DIARY FOR DECEMBER.

1. Friday N. T. Day Q. B. Clerk of every Mun. ex. Co. to [ret. number of res. rate-payers to R.G.
2. Satur. Michaelmas Term ends.
3. SUN. .. 1*st Sunday in Advent.*
4. Mon. .. Last day for notice of trial for County Courts.
8. Friday *Cn. B. V. Mary.*
9. Satur.. Last day of service of York and Peel.
10. SUN... 2*nd Sunday in Advent.*
12. Tues... Qr. Sess. and Co. Ct. sittings in each County.
14. Thurs. Last day for Coll. to ret. roll to Chamb. or Treas.
17. SUN... 3*rd Sunday in Advent.*
18. Mon. .. Recorder's Court sits. Nomination of Mayors.
19. Tues... Declare for York and Peel.
21. Thurs. *St. Thomas.*
24. SUN... 4*th Sunday in Advent.*
25. Mon. .. Christmas Day.
26. Tues... *St. Stephen.* [York and Peel.
27. Wed. .. *St. John Evang.* Last day for notice of trial for
28. Thurs. *Innocents.* Sitt. Court of Error and Appeal com.
30. Satur.. Last day on which remain. half G. S. F. payable.
31. SUN... 1*st Sunday after Christmas.* End of Mun. year.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

The Local Courts'

AND

MUNICIPAL GAZETTE.

DECEMBER, 1865.

LIEN ON TIMBER FOR PURCHASE MONEY.

In these days of timber and cordwood, it may not be amiss to direct the attention of such of our readers as may be thereby interested to some decisions as to the position of persons owning timber lands, with respect to any supposed lien on the timber cut thereon.

It is a well known principle of equity, that a vendor of real estate has a lien on the property sold for the unpaid purchase money, and so long as trees are standing, they are considered as part of the realty. So far well; but it is also clear, that when these trees are cut down or severed from the realty, they become personal property, and the right of lien as far as they are concerned, is gone. And it is also well established that when once the possession of a thing is lost, any right of lien upon it goes with it. The result of these propositions sometimes, as will be seen, works a great injustice, and should be guarded against.

In *McCarthy* v. *Oliver*, 14 U. C. C. P. 290, the plaintiff, having by parol agreed with the defendant for the sale to and purchase by the latter of certain standing trees, permitted defendant to cut the same down and to manufacture them into square timber. Subsequently, a dispute having arisen, and the defendant in the meantime having removed the timber from the land, plaintiff replevied same. Upon this state of facts the court held that by permitting defendant to cut down and manufacture the timber, the plaintiff thereby gave up possession thereof, and his lien for purchase money was lost to him in consequence.

Thus much for courts of law. But the owner of timber lands will probably think that this was a hard case, and that the Court of Chancery would under like circumstances grant him the relief which he probably thinks he is entitled to. Such, however, is not the case, as may be seen from the recent case of *Smith* v. *Bell*, 11 U. C. Chan. R. 519. The plaintiff sold wood land to the defendants on credit; and the agreement stipulated that any cordwood or timber removed from the premises by the defendants, should be paid for at specified rates, if the plaintiff should demand such payment, the sums so paid to be credited to the defendants on instalments due or to become due. The defendants cut a quantity of cordword and were removing it, before making the stipulated payments. The plaintiff thereupon applied for an injunction to restrain the defendant from removing this cordwood, but his application was refused, —the Vice-Chancellor, in giving judgment, saying, "The cordwood in question was manufactured before the first instalment of the purchase money became due; and it was not contended that the defendants were bound to pay for it before cutting down the trees, or that cutting down the trees was a wrongful act. But the trees when cut down became chattels; and the lien in equity for unpaid purchase money in the case of chattels is not, as a general rule, more extensive than at law. Now it seems clear that, under the agreement, the plaintiff had no lien at law on the cordwood; the defendants having been in rightfu possession of the land at the time they cut down the trees, and having been authorised to cut them down, and having ever since been in possession of them and of the cordwood manufactured from them, I cannot distinguish the case from *McCarthy* v. *Oliver*."

COMMON CARRIERS.

The necessity for some legislative enactment on this subject, as connected with the too common practice, to which common carriers, particularly railway companies, are addicted, of exempting themselves from liability by imposing special and unreasonable conditions, has lately been again discussed in the court of Queen's Bench.

Whilst admitting that some of the principal reasons, in which originated the strict rule of law as to the liability of common carriers, have passed away with the change of customs and means of transit and traffic that have taken place of late years, it cannot, on the other hand, be denied that it is going to the other extreme to allow public companies to bind the travelling and trading community by all sorts of unreasonable and unfair conditions—conditions not only unreasonable in themselves, but, generally speaking, practically unknown to any but the managers or servants of the company imposing them.

These conditions are, generally, kept in the background; they are often printed in small type in some inconspicuous place in a way-bill, bill of lading or receipt, or whatever the document may happen to be called. Even if the forwarder *is* aware of them, he is not generally in a position to help himself, and must submit to them or else give up business altogether, as there is probably only the one means of transit. In fact, he is, under such circumstances, the victim of a monopoly.

Our attention has been drawn to this subject by the late cases of *Hamilton* v. *The Grand Trunk Railway Co.* 23 U. C. Q. B. 600, and *Bates* v. *The Great Western Railway Co.* 24 U. C. Q. B. 544 (also published in another place in this *Journal*.) In the former case the company received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions endorsed, which were that the company would not be responsible for damage done to any glass, &c., and the defendants gave a receipt for the glass with the same conditions upon it. The evidence shewed that the damage sued for arose from the gross negligence and improper conduct of the defendants' servants. The court yielded to the authority of decided cases, and held that such a delivery and acceptance formed a special contract, which was valid at common law and exempted the defendants from liability. But the Chief Justice, in giving judgment, intimated that, if it had not been for the weight of authority, he would have decided that such special contracts are a violation of the principles of the common law, which imposed and enforced duties on common carriers for the protection of the public; but though he could not shake off the impression that they are contrary to the public policy so frequently enunciated and so much lauded in the older cases, he was obliged to hold that they are binding.

In the latter case, the declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was, that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that, by the unreasonable delay in the carriage and delivery of the others, the plaintiff lost a market, &c.

To this the defendants pleaded a special contract—that the plaintiff undertook all risk of loss, injury or damage in loading, unloading, conveyance and otherwise, arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants; and that they did not undertake to forward the animals by any particular train, neither were they responsible for the delivery of the animals within any certain time, or for any particular market.

On demurrer, it was held that the plea was good; that the parties could lawfully enter into such a contract; that having done so, their rights and liabilities must be ascertained by the terms of it, and not by the common law.

In both these cases the court alluded to, and deplored the present state of the law, and suggested the propriety of legislative redress as the only means of putting the public upon a fair footing with companies who are *not*, in reality, owing to the present system of special conditions, "common carriers," in the sense that a lawyer would use the words. The defect in the law, which we are now complaining of, was also experienced in England; and Baron Parke, in *Carr* v. *The Lancashire and Yorkshire Railway Co.*, 7 Ex. 708, suggested the same remedy, when he said that it was not a matter for the interference of the courts,

"but must be left to the legislature, who may, if they please, put a stop to this mode, which the carriers have adopted, of limiting their liability."

And now as to what statutory alteration should be made in the law. We are not at a loss for a guide in this, for we have the English statute, 17 & 18 Vic., cap. 31, sec. 7, which, with such modifications as the requirements of business in this country or the experience of mercantile men might suggest, would, we think, in a great measure remedy the evils complained of. The enactment is to the following effect:—

That every company (confined in England to railway and canal companies) shall be liable for all loss or injury to any animal or thing in the receiving, forwarding or delivery of them, occasioned by the neglect or default of such company, notwithstanding any notice or conditions made or given by such company contrary thereto; every such notice or condition being declared null and void. Provided that such company may make any conditions in the premises, which shall be adjudged, by the court or judge before whom any question affecting the matter is tried, to be just and reasonable.

The section makes further provision, limiting the *amount* of the liability of the company in certain cases, unless the value is declared to them and an extra payment made. Proof of the value is on the person claiming compensation, and no special contract shall be binding unless signed by the person delivering the goods for carriage.

The facts of the case of *Allday* v. *The Great Western Railway Co.*, 11 Jur. N.S. 12, referred to by the Chief Justice in *Bates* v. *The Great Western Railway Co.*, as exemplifying the benefit of the English act, were as follows: the plaintiff delivered cattle to the defendants to be carried to B station, and at the same time signed a ticket, containing certain conditions, whereby the company claimed immunity "from any consequence arising from over-carriage, detention or delay in, or in relation to the conveying of the said animals, however caused." The cattle were over-carried, and suffered in consequence. The court held that the deterioration of the cattle was an "injury" within the statute already referred to, and that the condition attempted to be imposed was an unreasonable one.

