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DIARY FOR DECEMBER.

1. Thursday ..... Paper Day C. P. Clerk of every Municip. ex. Co. to return [number of resident ratepayers to R. G.
3. Saturday ..... Michaelmas Term ends.
4. SUNDAY ..... *2nd Sunday in Advent.*
5. Monday ..... Last day for notice of Trial for County Court.
8. Thursday ..... *Con. B. V. Mary.*
10. Saturday ..... Last day for service York and Peel.
11. SUNDAY ..... *3rd Sunday in Advent.*
12 Monday ..... Collector to return Roll to Chamberlain or Treasurer.
13. Tuesday ..... Quarter Sessions and County Court sittings in each County.
18. SUNDAY ..... *4th Sunday in Advent.*
19. Monday ..... Recorder's Court sits. Nomination of Mayor.
20. Tuesday ..... Declare for York and Peel.
21. Wednesday .... *St. Thomas.*
25 SUNDAY ..... CHRISTMAS DAY.
26. Monday ..... *St. Stephen.*
27. Tuesday ..... *St. John Evangelist.*
28 Wednesday .... *Innocents.* Last day for notice of trial for York and Peel.
29 Thursday ..... Sittings Court of Error and Appeal commence.
31 Saturday ..... End of municipal year. Last day on which remaining half [Grammar School Fund payable.

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 Ardagh & Ardagh, Attorney, 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 could not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

DECEMBER, 1864.

VICE CHANCELLOR MOWAT.

When the death of the late lamented Vice Chancellor Esten became generally known, there was some speculation as to his probable successor. All agreed that the most likely man was the gentleman upon whom the appointment has now devolved. Some supposed that he would decline it, and men were by no means agreed as to the best man for the appointment in the event of his refusal. Fortunately, his acceptance of the office has both relieved the government from embarrassment and secured for the office one whose legal attainments and position at the Chancery bar make him eminently the right man in the right place.

Mr. Mowat, like the Chancellor, is by birth a Canadian. He was born in 1820, in the city of Kingston. He is the son of Mr. John Mowat, formerly of Caithnessshire, Scotland, but who for many years had been an inhabitant of Kingston, and recently died there. The son was destined for the bar, and, in Hilary 1842, received his call. He practised for some time in Toronto, in partnership with the present Chancellor; and at one time was considered a rival for the office of Chancellor. After the dissolution of his partnership with the Chancellor, he formed a partnership with Messrs. Roaf and Davis, and became in a short time the leader at the Equity bar. Latterly, he practised in connection with Mr. John McLennan. In 1855, upon the recommendation of the present Attorney General for Upper Canada, he received a silk gown, and was then in the zenith of his professional success. Of late years, his attention to politics necessarily to some extent withdrew him from the practice of his profession, no doubt to the serious detriment of his pocket.

He became a politician in 1857, having been induced by Mr. George Brown to become a candidate for the South Riding of Ontario. He was elected by a large majority and from that time till the present has continued to sit in the Legislative Assembly for that constituency. He became a cabinet minister in 1858, when the Brown-Dorion government was framed; but as that government lasted only for two days, he did not then enjoy much of "the sweets of office." Upon the defeat of that government he went into opposition, and became an opponent of the present Attorney General Macdonald. He was, as it is well known, of the extreme liberal school of politics, while the Attorney General was conservative. His hostility to the Attorney General became so bitter that the latter was provoked on one occasion to threaten personal violence; besides which, at the instance of his party, he opposed the Attorney General in Kingston, but was defeated by a large majority. He, with George Brown and others, opposed the Cartier-Macdonald government through thick and thin, and they at length succeeded in defeating it. The consequence was the formation by Mr. Sandfield Macdonald of the Macdonald-Sicotte government, in which he again accepted office as a minister of the Crown, and continued in office, with the exception of short intervals, till April last, when Sandfield Macdonald was defeated and John A. Macdonald and Cartier were again called to power. Mr. Mowat, following his leader, George Brown, again went into opposition, but only continued so for a short time. When the present coalition was formed he was appointed a minister of the Crown in the same cabinet with John A. Macdonald, and was finally made Vice Chancellor upon John A. Macdonald's recommendation.

The fickleness of politics cannot be better illustrated than by the career of Mr. Oliver Mowat. To John A. Macdonald he owed his appointment as a Queen's Counsel, and to him he now owes his appointment as Vice Chancellor, and yet for more than five years he and John A. Macdonald were at daggers drawn. To the present combination we are indebted for the present appointment, and, so far, good has come out of it.

Mr. Mowat, as a lawyer, commanded the confidence of the community in which he lived. His reputation soon grew beyond the limits of the city in which he commenced

to practice, and became provincial. He made Chancery a specialty, and was retained in every case of importance heard or determined by that Court. His income was large. And had he kept to his profession and remained deaf to the charms of political life, he would have acquired much of this world's goods. But like others, who before him abandoned lucrative practice in our profession for the stormy sea of politics, he has been tossed about, one day up and another down, till he has at last found a peaceful harbour, a wiser if not a richer man than when he first became a politician. Had he never become a politician, his way to the bench was clear and undisputed. But like most lawyers who acquire reputation in the profession, he desired to extend it as a politician, and did so to his cost.

If members of our profession were endowed with sufficient patience to work a comfortable independence before rushing into politics, it would be better for themselves and better for the country. This remark, which we make in a general sense, is true of others as well as of members of the legal profession. Needy politicians are the curse of every new country. We are told that our parliament lacks the tone of the imperial parliament. Why is this? Because we have not as yet the men of independent means who can, while presiding in parliament, sink self in the affairs of the nation. Whilst men are more thoughtful of themselves than of the trust in their keeping, they may be and often are unfaithful to that trust. The independent mind is seldom found without the independent pocket. The more this is understood the better will it be for us as a people still in the infancy of self government.

Mr. Mowat, as a politician, commanded the respect of all parties. His judgment was generally good; his honesty beyond reproach; and his powers of debate good. He from the first took his place in the front rank in the House of Assembly, and maintained that position to the last. He owed much of his success as a politician to Mr. Geo. Brown, who was his senior as a politician, and who became his sponsor at the political font. He owed his success as a lawyer entirely to his own talents. His success as a judge must of course depend upon himself. We have no doubt that he will be found equal to the fondest expectations of his many well wishers, both at the bar and among the public. It would not become us at present to say more. We conclude by congratulating him upon having attained his present high position, and trust that he will long be spared to adorn the bench to which he has been so worthily raised.

TIMBER SLIDES.

Among the many sources of industry and wealth which are daily springing up in this young country, not the least is the trade in lumber and timber. Labour and capital combined are rapidly developing the immense resources of the Province in these materials.

The trade in timber, using the word in a general sense, is divided into two great and distinct branches, one being the procuring of saw-logs for manufacture in this country of lumber for use here, or for shipment United States and other countries, the other consisting in "getting out" squared or mast timber, principally for exportation, to be used for ship-building purposes.

The "glut" that occurred in the American lumber market some years since, prevented the same increase in the trade in that commodity which has taken place in the trade in *timber*, technically so called. But it is gradually recovering itself, and we may hope that when the troubles across the border cease it will be as brisk as ever.

The preliminary process is of course the same in both cases, namely, felling the trees and preparing them for removal, and then their transportation to the mill or market.

With the carriage of saw-logs or timber by land we have at present nothing to do, but propose to discuss some of the prominent features of the law, as it stands, with reference to certain incidents of travel which this buffeted and bewildered *raw material* experiences on its voyage "down stream."

Nothing worth recording happens to it whilst in the smooth waters of the stream that it floats upon, but when it arrives at the rapids, which abound in most of them, or at one of the many mill-dams that bar the passage, it is necessary to provide a means of preventing it from sticking fast on the natural barrier of rocks and shallows, or from being stopped by the artificial mill-dam.

The rough-and-ready lumberers, who guide the logs to their destination, are not easily balked by trifles like these. They soon construct a slide to overcome the former difficulty, and if the unlucky mill owner has not taken the precaution of providing an "apron or slide" to his dam, he may find that his enemies have cut away such portion of it as they think necessary to effect their object; and further, that in certain cases the law gives him no remedy, he having to his own damage neglected the requirements of "the statute in that case made and provided."

The first act on the subject of mill-dams was 9 Geo. IV., cap. 4, which provided that every owner or occupier of a mill-dam erected on a stream where lumber is usually brought down, who should neglect to construct a sufficient apron to his dam, according to the measurement given by the act, should be liable to a fine.

The Statute 7 Vic., cap. 36, and 10 & 11 Vic., cap. 20, provided that the passage of rivers and streams should not be obstructed, &c., by throwing certain prohibited articles

into them, or by the felling of trees across them. (Con. Stat. U. C., cap. 47)

The Statute 12 Vic., cap. 87, was passed in May, 1849, to amend 9 Geo. IV., cap. 4, and enacted that every apron or slide, required to be constructed, should have sufficient depth of water to admit of the passage over such apron or slide of such saw-logs, lumber and timber as are usually floated down the stream. This act makes further provisions for carrying out the objects of it, which are now to be found, together with other enactments on the subject of mills and mill-dams, in chapter 48 of the Consolidated Statutes of Upper Canada.

The Consolidated Statutes of Canada, chapter 48, section 3, enacts that the owner or occupier of a mill-dam on any stream down which lumber is usually brought, shall construct and maintain an apron thereto, not less than 18 feet wide by an inclined plane of 24 feet 8 inches to a perpendicular of 6 feet, and so on in proportion.

Section 4, of the same statute, provides for the construction of aprons or slides sufficient for the passage of timber, but that the mill-owner may place slash-boards or wastegates to prevent any unnecessary waste of water, and may keep the same closed when no person is ready and requires to pass any timber or saw logs over the apron or slide, and until the same is in the main channel of the stream (sec. 5), but these sections do not apply to small streams unless required for the purposes of rafting or floating down lumber and saw-logs (sec. 6).

Section 7 provides for the recovery of a fine of two dollars a day against any owner or occupier of a mill-dam who neglects to make and keep in repair the necessary apron or slide.

Section 8 refers to mill-dams on streams in the county of Huron. Sections 9, 10, 11 and 12, to those on the river Moira, and section 13 to those on the river Otonabee.

In case any apron be destroyed by flood or otherwise, no penalty shall attach if it is repaired as soon as the state of the stream safely permits (sec. 14.)

All persons may float saw-logs and other timber down all streams in Upper Canada during the spring, summer and autumn freshets, and no person shall, by felling trees or otherwise, prevent the passage thereof (sec. 15.)

Section 16 enacts that in case there be a convenient apron, slide, gate, lock or opening in any such dam or other structure made for the passage of saw logs, authorised to be floated down any stream, no person using any such stream shall alter, injure or destroy any such dam or other useful erection, in or upon the bed of, or across the stream, or do any unnecessary damage thereto, or on the banks thereof.

The most important question that has come up in the courts under these sections, has been in what cases and to what extent parties desirous of floating timber down a stream, can take the law into their own hands when they find the free passage of the stream unlawfully obstructed by mill-dams, not possessing the necessary means provided by the statute for facilitating the passing of the timber.

In *Shipman* v *Clothier et al.*, 8 U. C. Q. B. 592, the court thought that there was "no such right in any case in which the stream did not appear on the pleadings to be a navigable river, and, as such, a common and public highway. * * * The fifth clause of 12 Vic., cap. 87, (sec. 16 of the Consolidated Act,) seems to give an implied authority to remove the obstruction, by only prohibiting the destroying or injuring any dam, provided there shall be a convenient apron, &c., made for the passage of timber. Hence it is argued, that when there is no such apron, &c., the dam may be destroyed. If it were not for the fifth section, I should certainly think that parties must content themselves with having the party fined for the obstruction as the act points out; and I have doubts whether the negative provision in the fifth clause extends further than to protect parties against the consequence of involuntary injuries occasioned to dams, by floating down the timber when there is not adequate facility afforded."

