which was passed last session, and I beg you to refer to the same.

Strong.—If that act is referred to, I must consider whether I can retain my brief. My learned friend must not take me by surprise. I have not seen the act; it is not yet printed; and it was understood that that subject should not be referred to.

The Court.—The acts of last session are printed, and are in court. We had better see the act, Mr. McDonald, and hear what you have to say upon it.

McDonald read from an act passed last session, cap. 17, entitled "An Act to explain and amend the Railway Act." The 8th section he relied upon, is as follows:

"The interest of the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway; and the price or purchase money of any real property or thing, without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway."

Esten, V. C.—Is that a declaratory act, and does it apply?

McDonald.—I think I shall be able to shew that it does apply; and I refer to *Wilson* v. *Whatley*, 1 T. & H. 436; a decision of Mr. V. C. Page Wood, which I think carries the application to the present case completely.

The Court.—What definition do you give to the word "thing."

McDonald.—The case I have cited gives the definition; and I contend, upon the authority of that case, that a "locomotive" is a "thing," within the meaning of the act.

Galt objected to any reference being made to this statute. He considered that it did not apply, and he did not wish that it should be made any part of his case.

McDonald concluded his argument by a general reference to the position of the company and directors in this litigation, and reviewed the points, which, as submitted, established the views he had taken of the case.

S. H. Strong.—I appear for the Hon. John Hillyard Cameron, who is made a party defendant in the interest of the preference bondholders. I need not recapitulate the various statutes which have been so frequently, in the course of this argument, brought before the attention of the court. Mr. Galt has exhausted all that I need say on the question of extracts from the statutes. To my mind, the question is one of construction—the construction of the 5th section of the act 22 Vic. cap. 53. I take the practical question for consideration to be, whether the directors have a right to pay any debts other than mere current expenses—working expenses. These, I submit, must be met and paid. And what are working expenses? They are easily described. I understand working expenses to comprise wages to employees, wood and oil, necessary to work the line, repairs of rolling stock, and the maintenance of the permanent way. And how can it be otherwise? The acts clearly provide how the company are to pay their debts, and indicate the fund to be employed for that purpose. The company, by their acts, have power to raise capital by *contribution* and by *loan*; and, reading the acts by the light of an ordinary commercial understanding, the interpretation is clear. Take the case of a partnership, which I submit is a proper illustration. Suppose that the profits thereof are mortgaged—profits to be hereafter made—can the mortgagors, the partners, use the capital of the partnership for purposes foreign to their trade? Certainly not; the capital cannot be so used. And now refer to 20 Vic. cap. 11, sec. 4, and the force of my illustration is apparent The *share* capital was limited, but there was no restriction to the *loan* capital; and the section last referred to goes to show clearly how the income of the railway was to be applied, after deducting working expenses. Mr. Strong contended that *Russell* v. *East Anglian Railway* was inapplicable. He also reviewed *Corry* v. *The Londonderry and Enniskillen Railway Company*, and pointed out that that case was as to the distribution of profits as *between shareholders*, while this case was as *between creditors*. And here again he referred, by way of illustration, to the case of a partnership, arguing that as a division of profits between shareholders (*i. e.*, partners), the case of *Corry* v. *Londonderry* was sustainable, but urging the great and grave distinction between that and this case. He also urged that the act of 1858 (22 Vic. cap. 52) superseded the act of 1857 (20 Vic. cap. 11); that in the act of 1858 there were not any conditions; that the order of application of earnings, after payment of working expenses, was clear, and that the first payment thereafter was to be made by payment of interest to the preference bondholders; that this act gave them a title even as against judgment creditors; and that the lien of the Province *absolutely vested in them. He referred to the frame of* this suit; and as to defendants by representation, referred to Calvert on Parties, 41.

Edward Blake followed on the part of Mr. Cameron, in the interest of the preference bondholders. The lien of the crown, or that of the preference bondholders, or both, extending to everything owned by the company, the execution creditors would be restrained from levying, at the instance of these parties, and therefore the damage alleged by the bill would not arise in fact. The lien of the bondholders was practically a first lien, not on the profits, but on the road and effects of the company; and the bondholders were entitled independently of the act of 1858, to a receiver of the profits, on default of payment of interest or principal. The clear intention of the Legislature was, that the company should construct and equip the road by means of the borrowing powers conferred under the various acts, and there was no intention that the company should go into debt to contractors or others for construction, except by means of these borrowing powers.

The result of the plaintiff's contention would be to give the company power to postpone all holders of securities by the simple expedient of going into debt, and the bondholders would be better off if they had nothing to look to save the company's promise to pay. The words of the act of 1858 were clear, and it was manifest that under them the bondholders were entitled to all the earnings except what were applicable to the expenses of management and maintenance. This was really a suit between the execution creditors and the bondholders, and the former were necessary parties to the litigation, as were also the other classes of creditors If the act of last session applied, it was clearly fatal to this bill; as it was prospective and did not assist the present execution creditors, while it indicated that the pre-existing law was in favor of the bondholders. *Corry's* case is not an authority, the plaintiff being a shareholder, and the question being as to the application between shareholders of the profits. The proper course for the company was to exercise its borrowing powers, and thus to pay the construction debts. It was no excuse to say that these powers could not be exercised. The answer to that was, that the liabilities should not have been incurred until the means to pay had been provided by the exercise of these powers, which were the only means to which the creditors could look for relief.

Adam Crooks now interposed, and begged to refer to *Linley on Partnership*, pp. 419, 777, 778.