We may mention that the American Courts take a somewhat more liberal and equitable view of the law on this subject. Our readers will find in the *Repertory* a late American case bearing on it.

The courts have done their duty in pointing out the defects in the law. The mode of remedying the evil is hinted at in the cases in our own courts, and is now brought more prominently before the public. It remains, therefore, for the Legislature to pass such a measure as may be necessary to protect the business public, without, at the same time, imposing any unnecessary restriction on the working of what ought to be, and generally are, great public conveniences.

CONSTABLES' FEES.

It has been brought to our notice, that a misconception exists in the minds of many bailiffs or constables, as to the fees they are entitled to charge in cases of distress under warrants received by them to enforce the collection of taxes.

It is said, and we are afraid with truth, that, in some cases, what can scarcely be called by any other name than extortion is practised under colour of these warrants. It is said that some bailiffs, not apparently being possessed with consciences, or else very ignorant of their rights under the statute, have charged as much as ten or even fifteen dollars fees, and it is as well that they should understand their position, particularly in these days of high taxation. We shall, therefore, in our next number, give our readers a report of an interesting case on the subject, for which we have now no space.

LAW AND PRACTICE OF DIVISION COURTS.

The professional engagements of the gentleman who supplies us with this treatise have for the last few months been so pressing and engrossing, that he has been unable, for the time, to continue his interesting and instructive remarks. With the beginning of the new year, however, we think we may promise a continuation of the serial.

The Statutes of last Session have not yet made their appearance. Our readers however are better off than the public generally, as we have published the most important acts. It is high time however that they were distributed in full for public use.

SELECTIONS.

LIABILITIES OF MUNICIPAL CORPORATIONS FOR CONSEQUENTIAL DAMAGES.

I. How far a municipal corporation, acting under its lawful and undisputed powers, such as the laying out, opening, and grading of streets, &c., may be liable for consequential damages to property-owners, has within the last few years been extensively discussed. So far as private property is taken for public use, the rights of the owners are protected under the provisions of all the state constitutions in regard to such taking; but there are numerous cases in which no property was actually taken for public use, and yet substantial damages resulted to individuals from the progress of changes made for the public benefit and by the public authorities, and for this damage the owners have sought to recover compensation under the constitutional protection referred to. With the exception, however, of some cases in the State of Ohio, which will be noticed presently, the decisions have been uniformly against the right to recover, the provision in the constitution being held to refer only to a *taking* of property, and any damage merely consequential from a lawful action being *damnum absque injuria*. Thus, in Pennsylvania, *Green* v. *Borough of Reading*, 9 Watts 382, where it was first held that a municipal corporation is not liable for damages caused by the opening of a street. *Mayor* v. *Randolph*, 4 W. & S. 514, where it is said, that the motives of the corporation are not the subject of inquiry, and it is not liable, therefore, though its motives may have been merely to benefit its private property; and *O'Connor* v. *City of Pittsburgh*, 6 Harris (18 Penn. State Rep.) 187, where the city was held not liable for damage from the change of grade of a street, though the building was conformed to the grade previously established by law.

In Ohio, however, it was held in *Rhodes* v. *City of Cleveland*, 10 Ohio 159, that municipal corporations are liable, in the same manner as individuals, for injuries done, although the act be not beyond their legal powers. And in *McCombe* v. *Town Council of Akron*, 15 Ohio 476, the court went further. The plaintiff's house stood higher than the street grade as adopted by the Town Council, and by the cutting down of the street his house was injured, without any fault of the Council or their agents in performing their work. The court, basing its decision on the broad ground of justice, that he should receive compensation for an undeniable injury, avowedly went beyond precedents, and permitted the plaintiff to recover. BIRCHARD, J., dissented, and delivered an opinion showing very clearly that a private person would not be liable on the same state of facts, and that the decision was going far beyond what was called for by the case of *Rhodes* v. *Cleveland*. The court, however, adhered to its decision on second hearing: *Akron* v. *McCombe*, 18 Ohio 229: and the decision was afterwards affirmed in *City of Dayton* v. *Pease*, 4 Ohio, N. S. 80.

II. The basis of the decision in the foregoing cases, that the corporation is not liable, is, that the duties involved are discretionary and *quasi* judicial, and wherever they partake of that character, the party to whom such discretion is committed by the sovereign authority, is exempt from question as to the manner of exercising it, and from liability for the results that flow therefrom. If the exercise of the corporation's judgment in a particular case could be questioned in an action at law, the result would be ultimately to remove the discretionary power from the corporation and put it into the hands of the court and jury, a result clearly shown and deprecated in the principal case of *Carr et al* v. *Northern Liberties*, 11 Casey (35 Penn. State Rep.) 329.

The precise point, therefore, at which municipal duties cease to be discretionary or *quasi* judicial, and become merely ministerial, is of great importance, and has been much discussed, especially in the state of New York. It is thus expressed by SLOSSON, J., in *Lacour* v. *Mayor, &c., of New York*, 3 Duer 406: "A public officer is not amendable to an individual in a civil action for the exercise, or the refusal or neglect to exercise a judicial duty, but the moment the duty ceases to be of this character, which it does when the election to perform it is made, this immunity also ceases. The execution of the work itself is purely ministerial, and thenceforth the public officer is liable in damages for the improper or negligent exercise of the duty."

From this distinction it follows that, while a municipal corporation is not compellable by a civil action for damages, to exercise its discretion in any particular manner, or at all in any particular case, yet, when it has decided, and undertaken a work, it is to be held to the same rule of carefulness and skill in the performance of it as a private individual; and there are numerous cases, accordingly, in which damages have been allowed to be recovered against such corporations. And the distinction thus indicated has been adhered to with great unanimity wherever the question has arisen, unless it be in the case of *The Mayor, &c., of Baltimore* v. *Marriott*, 9 Md. 160. In that case the plaintiff, in passing over a pavement covered with ice, fell and was injured, and brought an action against the city for damages. There was some evidence that the pavement had been allowed to remain covered with ice for a considerable time, and the recovery, therefore, might have been allowed on the ground of negligence of the city in enforcing its ordinances for cleaning pavements, but the court declared that the action would lie because the city charter contained a provision that the corporation "shall have full authority, to enact and pass all laws * * * and to *prevent and to remove nuisances*." This, it was held, was not discretionary but imperative, and the words "power and authority,"

meant "duty and obligation," which were enforceable by a private action for damages. In this view of the case, it would appear to be an exception to the general current of authorities.

III. In the principal case of *Wills* v. *City of Brooklyn*, 5 Am. Law Reg. N. S. 33; the declaration averred that the drain in question was negligently and unskilfully built, being entirely inadequate for the purpose designed. It was a temporary drain merely, and it appears not to have been denied, that it was of insufficient size to carry off the water from such storms as might be frequently expected to occur. It may, therefore, be regarded in one view as a negligent performance of duty by the corporation, who though not bound to make a sewer there, were bound to make a good one if they made any at all. The case therefore would come within the class already noticed, where the corporation is liable, and this appears to have been the view taken by the judge who tried it in the court below. But the cardinal fact in the evidence, as reviewed by the Chief Justice in the Appellate Court, was, that the construction of the drain did not put the plaintiff in any worse position than he was in before it was made. On the contrary, though not a perfect protection, the drain was nevertheless, a benefit so far as it operated at all, and therefore, unless the defendants would have been liable for not making any drain, they were not liable for making an insufficient one. If on a new trial, the fact should appear to be otherwise, the plaintiff might still recover without in any degree impeaching the rules of law so clearly and satisfactorily laid down by the Chief Justice in the foregoing opinion. — *American Law Register.* J. T. M.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Action for not Repairing a Bridge—Common Law liability—Notice of Action—Con. Stats. U. C. ch. 126; ch. 54, sec. 341.—In an action against defendants for negligence in not keeping sufficiently secured a bridge, which had passed from the crown under their control, in consequence of which it broke away from its fastenings, and injury was thereby caused to plaintiff. *Held*, that defendants were liable to plaintiff at common law in a civil action for the injury sustained by him, although the property and freehold in the bridge were not vested in them; and that they were not entitled to notice of action under Con. Stats. U. C. ch. 126, as they were sued, not for acts done, to which that statute alone applied, but for acts omitted to be done by them. *Held*, also, that defendants were bound to maintain the bridge, after it came into their hands, in the same state of repair that they would have been if it had been built by themselves, and not merely in the condition in which it was when they received it from the crown. *Semble*, that if the accident complained of had occurred within so short a period after the transfer of the bridge to defendants that they had not had time to ascertain the defects, they would not, under the circumstances of their not having had any voice either in its construction or in its transfer, have been liable to plaintiff. *Quære*, whether the Commissioner of Public Works, if furnished with funds to repair the bridge, would not have been liable to indictment, if, with full knowledge of its dangerous condition, he had wilfully neglected to repair it. Sec. 341, Con. Stats. U. C. ch. 54, does not limit the responsibility of counties to the same kind of responsibility to which magistrates in Quarter Sessions are subjected, that is, to criminal responsibility merely: the object of the statute is to transfer from the magistrates to the county councils all their powers, &c., and on the completion of such transfer, the councils are to hold the property affected in like manner, and subject to their general duties and *liabilities* respecting other property belonging to them: (*Harrold* v. *Corporations of Simcoe and Ontario*, 16 U. C. C. P. 43.)