This case is not to be taken as decisive on the point, as the defendant's plea, setting up this defence, was held bad on another ground. The view taken of the law, moreover, appears to be at variance with a subsequent and more elaborate judgment of the Court of Common Pleas in *Little* v. *Ince et al.*, 3 U. C. C. P. 528, in which case the pleas did not go so far as to place the justification upon the stream being a public highway by water; but rested it specially upon the rights and privileges which the defendants were entitled to by virtue of the statute.

Chief Justice Macaulay, in giving judgment, said, "It might perhaps have been put upon the higher ground of a public or common right, owing to some expressions used in the pleas; but it was not so treated in the argument, nor did the pleader so intend to treat it in framing the pleas." And then going on to the question we are discussing, and after a careful examination of the authorities, he says, "without attributing to the defendants a right at common law, either original or acquired, to the free use of the stream for the purposes mentioned, it it evident that the statute (12 Vic., cap. 87, sec. 5,) conferred the right in terms so distinct, that I think it must be looked upon as equivalent to a declaration of such right, upon the principles of the common law. And since it is obvious that the obstruction stated in the pleas was calculated to inflict an immediate injury upon the owners of the saw-logs, and which the slow remedy by action might prove a very inadequate remedy, the urgency of the case would justify sum-

mary redress as much as in the cases of positive nuisances infringing similar rights strictly derived at common law. I am not able to point out any distinction."

The last mentioned case again came before the court, (4 U. C. C. P. 95,) and the opinion expressed above was not dissented from.

There is this difference however in the cases referred to, that in *Little* v. *Ince et al.*, the logs were floated during an autumn freshet, of which there was no allegation in *Shipman* v *Clothier*, a difference carefully to be borne in mind when reading the cases.

The fifteenth section of the Consolidated Act, which gives the right to all persons to float saw-logs, &c., down streams in Upper Canada during spring, summer, and autumn freshets, and that no person, by felling trees or placing other obstructions in or across them, shall prevent the passage thereof, has, according to its literal reading, a much wider signification than that placed upon it by the courts.

In *Shipman* v. *Clothier*, Chief Justice Robinson said, "the mentioning spring and autumn freshets was only for the purpose of shewing the intention to be, that streams should be clear of obstruction, even though they can only be used for purposes in times of freshet." Chief Justice Draper, however, takes a different view of the section, and does not confine the class of streams referred to in the statute to those which can only be used in times of freshet. In *Boale* v. *Dickson* (13 U. C. C. P. 37), he says, "I am of opinion that this right, so given, (by section 15,) extends only to such streams as in their natural state will, without improvements, during freshets, permit saw-logs, timber, &c., to be floated down them; to streams of a different class to those mentioned in the third section, down which lumber is usually brought. The protection of the right granted against felling trees into the river or interposing other obstructions, cannot, in my view, be construed to prevent the erection of a mill-dam, while the necessity of building an apron or slide does not arise according to section six in small streams, unless required for rafting or floating down timber, which again, by the express reference to the third and fourth sections, applies only to streams down which timber is usually brought."

Neither of these views are easily reconcileable with the case of *Little* v. *Ince*, for there the pleas expressly alleged that the occurrence took place during a freshet, and it seems to have been admitted on all sides that this was material, and it was decided that the pleas shewed a watercourse within the statutes referred to, though whether as a stream down which lumber was usually brought, or as a stream such as Chief Justice Draper subsequently defines, does not appear.

We suppose therefore that it may be inferred from the cases before us, that lumberers and others are entitled, for the purposes of rafting and floating timber, &c., to the use of all public navigable highways by water, and all streams down which lumber is usually brought at any season of the year, and all such streams as in their natural state will, without improvement during freshets, allow saw-logs, &c., to be floated down; and that, with reference to the two former classes and perhaps the latter, if any mill-dam or other obstruction is placed in or over such strerm, without being provided with a proper and convenient apron, slide, gate, lock, or opening, lumberers may, according to Macaulay, C. J., without request to the mill-owner, remove sufficient of the obstruction to enable them to pass their logs. But in any defence on the above ground, the defendant's pleas must clearly negative the fact of there being available to them any of the modes of passage which the statute alludes to, and it would be advisable for the lumberer to be very careful in making all proper enquiries as to the possibility of their being any of the conveniences required by the statute, and requiring passage for his timber before he thus takes the law, as it were, in his own hands. He must also be very cautious that there is no excess, and that no unnecessary damage is done so far as he is concerned, for otherwise he would become liable for all damage as a trespasser *ab initio*.

Little v. *Ince* also decides that although the right to pass saw-logs over a dam is derived exclusively from the statute, and not at common law, as a public or common easement in the stream, a common law remedy, by action on the case, is open to a person suffering special damage by its obstruction, and this besides the usual remedy provided by the statute for the protection of the public. So where a timber slide had been constructed in a stream down which timber could only be brought down, and not always then, during freshets, and it also appeared that but for this slide the defendant's logs could not, at the time, pass down, in an action brought by the owner of the slide for tolls for the passage of defendant's timber over this slide, it was held that the plaintiff was entitled to recover a reasonable remuneration for the use of it, the ground of the decision being that the stream was not one coming within the provisions of the third section of the Consolidated Act, for if it did the action must fail. (*Boale* v. *Dickson*, ante.)

THE LATE VICE CHANCELLOR ESTEN.

At the opening of the Chancery Court at Goderich, last month, V. C. Spragge addressed the Bar, as follows:

"Since I last met you, gentleman of the Bar, and within the past few days, one of the Judges of this Court has been

removed from us by death. It is known to you as well as to myself how ably and how faithfully he discharged the duties of his office. I may be permitted to add my experience of nearly fourteen years of almost constant judicial intercourse with my brother Judge. I have seen, during all that time, the most untiring devotion to duty; the anxious desire to do right; the apprehension, the almost nervous apprehension, that through error or oversight in judgment on his part, any one should by possibility suffer wrong; the earnest desire and endeavour to come to a right decision; all, all this, not for the mere sake of his reputation as a Judge; for that I believe was the least of the motives which actuated him; but because he knew and appreciated the very important duties he had to discharge, and was resolved to discharge them faithfully and to the best of his ability.

You, gentlemen, I have no doubt have given credit to the learned Judge whose loss we mourn, for the high qualities that I have ascribed to him, for you have seen the fruits of them in his judgments and have learned by your own intercourse with him to revere his character. You know well with what great learning and ability, with what perfect uprightness, with what unswerving integrity he discharged his duty. No Judge ever went to the grave with a clearer conscience; none could leave behind him a more unsullied name.

I have spoken to you of his admirable qualities as a Judge; with them he united, as indeed you know, great kindness and gentleness of disposition and goodness of heart, and the faith and life of a Christian."—*Huron Signal.*

COMMON PLEAS REPORTERSHIP.

The appointment of Salter J. Vankoughnet, Esquire, as reporter to the Court of Common Pleas, made by the Benchers of the Law Society, on the 27th of August last, was, during the present (Michaelmas) Term, approved by the Judges of the Court.

Mr. Vankoughnet has already commenced his duties. We congratulate him on his appointment, and are sure that he will spare no exertion to be in no way behind his able *confrere* in the Court of Queen's Bench.

LAW SOCIETY, MICHAELMAS TERM, 1864.

NEW BENCHERS.

Kenneth McKenzie, Esquire, Q. C., of Toronto, Adam Crooks, Esquire, Q. C., of Toronto, and Robert Dennistoun, Esquire, Barrister, of Peterboro', were during this Term elected Benchers of the Law Society.

CALLS TO THE BAR.

The following gentlemen having successfully passed the required examinations, were called to the Bar during the present Term, viz.: Allison, H. R.; Dickson, G. D.; Edgar, J. D.; Elwood, T. Y.; Gilman, C. H.; Gordon, J. K.; Harris, Rusk; Hector, Alfred; Hill, A. G.; Hossack, J., jun.; Jones, C. S.; McMillan, J. P.; Moncreif, George; Murphy, N., and Robertson, J.

ATTORNEYS ADMITTED.

The following is a list of the gentlemen, who having passed the necessary examinations, were admitted during this Term to practice in the Courts of Law and Equity in Upper Canada:

Barrett, William; Cahill, —.; Dickson, G. W.; Ferguson, J. W.; *Fitch, B. F.; Gildersleeve, J. P.;* Harris, Rusk; Hector, Alfred; Hoskin, Samuel; Hossack, J., jun.; Jamieson, Jos.; McKeown, —.; McKindsey, J.; Monerief, George; Rolls, Jas. A.; Scott, W. J.; Stephens, John J.; Thomas, J. P.; and Wetenhall, Henry.

SCHOLARSHIP EXAMINATIONS.

No Scholarship was awarded for the First year.

The Scholarship of the Second year was awarded to Adam W. Lillie. He received 229 marks out of a maximum number of 320. The number required for election to the Scholarship was 212.

The Scholarship for the Third year was awarded to Mr. McGee. He received 260 marks; the maximum number being 320, and the minimum 212.

The Scholarship of the Fourth year was awarded to Mr. Stephens, who received 302 marks; the maximum number being 320, and the minimum 212.

NEW COURT HOUSE IN NORFOLK.

On the occasion of the opening of the new court house for the county of Norfolk, with Masonic honors, on Monday, 31st October last, Colonel W. M. Wilson, the warden of the county, presented an address to the Chief Justice of Upper Canada, to which the latter made an impromptu reply.

We subjoin the address and reply.

ADDRESS.

To the Honorable William Henry Draper, *C.B., Chief Justice of Upper Canada, &c.*

It affords the Corporation, the members of the Bar, and the inhabitants of the county generally, much pleasure to welcome you on such an auspicious occasion as the present, and to express their cordial thanks for your kindness in arranging the sittings of the present assizes for this county, so as to be enabled to inaugurate the opening of this new court house in such a fitting and appropriate manner.

The building in which we have the pleasure of meeting your lordship on this occasion is, we are happy to believe, one which, in its external appearance and in the completeness of its internal arrangements, is worthy of the purpose for which it has been designed. It has been the aim of those who have had the charge of its erection to combine all modern improvements in its construction. The arrangements for its proper ventilation and heating, and for the accommodation of those engaged in the business of the courts and the public, have been carefully designed, and it is hoped that experience will demonstrate their efficiency.

And while we contrast the lofty proportions of the handsome exterior of our new court house with the scant proportions and homely exterior of the one from whose ashes it has risen like a phœnix, we cannot but experience the greatest

pleasure in the thought that the noble science of jurisprudence has, through the untiring and successful labors of men like your lordship, marched onward with a progress more stately if not so rapid. For material progress, the harbinger of intellectual, must always precede and pave the way for its distinguished successor. Nor can we deny ourselves the pleasure of paying a passing tribute of admiration and gratitude to the distinguished intellectual attainments and unspotted integrity that have raised the members of the Canadian judiciary to such an elevated position in the confidence and esteem of the Canadian people. And well have they merited this confidence and esteem, for the ermine is without a stain. It is indeed almost impossible to estimate the beneficial influence that is exerted on the well-being of a state by a well-organized system of administering justice, the execution of which is characterized by dignity, learning and integrity, on the part of those to whose hands the important trust is committed.

And while we deplore the loss which the country has sustained by the death of such men as the late lamented Chief Justice Robinson, we cannot but rejoice in the knowledge that his successors are so eminently qualified to assume his duties, and that the mantle of departed greatness has fallen upon the shoulders of so worthy successors.

It is a source of unqualified gratification to us also on the present occasion to testify the pleasure which we feel in having the opening of our new court house inaugurated under the auspices of one so distinguished as your lordship. The reputation acquired by you at the bar for a thorough knowledge of your profession, your valuable public services, and the high regard and esteem entertained for you, not only by the profession, but by the public generally, rendered your appointment to the high and dignified position of Chief Justice of Upper Canada peculiarly appropriate and acceptable; and we rejoice in the thought that our late Chief Justice, who had secured the respect and esteem of every one, should have been succeeded by one possessing the high intellectual attainments, the dignity of manner and weight of character calculated to secure the esteem and confidence of all. May your lordship long be spared to adorn the elevated position which you now so worthily occupy, and to enjoy that happiness which your varied and successful labors in the public interest so richly merits.