Galt rose to reply, but inasmuch as both Strong and Blake had not referred to the Railway Clauses Consolidation Amendment Act, the Court stated that they should like to hear their views upon *the 8th clause, cited by Mr. McDonald.*

Strong said, that he considered the last act a general act—that the act was prospective, and did not apply to personal property—and as to the interpretation to be given to the word "thing," the words of the act were, "real property or thing," and the adjective must apply to "thing" as well as "property," and the act would read "real property or real thing."

Blake was of the same opinion.

Galt said he did not rely at all upon the statute referred to by Mr. McDonald, and passed last session.

ESTEN, V. C.—I do not think that statute will bear the interpretation Mr. McDonald seeks to give it.

SPRAGGE, V. C.—That act is a general act; it does not refer to the Grand Trunk Railway.

Galt continued.—My learned friends Mr. Strong and Mr. Blake may think it was quite an easy thing for the company to borrow money, and that it was only necessary to announce the fact that money was required, and it could at once be procured, but he (Mr. Galt) could assure them that they were much mistaken; it was one thing to have the power to borrow, and another to get the money. If the arguments of Mr. Strong and Mr. Blake prevailed and were conceded, four millions sterling of ordinary bonds would be cut out, and he was sure the Legislature never intended that.

Their Lordships retired for fifteen minutes, and returning into court, Esten, V. C., gave judgment as follows:—

ESTEN, V. C.—After the best consideration we have been able, in so short a time, to give to this case, we have come to the conclusion that the plaintiff's bill must be dismissed. It appears to us that the situation of the preference bondholders is clear—their position and their rights have been well defined by the acts. I refer to 12 Vic., ch. 29, which gave the Crown the lien for interest—18 Vic., ch 174, which extended that lien to principal as well as interest—19 & 20 Vic., ch. 111, which authorized the issue of the preference bonds. Now, this last act authorized this company to issue preferential bonds to the extent of two millions of pounds sterling: the holders of such bonds to have priority of claim therefor *over* the present first lien of the Province. As bondholders merely they have no lien, but by this enactment their lien (for they get the lien which the Government already possessed) attaches to the whole property of the company *present* and *future*, for principal as well as interest.

The rights of the preference bondholders thus created are not impaired by any subsequent enactments, and in my view the act 22 Vic., ch. 52, rather confirms those rights.

Now the object of this suit is to restrict the directors from paying the interest now due and unpaid on the preference bonds. Apart from the acts of Parliament, this Court has no power to interfere. *This Court must decide the questions raised upon the* pleadings, according to the several acts of Parliament which bear upon the subject; and if we refer to those acts, as we have done, we find it clearly expressed, that the preference bondholders are in the position of preferred creditors, having a lien upon the road and all the works and property of the railway. Then again, on looking at those parts of the acts which have been cited as describing the order of distribution of the earnings of the road, we do not find that in those acts the rights of the bondholders are in anywise impaired. There is no doubt in my mind but that the

bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the acts. This case is to be distinguished from *Corry* v. *Londonderry and Enniskillen Railway Company*.

We cannot say how the past debts, due and unpaid, are to be met; but it is quite clear to me that any person having a lien is not obliged to submit to payments of past debts which the directors have neglected to pay; and I consider that the preference bondholders of the Grand Trunk Railway Company are in that position.

From the best consideration we have been able to give to the case, we have concluded that the bill must be dismissed, and with costs.

SPRAGGE, V. C.—I regret that I have not been able to give this case more consideration before rendering judgment. There are two branches in the case. (His lordship then read the prayer of the bill.) I am of opinion that it would be a breach of trust to apply the earnings in any way unauthorized by the acts. I am in doubt as to the expenses of maintaining and working, and whether the preference bondholders were entitled to anything more than the "profits." I think that the statutes 12, 19, 20 & 22 Vic., should be read in *pari materia*. I, however, desire to reserve my opinion on these points, as I have not sufficiently considered the effect of the numerous statutes which had been referred to, and I wish to look more fully into the case of *Corry* v. *Londonderry, &c.* At any rate my leaning is in favor of the decision come to by my learned brother Esten, and I shall agree, *pro forma*, that the bill be dismissed

Per cur.—Bill dismissed with costs.

Reported by THOMAS HODGINS, ESQ., *Barrister-at-Law.*

HARRIS V. MEYERS.

Injunction—Redemption—Agreement not under seal.

When an agreement not under seal was entered into by a mortgagee who obtained from mortgagor a deed of certain property, whereby the mortgagor was allowed to retain possession of a portion of the property and the mortgagee the other portion until he was paid, an such agreement having been destroyed by the mortgagee and an action of ejectment brought on the deed, the Court restrained the mortgagee from enforcing his legal right.

This was a bill for redemption. On 29th January, 1848, plaintiff gave a mortgage to defendant on 200 acres, including a saw mill, as a continuing security. Some time in August following an arrangement was made between the parties, by which defendant was to get a deed of the whole property and to go into possession of the mill and mill yard (about 4 acres), and to pay himself out of the profits of the mill, and plaintiff to retain possession of the balance. The deed was executed on the 4th September, 1848, and at the same time defendant undertook to re-convey on payment of plaintiff's indebtedness to him. Some time afterwards the defendant endeavoured to sell out his right, and obtained possession of the plaintiff's papers. He continued in possession, and in 1858 assumed possession of 30 acres additional. In 1861 defendant brought an action of ejectment; and plaintiff claimed possession under an agreement under seal, which he said was in the hands of the defendant. At the trial defendant was examined and swore that the agreement was not under seal, and had been destroyed, whereupon the learned judge directed a verdict to be entered for Meyers. This bill was thereupon filed, and a motion was now made for an injunction to restrain the defendant taking possession until the account of the rents and profits of the mill and preperty was taken.