Municipal Corporation—Failure to Provide Sewerage.—A municipal corporation is not liable in a civil action to a private property owner, for failure to provide sufficient sewerage to drain his lot. The public duty to provide sewerage and drainage for the city in the first place, is *quasi* judicial, and the exercise of discretion as to the manner of performing it, is to be distinguished from a neglect of duty, by which a sewer is so badly constructed or allowed to get so out of repair as to become a nuisance, for which the corporation would be responsible: (*Mills* v. *City of Brooklyn*, 5 American Law Register, N. S., 33.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Deduction from Price agreed upon—Liquidated Damages—Admissibility in Evidence.—An agreement in writing, by which plaintiff undertook to do for defendant certain work therein specified, contained the following clause: "The whole of the work to be completed, and the mill in good running order, by the 15th of April next, under a penalty of ten dollars per day from that day until completion, as and for liqui-

dated damages, and to be deducted from the price to be paid for such work." *Held*, that the ten dollars per day was not a *penalty*, in the technical sense of the term, requiring an assessment to fix the precise sum at which each day's delay should be estimated, but a liquidated sum to be paid in the event provided against. *Held*, also, that it was not necessary to plead the right to make this deduction, but that *as a deduction* it was admissible in evidence, under the plea of *non assumpsit*, in determining the amount of the plaintiff's right to compensation: (*Fisher* v. *Berry*, 16 U. C. C. P. 23.)

TITLE BY POSSESSION—"SQUATTER"—TRESPASS.—Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot. It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer the possession of the whole land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing, and cultivating, has been limited to a portion; and *Held*, that in this case there was evidence legally sufficient to warrant such inference. *Semble*, that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession. A. being sued in ejectment, suffered judgment by default for want of appearance, and B. was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference: (*Dundas* v. *Johnston et al*, 24 U. C. Q. B. 547.)

BUILDING CONTRACT—EXTRAS—RIGHT TO RECOVER FOR—CONDITION PRECEDENT.—A building contract, for the erection of a church according to certain plans and specifications, contained a proviso, that if defendants should at any time be desirous of making any alterations or additions in the erection or execution of the church, or other works thereunto appertaining, plaintiff should erect, complete, make and execute the church or other works, with such alterations and additions as plaintiff or one S. should direct, by *writing under his or their hand*. Certain extra work was done at the desire of the defendants, though such desire was not expressed *in writing under their hand*. *Held*, that plaintiff was entitled to recover for the extra work, for the contract did not provide that no such work was to be allowed for *unless* ordered in writing, which *would* have prevented the plaintiff's recovering, but merely that plaintiff was *bound* to execute such extra work as defendants or S. should direct in writing to be done. Certain other work, also claimed as extras, was contained in the *addenda*, which were annexed to the specifications *before* plaintiff signed the contract. *Held*, that such extra work was *included* in the contract and could not be allowed as extras: (*Diamond* v. *McAnnany*, 16 U. C. Q. B.)

LIABILITY OF COMMON CARRIERS AND FORWARDERS.—The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted. Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees. Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier. If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of the goods, occasioned by the carelessness of negligence of the employees on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employees of the steamboat are, in legal contemplation, for the purposes of the transportation of such goods, the managers and employees of the carrier. A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms: (*Hooper* v. *Wells et al.*, 5 American Law Register, N. S., 16.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

MOFFAT v. BARNARD.

Action against J. P.—Conviction under C. S. C. ch. 92, sec. 18—Right to commit without distress—C. S. C. ch. 103, secs. 57, 59, 62. C. S. U. C. ch. 126.

Defendant, a Justice of the Peace, convicted the plaintiff, under Con. Stat. C. ch. 92. sec. 18, of making a disturbance in a place of worship, and committed him to gaol without first issuing a warrant of distress, whereupon the plaintiff brought trespass. It appeared at the trial that the plaintiff was well known to defendant, as a boy living with his parents and having no property.

Held, that the action would not lie, for defendant was authorized by Con. Stat. C. ch. 103, sec. 59, to commit in the first instance, that statute applying to this conviction; and the warrant was sufficient, as it followed the form given by the Act, which contains no recital of the ground for not first issuing a distress.

Quære, whether defendant would have been liable if he had not proved, as he did, the facts which justified him in dispensing with distress.

The warrant committed the plaintiff also for the charges of conveying him to gaol, but omitted to state the amount.

Held, following *Dickson* v. *Crabb*, 1 L. C. G. 171, that this would not make defendant a trespasser.

[Q. B., T. T., 1865.]

Trespass, for assaulting the plaintiff and giving him in charge of a constable, and causing him to be imprisoned in gaol. *Plea*, not guilty, by statute.

At the trial, at Cobourg, before Adam Wilson, J., at the last spring assizes, the gaoler was called, who proved that the plaintiff was brought to gaol on the 17th of September, 1863, under a warrant signed by defendant, and remained in gaol until the 26th of September, when he was discharged on *habeas Corpus*, by an order of Mr. Justice John Wilson.

The warrant was addressed, as usual, to all constables and the keeper of the gaol, and recited that the plaintiff and another were convicted before the defendant, one of her Majesty's Justices of the Peace, &c., for that they, the said Charles Moffat and W. H., did on Friday night then last past, enter the Baptist Church during divine service, in South Monaghan, and disturb the solemnity of said meeting, by talking and making a noise, and acting in a disorderly manner; and it was thereby adjudged that the said Charles Moffat and W. H. for their offence should forfeit and pay the sum of five dollars each, and should pay to Benjamin Halsted the sum of ten dollars, for his costs in that behalf; and it was thereby further adjudged, that if the said several sums should not be paid before the 15th inst., the said Charles Moffat and W. H. should be imprisoned in the common gaol of the said United Counties at Cobourg, for the space of 21 days, unless the said several sums and costs, and charges of conveying the said Charles Moffat and W. H. to the said common gaol, be sooner paid; and that the time in and by said convictions appointed for payment of the said several sums had elapsed, but Charles Moffat and W. H. had not paid the same or any part thereof, but therein made default. "These are therefore to command you, the said constables, &c., to take the said Charles Moffat and W. H., and them safely convey to the common gaol at Cobourg aforesaid, and there to deliver them to the keeper thereof with this precept. And I do hereby command you, the said keeper, &c., to receive the said Charles Moffat and W. H. into your custody in the said common goal, there to imprison them for the space of 21 days, unless the said several sums, and costs and charges of conveying them to the said common gaol, amounting to the further sum of dollars, shall be sooner paid," &c.

A rule of this court of Michaelmas Term, 27 Vic., was also put in, quashing the conviction made by the defendant upon which he issued the warrant.

At the close of the plaintiff's case it was objected, on the part of the defendant, that trespass would not lie, as the defendant had jurisdiction over the offence as a justice of the peace, and that he did not exceed this jurisdiction, although he might have proceeded irregularly. The plaintiff contended that there was an excess of jurisdiction by the defendant, in his having issued a warrant of commitment in the first instance, he having no authority under Con. Stat. C. ch. 92, sec. 18, to issue a warrant to arrest until after he had issued a distress warrant and no distress found; and that that enactment was not affected by Con. Stat. C. ch. 103, sec. 59, and that in any event defendant did not profess to act under it. The plaintiff also contended that defendant exceeded his jurisdiction in directing the gaoler to detain for the charges of conveying defendant to gaol, the amount not being mentioned in the warrant.

The learned judge was of opinion that the defendant had jurisdiction to issue the warrant to commit, and that, without first issuing a distress warrant, and also that it was not an excess of jurisdiction in the defendant to include the costs of conveying to gaol in the warrant, although as a fact he did not do so; but on this point, not being clear as to the effect of the case of *Leary* v *Patrick*, 15 Q. B. 266, he ruled in favour of the plaintiff. Several other objections were taken at the trial and in the rule nisi to the right of the plaintiff to recover, which it is not necessary to advert to.