REPLY.

His lordship the Chief Justice in reply to the address said: In rising to respond to the very flattering address presented to him through the Warden, he felt a peculiar degree of satisfaction and pleasure. First, he would congratulate the inhabitants of Norfolk on the completion of so beautiful and well adapted a county building as the one they were then occupying, and which he had been so flatteringly invited to declare in the beautifully symbolical ceremonial, Masonically complete—from foundation stone to cope stone—"well built, trusty, and true." The erection of so beautiful a structure was an indication of advancement in the arts of civilization and refinement, pleasurable to contemplate, as compared with the primitive times not long since gone by, when life in these regions was necessarily rough, as well as toilsome and laborious. All honor to the brave men who, with willing hands and brave hearts, have changed the wilderness into a fruitful field, and, by their example, patriotism, and strict adherence to principle, have left to their descendants a legacy of high-born freedom, moral power and intellectual wealth, which any people might be proud to boast of, and ambitious to possess. He could not forget that the soil of "glorious old Norfolk" was, educationally considered, sacred soil Several of the sons of Norfolk had earned for themselves a proud position in the councils of their country, while one in particular had woven an imperishable wreath of fame about his forehead as the author of the Common School System of Canada, the equal of which was not to be found in any land or any country. Nor was it the least proud of his recollections that when in political life thirty-three years ago, it was his pleasurable duty to introduce into the Legislature of Canada, at the instance of its originator, and framed by him, the bill which was the foundation of that great code of common school education which, in the annals of history, will render Dr. Ryerson's name immortal. Other names and other deeds will fade from memory, but that which pertains to intellectual growth is never lost. The flattering terms in which he had been spoken of in the address he felt in his inmost soul. It was indeed a proud position for him to occupy the place of the noble man who was late Chief Justice of Upper Canada, Sir J. B. Robinson. He felt it was no light thing to succeed a man of such integrity and worth, whose memory was enshrined in the heart of a nation, and it was with emotions of no common satisfaction that he heard the voice of a county declare their appreciation of his services. He might say that he had sought to deserve it; he had labored to fit himself for the position to which his country and Queen had called him, and to feel that he had been successful in his efforts to follow in the footsteps of his predecessor was no light gratification.—*Norfolk Reformer.*

THE SOLICITORS' JOURNAL & WEEKLY REPORTER.

We take great pleasure in directing attention to the advertisement of the *Weekly Reporter*, in other columns. Published as it is in connection with the *Solicitors' Journal*, each subscriber not only weekly receives current reports of decided cases, but current news relating to the administration of justice, as well in England as in the Colonies.

The eleventh volume of the *Weekly Reporter* contains no less than reports of 1,163 cases decided since Michaelmas Term 1862, being 300 in excess of any of the previous volumes. The reports are, as said in the advertisement, not mere notes, but full and sufficient for every purpose of the practitioner. The Lord Chancellor recently described them as reliable and refused to give preference to what is commonly known as the authorized reports. This from one so competent to judge and so eminent in station is testimony of which the proprietors may well be proud.

No legal journal published in England pays more attention to affairs in the Colonies than the *Solicitors' Journal*. Take for example the number issued on 29th October last. In it we find an article on "Colonial Statistics," and under the heading "Colonial Tribunals and Jurisprudence," the report of a case transferred from the columns of the *Upper Canada Law Journal*, being In re Smith, a decision of importance under the Foreign Enlistment Act. Each number contains something of especial interest to the Colonies. It is unnecessary to further particularize.

The subscription to the *Solicitors' Journal and Weekly Reporter* combined is 52s. sterling per volume, and this, when paid in advance, includes postage free to the colony. Intending subscribers may apply to Messrs. W. C. Chewett & Co., King Street East, Toronto.

JUDGMENTS.

QUEEN'S BENCH.

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

Saturday, November 26th, 1864.

Gayner v. *Salt*.—Rule discharged.

In the matter of Sheriff Davidson and the Chairman of Quarter Sessions in and for the County of Waterloo.—Rule discharged without costs.

In re James v. *McKibben.*—Rule absolute to enter verdict for plaintiff.

SELECTIONS.

LAW REPORTING.

Some months since we gave place in our paper to some remarks by a gentleman of this bar—to whom our readers have been often indebted for contributions of a more amusing character—on the subject of law reporting. The remarks attracted notice in England. They were quoted in the *London Jurist*; and we soon after received a letter from the *Solicitor's Journal and Reporter*, asking for a copy and proposing an exchange. They were also quoted much at large and with approbation in the *Upper Canada Law Journal*. The subject is attracting great attention now in England. It deserves to attract much attention here. We accordingly asked our correspondent to favour us with a more extended form of his reflections. He has done so in a manuscript of length. We shall publish it in numbers. To one class of our readers the topic possibly may not be very interesting. To another—and a large one, we hope—it will be much so. We believe that as a whole, no paper published in America has gone so much into the *principles* of the subject. We give the first number to-day.

No. 1.

It will be admitted, I presume, by that part of the profession whose freedom from active duties has allowed them to observe its literature at all, that great dissatisfaction has existed both in England and with us, of late, as to the matter of these records of judicial judgments. On the other side of the Atlantic the discontent has exhibited itself quite lately in a meeting of the Bar of England in its corporate capacity; the Attorney General presiding.* And the result has been an effort to work a fundamental change in the source and issues of these exponents of British jurisprudence. The report of the committee appointed at the great meeting in Lincoln's Inn Hall, December 2, 1863, after much "discussion and deliberation," and after minute inquiries into the systems of Germany, France and the United States, proposes to put the whole subject under the immediate management of the Inns of Court, and to break up every system which has ever prevailed at any time in England.† Every response, the committee informs us, received by them in reply to circulars of inquiry "sent to the judges and extensively distributed among both branches of the profession," has exhibited "a very general desire for amendment."

In America, owing to the numerous centres which from State organizations characterize our bar, and from the comparative feebleness of the attraction which operates from its Federal and only common centre, no dissatisfaction has with us been expressed by the united profession. Dissatisfaction has nevertheless everywhere exhibited itself. In some regions the Legislature has sought to bring a relief. Certain States have compelled the judges, themselves, to report their decisions. In others, as in my own State, the remedy has also been sought through statutory force; though force acting in a different direction: for in Pennsylvania, judges are deprived of most authority in the matter; having, now, neither power to appoint their own reporter nor to decide unreservedly what opinions they may publish! In other States the same sense of professional discomfort may be seen, I think, in the efforts which have been made from time to time to *codify* decisions; a process by which it is hoped that the difficulties of "judge-made law" may be obviated;—difficulties arising, in reality, from the complexity of science—the result of increasing wealth and civility—but which popular impression attributes more to obscurity in the forms in which the law is delivered. In some courts, including the Supreme Court of the United States, those "Condensed Reports," which have from time to time appeared, point in one direction to the evil;* while the popularity of "Leading Cases," every where show that the form of evil here aimed at is one common in all the courts, English and American, Federal and State alike.† Even where Legislators have not given expression to this sense of *malaise*, and where neither condensers nor compilers have exerted their efforts, dissatisfaction has been long and greatly felt; exhibiting itself sometimes in complaints through professional and other journals;‡ sometimes in vain vituperation of reporters, in Law Libraries and "Conversation Rooms" attached to courts; and oftenest, perhaps, of all, in the suffering, merely, "that patient merit of the unworthy takes."

Discontent about the reports is not confined to the British Isles and to the United States. "If the profession in England," says a recent writer in the *Law Journal of Upper Canada*, "are dissatisfied with *their* reports, how loud must be *our* complainings, when we regard the present condition of our own."§ And the able editors of that journal observe that these remarks of their correspondent will "find an echo from *many* a city, town and village of Upper Canada."‖ Elsewhere they commend as "medicinal" to their own reporters or to some of them, a series of as sharp remarks on a reporter of our country as any that have appeared,**

The whole matter of reporting, seems, in short, to have reached climacterick. Is it a fifth and last one? to be followed by a dissolution of the system wholly?

This dissatisfaction as respects ourselves is not surprising. In 1788 we had not a single volume of American reports. We have now a legion; and the number is increasing in alarming ratio. Under any circumstances it is not easy to tell what the law as contained in such numerous pages may be; but if in addition to this *number* of books, obscurity, confusion and an extensive bad discharge of the reporter's duty belong to them, the office of telling what it is that courts have adjudged becomes an impossibility pure. Precedents become buried in their own masses, and authorities are disregarded in virtue of the very means that should insure to them respect.

The causes of complaint in England are quite different from the causes of complaint with us; and so, apparently, they

* *London Times*, December 3, 1863. Also *Law Magazine and Law Review*, vol. xvi., p. 387.

† *The Jurist*, June 25, 1864; vol. x., new series, 249. See also the *Law Magazine* and *Law Review*, August, 1864, vol. 34, new series

* The Reports of Mr. Wheaton, which needed it as little as any volumes in the Federal series, have been *twice* condensed.

† The *sixth American* edition of Smith's Leading Cases is now in preparation the fifth (of 2000) copies having been long exhausted.

‡ See the *North American Review*, vol. 3, p.—; Id vol. 8, p. 71, an article written I believe, by Mr. Webster; *Pennsylvania Law Journal*, vol 1, p. 22; Id. vol 2, p. 130, *Philadelphia Legal Intelligencer*, vol. 21, p. 52; an article spoken of in the *Upper Canada Law Journal* as "well written," and reproduced in it; quoted also in the *London Jurist*, vol 28, O. S. p. 189, and in the *Solicitor's Journal*; *New York Transcript* as quoted in the *Upper Canada Law Journal* vol. x. 64; March, 1864 The (London) *Law Magazine*, and the (London) *Jurist*, have been for years complaining on this topic. See the former vol. xi., O S. 1848, p. 1, and the latter vol vii., p. 223; x., p. 395, xii., p. 261. See also (London) *Law Magazine* and *Law Review*, ix., p. 321; xvi., 122.

§ *Upper Canada Law Journal*, vol. x., p. 109; April 1864.

‖ Id. p. 110

** Id. p. 88; March, 1864.

are in part in Canada; but all the countries alike exhibit a departure from the frequency and style of former books.

It seems remarkable that with good models before the profession in each country, there should be such continual and sharp complaint in all. There is not, one would say, any such vast intellectual power, nor any such deep professional learning required to report a law case as that cases in so many courts and on both hemispheres, should, of necessity, in this, the nineteenth century of grace, be so continually reported ill. I do not however, propose to speak at all of those defects in the British system, or in any of the British reports which have caused so much discussion in England and in Canada during the last year and are still causing it. My purpose is practical and has reference to our own country alone.

What is meant by a good report of a law case? The question is easily enough answered; but it is more easily still illustrated. We have reports both in England and America which all courts and the whole bar would acknowledge to be good reports; more perhaps with us, of former times, than of the latter ones, though in Massachusetts we have good ones still. Without assuming the invidious office of pointing out such as would be universally acknowledged to be within the class among ourselves, I may refer to one or two in England which by common consent would be so regarded; those let us say of Sir James Burrow in Lord Mansfield's time, and those of Durnford & East, sometimes called the Term Reports, chiefly in his successor's. Those of Burrow are the more elaborate, and in a style somewhat scholastic; those of his successor—like the judgments they record—are more plain, direct and solid. The one or the other will be preferred as the tastes of the reader may prefer one style or the other. Each, however, is clear; neither contains repetitions; the order in both is good: there is nothing in short to be suggested in regard to either of them. They are reports which every one who loves the law and has studied the volumes will say are not only good as reports, but delightful as illustrations of its modes of record.

On what plan then, are these reports made? What are their divisions? and how are they prepared in respect of each?