Hodgins for the injunction, relied upon the fact of some agreement having been entered into for possession at the time of the deed in September, 1848; that it had never been cancelled, and that plaintiff had been ever since in possession.

Bell, for defendant, contended that the agreement was not under seal, that it had been given up voluntarily, and that plaintiff had deceived the defendant in not disclosing a mortgage on the property.

ESTEN, V. C. After learning that the question of the cancellation of the agreement entered into as to the right of plaintiff to hold possession of the balance of 200 acres had not been submitted to the jury, granted the injunction.

DIVISION COURT CASES.

In the First Division Court of the County of Elgin, before his Honor Judge Hughes.

TINDALL V. HAYWARD.

Money Letter by a friend—Loss—Liability.

Held—1. That it is not illegal to deliver a money letter to a private friend on his way, journey or travel provided such letter be delivered by such friend to the party to whom it is addressed.

2. That such friend, as a gratuitous bailee, would be bound to take as much care of the letter as he would have of his own.

3. That if lost where he does take such care, he is not responsible.

The plaintiffs carried on a mercantile business at Port Burwell, and another at Aylmer. The defendant was a livery stable keeper, and in the habit of occasionally carrying parcels and money letters from the Port Burwell branch of plaintiffs' business to the chief place at Aylmer, and in one instance charged for carrying a money letter. In this the plaintiffs' clerk delivered to the defendant a letter, containing fifty dollars in bank notes, which the defendant agreed to carry. It was directed to the plaintiffs at Aylmer, and marked on the envelope "money." The defendant was, at the time the letter was delivered to him, at an hotel in Port Burwell, but just then about to leave on his journey. He handed the letter to the bar-keeper of the hotel in Port Burwell, to take care of, in presence of the plaintiffs' clerk, who did not object to it. This was the last the plaintiffs or their clerk ever saw of the letter or the money, as the defendant never delivered it, but urged that it was never given back to him by the bar-keeper, but lost or stolen. The plaintiffs, therefore, sued the defendant in the Division Court, alleging that the defendant "promised to deliver to the plaintiffs, at their place of business at Aylmer, a letter, containing fifty dollars, which was intrusted to him for that purpose, which undertaking the defendant had not performed."

For the defendant it was objected, that the contract alleged, if made, was illegal, as no private person has a right to carry letters for hire or otherwise, because it was contrary to the 17th section of the Provincial Post Office Act, and punishable; and because it was against public policy.

The judge said he thought the objection fatal to the plaintiffs' claim, but reserved the point for further consideration. Afterwards the following judgment was delivered:

HUGHES, Co. J.—In this case I find I was wrong in supposing that the Provincial Post Office Act prohibits the carrying and delivery of letters by private hand, under circumstances such as were detailed on the trial; for although the Postmaster-General has the sole and exclusive privilege of "conveying, receiving, collecting, sending and delivering letters" within this Province, letters sent by "a private friend in his way, journey or travel, provided such letters be delivered by such friend to the party to whom they are addressed," and letters "sent by a messenger on purpose, concerning the private affairs of the sender or receiver," are specially exempted from that exclusive privilege. It does not appear that the defendant was to be paid anything for carrying this letter, nor was it probable that he was a messenger "sent on purpose" to carry so small a sum as fifty dollars a distance of several miles, when a postal communication existed daily between the two places. I must therefore regard the letter as dispatched by the plaintiffs clerk, and sent by the hand of the defendant as a private friend on his way and journey, to be delivered by him to the plaintiffs at Aylmer, to whom it was addressed, which was perfectly legal, and would oblige the defendant, as the bailee, to take as much care of the letter as he would of his own, and no more. I think he did that; for it was not to be supposed that the innkeeper would place a man behind his counter who was not fit to take care of a money letter which a guest might commit to his custody. The evidence is, that the defendant was about to put it in his own pocket, but bethought himself, and handed it to the bar keeper for safer custody, until he should leave, which was to have taken place in a few minutes. I think he exercised ordinary prudence and care by so handing it to the bar-keeper, in the presence of the plaintiffs' clerk, who had delivered it to him, and who was present, tacitly assenting to it. I therefore order judgment to be entered for the defendant.

There were, however, circumstances which, if urged upon a

jury as they were detailed upon the present trial, might induce them to believe that a strong inference might be drawn, that the defendant himself took the money out of the till in the bar-room I cannot say they have had that effect upon me, but a jury may think differently. If the plaintiffs, therefore, choose to apply for a new trial, and desire the opinion of a jury upon the facts, I shall feel disposed to grant one, unless good ground be shown against it on the part of the defendant.

(In the First Division Court for the County of Lambton, tried at Sarnia, before ROBINSON, Co. J.)

MCELHERON v. MENZIES.

Assessment laws—Action against collector of taxes—Terms thereof.

Held, 1 That no action on the case will lie against a collector of taxes for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could have been made.