Leave was reserved to defendant to move to enter a nonsuit, on the grounds taken; and the plaintiff had a verdict for $10 damages.

J. D. Armour, pursuant to leave, obtained a rule nisi to enter a nonsuit on several grounds, the first of which was that trespass was not maintainable against the defendant, the act complained of being an act done by him in the execution of his duty as a justice of a peace, with respect to a matter within his jurisdiction as such justice, and that he did not exceed it.

Nanton shewed cause, citing *Leary* v. *Patrick*, 15 Q. B. 266; *Barton* v. *Bricknell*, 13 Q. B. 393; *Massey* v. *Johnson*, 12 East 68; *Hardy* v. *Ryle*, Q. B. & C. 603.

Armour supported his rule, citing *Cronkhite* v. *Sommerville*, 3 U. C. Q. B. 129; *In re Allison*, 10 Ex. 561; *Regina* v. *Shaw*, 23 U. C. Q B. 616; *Haacke* v. *Adamson*, 14 U. C. C. P. 201.

MORRISON, J.—Upon the first objection, that trespass will not lie, I am of opinion that our judgment should be in favor of the defendant. The cause of action was an act done by the defendant as a justice of the peace, with respect to a matter within his jurisdiction, and he is entitled to the protection of our statute (Con. Stat. U. C. cap. 126, sec. 1).

The plaintiff was charged before the defendant with an offence within the provisions of the 18th section of chapter 92, Con. Stat. C. The defendant had jurisdiction under that section to impose the fine and costs on the plaintiff, and in default of payment within the period specified for payment, to issue a warrant to levy the fine and costs; and if no sufficient distress could be found, to commit the plaintiff to gaol for a term not exceeding a month, unless the fine and costs were sooner paid. In this case the defendant did not issue a warrant to levy the fine and costs, but, without first doing so, he issued a warrant to commit the plaintiff, and the plaintiff contends that such a proceeding was an excess of jurisdiction. I cannot take that view of it.

The act respecting the duties of justices out of sessions, in relation to summary convictions, ch. 103, Con. Stat. C., secs. 57 & 59, very clearly gives the authority and jurisdiction to the convicting magistrate to commit to gaol without first issuing a warrant to levy the fine and costs; and I think the statute applies to a conviction under the 18th section of chapter 92, and that the defendant was authorized to commit the plaintiff by a warrant in the form used by the defendant in this case.

The 57th section enacts that when a conviction adjudges a pecuniary penalty, and by the statute authorizing such conviction the penalty is to be levied upon the goods of the defendant by distress, &c., the justice making such conviction may issue his warrant of distress, according to a form in the schedule of the act, &c.; and the 59th section enacts that "whenever it appears to any justice of the peace to whom application is made for any warrant of distress as aforesaid (*i. e.* in the preceding clause 57) that the issuing thereof would be ruinous to the defendant and his family, or whenever it appears to the said justice, by the confession of the defendant or otherwise, that he hath no goods and chattels, &c, whereon to levy such distress, then such justice, if he deems it fit, instead of issuing a warrant of distress, may (O 1, 2, referring to the form of warrant to commit) commit the defendant to the common gaol," &c., "there to be imprisoned, with or without hard labour, for the time and in the manner the defendant could by law be committed in case such warrant of distress had issued, and no goods or chattels had been found whereon to levy," &c.

Upon a reference to the form of the warrant in the schedule to the act, no recital or reference is made, that it appeared to the justice that the party had no goods, and the warrant issued by the defendant corresponds with the form authorized by the statute; so that if it did appear to the defendant that it was useless to issue a warrant of distress in the first instance, the defendant was justified in issuing the warrant to commit as he did.

In the present case the defendant, no doubt, was satisfied that the plaintiff had no goods, as it appeared in evidence at the trial that the plaintiff was well known to the defendant, that he was a young lad living with his parents, and that he had no property.

I am not prepared to say, and I wish to guard myself from holding, that if a justice of the peace should issue a warrant to commit in the first instance, upon a charge such as was alleged against this plaintiff, without it appearing to him that the person convicted had no goods, or taking some means to ascertain the fact, that he would not be liable in trespass for exceeding his jurisdiction, and that it would not be incumbent on him in an action like this to give some evidence to that effect, the statute under which he convicts expressly declaring that he shall first issue a distress warrant, and the statute (c. 103) only dispensing with that proceeding under certain circumstances.

It would have been better and more satisfactory, perhaps, if the form given by the statute had provided for reciting the fact, so as to show that the justice professed to act under that provision of the act to which the form referred, but, as Pollock, C. B., said, in *In re Allison* (10 Ex. 567), "The statute gives a form to be adopted by magistrates, and they are not called upon to reason upon the matter."

Then as to the objection to the direction in the warrant to detain the plaintiff until payment of the charges of conveying him to gaol. There can be no doubt, and it was not denied, that the defendant had authority so to do, under the 62nd section of chapter 103, and the form of the warrant referred to in the 59th section expressly refers to these charges; but it is contended that as the amount of these charges was not inserted in the warrant, the blank for the amount not being filled up, there was an excess of jurisdiction. Leaving the amount blank was evidently an omission. A like objection was taken in the case of *Dickson* v. *Crabb*, in this court, in which judgment was delivered to-day. There the objection taken was, that neither the costs and charges of the distress nor of the commitment, nor of the conveyance of the party to gaol, were stated in the warrant; and, as said by the learned Chief Justice, it only shows an irregular exercise of jurisdiction, rather than an excess of it. Here the defendant apparently had determined the amount of the charge, but omitted to insert it in the warrant, leaving the amount "—— dollars." In *Dickson* v. *Crabb* we have decided that the case is within the spirit and meaning of the statute, cap. 126, sec. 1, and that trespass will not lie; and that decision disposes of the objection in this case.

HAGARTY, J., concurred.

DRAPER, C. J., not having been present at the argument, took no part in the judgment.

Rule absolute for nonsuit.

COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

STEPHENS v. BERRY.

Unstamped bill of exchange—Time for affixing double stamp—Evidence—Bill payable in American currency—Damages—Account Stated—White v. Baker, 15 U.C.C.P. 292, *followed*

(*Continued from page* 174.)

During the same Term the plaintiff also obtained a rule *nisi* to increase the verdict, pursuant to leave reserved, 1st to the sum of $15,161 10, on the ground that the plaintiff was entitled to the full amount, in lawful money of Canada, of the face of the bill in the declaration mentioned, being $15,000 with interest, or the

equivalent, in lawful money of Canada, of the sum of $15,000 in American money, having regard to the relative value of the Canadian and American dollar respectively; or, 2nd, to the sum of $10,743 34, on the ground that the plaintiff was entitled to a verdict for an amount which would, on the day of the trial, have purchased a draft on New York for $15,000 and interest and such sum of $10,743 34, being e requisite sum for such purpose.

Both these rules were enlarged until the present Term, and came on to be argued together.

Anderson for the plaintiff.

The bill was drawn and is payable in the United States, though accepted in this Province.

The 9th section of the Stamp Act provides, that any person in the Province who makes, draws, accepts, indorses, signs, or becomes a party to any bill or note chargeable with duty, before the duty or double duty has been paid by affixing the proper stamp, such person shall incur a penalty of $100, and the instrument shall be invalid and of no effect in law or equity, and the acceptance shall be of no effect, except only in case of the payment of double duty; but that any subsequent party to such instrument may, *at the time of his becoming a party thereto*, pay such double duty by affixing to such instrument a stamp to the amount thereof, and by writing his signature or initials on such stamp, and the instrument shall thereby become valid. Here the plaintiff has affixed the double stamp to the bill, and the only question is, has he done so in the proper time? That depends on the time when he became a party to the bill. This he did when he endorsed it. The holder of a bill is not necessarily a party to it, and until he puts his name on it, or in some way signifies that he is a party to the bill, he ought not to be brought within the highly penal terms of the statute.

There is a letter admitting defendant's liability, and the verdict is on the common counts as well, and may stand for the plaintiff on these counts.

The face of the bill with interest is the proper measure of damages. It is payable in dollars, and we know of no difference between the American dollar and our own; it is very trifling if there be any difference; and, therefore, the amount of the bill in our own country is what it really represents. We cannot take notice of the fact, that in the United States something else than gold is receivable in payment of debts, which in fact reduces the standard of their currency, though the coinage is precisely the same as it was before. The action is against the acceptor, and the case of *Suse* v. *Pompe*, 8 C. B. N. S. 538, is only authority to shew that, as against the drawer or endorser of a bill, the damages are limited to exchange and expenses: Chitty on Bills, 412; *Dawson* v. *Morgan*, 9 B. & C. 618 But in an action by indorsee against acceptor, the liability is to pay the money mentioned in the bill with legal interest, according to the rate of the country where it is due.