I think it will be seen that they always *begin* with a statement of the material facts of the case; whether those material facts be facts *in pais* or facts in law; by which, I mean, whether the question arise on some transaction in the course of business, the *quicquid agunt homines*, or whether it be a more abstract sort and arise from a passage in some statute, deed, or other writing. These facts are grouped together and arranged; and the question or questions arising on them and to be decided are stated. These facts and questions thus arranged, make what is technically called THE CASE. This "case" alone comprehends everything necessary to give the reader an understanding of the matters to be passed upon; so completely so, indeed, that if the reader can only see afterwards which way the *judgment* has gone, he has with that statement of facts and questions—that "case"—alone, a report which, in numerous instances, is a good report; though not a report with the reasons assigned; and therefore not a report in all instances the most satisfactory.

Then comes the argument of counsel. In the reporters I have named, this argument is argument purely, with precedents, of course, cited to support it; precedents, in the law, being argument. This part of the report brings up no new facts. These have already been stated, and we have left the laying of foundations. The argument is upon a presupposed case; the case to wit preceding and with which the reader's mind is supposed to be imbued.

Finally comes what is called the opinion of the court, that is to say, the judgment of the court on the case before it, with the reasons assigned for such judgment. As the first part of the report was pure fact, and as the second part was pure argument upon fact, so in this the third and final part we have enunciation of judgment on those same facts with a statement of the grounds for the given resolution of the case. The court does not re-state the case. Why should it? It has been already stated once and is under the reader's eye. Neither does it recite anew the argument. Why do that? The reader has just read the argument and it is fully in his mind. "Iteration" of either case or argument would be tedious merely, and—to be condemned.

The extract which follows of a report from Term illustrates briefly the style.

STOREY against ROBINSON and others,

A horse cannot be distrained *damage feasant* if there be a rider upon him.

This was an action of trespass for an assault and false imprisonment, and for seizing and leading away the plaintiff's horse upon which he was riding.

The pleadings in this case were long; but the questions in all of them were resolved into the point insisted upon by the defendants on the second plea, namely, that as to the seizing and taking of the horse, they distrained him *damage feasant* in the defendant Robinson's ground, and impounded him; to which plea there was a demurrer.

Holroyd, for the demurrer, contended that a horse, on which the owner was riding, could not be distrained. Co. Lit. 47. *a*; and the cases there mentioned in *n.* 13. In *Simpson* v *Harcourt* (*a*), Lord Ch. J. Willes in giving the judgment of the Common Pleas, mentioned the case of *Webb* v. *Bell*, in 1 Sid. 440, as the only case in which it is said that a horse may be distrained with his rider on him, *damage feasant;* and added, "I am far from thinking that case to be law." It is to be observed too that that was only a dictum of Ch. J. Kelyng, in *Siderfin* and not necessary to the decision of the case.

T. Walton, contra, relied on the dictum of Lord Ch. J. Kelyng in *Siderfin*, it never having been expressly over-ruled; observing that the opinion of Lord Ch B. Gilbert (*b*) coincided with it. And he added that the passage cited from Co. Lit. 47. *a.* was applicable only to a distress for rent, between which and a distress *damage feasant* a difference is taken in the same page, many things being privileged from distress in the former case that are not in the latter.

Lord KENYON Ch. J.—This distress cannot be supported. All the authorities upon this point are collected together in the notes in Hargrave, Coke Lit. 47., and the clear result of them is that such a distress is illegal. If it were permitted to a party to distrain a horse, while any person is riding him, it would perpetually lead to a breach of the peace.

Per Curiam.— Judgment for the plaintiff.

The report here given is indeed very curt every way, in statement, argument and opinion alike. We can give no room to a very long report. But the report extracted, short as it is, is yet long enough, and has enough in each of its members to illustrate what we mean: that is to say, to illustrate the trinal division of which we speak: statement, argument and opinion; each separate from the other, but all correlated, and in their unity making a full but not a redundant report.

To inquire which of these three divisions, so naturally separable and separated is the most important, would be as useless an inquiry as that one of old as to which member of the human frame rendered most essential service to the body. The statement of the facts,—"*the* case," as the old books always call it—is of course the foundation of everything. Indeed in every controversy to be discussed and to be resolved, the first thing of all—a requsite to understand a comment of any sort on the matter—is perfectly to understand what the dispute is about; what the controversy *is*. A full, terse, clear and orderly statement of the facts therefore—"the case"—is the first and fundamental part of every good report. Hence as I have intimated, many of the ancient reporters, and not a few of the latter day, though not so many in this, give us

(*a*) Cited in *Gordon* v. *Falkner*, 4. vol. 562.
(*b*) Gilb. Law of Distress 45.

nothing but "the case," and the judgment which was given on it. And if the case be well stated, that is to say, if every thing material is given, and everything irrelative is thrown off—and but *one* question be raised by it,—that case and the record of what judgment was given on it *is* a report, and so far as a precedent only is wanted, is a perfect report. As respects the ground of the judgment, I have already said that such a report is seldom satisfactory; in a difficult case never quite so.

The argument of counsel is not an essential part of a report. If the case be one not difficult, and if the opinion be full and have a certain form it is not so at all. Indeed if the opinion follows largely in the line of argument presented by the counsel on whose side the judgment is given, the argument of *such* counsel may often be well dispensed with; for on its reproduction by the judge its interest and value is merged in the higher and more authoritative argument of the bench. But without doubt an abstract of a good argument adds greatly to the value of the report. As respects the judgment passed, it fixes its true value; for it shows that it has been well aided, or not so well aided; and that whatever a subsequent objector to it may think *he* first suggests, has already been suggested and considered and disposed of,—or not suggested, considered and disposed of—before him. If in its form the opinion have a responsive cast, and be replying to what was said at the bar it is almost indispensable for understanding such opinion that the argument be stated, and if the argument at the bar be truly answered, the report of it at once expounds and exalts the effort of the judge. It is a vast mistake to suppose that the office of a judge is rendered less great by an able discussion at the bar before him. The permanent fame of judges has been, I fancy, generally in proportion to the ability of the contemporary bar. The opinions of Mansfield are still celebrated throughout England and America; yet in the very volumes where they are recorded and from which their fame yet radiates, we have constantly preceding them, and reported with a fullness and fidelity such as is given by scarce any other reporter, the arguments of Dunning, Fletcher Norton and James Wallace, in which little that the court decided—though it was a court pre-eminent for innovation—was not previously suggested and enforced.*

Superior, of course, to any argument is the higher office of the judge; higher in its dignity, greater in its requirements, moral and intellectual at once. It is there that we look for the exhibition of JUDGMENT, the rarest, finest, least seldom betrayed of the faculties of mind. "To say of any man that he excels by *that* attribute is to award perhaps the highest praise that can be bestowed. It is above invention. It is beyond eloquence. It is more than logic. In every employment, and every condition of life, public and private, deliberative and executive—and most of all in the judicial, the ascendency of judgment over talent, wit, passion, imagination, learning, is evinced at once by the rarity of the endowment, and by the superiority which it is certain to confer on its possessor."*

These three divisions, therefore,—divisions such as I have said may be found in the reports I have named—are, I apprehend, the fundamental characteristics of every report which is at once good and *elegant*.

The statement, indeed, can have but one characteristic. It must contain every fact material to the point adjudged; and it must exclude every one irrelative.

The argument may have divers qualities. It may be full or it may be curt. Cases may be cited only or their language may be given in part at large. It may have the dryest form of legal argument or may pass occasionally in the regions of forensic eloquence.

The opinion too has various characteristics, as various as the forms of presenting legal truth; but not *one* form more. Sometimes it states facts, but it states them not narratively—for this would be to state the case anew—but states them as argument; for though facts are not argument the collocation of facts is sometimes the strongest form that argument can take: skilfully to state a case is often conclusively to decide it. Sometimes the opinion is abstract purely; no part of the case being imported into it at all; though all its facts are reasoned *upon*. But whether facts be stated or whether dogmas only be delivered, the opinion in the reporters whom I have named, assumes, I think, generally speaking, the form of argument only, or where facts are re-stated, or arguments rehearsed, they are so re-stated or rehearsed only as "inducement," and to prevent what might seem too great abruptness; or to revive in the reader's mind a point which is now to be considered, and so lead in with more distinctness and grace the reasoning which is to follow.

I have taken as illustrations only two reporters and those English ones. Others, both English and American—for we have had as good reporters in America as England has ever had, and in my opinion some better—will readily suggest themselves to every reader. But the divisions I mention, and the style I have described, is common I believe to all reporters who are good ones; and better divisions and style can no man devise.

Now wherein and why do the American reports—those I mean of the present day—very frequently differ in their divisions and style from these?

This we will consider in a future number.—*Legal Intelligencer.*

* I am happy, since writing what is above, to see my general idea confirmed by a thinking writer in the Boston *Law Reporter*. Vol. 25, p 693.

* Horace Binney Wallace.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 204.)

Towards the further protection of persons for acts done by them in execution of the statute, the following privileges are granted by law:

I. *As to tender of amends before action brought*—It is enacted by section 194 of the Division Courts Act, that if sufficient tender of amends be made before action brought, the plaintiff shall not recover, and

II. *As to payment into court*—By the same section, that if a defendant, after action brought, pays a sufficient sum of money into court, with costs, the plaintiff shall not recover in any such action.

Sections 13 and 14 of cap. 126, Con. Stat. U. C., if they do not apply to division court officers (see sections 1 and 20 of the same act, and see also *McPhatter* v. *Leslie et al.* 23 U. C. Q. B. 578) contain the fullest provisions both as to tender of amends *before*, and payment into court *after* action brought, and the bare provision in sec. 194 of the Division Courts Act may at least be worked out with some regard to the analogous provision in chapter 126, but the provisions of this Act do not vary or overrule the provisions

of the Division Courts Act (see *McPhatter* v. *Leslie et al.* ante).*

By these sections (13 & 14 of c. 126) it is provided that after notice of action has been given and before action has been commenced, the (justice) person to whom such notice has been given, may tender to the party complaining, or to his attorney or agent, such sum of money as he thinks fit, as amends for the injury complained of in such action; and after the action has been commenced, and at any time before issue joined therein, such defendant, if he has not made a tender may pay into court such sum of money as he thinks fit; and if the jury at the trial be of opinion that the plaintiff is not entitled to damages beyond the sum so tendered or paid into court, they shall give a verdict for the defendant, and the plaintiff shall not be at liberty to elect to be nonsuit, and the sum of money, if any, so paid into court, or so much thereof as is sufficient to pay or satisfy the defendant's costs in that behalf shall thereupon be paid out of court to him, and the residue, if any, shall be paid to the plaintiff.

III. *The general issue may be pleaded in any such action*, and the defendant will thereunder be at liberty to give any special matter of defence, excuse or justification in evidence under such plea at the trial of the action (Div. Courts Act, secs. 194 and 198; and Con. Stat. U. C. cap. 126 sec. 13).

By a rule of practice in the superior and county courts, the plea must have the words "by statute" inserted in the margin, together with the year or years of the reign in which the act or acts of parliament on which defendant relies were passed, and also the chapters and sections of such acts. *If the defendant omit to follow the requirement* of the rule, he cannot give special matter in evidence to bring himself within the terms of an act which allows a plea of not guilty; but if at the end of the plaintiff's case it appears that the plaintiff was entitled to a notice of action and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in the wrong county, this is not aided by the defendant having omitted to add the words "by statute" in the margin of his plea (*Coy* v. *Forrester*, 8 M. & W. 312) and after verdict for defendant and rule *nisi* to set aside the same, the court allowed a defendant to amend a plea of "not guilty by statute," by inserting in the margin the statutes necessary to justify the trespass complained of (*Edwards* v. *Hodges*, 24 L. J., N. S., C. P. 121, and M. C. 81). But when the nisi prius record had not the words "by statute" in the margin an amendment allowing these words was not allowed, as it could not be shewn that they were in the margin of the defendant's plea (*Forman* v. *Dawes*, 1 Car. & Marsh. 127).

PROCEEDINGS BY ATTACHMENT.