The plaintiff sued the defendant for the value of a stack of hay seized by him as collector of taxes for the Township of Sarnia. The following were the particulars of claim:—

William J. McElheron, of the Town of Sarnia, in the County of Lambton, states that William Menzies, of the Township of Sarnia, in the County of Lambton, did on or about the thirty-first day of December, A.D. 1860, at the Township of Sarnia, wrongfully, maliciously, and without reasonable and probable cause, and pretending to be a collector of taxes for said Township, seized one stack of hay, the property of the said William J. McElheron, situate on the east half of the east half of lot thirteen in the seventh concession of Sarnia, in said County of Lambton, as and for an alleged distress for taxes alleged by the said William Menzies to be due from one James Sheridan in respect of the east half of the east half of said lot thirteen; whereas in truth and in fact, if any taxes were due with respect to said land there were then and there on said premises at the time of said seizure, and until and after the sale hereinafter mentioned, personal property belonging to the said James Sheridan capable of being distrained and sold for taxes more than sufficient to pay all taxes and costs alleged to be due as aforesaid, of all which the said William Menzies then and there had due notice, but that the said William Menzies did, notwithstanding such notice, maliciously and without reasonable or probable cause, seize the said stack of hay then being in my possession on said lot, and did afterwards sell and dispose of the same, and caused the same to be taken and carried away, whereby I, the said William J. McElheron, was deprived thereof and sustained damages, and I, the said William J. McElheron, claim forty dollars damages of the said William Menzies.

At the trial the following was the evidence:

For the plaintiff—1st witness deposed, that he as bailiff of said Court sold the stack of hay in dispute to one Tilton Howard, under an execution issued against one James Sheridan, on the east half of the east half of lot thirteen, in the 6th concession of Sarnia, some time in the beginning of December.

2nd witness. I bought the stack of hay from the bailiff and sold the same to the plaintiff. Before the bailiff's sale I met the defendant on the street (meaning in the Town of Sarnia), and he said, I am told the bailiff has seized that stack of hay of Sheridan's, I am glad of it, as I can make the taxes out of a stack of oats on Sheridan's premises. After this conversation the sale by the bailiff took place.

3rd witness. I met the defendant on the London road and asked him had he all the taxes collected yet. He answered, very nearly. I am after seizing Sheridan's hay (meaning the hay in dispute). I told him that that hay was sold for taxes and was now owned by McElheron, the plaintiff

4th witness. I attended the bailiff's sale. I also attended the collector's sale. I bought the stack of hay for $7, there were five good loads of hay in it. Before the sale the plaintiff told the defendant that the hay was his and not to sell it, but to seize the stack of oats and that he would pay the taxes therefor. Defendant replied that he would sell the hay. Plaintiff said, since you are determined to sell it here are the taxes and do not sell it. Plaintiff called me to witness him offering to pay the taxes. I had no connection with the plaintiff in the purchase of the hay. I bought for myself. Plaintiff gave me the money to pay the defendant, but I gave the same amount back to him on the same day.

For the Defendant—1st witness. I attended the sale with the defendant Plaintiff attended there and forbade the sale. He asked defendant to seize the stack of oats and that he would pay the taxes therefor. Did not hear plaintiff tendering the taxes for the hay. He could have done it. Considered that Barron (meaning witness No. 4) bought the hay for plaintiff.

2nd witness. Corroborated the evidence of the 1st witness for the defence, and also stated that he did not believe the plaintiff offered to pay the taxes.

3rd witness. I live near the lot on which the hay was. Sheridan does not live on it but has a house thereon. He boards out whilst he is tilling the land and also during harvest. He works round the neighborhood with the farmers.

The defendant called—I was collector of taxes for the Township of Sarnia for last year. I seized the stack of hay for taxes due by Sheridan, the owner of the lot. The plaintiff never offered to pay me the taxes if I would not sell the hay, but asked me to seize the oats and that he would pay the taxes therefor. I never had the conversation spoken of by witness No 2. I would have taken the taxes if they were offered. Plaintiff forbade the sale.

The plaintiff called—I bought the hay in question from Howard (witness No. 2) and paid him for it. I attended the sale of the same by the collector. I asked him to seize the oats and I would pay the taxes for it. He refused to do so. I then offered to pay the taxes for the hay if he would not sell it. He refused to accept it. I then called *Barron* (witness No. 4) to witness that I offered to pay the taxes for the hay if he would not sell it. He refused a second time. I then did forbid the sale, and said I would sue Menzies for the damages I sustained I had some $50 in my pocket at the time. I never got the hay after the sale.

The defendant's agent submitted that the defendant was justified in seizing the hay and selling, and relied on secs 93 to 107 of cap. 55 of the Consolidated Statutes, and on cap. 126 of the Con. Stat. The case went to the jury on the above evidence, and they were directed to find whether the plaintiff offered to pay the taxes for the hay before the sale. The judge reserved the right of dealing with the law. The jury found that the plaintiff before the sale by Menzies the collector, offered to pay the taxes therefor, and gave a verdict for the plaintiff of $18

The defendant moved for a new trial on the ground of surprise as to the tender, and filed affidavits to that effect, and also that the verdict was contrary to law and evidence. The plaintiff replied by affidavit substantially the same as his evidence, and also said that the defendant was not entitled to a new trial on the ground that the point was left to the jury, and referred to *Patrucci v. Turner*, 2 U. C. *L. J.*, folio 18, and to *Chitty's Practice*, 9th ed. vol. 11, pp. 1433 and 1434

ROBINSON, Co. J., gave judgment as follows:—

I am not certain whether the plaintiff means to claim in this action to recover damages for a trespass, or whether he intends to bring an action on the case for an unnecessary taking of his goods when there was plenty of property on the premises of Sheridan that the defendant might have seized.

If this is to be considered an action on the case, I am of opinion the plaintiff cannot recover. (See *Fraser v. Pope et al.*, 18 U. C. Q. B. 327.) Robinson, C J. says, "I find no precedent or authority for an action for distraining the goods of a stranger without necessity, upon the allegation of there being goods enough of the defendant in the warrant out of which the money could be made."