As to the variance in not describing the bill as payable in lawful money of the United States, he applied to amend if necessary.

McLennan, contra.—The venue is laid in the County of Victoria in this Province, and the bill according to the declaration, will be considered as made there, and the money mentioned in it will be considered as lawful money of Canada. *Kearney* v. *King*, 2 B. & Ald. 301, was an action against the defendant as acceptor of a bill of exchange. The declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for certain sums therein mentioned, without alleging it to be Dublin in Ireland; and it was held, that, on this declaration, the bill must be taken to have been drawn in England for English money, and, therefore, proof of a bill drawn at Dublin in Ireland for the same sum in Irish money, which differs in value from English money, did not support the declaration, and was a fatal variance. In *Sproule* v. *Legge*, 1 B. & C. 16, the declaration stated the plaintiff, at Dublin, made a promissory note, and promised to pay the same at Dublin, without alleging it to be Dublin in Ireland, where also it was held that the promissory note must be taken to have been drawn in England for English money, and proof of a note made in Ireland for the same sum in Irish money did not support the declaration. Reference is also directed to Chitty on Bills, 397.

The stamps not having been put on the bill until after the commencement of the action, plaintiff must fail; the plaintiff's rights have reference to the time of bringing the action, and if the bill was not a good bill then, it cannot be now. If the plaintiff was not a party to the bill, he could not bring an action on it; and if, having brought his action, he then became a party to the bill, he did not even then stamp it, and it is therefore void. According to defendant's argument, the holder of a bill, who has never endorsed it away, can always avoid the forfeiture by putting on the double stamp and writing his name on it, even at the trial. This would in fact render the act of Parliament of little use; for frauds would constantly be practiced to avoid it. *Baxter* v. *Baynes*, 15 U. C. C. P. 245, is referred to as to the effect of the stamp act.

As to the account stated, the contract arising from the account stated is a contract to pay on request or demand, whilst the agreement to pay by defendant's letters is in a particular way.

No contract arises on the account stated from plaintiff being the holder of the bill, as there is no privity between him and the acceptor; *Early* v. *Bowman*, 1 B. & Ad. 889. *Calvert* v. *Baker*, 4 M. & W. 417; *Burmester et al.* v. *Hogarth*, 11 M. & W. 97; *White* v. *Baker*, 15 U. C. C. P. 292; Story on Conflict of Laws, secs. 286, 309; *Wood* v. *Young*, 14 U. C. C. P. 250; Chitty on Bills, 9 ed. 582, 583, 685, 686.

If the plaintiff can sustain the action, all he is entitled to recover is the value of the American money the day the contract was to be performed, with interest. He referred also to *Suse* v. *Pompe*.

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

The first question to be considered is whether the plaintiff is a party to the bill sued on, and when he became such party. As a general rule, no person can sue on a bill of exchange or promissory note unless he is a party to it. The expressions run constantly through the cases, "He cannot sue on the bill; he is no party to it."

In Chitty on Bills, 9 ed. p. 27, it is stated, "The drawer, acceptor, endorser, and *holder*,

are the principal and intermediate parties to the instrument." In the declaration the plaintiff avers that Young endorsed and delivered the bill to the Metropolitan Bank, who endorsed the same to plaintiff. Now all this must have been done before the plaintiff could sue on the bill. It is true some of the authorities shew that if the bill, when the action was commenced, was in the hands of a third person, as agent or trustee for the plaintiff, he might sue, though the bill was not then in his actual possession. In all these cases, I apprehend, the person suing has been a party to the bill at some time before the bringing of the action. For the purposes of our stamp act, I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill, so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp when the bill without it would be void. The holder, in my judgment, can only be considered safe when he puts on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter. We are, therefore, of opinion that, on the first ground of nonsuit, our judgment must be in favour of the defendant.

In coming to this conclusion, I may observe that I still retain the view expressed in *Baxter* v. *Baynes*, that the most convenient way to raise the question as to the invalidity of a bill for want of a stamp is by a special plea; but as no objection was taken at the trial to the want of a special plea, and express leave was given to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover for want of the bill being properly stamped in due time, and the case was argued before us on that ground, we do not think it necessary in this case further to discuss the question as to this ground of defence being set up under the plea, that the defendant did not accept the bill.

The bill is not evidence of an account stated as between these parties, for there is no privity between the acceptor and the endorsee. The only evidence is the letters produced at the trial, and these only refer to the bill which is the subject of the action. If that bill is void and of no effect, an acknowledgment of it, and a promise to pay in a particular way, can raise no promise to pay on the account stated, for there would in any event be no legal or valid consideration for the promise stated. The doctrine is laid down in some of the older cases, though not expressly in relation to the particular point now under discussion, "the accompt doth not alter the nature of the debt, but only reduceth it to certainty;" *Drue* v. *Thorn* Aleyn. 73.

As to the question of damages, *Suse* v. *Pompe* is an authority that the amount for which the jury assessed damages, is the amount which could be recovered against the drawer or endorser of the bill; and some of the authorities seem to sanction the view, that larger damages may be recovered by the holder against drawer and endorser, than against the acceptor; the acceptor not being considered liable for re-exchange, as his contract is only to pay the sum specified in the bill and legal interest, according to the rate of the country where it is due. The amount found for the plaintiff accords with the views expressed in *White* v. *Baker*, decided in this court, and is quite as favourable to the plaintiff as the authorities would seem to warrant.

In argument it was suggested, that the value of the American currency, as compared with our own, at the time of the trial, was the true measure of damages for the plaintiff, or that the plaintiff might select any day between the breach of defendant's contract to pay and the assessing of the damages, as the one on which the rate of exchange should be fixed. Independent of the invariable doctrine in England, that interest is the only damages that can be given for the detaining of money after the day on which it is due, the authorities, particularly in England, in the case of an ordinary breach of contract, when the party suing has paid all the money, decide that the damages are to be considered by placing the plaintiff in the position he would have been in, if the defendant had carried out his contract; and the value of the commodity to be delivered is to be estimated at what it was worth at that time. There seems to be one exception to this rule; when stocks are borrowed to be returned by a certain day, the jury should give such damages as will indemnify the plaintiff, and, when the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial; (*Owen* v. *Routh*, 14 C. B. 327, and American notes to that case.)

There was nothing said in the argument as to this bill being payable in New York with current funds. If that means any thing different from lawful money of the United States, then it may be a question if the instrument is a bill of exchange at all; and if it is not legally a bill of exchange, plaintiff can have no property in it.

The rule to increase the damages will be discharged, and the defendant's rule to enter a nonsuit made absolute.

Rule absolute to enter a nonsuit, rule to increase damages discharged.

Friel v. Ferguson et al.

Magistrate—Trespass—Information—Warrant, evidence of—Joint tort—Evidence—Notice of action—Direction to jury—General verdict—Restricting to one count—Verdict against two defendants on separate counts.

The warrant of a magistrate is only *primâ facie*, not conclusive evidence of its contents; as, for instance, of an information on oath and in writing having been laid before him.

Such information must be, under Con. Stats. C. cap. 102, sec. 8, not only on oath, but in writing; and, except on an information *thus* laid, there is no authority to issue the warrant.

In this case, the magistrate having acted in direct contravention of the statute, in issuing a warrant without the proper information under the statute, or without even a verbal charge having been laid against the plaintiff, and and there being no evidence of *bona fides* on his part, the court held that he was not entitled to notice of action.

Semble, 1. That the fact of a magistrate's issuing a warrant without the limits of the county for which he acts does not necessarily disentitle him to notice of action. 2. That such notice will be bad, if it omit the time and place of the alleged trespass.

A general verdict, on a declaration containing one count in trespass and another in case, is not bad in law. But in this case, the court being of opinion that there was only one joint cause of action against the defendants, that is the arrest, restricted the verdict to that count.

Held, also, that a joint tort was sufficiently established against the defendants by evidence that one procured the warrant to be issued and the other issued it; that both knew that no charge had been made against plaintiff, that the warrant was given by the one to the other for the

arrest of plaintiff—who was accordingly arrested upon it, and that illegally.

Held, also, that the effect of this evidence was not destroyed by the fact, that the arrest was made in another county and under the authority of another magistrate's endorsation upon the warrant; for that that endorsation was not strictly the authority to arrest, but merely to execute the original warrant; and that the arrest was wrongful, not from the endorsation, but from the antecedent illegal proceedings of the defendants; and that the defendant who issued the warrant was as much responsible as if the arrest had been made in his own county.

Semble, 1. That if it had appeared that defendant who issued the warrant, was liable in *case* only, and malice or some special kind, personal to himself, in which his co-defendant was not, and could not be a partaker, had been proved, a joint action would not lie against both. 2. That one defendant might have been convicted in trespass, and the other in case.