We refer officers of Division Courts to the case of *Hope* v. *Graves*, which appears in another place in this number. Our present object is merely to direct attention to one point suggested by the case, namely, the mode of serving a summons where an attachment issues, and the defendant is not to be found. Other points in the case we may refer to hereafter. As observed by Judge Wilson, natural justice requires that he against whom a judgment is recovered, should have personal notice of the proceeding. The general rule as to the service of process, with a view to a judgment in the Division Court is, that it must be personal; and in the cases in which personal notice is dispensed with, the Legislature has provided for a kind of notice (or service of process), from which a reasonable inference may be *drawn that the defendant has had personal knowledge of* the proceeding.

The 212th section provides for the mode of serving summonses in proceedings by attachment against a debtor, namely, that process "may be served either personally or by leaving a copy at the last place of abode, trade or dealing of the defendant, with any person there dwelling, or by leaving the same at the said dwelling, if no person be there found."

There is, we fear, much laxness in the mode of effecting service by bailiffs, and great want of care in preparing affidavits of service when made. In these cases, the summons and particulars of claim should appear by the affidavit of service to have been delivered to a grown person dwelling at the place of abode, trade or dealing of the defendant: the person, moreover, should be named, and with a view to this being done, the bailiff should ascertain the name of the individual to whom he delivers the process. If no person be there found, the fact should be stated in the affidavit, and that process was left at the place, as is

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* DRAPER C. J. delivered the judgment of the court in this case.

"The notice of action did not contain all that Con. Stat. U. C. ch. 126 requires, for neither the name and place of abode of the plaintiffs, nor the name and place of abode of the attorney was endorsed upon it, and if the defendant Leslie was entitled to such a notice, it was clear he had it not. I felt inclined at first to hold that the reason on which Macaulay, C. J., held that a sheriff was not entitled to notice under ch 126 might apply also to the defendant, the clerk of the Division Court. But even then he was entitled to notice under the Division Courts Act, and so the cases were dissimilar.

In *Dale* v. *Cod*, 4 U. C. C. P. 462. *Macaulay, C. J.*, on reference to 13 & 14 Vic. ch. 53, sec. 107, the 14 & 15 Vic. ch 54, sec. 5, and the 16 Vic. ch. 177, sec. 7, considered the bailiff entitled to notice, and that the objection was open to him on the plea of not guilty, per Stat. The first of these three acts is the Division Courts Act, the second is the Act for the Protection of Magistrates and others, and the third is the Division Courts Extension Act, though I presume sec. 14, and not sec. 7, was meant. In *Anderson* v. *Grace*, 17 U. C. Q. B. 96, the Chief Justice says, it is the Act 14 & 15 Vic. which must govern, because the previous enactments giving protection are repealed by that act. But the Con. Stat. U. C ch. 19, secs. 193. 194, provides expressly for notice and limitation of action for anything done under that Act, and though the enactments of the 14 & 15 Vic are re-enacted by Con. Stat. U. C ch 126, it appears to me we cannot hold that the latter chapter was intended to overrule or vary the provisions of ch 19 of the same statutes, but that they were establishing rules for distinct cases. I think, therefore, that the clerk in this case having been served with a notice of action, such as ch 19 requires, cannot successfully object to the want of additional formalities which ch 26 requires. It is not, however, in our view, necessary to determine this point." &c.

usual, nailed to the door. In the case of *Hope* v. *Graves*, the service was thus stated: "by nailing to the door of the defendant's last residence." This was clearly defective; for it might have been that the house was occupied; and if so, process should have been delivered to one of the inmates. The term "residence" is not mentioned in the clause, but "place of abode," and it is always better to adhere closely to the terms used in the act.

Enough has been said to direct the attention of officers to the subject of service, and to put them on their guard against errors that may be followed by serious loss to the plaintiff in such suits, and by costs and trouble to officers themselves.

In the case before us, the plaintiff will probably lose some $300 by the errors and omissions objected to.

CORRESPONDENCE.

Interpleader—Indorser on note payable to bearer.

To the Editors of the Law Journal.

Gentlemen,—There is a Division Court Rule (No. 53) entitled "*Interpleader*," which requires that the claimant shall, *five clear days* before the day on which the summonses are returnable, leave at the office of the Clerk of the Court, a particular of any goods or chattels, &c. &c.

The County Court Judge of —— interprets this rule with unyielding strictness, and decides that if the claimants do not conform in manner and form pointed out by the "Rule," that the Interpleader cannot be heard!

Now, is it not the fact, that in the County Courts of England (which are similar to our Division Courts here), this rule is greatly relaxed; and are there not decisions in England to the effect that a *mandamus* will be granted to compel a Judge of a County Court to hear and determine an interpleader claim, upon his refusal to adjudicate upon the claim because of a mistake as to the sufficiency of the notice or some other preliminary matter? (Vide *Regina* v. *Richards*, iii. 410 Eng. Law & Equity Reports).

In the case I refer to, the claimant left the requisite "particular" at the Clerk's Office, *on Friday morning instead of on Thursday*, thus interfering with the *five clear days*, the Court sitting on the following Wednesday.

Pray, does not the case I put fall within the authority I have cited? I am aware that there are other authorities deciding the point.

There is yet another point that I would like you to set me right upon. Here it is:

Am I right in supposing, for I have not our Reports to refer to, that, in the case of a note payable *to bearer*, the indorser of the note *is* liable *as an indorser?* Or, is the indorser of such note, as I have heard a county court judge gravely propound, liable *as a maker*, and *not* as an *indorser?*

Yours, &c.,

November 19th, 1864. L. S.

[Cases upon the English County Court provision would be in point, as our Division Court enactment and rules are nearly identical with those in the County Courts.

The Judge has ample power to amend the claim or to allow an adjournment, that a proper claim may be put in and duly served. And this power, so far as our experience extends, we know is liberally exercised. In interpleader proceedings, we know it is of importance that no mere technical difficulty should shut out a claimant, as there would not be the power to relieve by new trial. Within the last month we were present at a Division Court before Judge Gowan, who adjourned a case to enable a party to put in a claim which from some cause had not been left with the Clerk of the Court: the claimant, however, had to pay the costs of the day.

As to the latter question, we refer our correspondent to the cases of *Ramsdell* v. *Telfer et al*, 5 U. C. Q. B. 508, and *Vanleuven* v. *Vandusen et al*, 7 U. C. Q. B. 176, which decide that a party indorsing a note payable to *A. B.* or bearer, may be sued as indorser.—*Eds. L. J.*]

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

In re two several Appeals to the Quarter Sessions in and for the County of Hastings, between William Henry Meyers, Appellant, and Jane Wonnacott, Respondent, and William Henry Meyers, Appellant, and John Wonnacott, Respondent.

Conviction—Appeal under C. S. C. ch. 99, sec 117—Proof of right to appeal—Waiver—Prohibition.

The appellant having been convicted of an assault under Consol. Stat. C., ch 91 sec 37, appealed to the Quarter Sessions. On the first day of the court, after he had proved his notice of appeal, at the respondent's request the case was postponed until the following day; and the respondent then objected to the jurisdiction, as it was not shewn that the appellant had either remained in custody or entered into a recognizance as required by section 117 of Consol. Stat. C, ch. 99. The court held that this objection had been waived by the application to postpone, and they quashed the conviction. On motion for a prohibition to the Quarter Sessions from further proceeding in the matter.

Held, that this was an appeal under sec. 117 above mentioned, not under Consol Stat. U. C., ch. 114, sec 1, that it was clearly incumbent on the appellant to *shew his right to appeal by proving compliance with that section; and that the* necessity for such proof was not waived by the respondent's application for delay. The prohibition was therefore granted.

(Q. B, T. T., 28 Vic.)

Robert A. Harrison obtained a rule calling on the justices in and for the county of Hastings who presided at the said court, and on the said Meyers, to shew cause why a writ of prohibition should not issue prohibiting the justices in General Quarter Sessions assembled, and the clerk of the peace and other officers of the said court, from further proceeding in the said appeals, on the ground that the appellant not having remained in custody until the sessions at which the appeal was entered, nor having entered into recognizance conditioned to appear at the said sessions to try such appeals, &c., the court had no jurisdiction to entertain them and determine them, or to make any order allowing them; with costs or otherwise.

The following are the facts shewn on the affidavits:—

Meyers was convicted before the police magistrate at Belleville of an assault upon John Wonnacott. The return of the proceedings made by the magistrate to the Court of Quarter Sessions, on being served with the notice of appeal, shewed that on the 6th of March, 1864, the assault was proved, and a fine of 10s, with costs, 9s. 3d., ordered to be paid, and a conviction was made up, ordering that if these sums were not paid within five days, they should be levied by distress and sale, and in default of goods that Meyers should be imprisoned ten days.

Notice of appeal was given, and among the grounds stated were the following:—that the justice was ousted of jurisdiction, as the title to land or possession thereof was brought in question: that the defendant Meyers had the right of possession, and the alleged assault consisted in only using sufficient force to put John Wonnacott out, he being a trespasser.

The Court of Quarter Sessions opened on the 14th of June, 1864. The appellant's counsel produced the notice of his appeal, and evidence of its service was given. The respondent's counsel then, alleging the absence of the respondent and his witnesses, asked to have the appeal stand until the following day, which was granted. On the next morning he objected to the jurisdiction of the court to hear the appeal, contending that the conviction was founded upon the summary jurisdiction given by sec. 37 of ch. 91, Consol. Stat. C., and that the appeal was given by the 117th sec. of ch. 99 of the same statutes: that the right to appeal was conditional, first, on the giving the notice, and, secondly, upon the appellant remaining in custody until such sessions, or entering into a recognizance conditioned to appear personally and try the appeal, and abide the judgment of the court thereon, and to pay such costs as should be awarded.

The court held that the objection should have been taken on the preceding day, and was waived by the application to postpone the hearing, and informed the respondent that he must proceed or they would quash the conviction. He then went into his case, and the appellant's counsel objected that the justice was not authorised to hear and determine the case, as a question arose as to the title of land, citing sec. 46 of chapter 91, already referred to. The court thereupon ordered that the conviction be quashed with costs.

Diamond and *Bull* shewed cause, and after raising some preliminary objections, it was agreed between the counsel that the rule should be argued as in the case of *Meyers, appellant*, and *John Wonnacott, respondent*. They cited *Regina* v. *Burnaby*, 2 Ld. Raym. 900; *Rex* v. *Justices of Yorkshire*, 3 M. & S. 493; *Scarlett* v. *Corporation of York*, 13 U. C. C. P. 161; *In re Winsor* v. *Dunford*, 12 Jur. 629; *Jones* v. *James*, 14 L. T. Rep. 424.

Robert A. Harrison, contra, cited *Jones* v. *Owen*, 18 L. J. Q. B. 8; *Kimpton* v. *Willey*, 19 L. J. C. P. 269; *In re Earl of Harrington* v. *Ramsay*, 22 L. J. Ex. 326; Paley on Convictions, 3rd. ed., p. 59.

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

We have no doubt this conviction must be treated as having been made under the 37th section of ch. 91. The information charged the appellant with having committed an assault on the respondent by catching hold of him by the collar of his coat and throwing him down, and prayed that the justice do proceed summarily in the matter, in pursuance of the statute; and the appellant's counsel relies on the provisions of the 46th section of the same act.

It is, we think, equally clear that the appeal is under the 117th sec. of ch. 99 of the same Consol. Stats., and not under the 1st sec. of the Consol. Stat. U. C., ch 114, which applies to convictions, &c., in any matter cognizable by justices of the peace, "*not being a crime.*" See *Butt* v. *Conant*, 1 B. & B. 174.

The appeal then is given to any person who thinks himself aggrieved by a summary decision, who, 1st, gives a certain notice, and, 2nd, either remains in custody until the sessions, *or* enters into a recognizance with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the sessions and try the appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded.

It is not asserted that the appellant was either in custody or that he entered into a recognizance, but for the appellant it is suggested that no proof was given on the part of the respondent that the appellant was not in custody, and that nothing appeared before the Court of Quarter Sessions to shew that he was not. The answer to this is so obvious, that if the suggestion had not been seriously put forward in an affidavit of his professional adviser, we would not have thought the objection worthy of notice. The right to appeal is given on certain conditions, the latter presenting the alternative of remaining in custody or of giving a recognizance. It is for the party claiming the right to appeal to bring himself within the class of persons so entitled by the statute, and the appellant has not done so.