In the claim of the plaintiff in this cause, he, however, states that the property sold was in his possession. If that be the case, the defendant is a trespasser, and should be sued as such; but as from the manner in which the trial was conducted the plaintiff seemed to treat the action as one on the case and not in trespass, I would have felt it my duty to enter judgment for the defendant if he had not without waiting for any judgment thought proper to apply for a new trial.

If this is an action for trespass, the all-important point of possession was not left to the jury, and the case has not in fact been tried.

I have therefore, come to the conclusion to grant a new trial.

The plaintiff, I think, would do well to amend his claim that it may be known distinctly what is the subject matter of trial.

ASSESSMENT CASE.

In the Third Division Court of the County of Elgin.

FRANCHON v. THE CORPORATION OF ST. THOMAS.

Assessment—Dwelling-house of Clergyman.

Held—1. That assessors are not bound to inquire into trusts upon which lands are held, but to view each man's premises and find out whether or not he is assessable, or whether or not he comes under any of the exemptions allowed by law.
2. That the assessor, upon seeing a dwelling house occupied as such by a minister of religion for his private residence, the assessor is bound to assess the occupant for it, no matter upon what trust the freehold in the land upon which the house stands is held.

The appellant was the pastor of the Roman Catholic congregation at St. Thomas. His predecessor had built a house for a priest's residence, upon property conveyed in trust for a site of a church and burial ground. The appellant was assessed as the occupant of a dwelling-house at its taxable value. He appealed, first to the Court of Revision, which refused to disturb the assessment, and subsequently to the County Judge.

Scatcherd, for the appellant, contended that the property upon which the house occupied by the appellant was erected, being held by trustees for the use of a religious body for a place of worship, church yard or burial ground, is not assessable; that this house was built in a church yard and burial ground; that the land cannot be sold away from the trust, supposing the appellant does not pay the taxes, or if it should be returned as absentee land. He also contended that the names entered upon the roll were wrong, because he showed that the property belonged to "The Roman Catholic Corporation of the Diocese of London." No objection was made that the quantity of land occupied does not amount to a quarter of an acre, nor that the assessed value was excessive.

Ellis, for the Corporation, contended that the assessor is not to inquire about trust property; he has to assess all land and property liable to taxation, which is not made the subject of exemption. If parties choose to assume the right to use the trust property, they must take the consequences. Neither the place of worship, the church yard, nor the burial ground, had here been assessed, but the private dwelling of the priest, at its ratable value. It was true, the freehold in this property belonged to the trustees, although used for private purposes; but private dwelling houses belonging to religious corporations are not exempted from taxation, the same as property belonging to a county, city, town or township. This house is therefore assessable, and the appeal should be dismissed with costs. The wrong done to the trust here gives the right to taxes.

HUGHES, Co. J.—I am of opinion that I cannot set aside this assessment, because I conceive the assessors are not bound to inquire into trusts upon which lands are held, but to view each man's premises, and find out whether or not he is assessable, or whether or not he comes under any of the exemptions allowed by law. Upon seeing a dwelling house occupied as such for his private residence by a minister of religion, the assessor is bound to assess the occupant for it, no matter upon what trust the free hold in the land upon which the house stands is held.

The fact of the assessment law providing no remedy authorizing the charging of the property with this assessment in case the appellant should leave it before the collector takes his round, does not, as I conceive, affect the question before me. All I have to consider is, whether the occupant is rightly or wrongly assessed, and not the remedy for recovering the taxes when assessed; and as I do not find there is any objection made, that the land used in connection with this house does not amount in quantity to a quarter of an acre, nor any as to the value, I cannot, I think, properly set aside the assessment upon the points urged for the appellant.

As to the objection to the names inserted on the roll, it is a ground for amendment only, and not for setting the whole assessment aside.

I therefore order that the assessment roll be amended by inserting the name of "The Rev. Mr. Franchon," as the party assessed, and by substituting the name of "The Roman Catholic Corporation of the Diocese of London" as the owners, instead of those persons already designated as the occupants and owners respectively, and that the appellant do pay the costs.

GENERAL CORRESPONDENCE.

Act of last Session, abolishing Registration of Judgments.

TO THE EDITORS OF THE LAW JOURNAL.

DEAR SIRS—Various and contradictory are the constructions which it seems have been given to this act by those of the profession who have been bold enough to venture an opinion at all upon it: and complaints are made of its ambiguity. I will not say that there is absolutely no ground for these, but will venture the opinion, that when carefully analyzed, the act admits of but one construction.

In your very pleasing commentary upon this act, you are shown to be among those who make the complaint of ambiguity. You do so when speaking of the two last sections, by terming them "incoherent," and saying—"The construction of which will, we fancy, puzzle the courts as they now puzzle us."

In submitting my view of this act, I shall reply to your suggestions. In the end I shall give the construction consolidated, which, I think, will be found after all, to be very brief and very simple.

It is perhaps best to recite before proceeding, the two sections you complain of.

10. "Nothing in this act contained shall be taken, read, or "construed, to affect any suit or action on or before the 18th day "of May, 1861, pending in any court in Upper Canada in which "any judgment creditor is a party."

11. "This act shall take effect on the 1st day of September "next, and in cases of judgments heretofore registered, all writs "of execution against land issued before the said first day of "September, shall have priority according to the respective times "of the registration of the judgments on which they have issued "or shall issue respectively."

You ask—If the first clause of the 11th section means that the act is not to take effect before the 1st September, what is the meaning of the 10th section.* "That nothing in the act contained shall be taken, &c., to affect any suit, &c., on or before the 18th May, 1861, pending, &c."