[C. P., T. T., 1865.]

This was an action for arrest and malicious prosecution.

The first count was in trespass for the arrest, and for delivering the plaintiff to a constable, who kept him in custody for ten days.

The second count was in case, for maliciously and without reasonable cause procuring the plaintiff to be arrested and imprisoned in the custody of a constable for the space of five days, on a charge of felony.

The defendant Ferguson in person, and Collinson by Ferguson, his attorney, pleaded, severally, Not guilty by statute.

The venue was laid in the county of Leeds, one of the United Counties of Leeds and Grenville.

The trial took place before Morrison J., at the last Brockville Assizes, and a verdict was rendered for the plaintiff for $300 damages.

The following facts appeared: That Ferguson was an attorney, and was Reeve of the township of Pittsburgh, in the county of Frontenac, where the warrant afterwards mentioned issued; that the plaintiff brought an action for the seduction of his daughter against Collinson; that Collinson on the 7th of July, 1864, asked one P. H. Russel to go from Leeds to Kingston, and paid Russel $2 for going with him; that Collinson and Russel went together to Ferguson's office, when Ferguson asked Russel about some tea-meeting tickets; that they afterwards talked about forged notes; that they wanted Russel to be a complainant against plaintiff, but he would not; that Ferguson wrote a paper, and Collinson got it, but Russel had nothing to do with it, the first that Russel knew of the issuing of a warrant against the plaintiff being, when he was summoned by Collinson to attend before Mr. Moulton, a magistrate, at the township of Leeds, to give evidence against the plaintiff, who was then in the custody of a constable; that Collinson got a warrant from Ferguson against the plaintiff and gave it to Mr. Moulton, and another paper also, which appeared to the latter to be an information with Ruesel's name in the body of it, and which was handed back to Collinson again, who took it away; that Moulton backed the warrant to Collinson, and gave it to him; and that Collinson afterwards told the magistrate that the plaintiff had been arrested, and he got summonses for the witnesses to attend and give evidence against the plaintiff; that Moulton, when the plaintiff was brought before him, took the depositions of the witnesses, and after doing so he told the plaintiff he saw nothing against him, but as the warrant came from another county he could not discharge him; that Collinson had the warrant, and the magistrate sent the plaintiff to the defendant, Ferguson, at Kingston, in charge of the constable; that the plaintiff, when taken by the constable to Ferguson, was sent back by Ferguson to Moulton at Leeds; that Ferguson said to the constable he could not act on the depositions taken by Moulton, whereupon the plaintiff was conveyed by the constable to Leeds; that Moulton could not be found for two days, and on the third day, when he was found, he discharged the plaintiff.

The general facts, therefore, seem to be, that Collinson, having been sued by the plaintiff for the seduction of plaintiff's daughter, procured a warrant from his co-defendant, Ferguson, in the city of Kingston, while Ferguson was a magistrate only by virtue of his office as Reeve of the township of Pittsburgh, against the plaintiff upon a charge of forgery, without any complaint or information having been made by any one to authorize the issuing of the warrant. Upon the warrant the plaintiff was arrested in Leeds, and after an examination there he was sent by Moulton, the magistrate at Leeds, in charge of a constable, to Ferguson at Kingston; then sent back again by Ferguson to Leeds; and, after several days, he was finally discharged by the magistrate, because there was no case against him.

There can be no doubt that this was a most wanton and malicious proceeding by Collinson against the plaintiff, and that he prosecuted the plaintiff, as suggested, for the purpose of compelling him to drop, or to arrange on some kind of favorable terms the action for seduction, which the plaintiff had then pending against him.

As to Ferguson, the only facts against him are that he had no authority, as a magistrate, in the city of Kingston, for he was not a magistrate of the city, but of the county of Frontenac, by reason of his official position as Reeve of Pittsburgh, and that he issued the warrant without any charge or information having been first made, he being the attorney for Collinson in the action for seduction.

At the close of the plaintiff's case several objections were taken, which were for the time overruled, and leave was reserved to the defendant, Ferguson, to move to enter a verdict for him, if the court should think a notice of action to have been necessary, and that the one served upon him was defective.

In Easter Term following, *Gwynne*, Q. C., obtained a rule *nisi* calling upon the plaintiff to shew cause why a nonsuit should not be entered in favour of the defendant, Ferguson, in pursuance of leave reserved at the trial, for want of proof of sufficient notice of action; or why a new trial should not be had by Collinson, or by both the defendants, without costs, on the following grounds:—

1. That the declaration, containing two counts, one in trespass and the other in case, and the verdict being rendered generally, the verdict was contrary to law.

2. That the learned judge, who tried the cause, erroneously received evidence for the plaintiff under the count in trespass and under the count in case, and submitted all such evidence to the jury; and that such reception of evidence and

submission thereof to the jury were, under the circumstances, contrary to law and evidence.

3. That the evidence tendered for the plaintiff failed to establish any joint tort, for which the defendants could in law be held jointly liable, and that, therefore, the verdict rendered against the defendants jointly was erroneous.

4. That the learned judge improperly refused to receive evidence tendered on the part of the defendants, for the purpose of establishing the truth of the charge, in respect of which the warrant under which the arrest of the plaintiff complained of took place.

5. That the only evidence against the defendant, Ferguson, having been the issuing of the warrant produced at the trial, and the only evidence against the defendant, Collinson, having been of acts done without the jurisdiction of Ferguson, such acts were not sufficient to warrant a joint verdict against the defendants, or against either of them.

6. That the learned judge, who tried the cause, misdirected the jury in this, that he directed the jury that, as a matter of law, the defendants had acted in the premises without any reasonable or probable cause, and that malice was necessarily to be assumed, although the learned judge had refused to receive evidence tendered for the defendants, to establish the truth of the charge against the plaintiff mentioned in the warrant, and to shew the absence of malice and the presence of reasonable and probable cause; and because the learned judge refused to leave it to the jury to determine as a fact, whether the defendants, or either of them, acted in good faith, or to receive evidence to establish such acting in good faith.

7. That the learned judge misdirected the jury in this, that he left it to the jury to find that the warrant, under which the plaintiff's arrest took place, issued without any previous information, although the warrant, having been put in evidence by the plaintiff, sufficiently established the fact of such previous information having been taken.

8. That the evidence adduced by the plaintiff established that no action but an action in case could be sustained against the defendant Ferguson; and that the only action [if any] established against the defendant Collinson was an action of trespass; and that under these circumstances the joint verdict against both defendants, or any verdict against either of them, was contrary to law and evidence.

9. That no sufficient evidence was given to justify any verdict against either of the defendants; for the learned judge strongly charged the jury that there was evidence to warrant them in rendering a verdict against both of the defendants.

10. That, as against the defendant Ferguson, the venue laid in the declaration was wrongly laid, and, therefore, as against him no verdict could properly be rendered; so that the joint verdict was contrary to law.

In Trinity Term last, *Sir Henry Smith*, Q. C., shewed cause.—Ferguson was not entitled to notice of action at all, because he was not a magistrate of the city of Kingston when he made his warrant; and because he issued his warrant without any complaint or information having been made to him, either verbally or in writing.

But if a notice were necessary to be given, the one served was sufficient. It is said to be defective in the statement of time and place, when and where the alleged wrongs were committed. The plaintiff is described in the notice as of the township of Leeds, in the county of Leeds. The first part of the notice which is applicable does not mention any time or place, when and where the trespass on the plaintiff was committed, but specifies simply the assault and imprisonment complained of. The second part of the notice, which is the part that is applicable to the second count, states the wrong as having been committed by the defendants "on the said 9th day of July last past, at the township of Leeds aforesaid."

The original notice, which was retained by the plaintiff's attorney, does describe a place, which the copy does not, where the trespass was committed, namely, "at the said township of Leeds;" but this too is objected to on the same ground that is raised against the sufficiency of the place as to the second part of the notice. It is objected by the defendant Ferguson, that there is no such place as the township of Leeds. It is true the Upper Canada Territorial Act has no such township in the county of Leeds as the *township* of Leeds; and that what was formerly the township of Leeds and the township of Lansdowne, is now called, as townships, "Front of Leeds and Landsowne," and "Rear of Leeds and Lansdowne." But the 12th Vic. ch. 99 (Private Acts) shews that these present townships are formed only for municipal and election purposes; and the Act of Canada, respecting the Provincial Statues (ch. 5, sec. 6), provides, that "the name commonly applied to any country *place* * * * ahall mean such country *place*, * * * although such name be not the formal and extended designation thereof;" and as the locality in question is commonly known as the *township* of Leeds, it is sufficiently described as such, although that may not happen to be the strictly formal designation thereof.