Then it was urged that the objection had been waived by the respondent's counsel asking to delay the hearing of the appeal from the first to the second day of the sessions. If we could look upon the objection as based upon merely technical grounds, we should feel disposed, if possible, to deny effect to it. But we do not view it in that light. It strikes at the appellant's right to be heard. He had proved one step towards establishing his right of appeal, the other was to be proved. To ask a postponement until the following morning involved no admission on the part of the respondent of any matter which it was incumbent on the appellant to establish, nor do we see that it involved any waiver of such proof. It appears to be the established practice for the Quarter Sessions to hear appeals on the first day, but there is no law compelling them to do so, and many reasons might be presented to that court, which in a particular case would make the adherence to the practice a harsh and unjust proceeding. In letting the case stand over, no conditions were imposed; nothing was said beyond a consent to the application, which appears to have been made as soon as the notice of appeal was proved. We cannot say that we think the court, if applied to by the appellant, would or ought to have refused the delay to the respondent except on the terms that it should be admitted that the appellant had a right to be heard. We are of opinion this objection fails, and that the necessity to prove compliance with the condition rested on the appellant, and failing such proof that his appeal should not have been entertained.

We think, therefore, the rule for a prohibition to proceed further in the matter should be made absolute.

Rule absolute.

IN RE COLEMAN, CLERK OF THE PEACE FOR THE COUNTY OF HASTINGS.

Quarter Sessions.

The court having granted a prohibition against proceeding further with the appeal, refused a mandamus to the clerk of the peace to certify the non-payment of costs.

Semble, that the chairman of the Quarter Sessions cannot make any order of the court except during the sessions, either regular or adjourned.

(Q. B., T. T., 28 Vic.)

In this case, *Diamond* obtained a rule *nisi* calling upon the clerk of the peace to shew cause why a peremptory writ of mandamus should not issue, commanding him to grant a certificate of non-payment of costs of the appeal in which John Wonnacott was respondent, in pursuance of the order of the chairman of Quarter Sessions, as required by Consol. Stats. C., ch. 103, sec. 67.

C. S. Patterson shewed cause.

DRAPER, C. J.—The decision in the foregoing case necessarily disposes of this application for a mandamus, which is sought with a view to further proceedings founded upon the appeal therein referred to. Having granted a prohibition against proceeding, we cannot by mandamus command ulterior proceedings to be adopted.

We have observed in the papers before us an order signed by the judge of the County Court in his character of chairman of the Quarter Sessions, and dated on a day when that court was not sitting, during the interval between two Quarter Sessions of the peace, and not professing to be done at an adjourned session. We are not aware of any authority under which the chairman can make orders of sessions except during the sessions, either regular or adjourned.

CROSS v. WATERHOUSE.

Costs—C. L. P. A., secs. 324, 328.

Where in an action for false imprisonment the plaintiff obtained a verdict for 1s., and no certificate *Held*, that as he was entitled to no costs, defendant could not, under the 328th section of the C. L. P. A. set off or recover his costs against him.

(Q. B., T. T., 28 Vic.)

In this case *M. C. Cameron*, Q. C., obtained a rule *nisi* calling upon the plaintiff to shew cause why an order of the learned Chief Justice of this court, made on the 12th of April last in this cause, should not be rescinded and set aside, on the ground that the defendant was entitled to his costs in this action, and to have execution therefor, and the said order ought therefore not to have been made, and why the plaintiff should not pay the costs of the application

It appeared that this was an action for trespass and false imprisonment, in which the jury found a verdict for the plaintiff, and 1s. damages: that no certificate was obtained under the 324th section of the Common Law Procedure Act: that on the application of the defendant an order was made by a judge in chambers on the plaintiff, to bring in the *nisi prius* record to the clerk of this court, for the purpose of having costs taxed and judgment entered: that a notice of taxation of costs before the master was served by the defendant on the plaintiff's attorney, and also notifying the plaintiff to bring in his bill of Division Court costs, in order that the defendant might set off his costs: that the plaintiff's agent attended before the taxing officer, produced no bill, and objected to any taxation or entry of judgment by the defendant, as the plaintiff was not entitled to any costs, and that there were no costs against which the defendant could set off his costs: that the master proceeded to tax, and did tax the defendant $75 89, for which amount judgment was entered and execution issued against the plaintiff.

Upon this the plaintiff obtained a summons, on the 28th of March last, to review the taxation, &c., and on the 12th of April the learned Chief Justice, after hearing the parties, made an order that the master should review his taxation, and directed him to disallow to the defendant so much of the defendant's costs taxed between attorney and client as exceeded the taxable costs of defence, which would have been incurred in the inferior court, and not to set off the same against the plaintiff's verdict; and he further ordered that the execution against the goods and chattels of the plaintiff be set aside. To rescind this order this motion was made.

Robert A. Harrison shewed cause, citing *Cameron* v. *Campbell*, 1 U. C. P. R. 170; S. C. 12 U. C. Q. B. 159; *Cross* v. *Waterhouse*, 10 U. C. L. J. 215.

The sections of the statute referred to are cited in the judgment.

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

We are of opinion that the order of the learned Chief Justice was properly made, and that this rule moved should be discharged.

This is a case within the provisions of the 324th section of our Common Law Procedure Act, Consol. Stat. U. C, ch. 22, which enacts that "if the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less damages than eight dollars, such plaintiff shall not be entitled to recover in respect of such verdict *any costs whatever*," unless the judge who tried the cause certifies as in the section mentioned. The verdict here is for 1s., and no certificate granted; but it is contended for the defendant that the case is one within the 328th section of the act, and that he is entitled to have the benefit of that section, which enables a defendant to set off against the amount of the plaintiff's verdict and inferior court costs taxed to him, a certain portion of his, the defendant's, superior court costs, and to have execution against the plaintiff for the excess, if any.

The 324th section was passed and no doubt was intended to discourage vexatious and petty litigation, and the 328th section provides for cases not already provided for by the 324th section, and which are of the proper competence of the County Court and Division Courts; cases which plaintiffs were not prohibited from prosecuting in the superior courts; but the legislature, with a view of restraining plaintiffs from incurring needless expense, by the 328th section enacted that if the plaintiff brings this suit in the superior court, and recovers a verdict for an amount within the jurisdiction of either of the inferior courts, and does not obtain from the presiding judge the certificate required by that section, in that case "the defendant shall be liable to County Court costs or to Division Court costs only, as the case may be;" and the section further provides, that if the judge does not certify, "so much of the defendant's costs taxed, as between client and attorney, as exceeds 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 to be taxed*, and if the amount of costs so set off exceeds the amount of the plaintiff's verdict *and taxable costs*, the defendant shall be entitled to execution for the excess."

There is no authority for the taxing officer allowing costs to the plaintiff here, nor is the defendant liable to any. Consequently there are no costs within the meaning and intention of the 328th section, against which the defendant's excess of costs are to be set off, and against which the defendant may desire to protect himself.

In our opinion the two sections of the act are distinct, and applicable to cases clearly distinguishable. In the one set of cases the defendant is not liable to any costs whatever; in the other he is liable to certain costs, but entitled under certain circumstances to set off against the plaintiff's costs and verdict a certain amount of his costs.

The rule must be discharged, and (as it was moved with costs) with costs.

Rule discharged.

REGINA v. SHAW.

Conviction for assault—Form of—Statement of place and of request to proceed summarily.

On motion to quash a conviction by two justices of the county of Norfolk for an assault,

Held, 1. That stating the offence to have been committed at defendant's place in the township of Townsend was sufficient, for Consol Stat. U. C ch. 3, sec. 1, sub-sec. 37, shews that township to be within the county.

2 That it was unnecessary to shew on the face of the conviction that complainant prayed the magistrates to proceed summarily, for the form allowed by Con. Stat C, ch 103, sec. 50, was followed, and if there was no such request, and therefore no jurisdiction, it should have been shewn by affidavit

3. That it was clearly no objection that the assault was not alleged to be unlawful.

(Q. B., T. T., 28 Vic.)

J. B. Read obtained a rule calling on the chairman *pro tem* of the Quarter Sessions for the county of Norfolk, &c, &c., and upon George W. Park and Thomas W. Clark, Esquires, two of the justices of the peace for the said county, to shew cause why a conviction made by the said George W. Park and Thomas W. Clark, dated the 23rd of May, 1864, upon complaint of Thomas Henry for assaulting him, whereof John Shaw was convicted, and the order of the Court of Quarter Sessions confirming the same, and all proceedings had thereunder, should not be quashed, on the following grounds:

1. That the conviction does not shew jurisdiction on its face, as the assault complained of is not alleged to have been committed in the county wherein the magistrates had jurisdiction, or that they had authority to adjudicate thereon.

2. That the conviction does not shew under what authority the justices proceeded to exercise summary jurisdiction, or that the complainant prayed the justice to proceed summarily, under sec. 37 of ch. 91, Consol. Stat C.

3. That it does not appear that Shaw was charged or convicted of any "legal offence" under the statute giving to justices summary jurisdiction, inasmuch as it does not appear that Shaw illegally assaulted complainant.

4. That complainant did not in fact pray for summary procedure on the part of the convicting justices.

This rule was granted on reading the writ of *certiorari*, the return thereto, and the papers and affidavits filed.

The conviction began thus:—"Be it remembered, that on, &c, at W., in the county of Norfolk, John Shaw is convicted before the undersigned, two of her Majesty's justices of the peace in and for the said county, for that he, the said John Shaw, did on Saturday, the 21st day of May, instant, at his place in the township of Townsend, being in a certain field of wheat on his place, violently assault and beat Thomas Henry, of the village of W. And we adjudge," &c.

Atkinson shewed cause. He referred to *Regina* v. *Fuller*, 2 D & L 98; 8 Jur. 604, S. C; *Ex parte Allison*, 24 L. J. N S. M. C. 3; 10 Ex. 561, S C; *Carpenter* v. *Mason*, 12 A. & E 629; Paley on Convictions, 147; Consol. Stats. C., ch. 91, sec. 37, ch. 103. sec. 50.

J. B Read, contra, cited *In re Helps and Eno*, 9 U. C. L. J. 302, *In re Switzer and McKee*, Ib 266; *In re Hespeler and Shaw*, 15 U C Q B 194; *Rex* v. *Inhabitants of Whitmash*, 7 B & C. 596; *Westbrook* v. *Callaghan*, 12 U. C. C. P. 616.

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

Except the affidavit of service of the rule there is no other

before us, for the copy of the evidence taken on the hearing of the appeal before the court of Quarter Sessions is not an affidavit.

There is no mention of any place or county in the margin, though, according to the old case of *Rex* v. *Austin*, 8 Mod. 309, that would not supply the want of an allegation of the fact being committed in the county.

In *Kite and Lane's* case, 1 B & C. 105, Abbott, C. J., said "In convictions the place for which the magistrates act must be shewn. The offence must be set out; and either it must appear that the offence was committed within the limits for which the convicting magistrates are appointed, or facts must be stated which give them jurisdiction beyond those limits." *Rex* v. *Edwards*, 1 East. 278.

The only statement of place where the offence was committed is, "at his" (the defendant's) "place, in the township of Townsend," not adding "in the county of Norfolk," or equivalent words. But in Consol. Stat. U. C, ch. 3, sec. 1, sub-sec. 37, it is enacted that the county of Norfolk shall consist of the townships of, &c., naming seven townships, of which Townsend is one. From this public statute we must take notice that the township of Townsend is in the County of Norfolk, of which county the convicting magistrates are two of the justices. The first objection, therefore, fails.