The act is an universal destroyer of the power of judgment, &c., to create or operate as liens, &c., with this 10th section as a proviso—as a saving clause. The act takes universal effect providing it does not affect any such suits as is described in this section. The act is affirmative, declaring what shall be done, and the time expressed, the 1st September is the time when it shall be done, and this clause is an exception to the rule of what shall be done—it is a negative clause, declaring what shall not be done, and the time expressed in it is merely descriptive of what is the exception to the rule, or what it is that shall not be done, and is not a time expressed as a date, either for the commencement or ending of any proceeding or operation.

You say—"Surely if the act is not to take effect till the 1st September, it cannot very well affect suits pending on or before the 18th May." Your own answer to this is, that by reading the clause, which says when the act is to take effect, alone, you would say it can not; but by reading this clause and the 10th section together, you would say it can. The 10th

* These sections are now numbered 11 and 12 in the statutes.

section declares that such suits shall not be affected at all; and the time when this act takes effect, whether it be before or after the 1st September, can in no wise affect this point. When we read the proposition, together with your own reply to it, there is some appearance, to us, of your meaning to say that if the act does not take effect till 1st September, it would, in judging from the nature of things, and without reading the 10th section itself, appear impossible for it to affect such suits, and that therefore such a provision as this 10th section makes it useless; but, that when reading this 10th section with the rest, you understand the act to mean, at least by implication, that without this provision of the 10th section, such suits would, or might have been affected by the act. My answer to this would be, whether we read the clause alone, or together with the 10th section, it is I think, clear, that not only does the act mean simply, that unless this provision had been made the act would have affected such suits, but also, that it in reality would have affected them: for example—many chancery suits to which judgment creditors are parties, will reach beyond the 1st September before judgment can be obtained, and in such cases, had not this provision—this exception of the 10th section been made, the interest of the judgment creditor party would have been destroyed, because this registered judgment would have ceased to operate as a lien upon the lands, and leave no grounds for his claim, as they will do in other cases. No judgment, &c. shall create or operate, &c., is the language of the statute. But my business is the construction of this act as it is, and not such points as these.

So much for the 10th section; its relationship to this first clause of the 11th section; and, with the main object and feature of this act—the abolition of registration.

The second clause of the 11th or last section, and its relations, will next occupy my attention.

You put the question—"What is the meaning of the second clause, which declares, that in case of judgments heretofore (before 18th May) registered, all writs of execution against lands issued before the said 1st day of September, shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue, respectively?"

The act down to the 10th section, has but one idea for its subject matter, or one object in view, and this object is, the abolition of the operation of registered judgments—it is declaring what shall be, and before adding its necessary associate *when* it shall be, it stops in the 10th section to make an exception to its operation simply, and then in the first clause of the 11th section the time *when* is declared. Here would appear to end, all that the act had originally contemplated, but bethinking itself, as it were, it adds something more. And here in this second clause of the 11th section is added *one* other idea to the act; but without coming in collision with or in any way influencing any of the other parts of the act, either by construction or implication; they have their several distinct offices to perform, as we have defined, and this has also a distinct sphere. The subject matter and the one idea of this clause, for it has but one, is the priority of certain writs, but while it has a distinct subject matter of its own, and declares on its own account a something to be done—having but this one idea—it has no associate idea of time *when* this something is to take effect, of its own; the terms here expressed are merely descriptive of the *kinds* of writs which shall have priority, therefore this clause having but this one distinct object of its own, the priority of writs, cannot affect the other object of the act, the prohibition of the operation of registered judgments; and having no time of its own for the operation of its object, it cannot affect the time expressed for the operation of the other object, that is, the first clause of the 11th section, as you and others appear to think: but on the other hand, this first clause entirely rules the second as to time,—without the time of this first clause there would be no time expressed for the operation of this second clause. This first clause of the 11th section is the governing genius, so to speak, of the act: whatever is to be done is subjected to the time here defined for its operation, and there is no proviso or exception made to it, either expressed or implied—it has absolute power.

This second clause then, as influenced by the first, means, that certain kinds of writs, namely, such as have and shall have issued before the 1st September, and on judgments registered before the passing of this act, shall after the said 1st September have priority according to the priority of the registration of the judgments on which they have issued or shall issue respectively. Here, although all registrations of judgments must cease to operate as liens upon lands on the 1st September, a reference to the registration will be necessary to test the priority of the writ. This clause will have the effect of leaving this kind of power, or rather, of giving this power, for it will be a new one, to registrations made "heretofore," that is before the passing of this act, if the other conditions shall have been complied with—that is if the writ shall have been issued before the 1st September. Still, this is not an object of the clause but is an effect, or is both an effect and a means, or as said before, is merely descriptive, and can have no other effect, by implication or otherwise, on any part of the act, and none at all upon the first clause of the 11th section.

The act has two objects in view, the prevention of registered judgments, &c. creating or operating as liens upon lands, &c., and the priority of certain writs; to the first it makes a proviso, and it sets the 1st September as the time when these objects are to be effected. These are the points, and all the points of the act.

Whatever may be thought of the utility of the other parts of the act, this proviso is certainly a consistent and wise provision, for without it great injustice might result to many. Parties having filed bills in chancery upon registered judgments, as liens upon lands, before knowing anything of this act, or before it was heard of, and who have not yet obtained decrees on the 1st September, though having been subjected to nearly all the expenses of a long suit, would have been at once ousted, and all their proceedings rendered of no avail, because (and as before shown under other heads) the registered judgments upon which their claims had been justly rested,

would then have no longer operated as liens on the lands, and so the foundation of their suits destroyed.