Besides the defendant, in the warrant which he signed, has described the plaintiff as of the *township* of Leeds, and has described the offence therein charged against the plaintiff as having been committed in the township of Leeds, and he cannot now be heard to say he has been misled by the description of place in the notice which has been served upon him.

A notice without any place at all would be bad: *Martin* v. *Upcher* 3 Q. B. 667.

As to there being a joint wrong by the two defendants: Collinson wrongly procured the warrant from Ferguson, Ferguson wrongly issued it, and then delivered it wrongfully to Collinson to be executed, and it was executed. This made them joint wrongdoers, particularly under the circumstances disclosed by the evidence.

Both the defendants knew there was no information in writing, and the Statutes of Canada ch. 102, sec. 8 shew it must be made in writing, and under oath.

As to the general verdict on both counts, he referred to *Hunt* v. *M'Arthur*, 24 U.C Q B. 254; *Mason* v. *Morgan*, 24 U. C. Q. B. 328; *Haacke* v. *Adamson*, 14 U. C. C. P. 207.

As to the alleged refusal of the judge at the trial to receive evidence of the truth of the charge against the plaintiff, it is not correct: the

learned judge did not refuse such evidence, but, on the contrary, offered to receive it.

The venue was properly laid in the county of Leeds, for it was there the arrest, the act complained of took place: Con. Stat. U. C. ch. 126, s. 11.

It was, also, properly left to the jury to say whether there had been an information in fact made against the plaintiff, and the jury were right in finding there had not been an information upon the evidence submitted, although the warrant produced by the plaintiff recited that an information had been made in the matter.

Trespass was maintainable against Collinson, as well as case: *Hunt* v. *M'Arthur*, before cited; *Leary* v. *Patrick*, 15 Q. B. 268.

Gwynne, Q. C., supported the rule.—Notice of action to Ferguson was necessary, although he acted without authority: *Bross* v. *Huber*, 18 U. C. Q. B. 285; *Kirby* v. *Simpson*, 10 Ex. 358; *Morris* v. *Smith*, 10 A. & E. 188; *Prestidge* v. *Woodman*, 1 B. & C. 12; *Rex* v. *Mattos*, 7 C. & P. 458.

At most, this was a case of an excess of jurisdiction, not a case where there was no jurisdiction: Ferguson had jurisdiction over the offence, but not in Kingston, where he made his warrant.

The notice which was served was insufficient for the reasons already stated: *Martin* v. *Upcher*, before cited; *Breeze* v. *Jerdein*, 4 Q. B. 585; *Prickett* v. *Gratrex*, 8 Q. B. 1020; *Madden* v. *Shewer*, 2 U. C. Q. B. 115; *Connolly* v. *Adams*, 11 U. C. Q. B. 327; *Cronkhite* v. *Sommerville*, 3 U. C. Q. B. 129.

(To be continued.)

COMMON LAW CHAMBERS.

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

IN THE MATTER OF WELLINGTON CROW.

Habeas corpus—Conviction by one magistrate when two required—Effect of erroneous recital in warrant of commitment—Necessity to show before whom convicted—Several warrants—Periods of imprisonment running contemporaneously or consecutively.

Where a statute empowers two justices of the peace to convict, a conviction by one only is not sufficient.

It lies on a party alleging that there is a good and valid conviction to sustain the commitment, to produce the conviction.

The warrant of conviction should show before whom the conviction was had.

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants of commitment, each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding, is valid.

If the portions in the margin of the second and third warrants could not be read as portions of the warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time instead of counting consecutively.

[Chambers, 1865.]

This was a summons calling upon the Attorney-general or his agent to show cause why a writ of *habeas corpus* should not be issued in this matter.

The prisoner had been committed by the police magistrate of the city of Hamilton, on three several convictions for enticing, persuading and procuring soldiers to desert her Majesty's service.

There were several warrants of commitment. Each warrant recited a conviction "before me, James Cahill," the police magistrate, and concluded "Given under my hand and seal," &c., and each one was subscribed as follows: — "J. Cahill, police magistrate of the city of Hamilton; Robert Chisholm, ald.; P. Crawford, ald."

Each warrant was dated 11th March, 1863, and each numbered. One was numbered 1, another was numbered 2, and the third was numbered 3.

The first warrant directed imprisonment for six months at hard labor; the second six months at hard labor, and it had this memorandum in the margin, "The time mentioned in this committal to commence at the expiration of the time mentioned in another committal which is numbered number 1;" and the third warrant directed imprisonment for six months at hard labour, and had the like memorandum which was upon number 2, but stated that the time in number 3 was to commence from the expiration of the time mentioned in number 2.

James Paterson argued, for the prisoner, that the warrant was defective, because it showed the conviction to have been made by one magistrate, and that the terms of imprisonment in the warrants numbers 2 and 3 were defective and uncertain.

R. A. Harrison, for the Crown, argued that the conviction itself should be before the judge in Chambers, because the presumption was that the conviction was correct, and it should be assumed that the warrant contained a misrecital of the conviction having been had only before the one magistrate; and it rested on the prisoner to complete his case by procuring the conviction; and that the periods of imprisonment in the warrants 2 and 3 were quite certain.

ADAM WILSON, J.—The Mutiny Act in force when these convictions took place, was the 27th Victoria, chapter 3, section 81, which provides that the conviction shall be before two justices.

The conviction, therefore, if it be really in the form in which the warrant recites it to be, is erroneous and void.

Am I to assume that the conviction is in this defective form, or can the warrant containing a misrecital be considered as not void, or may it be amended, or can a new warrant be issued?

By the Consolidated Statutes for Canada, cap. 103, sec. 71, one justice may issue his warrant of commitment after the case has been heard and determined, although the case required more than one justice to adjudicate upon it, and by sec. 72 it is not necessary that the justice who so issues his warrant shall be one of the justices by whom the case was heard or determined. It would seem, therefore, to be immaterial as a fact whether or not that part of the warrant is true, that the prisoner was convicted before Mr. Cahill.

Is it necessary, however, that it should appear before whom he was convicted? In all the forms which are given of warrants of this nature in the schedules to the statute, it is prescribed that the fact shall be recited. In *Rex* v. *York*, 5 Burr. 2684, the warrant of commitment stated that the prisoner had been brought "before me and convicted;" and Lord Mansfield, C. J., said

"This was upon conviction, and it ought to be shown that the person convicting had authority to convict. It is a commitment in execution. Here it does not appear by whom they were convicted. It is only said in the warrant 'brought before me and convicted.' The not showing before whom they were committed is a gross defect. Let them be discharged." In *the matter of Addis*, 2 D. & R 167; 1 B. & C. 687, it appears if the warrant of commitment be bad, and the party be discharged from it, that a new warrant of commitment may be issued upon the conviction, if that be sufficient to justify a warrant. See also *Egginton* v. *The Mayor of Lichfield* 1 Jur. N. S. 908. In *The King* v. *Rhodes*, 4 T. R. 220, the warrant of commitment recited that the party had been charged—it did not say convicted—before the magistrate, and the warrant was held bad for that cause. Buller, J., said, "The only question is, whether the warrant, on the face of it, be a good commitment in execution; and that it is not cannot be doubted, first, because the party was not previously convicted," &c. And Grose, J., said, "Therefore this warrant is bad, because it only states that the party had been charged with, not that he had been convicted of, the offence." See also 12 East. 78, note (*a*); and *The King* v. *Casterton*, 6 Q B. 509. In *The matter of Peerless* 1 Q. B. 154, Coleridge, J., said, "Of the conviction we know nothing, except through the warrant." See *Reg.* v. *Lordoft* 5 Q. B. 940; *Reg.* v. *Cavanagh* 1 Dowl. N. S. 552; *Reg.* v. *King*, 1 D. & L. 723. It lies on the party alleging there is a good and valid conviction to sustain the commitment, to produce the conviction (1 D. & L. 846). In this cause the conviction has not been brought before me. All I have seen is the warrant, and that recites a conviction before one magistrate only. I cannot infer from this, that the prisoner was convicted by two magistrates, and the warrant does not show jurisdiction in one magistrate to commit.

I think the adjudication that the imprisonment in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding it, is valid (see sec. 63 of cap. 103); and I think it is so stated as properly to form part of the warrant.

I may add, as to the imprisonment, if the portions in the margin of the second and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient. The only thing would be that all the warrants mentioned would be running at the same time, instead of counting consecutively.

The order must go for the issue of a writ of *habeas corpus* to bring up the body of the prisoner.

Order accordingly.*

CORRESPONDENCE.

Division Courts — Transcript of judgment.

To the Editors of the Local Courts Gazette.