We have had more doubt upon the second objection, because, unless the complainant did pray the magistrates to proceed sammarily they would have had no jurisdiction. But the first section of ch. 103 Consol. Stat. C. clearly includes this case, for the defendant has committed an offence for which he is liable by law upon summary conviction. Then section 50 of the same act authorizes the justices who convict to draw up the conviction in the form applicable to the case given in the schedule to that statute; and with the exception of naming the province and county in the margin, the form (I. 1) has been followed precisely. The case of *Regina* v. *Hyde* 16 Jur. 337, is an authority to show that it is sufficient to follow the form of conviction set out in the statute; and the case *In re Allison*, 10 Ex. 561, is to the same effect. Unless we hold it sufficient to follow the forms given in the act, they, as Parke, B., observes, "would prove only a snare to entrap persons," and as is further said by Alderson, B., there is no hardship, "for if the conviction was made without jurisdiction, the prisoner may remove and quash it." Here it has been removed, but no affidavits have been filed to establish the want of jurisdiction, and for this purpose there is no want of authority to shew that affidavits are admissible. We conclude therefore that this objection fails also.

The third objection is worthy of the days of special demurrer, and moreover has nothing in it. An assault is an attempt to offer with force and violence to do a corporal hurt to another; and a battery, which is the attempt executed, includes an assault. The offence is sufficiently charged in an indictment that A B., late of, &c., on, &c., at, &c., in and upon one C. D. did make an assault, and him, the said C. D., then and there did beat, bruise, and ill-treat, &c. If it be unnecessary in an indictment to say "unlawfully did make an assault," it cannot be necessary in a conviction. If the act or intent be not unlawful, it is no assault.

The last objection is an assertion without proof, and requires no notice.

We think the rule should be discharged with costs.

Rule discharged.

Hobbs v. Scott.

Consol. Stat. U. C, ch. 24, sec. 41—Application to commit.

The court, under the circumstances of this case, refused to order the committment of defendant under Consol Stat. U. C., ch. 24, sec. 41.

Answers are not unsatisfactory, within the meaning of the act, merely because they do not account for the application of defendant's assets in a proper manner.

Quære, whether a refusal to deliver property to the sheriff, that it might be taken in execution, when it is afterwards applied in satisfaction of another creditor, is a refusal to disclose such property, within the statute.

Remarks as to the difficulty of the court arriving at any satisfactory conclusion upon a defendant's examination.

(Q. B., T. T., 28 Vic.)

Hector Cameron obtained a rule nisi, calling on the defendant to shew cause why he should not be committed to the common gaol of the county of Peterborough for twelve months, or for such other time as to the court might seem fit, on the ground that he had refused to disclose his property and his transactions respecting the same, and he had not made satisfactory answers respecting the same, and had concealed and made away with property liable to be seized under execution, in order to defeat or defraud his creditors, or the plaintiff in this cause, as disclosed in the examination of the defendants under the order made herein.

Robert A. Harrison, *Boyd* with him, shewed cause, citing *Greene et al* v. *Wood*, 3 U. C. L. J. 113; *Davidson* v. *Gordon*, 5 U. C. L. J. 279; *McInnes* v. *Hardy*, 7 U. C. L. J. 295; *McKenzie et al* v. *Harris*, 10 U. C. L. J. 213; *Wood* v. *Dixie*, 7 Q. B. 892; *Re Bartholomew Courtney, a Bankrupt*, 3 L. T. Rep. N. S. 899; Imperial Act, 6 Geo. IV., ch. 16, sec. 63; Con. Stat. U. C., ch. 24, sec. 41, ch. 22, sec. 287.

Hector Cameron, contra, cited *Maxwell* v. *Ferrie*, 8 U. C. C. P. 11; *Bott* v. *Smith*, 21 Beav. 511.

Draper, C. J.—There is nothing before us except the defendant's examination, taken in March and April, 1864. From that we are left to extract such facts as may enable us to come to a decision on the rule applied for.

The defendant says the consideration of the notes on which judgment was recovered in this cause arose principally about 1859 and 1860.

The order for his examination is dated the 27th of October, 1863, and from that order it appears also that judgment had been recovered against him.

The sheriff closed defendant's store business in the summer of 1861. His store was finally closed in the fall of 1861, so the judgment must have been before that time. There were executions against defendant in the sheriff's hands three years previously, during which three years defendant paid executions to between $20,000 and $30,000. Defendant paid several small executions from June, 1861, to the time of the sale, and the balance of a heavy execution. His losses in flour and butter in the fall of 1860 and the spring of 1861 prevented his working through. The defendant said the sheriff enquired for what customers' notes he had *then*. (When? at or before the sale?) Defendant told him he could not have them, and refused to give the sheriff any information about them. Defendant had then between $2,000 and $4,000 of good and bad notes, and still has about $2,000 of notes, but not a good one among them. He had $1,000 or more of good notes in July, 1861, and has collected them since. He collected all the book debts he was able, but none within the last ten months. He could not say how much he had collected since his failure. He had never made out any balance sheet or statement of outstanding debts due to him. He produced his books. He estimated his present liabilities, exclusive of the Gibb mortgage and the debt due to the estate of his brother (deceased), at from $30,000 to $35,000.

It is extremely difficult to arrive at any satisfactory conclusion in cases like the present, when there is nothing before the court but a written continuous statement of answers made by the defendant upon his examination. Of the questions put to him, there is no information except by inference; of the necessity for repeating the same question in a varied shape to avoid evasion, of delay and hesitation in giving answers, we know nothing: nor of the character of the questions, nor of the manner of putting them, which may be irritating and painful to the defendant under examination The manner of giving answers may be such as to lead to a conviction of dishonesty and suppression of truth, even though in words the answer might be such as a man broken down by unforeseen failure and the prospect of privation for a wife and family, would give in a spirit of hopeless despondency. Even a refusal to answer a particular question, without a clear view of its value and connection with surrounding circumstances, might appear to justify a most unfavourable conclusion against the prisoner, and yet might not really warrant it. Such refusal might justify (if the power existed) a committal of a defendant for a short time, after which the examination could be resumed, and yet not be felt as affording sufficient ground for committal on an application like the present. It may be said the court has the power to award a *Ca. Sa.* in place of committing the debtor.

But a plaintiff, in the present state of the law, would scarcely avail himself of such an order, which in its effect on the debtor would be wholly valueless, while it would subject the creditor to the charges attending the writ, and in case of its execution to the sheriff's poundage also.

If the power of commitment were confined to the judge before whom the examination took place, the difficulties I have suggested would for the most part disappear. It would probably be found that the judges of the county courts have their time already fully occupied with their legitimate work, without having more cast upon them which is unconnected with their proper business. I am quite sure the judges of the superior courts could not find time to take such examinations, and I may be excused for saying it is not the kind of work that ought to be imposed on them. Moreover, it would be a great hardship and expense if defendants had to be brought from all parts of Upper Canada to be examined in Toronto, bringing books and documents necessary, and if other books or papers were required, being delayed in the progress of the examination while they were sent for. It is in cases of traders that this sort of questions most frequently arise, and it is to be hoped that the law of last session will render their occurrence much less frequent.

In the mean time, to dispose of the present case, I have been unable, after repeatedly going over this examination, to arrive at a sufficiently assured conviction to justify my passing a sentence of imprisonment, which is in effect what I am called upon to do. I have strong doubts on the defendant's conduct, which I do not find enough to remove. I have even suspicions, which are not wholly effaced by the defendant's explanations as they appear on his examination, but I do not feel justified in rejecting those explanations as untrue. In one sense answers are unsatisfactory when they do not account for the application of the debtor's assets in a proper manner, but I do not interpret the word in that sense. I am not prepared to say that a refusal to produce and deliver property to the sheriff, that it might be taken in execution for the benefit of one creditor, when it is afterwards applied to the satisfaction of another, is a refusal to disclose his property within the meaning of the act. Nor is a case of fraudulent concealment so proved by what appears on the examination before us, as to relieve me from the apprehension that if I should agree in ordering the defendant to be committed, I should be doing injustice. I am required to find the facts which subject the defendant to punishment. I think, if there be ground for reasonable doubt the defendant is entitled to the benefit of it, and I therefore must discharge the rule.

HAGARTY, J.—After some hesitation I feel bound to concur with the Chief Justice, that sufficient does not appear on the examination of defendant to warrant his committal under the statute.

If the facts were more fully before me as to the manner in which defendant did apply the proceeds of the notes which he refused to give to the sheriff, so that I might see more explicitly the debts which he alleges he has paid therewith, I should take time to consider whether the distinct and wilful defeating of the plaintiff's legal priority by applying existing assets to other purposes did not come within the words of the act, a concealment or a defeating or delaying of creditors.

But I am not prepared to dissent from the deliberate judgment of the rest of the court, that sufficient information is not laid before us on the examination. As suggested by the learned Chief Justice, this case is, as it were, a trial of a defendant and conviction as for an offence.

MORRISON, J., concurred.

Rule discharged, without costs.

COMMON PLEAS.

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

MILLER v. THE BEAVER MUTUAL FIRE INSURANCE ASSOCIATION.

Writ of execution—Renewal of—27 Vic., ch. 13, sec. 2

Held, that the 2nd section of ch. 13, 27 Vic., is not retrospective in its operation, and under the authority of *Nelson and Jarvis*, decided in this court, all writs of execution more than once renewed previously to the 15th of October, 1863, the date of the said act, are void.

(C. P., E. T., 27 Vic.)

This was an action brought to recover $500, on a policy of insurance made by the defendants, dated the 21st of September, 1863, for loss by fire of plaintiff's dwelling house, situated on lots No 27, 28 and 29, on Huron street, in the village of Thornbury.

The declaration was in the usual form, and contained the usual averments.

The defendants pleaded, first, that at the time the application was made for insurance and the policy issued to plaintiff, the premises were encumbered by a judgment for £85 5s., recovered in the Court of Queen's Bench for Upper Canada, in a suit of William Darling et al. against the plaintiff, which had been duly registered and on which a writ of *fi fa.* against the lands of the plaintiff had been issued, and was then in the hands of the sheriff of the county of Grey, in which the said village is situated; but that the plaintiff did not state in his application that the said lands were encumbered, but on the contrary stated that they were not encumbered.

Secondly, they pleaded, that in the application for the policy the plaintiff falsely and fraudulently declared the value of the dwelling house and kitchen, mentioned in the application and policy, to be of the then cash value of $750, exclusive of the land on which they were built, whereas in truth they were not of this value, but of a much less value as the plaintiff well knew.

The plaintiff took issue on both pleas, except the introductory averments in the first plea, which he admitted, and which are not material to the present case.

The cause came on to be tried at the last assizes for the county of Grey before Hagarty, J.

It appeared in evidence that the above mentioned judgment had been first registered on the 14th of May, 1858, and re-registered on the 26th of April, 1861, for three years; that on this judgment a *fi fa* against the lands of the plaintiff had been placed in the sheriff's hands on the 5th day of August, 1861, which had been twice renewed, the last time on the 29th day of June, 1863. There was conflicting evidence as to the value of the dwelling house and kitchen.

The learned judge at the trial held the land to be encumbered, and told the jury that if plaintiff did not state the encumbrance to the defendants the policy was void. The plaintiff had leave to enter verdict for him on this issue subject to the opinion of the court on this ruling. The jury found for defendants on the first issue, and for plaintiff on the second, and assessed the plaintiff's damages at $300.

In Easter Term last, *Macpherson* obtained a rule calling on the defendants to show cause why the verdict for defendants on the first issue should not be set aside, and a verdict for the plaintiff entered on that issue, on the following grounds:

1st. That the *fi. fa.* against lands, in the first plea mentioned, was not at the date of plaintiff's application for insurance on the 18th of August, 1863, and at the date of the issuing of the policy on the 21st of September, 1863, in full force as alleged in the first plea, but on the contrary thereof was of no force or effect having expired on the 14th day of July, 1863. 2nd. That the evidence did not prove that the lands were encumbered; as alleged in the defendants plea, at the time of the plaintiff's application for insurance, and of the issuing of the policy.

M. C. Cameron, Q. C., shewed cause and contended that the *fi fa* was in force, for the 27 Vic., cap. 13, sec. 2, is retrospective, so as to obviate the decision in *Neilson* v. *Jarvis*, 13 U. C. C.P. 176.