I submit then, that the construction of this act is,—*First*, that after the last of August, 1861, the registrations of judgments, rules, orders, or decrees, for the payment of money, of any court of Upper Canada, shall no longer create liens, or charges upon lands, or any interest therein; and that those which have been and which shall have been registered, will then cease to operate as liens, &c., *excepting* those upon which bills had been filed, and the suits had been pending on or before the 18th May, 1861—these will continue to operate as if this act had not been passed.

Secondly—That after the said last of August, writs against lands which have issued and which shall have issued before the 1st September, 1861, and which shall be founded on judgments which have been registered before the passing of this act, shall have priority according to the priority of the registrations of the judgments on which they have or shall have issued respectively.

This is the rendering, as I conceive it, of the last three sections of the act—last three as they are now divided in the published statute.

The rest of the act of course requires no comment to elucidate its meaning.

JUNIUS, JUNIOR.

Toronto, August 3, 1861.

[In the article to which our correspondent refers, we did not pretend critically to analyze the act. Our object was to make an announcement of its existence, and in general terms to state what we thought of it. It is quite possible that the construction of the act in some of the points to which we directed attention is free from doubt in the mind of our able and pains-taking correspondent, but it is, to say the least of it, a little singular that many felt doubts where our correspondent sees none.—EDS. L. J.]

Rights of accused on a charge of felony before a Magistrate.

TO THE EDITORS OF THE LAW JOURNAL.

DEAR SIRS,—There is a point of our criminal law on which there seems to be some difference among the magistracy, both in opinion and practice.

It is, whether at a preliminary examination before magistrates, on a charge of felony, the accused has a legal right to enter fully into his defence, and produce and examine his witnesses, either to disprove the charge in *toto*, or deprive it of a felonious character.

I see the Police magistrate in Toronto—the Hogan case for example,—allows the accused this privilege; our J. P.'s refuse it.

Now, is it either a right or a privilege, optional with the Justices, to grant or refuse? And if not a right, ought not and will not its refusal very frequently impose great hardship and inconvenience?

Where the proceeding is summary, the right is indisputable; if otherwise in cases of felony, as in the case cited, by what authority does the Police magistrate allow it to those brought before him?

Can it be justly called *an examination* where only one side, and not necessarily all of that, is heard?

Please give your opinion, and oblige

Yours truly, INQUIRER.

[1. The depositions on the part of a prosecution for felony having been all taken, the magistrate should consider whether they contain such a strong *prima facie* case of guilt against the prisoner as to warrant his sending the case to a jury.

2. If the magistrate considers the evidence sufficiently strong against the prisoner to call upon him for his defence, he should ask him what he has to say in answer to the charge made against him, and if he is willing to make any statement it is the duty of the magistrate after giving the usual caution, to receive it.

3. If the prisoner, after having been duly cautioned, either on his own motion or in reply to fair and open questions put to him from the bench, should think proper to make any statement, it is the duty of the magistrate to allow him to do so.

4. If the prisoner be desirous of calling witnesses for his defence at this stage of the proceedings, (which it is imprudent for him to do unless he has strong grounds for belief that he can satisfy the magistrate of his innocence, and thus procure his discharge, or at all events an admission to bail,) he is at liberty to call as many witnesses as he pleases, and they must be sworn and examined, and their examinations taken down in writing in the same manner as those for the prosecution. (See Stone's Petty Sessions, 6 Edn. 271, -2, -4, -6.)—EDS. L. J.]

REVIEWS.

A SYSTEM OF CONVEYANCING; COMPRISING THE PRINCIPLES, FORMS AND LAWS, WHICH REGULATE THE TRANSFER OF PROPERTY IN CANADA. Edited by J. Webster Hancock, LL.B., Barrister-at-Law, Berlin, C. W. Published by L. Stebbens, 1861.

This is by far the best work on conveyancing ever issued in Canada. We have had several works of the kind, but none manifesting so much ability and industry as this volume.

It is not a mere book of forms. It comprises, as indicated on the title page, not only forms, but "the principles" and "laws" of conveyancing in this province.

Truly does the Editor, in his preface, remark that "the voluminous and costly works of the great English conveyancers contain little that is needed in ordinary practice on this continent." The conveyancing forms of England are in general quite unsuited to the circumstances of this colony. Simplicity not complexity, is the rule of conveyancing in Canada. Real estate here, compared with real estate in Great Britain, is of little value, and changes hands much more frequently here than there. Titles here are simple; and owing to our admirable system of universal registration, the state of a title is usually easy of access.

The danger however with us is that the very simplicity of our conveyancing forms may lead to looseness of style and incoherency of statement. Nothing is better as a preventive than a reliable book of forms adapted to our want. The book before us appears to be exactly that which is needed.

The Editor has divided his work into thirteen chapters—each devoted to a particular class of conveyances—prefaced by explanatory remarks as to the law regulating that class of conveyances, and the principles regulating that law. The first chapter is on agreements for purchase and sale. The second, on arbitration. The third, on sales by auction. The fourth, on securities. The fifth, on conveyancing securities. The sixth, on securities. The seventh, on leases and agreements for leases. The eighth, on landlord and tenant. The ninth, on marriage articles. The tenth, on partnership deeds. The eleventh, on wills. The twelfth, on declarations of uses and trusts; and the thirteenth, on powers of attorney. Then follows a supplementary chapter, on bills of exchange, drafts, orders, &c.