Gentlemen,—As much difference of opinion exists among Division Court officials respecting transcripts of judgments from one county to another, permit me state what I conceive to be the proper course of procedure; and, first, as to the duty of the clerk of the county in which judgment was obtained. Sec. 139, cap. 19, Con. Stat. U. C., requires him, when requested, to make a transcript of the judgment and send it to the clerk of such county as the party may direct. Having so done, I contend, *his* connection as clerk with the suit *entirely ceases*. Next as to the duty of the clerk *to* whom the transcript is sent: He is, upon its receipt, to enter it into a book kept for the purpose, and to do *nothing* more unless directed by the party in whose favor the judgment was given, and then only *after* such party has complied with the requirements of sec. 137 of the above mentioned statute, by *producing the certificate* of the judge of the county in which the judgment was rendered, and the *order* of the judge of the county to which the transcript has been sent, *and also paid the clerk his legal fees.*

I am clerk of a court *to* which 125 transcripts have been sent in a year, and hardly in a single instance have the statutes been complied with. The usual practice is for one clerk to send the transcript to the other, and for the recipient to issue execution without further orders, and if the money is made to transmit it to the clerk from whence he received the transcript, and if returned *nulla bona* to send a return to the same party, *charging him* with the fees. This I hold is entirely wrong, as I contend that the clerks have *nothing whatever* to do with one another further than preparing and transmitting the necessary papers. If you agree with me in my view of the law I intend in future to require a rigid compliance with the statute so far as the judge's certificate and payment of fees is concerned, as I am continually suffering loss and annoyance, in consequence of parties not paying fees, and being, in many cases, I am sorry to say, impertinently required *by clerks* to make return of transcripts.

Much diversity of opinion exists as to the legality of sending transcripts from one *division* to another in the same *county*. I think it is illegal, but if so how can a judgment be enforced against a party *not* residing in the division in which the judgment was obtained, if the bailiff takes advantage of sec. 79 of the Division Courts Act, and refuses to go beyond the limits of his division.

* Before the writ of *habeas corpus* was given to the gaoler, valid warrants of commitment had been placed in his hands, so that the prisoner was not discharged.—Eds. L. C. G.

An insertion of this communication in your excellent *Gazette*, together with such remarks as you may deem appropriate, will much oblige Yours, &c.,

C.

[We gladly publish the above communication, which speaks for itself. Space does not now admit of a more extended reference to the subject, which is of some doubt and difficulty. At some future time we shall return to it.—Eds. L. C. G.]

New trials in Division Courts—Application for on day of hearing, when both parties present.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Would you be so kind as to inform me, through the medium of your valuable Journal, whether it is the practice in Toronto and in the counties in the vicinity, for the judge of the Division Court to refuse to allow an application for a new trial to be made before him during the sittings of the court at which judgment was given, both plaintiff and defendant (and all the witnesses) being present.

A case of the following nature lately occurred, in which I was concerned for the defendant. A. sued B. on a promissory note given by B. to A. on the supposed completion, according to contract of certain ovens, which A. was to build for B., but which were, after settlement, discovered upon use, to be so defectively done, that they fell in; the defect not being discernable from any inspection of the work. This note B. therefore disputed, having had no value, and upon other grounds.

The court having been held rather earlier than usual, neither plaintiff or defendant were present at the time when case was called, but judgment was given for the plaintiff. Both plaintiff, defendant and witnesses arrived shortly after the opening of court, and thereupon I asked the judge whether he would hear an application for a new trial, as both parties were present, and also the witnesses, and it could be determined in a few minutes; but this he at once refused to do, without making the slightest enquiry as to the grounds of the application. I still urged the application, stating that the amonnt was small, and the costs of making a regular application by affidavit and serving papers would be considerable, and could be saved if the application were heard then; but the judge still refused to look into the matter in any way. This does not seem to me to be at all in accordance with the spirit and intention of the Division Court Acts and Rules. I was the more surprised by the refusal to hear this application, as Judge Gowan in the County of Simcoe, always permits such application to be made and determined before him at same court where judgment is given, when possible to do so.

If the judge, of Division Courts were to take the same course as that adopted by the judge from whose ruling I dissent, a most beneficial part of the Rule relating to new trials, would be perfectly useless.

A Subscriber.

[We entirely agree with our correspondent, as to his view of the practice. Economy and speed are two most important elements in Division Court administration. Both parties being present, the application for a new trial might have been heard and disposed of in a few minutes, and the case could, we think, under the wording of Rule 52, have been gone on with at that court, unless sufficient and reasonable cause were shown to the contrary. But however this may be, Rule 52 is express that applications for new trials may be made and determined on the day of hearing, if both parties are present. Irrespective of this, we question very much whether the judge was not wrong, in the first instance, in giving judgment for the plaintiff when no one, as far as appears, attended on his behalf. The practice adopted in the County of Simcoe is, we believe, the same as that which obtains in all other counties of which we have cognizance.—Eds. L. C. G.]

Constables' fees.

To the Editors of the Local Courts' Gazette.

Dear Sirs,—A person is charged before a a justice of the peace with a felony, say forgery, and a warrant is handed to a constable for his apprehension, and the prisoner is arrested and carried before the justice who issued the warrant. On the investigation of the case, the justice finds that there is not sufficient evidence to convict the prisoner for trial, and so discharges him. The constable makes out his bill, swears to it, it is certified by the magistrates and passed by the auditors at Quarter Sessions, but payment is refused by the Government at Quebec because the case

had not been brought before a court of record. Please say how the constable is to get his pay from the county, or from the complainant, or can he get any pay at all.

CONSTABLE.

[In such a case as that above stated, we think the Crown ought to pay the fees, if a fair construction be placed upon the act respecting the expenses of the administration of justice. But in any case, the constable should not go unpaid, and he might naturally look to be paid out of county funds—at all events in the first instance.—EDS. L. C. G.]

Alterations of court limits.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—Our legislators have enacted *another* amendment to the Division Courts Act, and which, if carried but a step further, might have a very important and salutary effect.

The amendment referred to, provides that it may be lawful for any judge of a County Court, on the receipt of a petition from the Municipal Council to create a new division, &c., thus rendering still more onerous the duties of persons who have been always represented in your journal as overtasked and overworked.

Had the amendment been to the effect that when in the opinion of the county judge the business connected with those courts falls below a certain amount, it should be in his power to restrict the number of the divisions, would it not have been more to the purpose, and what the country requires. Instances could easily be found where a judge has been obliged to drive ten or twelve miles through bad roads to give judgment in a single cause, and that cause *confessed.*

The business transacted in the courts has for some years fallen off to a mere tithe of what it was when the divisions were set off; and as the law now stands it seems to require at least two-thirds of the magistracy of the county to drop any one division. Would not the matter be far better in the hands of the county judge, who can always from his position form a correct and unbiassed judgment? And no doubt, if the number of the divisions were reduced, the interest of the entire community would benefit.

As an instance of one-handed legislation, by *another* amendment it was enacted that suitors are allowed to take their suit to any division nearest to the residence of the defendant, even though that should be in another county. The shrewd officers of another county might induce the judge of that county to remove the place of holding their court to the extreme limit of the county, which would have the effect of enlarging their territory one-fourth at least, as they are allowed to go half way to the place of holding the court in the adjoining county, and by this means deprive the officers of that county of what is their just due. I hope this may have the effect of calling out an expression of opinion from those most interested in the matter, for if a law operates injuriously, should we not seek to have it repealed.

Certainly, what with amendments, alterations, and extending of jurisdiction, the Division Courts Act is rather an enigma than otherwise to many of those who require to use it.

I am, Sir,

UTILE DULCI.

Co. of Brant, October 27, 1865.

[Though not agreeing with our correspondent in all his views, we commend his remarks to those to whom they refer. We have before now expressed an opinion that a multiplicity of divisions in a county are objectionable, and we hope that municipal councils will have the wisdom to leave the matter in the hands of the county judges. We cannot conceive that any judge would allow the representations of any officer to induce him to change the place of holding a court contrary to his better judgment. As to the last point we have great hopes that Mr. O'Brien's notes on the Division Courts Act and Rules, &c., now nearly ready for publication, will be of much use, especially to those who, like our correspondent, seem to be troubled by amendments, by bringing together in an intelligible manner the law respecting these courts. — EDS. L. C. G.]

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JOHN TWIGG, Esq., and PATRICK JOSEPH BUCKLEY, Esq., LL.B., Attorney-at-Law, to be Notaries Public for Upper Canada. (Gazetted Nov. 18, 1865.)

TO CORRESPONDENTS.

"C."—"A SUBSCRIBER"—"CONSTABLE"—"UTILE DULCI"—Under "Correspondence."