We do not pretend to have examined the contents of the volume with much minuteness, but have seen quite enough to convince us that the Editor is a man who has shirked neither labor nor responsibility. Indeed, were we to find any fault with the book, it would be that it is too elaborate.

The arrangement seems to be very good. It is a pity, however, that in referring to Statutes of Canada or of Upper Canada we find "Revised Statutes, 1859, cap. —," instead of "Consol. Stat. U. C." or "Consol. Stat. Can." The latter are the abbreviations now in general use to denote our statutes. Probably while the Editor was engaged in his work, these abbreviations were not so well known.

But while seeing so much to admire, it is scarcely fair to find fault. The work contains no less than 630 octavo pages, and is printed on very superior paper. It reflects credit both on publisher and editor. We congratulate both on what has been accomplished. The work is well conceived—well written—and well printed. We cordially recommend it to our readers.

THE LAW MAGAZINE AND LAW REVIEW. London: Butterworth, 7 Fleet street.

It is with pleasure that we acknowledge the receipt of the August number of this publication. We are always glad to receive it. The number now before us contains a very full and elaborate paper on the professional and parliamentary career of the late Lord Campbell. It also contains other papers of less length, but of much interest, such as the Yelveton Marriage Case — The Province of Jurisprudence determined — Journal of a Gloucestershire Justice — A trial for Child Poisoning in Germany—Charitable Trusts—The Assizes—Old Wills, &c.

LOWER CANADA REPORTS. Quebec: published by Augustin Coté.

Numbers seven and eight of volume eleven are received. None of the cases reported much interest an Upper Canadian lawyer. The assimilation of laws between Upper and Lower Canada, so often promised, if ever effected, will make an interchange of reports much more acceptable. As it is, we often find cases decided in Lower Canada of deep interest to us in Upper Canada. The criminal laws of both sections of the province are the same. The laws as to civil rights are as wide apart as the poles.

THE SCOTTISH LAW JOURNAL. Glasgow.

The number for July is received. In it we find an article on the Small Debt Court, from which we learn that in Scotland there is a growing desire for the extension of the jurisdiction of the Small Courts. It is to be hoped, should the desire be realized, that the Judges will decide according to law and not to "equity and good conscience," which sometimes means in ignorance of or contrary to rules of law.

THE LONDON QUARTERLY for July,

Is also received from same firm. The contents are not quite so numerous as that of the *North British*, but will be found quite enough for an ordinary reader of reviews, who has to earn his daily bread by other than literary pursuits. They are as follows: Thomas de Quincy—Montalambert on Western Monarchism — The English Translators of Virgil — Maine's Ancient Law — Scottish Character — Russia on the Amoor — Cavour — Democracy on its trial. The latter are papers of much interest to us at the present time.

THE NORTH BRITISH REVIEW for August. New York: Leonard Scott & Co.

Is received. The contents are the British Universities and Academical Polity—Montalambert and Parliamentary Institutions in France—British Columbia and Vancouver's Island — Stanley's Eastern Church—Edwin of Deira — Recent Discoveries in Scottish Geology—Freedom of Religious Opinion — Marriage and Divorce — Du Chaulli's Explorations and Adventures—Buckle on the Civilization of Scotland.

BLACKWOOD for August is also received.

Though unpretending as usual, it offers to the reader much to please and delight. The contents are: Joseph Wolff—On Manners—Vaughan's Revolutions in English History—Norman Sinclair (conclusion) — The Royal Academy and the Water Colour Societies—Mad Dogs—Another Minister's Autobiography—Three Days in the Highlands.

THE ECLECTIC. New York: M. H. Bidwell.

The proprietor of this magazine is always "up to time." Indeed he is generally "a-head of time." Such we believe to be the case when during the month of August we receive the September number of his magazine. The number just received is prefaced by a beautiful engraving representing a likeness of Thorwaldsen, one of the most remarkable men of Denmark. The contents are numerous, comprising the best selections from cotemporary magazines, and embracing some of the articles to which we have already referred in our notices of the leading English periodicals. A person not having time to read all the current periodicals cannot do better than content himself with the admirable selections which month by month appear in this magazine.

GODEY'S LADY'S BOOK. Philadelphia: Louis A. Godey.

Godey also is generally "a-head of time," notwithstanding the commotion caused by the civil war in the United States. One thing certain is that the artists of Godey are not either in the Southern or Northern army. The magazine is artistically as well executed as ever it was in the most palmy days of the Republic. The "Widow's Mite" in the number before us is a touching and beautiful plate. The fashion plates, as usual, are all that can be desired.

APPOINTMENTS TO OFFICE, &c.

PRISON INSPECTORS.

JAMES MOIR FERRES and TERENCE J O'NEIL, Esquires, to be Inspectors of Prisons in the room and stead of Donald Æneas McDonell and John Langton, Esquires.—(Gazetted August 17, 1861.)

NOTARIES PUBLIC.

WILLIAM McKEE, of Toronto, Esquire, to be a Notary Public for Upper Canada.—(Gazetted August 10, 1861.)

NATHANIEL BALDWIN FALKINER, of Belleville, Esquire, Barrister, to be a Notary Public for Upper Canada.—(Gazetted August 1, 1861.)

ROBERT MULLIGAN, of Port Hope, Esquire, to be a Notary Public for Upper Canada.—(Gazetted August 17, 1861.)

TO CORRESPONDENTS.

"CHARLES DURAND"—Under "Division Courts."

"JUSTICE, JUNIOR"—"AN INQUIRER"—Under "General Correspondence."