Creasor, in support of the rule, contended that the 27 Vic., cap. 13, sec. 2. was not intended to be retrospective, as was quite clear when the two sections of the act were compared. He contended that the writ expired on the 13th of July, 1863, for the the first writ was issued on the 31st of July, 1861, renewed for one year on the 14th of July, 1863, and again on the 29th of June, 1863, but it really expired on the 13th of July, 1863.

JOHN WILSON, J.—The sole question in this case is, whether the execution of *Darling et al.* v. *Miller*, in the hands of the sheriff of the county of Grey, against the lands of the plaintiff, was a valid and existing writ on the 18th day of August, 1863, when the plaintiff applied for and obtained the policy on which this action was brought, so as to be an encumbrance on plaintiff's lands

The 249th sec of the Common Law Procedure Act was held, in the case of *Neilson* v. *Jarvis*, 13 U. C. C. P. 176, not to authorize the renewal of writs of *fieri facias* oftener than once. This construction was put upon it, from the fact that the words "and so from time to time during the currency of the renewed writ," which occurred in sec. 21, relating to writs of summons, and in the English Common Law Procedure Act, relating to final process, had been omitted in the 249 sec. of our act.

In consequence of this decision, this section was amended by the 2 sec. of the 27 Vic., cap. 13, which enacted that sec. 249 should be amended by inserting after the "expiration," in that section, the words "and so from time to time during the continuance of the renewed writ," and that such words shall be hereafter read and construed as constituting part of the act.

By the construction this court put upon the 249th sec. as it originally stood, the *fi. fa.* in the case before us was void, and if so the plaintiff's land were not encumbered by it; but the question is, whether we are to construe the 2nd sec. of the 27 Vic., cap. 13, so as to give it a retrospective effect. The words themselves seem to preclude such a construction, for they are "shall be hereafter read." The first section of the same act has reference to an amendment of it in regard to the sale of lands, under execution against a mortgagor, and here, as in the second section, the words "his heirs, executors, administrators or assigns," are to be read after the word "mortgagor," where it occurs in sections 257, 258 and 259, but the phraseology is quite different, and would give more scope to argue that it was intended to apply retrospectively, for it is said whenever the word "mortgagor" occurs in the said sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption" were inserted immediately after such "mortgagor."

Construing the words in the second section according to their literal meaning, and as different from the words in the first section, which it was argued was intended to be retrospective, though as to this we express no opinion, we think the second section has no retrospective operation, and therefore the *fi. fa.* of *Darling* v. *Miller et al.* in the hands of the sheriff of Grey, on the 18th day of August, 1863, against the lands of the plaintiff, was not an encumbrance on his lands so as to make the insurance effected under plaintiff's policy void.

This case has not been broadly presented to us, as to whether this execution would have constituted an encumbrance within the meaning of the act under which this company was formed, and we offer no opinion on this point.

The rule will be drawn up to enter the verdict for plaintiff on the first issue.

Per cur.—Rule accordingly.

Hope v Graves.

Ejectment—County Court—Fi fa. lands—Attachment—Division court judgment.

Ejectment having been brought to recover the possession of premises sold and conveyed by the sheriff to the plaintiff under a writ of *venditioni exponas*, issued upon a county court judgment, based upon a division court judgment, recovered on proceedings commenced by attachment and summons issued the same day, the transcript of the judgment of the division court not however shewing that the proceedings were commenced by attachment

Held, that the sale under the writ of *venditioni exponas* was void, by reason of the transcript of the judgment from the division court not having shewn that the proceedings in that court were commenced by attachment.

(C. P., E. T. 27 Vic.)

This was an action of ejectment to recover a piece of land containing forty-four square perches, lying at the intersection of Third street and Stuart's lane, in the city of Kingston, which the plaintiff claimed by virtue of a deed from the sheriff of the United Counties of Frontenac, Lennox and Addington, bearing date the 15th day of July, 1863. Defendant denied title of plaintiff, &c.

The case was tried at the last assizes held at Kingston before A. Wilson, J.

The plaintiff put in a transcript of the judgment of the first division court of the United Counties of Frontenac, Lennox and Addington, in which Isaac Hope, the now plaintiff, was plaintiff, and George Graves, the now defendant, was defendant, in these words:

"In the first Division Court of the United Counties of Frontenac, Lennox and Addington, between Isaac Hope, plaintiff, and George Graves defendant, the following proceedings were had: On the 15th day of May, A D. 1861, a summons requiring the defendant to answer the plaintiff's claims for debt amounting to forty-five dollars and — cents, was issued out of this court in this cause according to the statute in that behalf. On the 15th day of May, A D. 1861, the said defendant was duly served with a copy of the said summons and of the particulars of the plaintiff's claim. At the sittings of the said court, holden on the third day of September, A D 1861, at the court house, Kingston, the said cause came on to be tried, and the following judgment was then and there rendered by the court; Judgment for the plaintiff for forty-five dollars debt and ten dollars and sixty-one cents costs of suit, to be paid forthwith. On the nineteenth day of September, A D. 1861, a writ of execution upon the said judgment was duly issued out of the said court by the clerk thereof, which said writ of execution was directed to B. Fitzpatrick, a bailiff of the said court, and commanded him to levy the sum of fifty-five dollars and sixty-one cents of the goods and chattels of the said defendant. On the nineteenth day of October, 1861, the said bailiff returned the said writ of execution with a return thereto in the following words—"No goods."

Pursuant to the Upper Canada Division Court Act, I, Edwin Annesley Burrowes, clerk of the said Division Court, in the United Counties aforesaid, do certify and declare that the foregoing is a faithful transcript of the judgment and proceedings in the above cause, as shewn, and as appears by the original entries and records of the court.

Given under the seal of the said court, this 23rd day of November, 1861.

(Signed,) E. A. Burrowes,
[L S.] *Clerk.*"

This transcript was filed and entered in the county court of these united counties on the 26th of November, 1861, and on the same day a *fi fa.* against goods for $55 86 was issued upon it. This writ was returned and filed on the same day "no goods." On the same day an execution for $55 86 was issued against lands returnable in twelve months. This was returned on the 27th of August, 1862—"I have levied of the lands and tenements of the within defendant to the amount of one shilling, which lands and tenements I have on hand for the want of buyers." On the 12th of February, 1863, a writ of *venditioni exponas* was issued, and on the same day given to the sheriff. On the 15th of July, 1863, the sheriff sold and conveyed the land in question to the plaintiff for one hundred and twenty-seven dollars, by virtue of the said writs.

Copies of the proceedings in the division court were put in, from which it appeared that on the 15th day of May, 1861, the suit had been commenced by an attachment which had issued on the affidavit of the plaintiff in the usual form; that on the said day the bailiff levied on a house and lot near Eagle Foundry, Kingston; that on the same day a summons was issued against the defendant, which, with the plaintiff's claim annexed, the bailiff swore "he served on the 15th day of May, 1861, by delivering a true copy of both, by nailing them to the door of the defendants last residence."

John Duff was sworn and said, he was clerk of this division court and had the office book in court, in which the judgments of the division court are entered. He finds the judgment of Isaac Hope against George Graves entered for $45 debt and $10 61 costs, in all $55 61, on the 3rd day of September, 1861. The entry is in the handwriting of Mr. Burrowes his predecessor. The summons was returnable on the 28th day of May, 1861, but at this court it was adjourned to the July court, and from this court to the September court, when judgment was given. On the 19th September, 1861, an execution against goods was issued, and the bailiff returned it "no goods."

Sir Henry Smith, Q C., moved for a nonsuit on the following grounds,

1st That the transcript is not according to the statute for the purpose of maintaining the proceedings which have been had under it.

2nd. That the writs issued under the transcript do not follow it.

It sets out a judgment for $55 61. The writs against goods and lands are for $55 86.

3rd. The defendant's name in the entry on the book of the clerk of the county court is George *Grass*, instead of George Graves.

4th. The amount remaining due on the judgment is not entered in the clerk's book.

5th That the transcript should have set out the attachment and the proceedings had upon it.

S. Richards, Q. C., for the plaintiff, answered.

1st. That the transcript recites the amount of the recovery in the court below correctly.

2nd. The writs differing from the transcript by twenty-five cents are not void, at most it is an irregularity.

3rd. The difference in the clerk's book is at most an irregularity.

4th. The amount due not being stated, it must be presumed all is due.

5th. The transcript is according to the forms as set out in the rules of the division courts.

The learned judge ruled—

1st. That the transcript was sufficient on its face.

2nd. That the executions issued upon it were not warranted by it.

3rd. That the transcript ought to have set out the proceedings by attachment

4th. That it not appearing that any part of the judgment had been paid, it was not necessary to enter in the clerk's book what the amount is, remaining due.

The jury found a verdict for the plaintiff subject to the above objections.

It appeared that the original entry in the clerk's book had been *Grass*, corrected to Graves.

During last term *Sir Henry Smith*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, pursuant to leave reserved, on the above grounds taken at the trial.

S. Richards, Q. C., shewed cause. He contended, 1st. That the transcript was in form, according to the Division Court rules, made under the statute and sanctioned by the judges of the superior courts of common law, see Rules, page 60, form 52. It sets forth all that the 142nd section of the 22 Vic., cap. 19 requires. 2nd. The variance between the amount of the judgment as mentioned in the transcript, and the amounts mentioned in the writs of *fi. fa.* against goods and lands, is at most an irregularity, and does not make the writs void. 1 Arch. Prac. 11 edn. 595; *Webber* v. *Hutchins*, 8 M & W. 319; *King* v. *Birch*, 3 U. C. Q B. 425; *Doe Elmsley* v. *McKenzie*, 9 U. C. Q. B. 559. 3rd. That the entry in the clerk's book is directory; that however the name was entered, it appeared correctly at the trial. 4th. That it is only where part is claimed that it is necessary to make an entry of what is remaining due. 5th. That the attachment is a collateral proceeding, which it is not necessary should be stated as a proceeding, for by the transcript it appears the defendant was served with a summons.

Sir H. Smith, Q C., in support of the rule, contended that the proceedings had not been set forth in the transcript in accordance with the 142nd sec. By the transcript it was to be inferred that the defendant had been personally served with the copy of summons, but on inspection of the proceedings themselves the defendant had not been served The transcript shewed a judgment as if obtained in the ordinary way; the proceedings that it was obtained under attachment proceedings. The transcript should agree in every particular with the original proceedings. The 77th section requires personal service where the amount claimed exceeds eight dollars. The variance in the mandatory part of the *fi fa.* is fatal if it vary from the judgment, and the amount due ought to be entered in the book of the county court clerk. Every thing should strictly conform with the requirements of the statute. He contended also, that the proceedings being between the same parties, the plaintiff was bound to shew that the original and all the proceedings had been properly conducted. He cited *McDade dem O'Connor et al.* v. *Defoe*, 15 U. C. Q. B. 386; *Jacomb* v. *Henry*, 13 U. C C. P 377; *Thillipson* v. *Mangles et al*, 11 East 516; *Readshaw* v. *Wood et al*, 4 Taunt. 13; *Farr* v. *Robins*, 12 U. C C. P. 37

JOHN WILSON, J —As division courts are not courts of record, the legislature has not thought fit to allow them to issue writs against lands, but in order to enable judgment creditors to reach the lands of judgment debtors, it has provided a method by which its judgments may become judgments of county courts which are courts of record having the power to issue executions against lands. This court, in the recent cases of *Farr* v. *Robins*, and *Jacomb* v. *Henry*, has had under its consideration the mode by which judgments of division courts can be made judgments of record, and what is required to be brought from these courts to county courts to sustain writs of *fi. fa.* against lands and sales under them. A new question arises in this case. A principle of natural justice requires that he, against whom a judgment has been recovered, should have personal notice, or such other notice as the legislature has provided or the courts deemed reasonable notice of such proceedings as would, in the ordinary course, terminate in a judgment against him. The 77th section of the Upper Canada Division Courts Act, except in cases commenced by attachment, requires personal service of every summons where the claim exceeds eight dollars. In cases commenced by attachment in that court the act has provided for the mode in which service has to be effected. Where an attachment has issued, and no summons previously served, and the defendant has not appeared, the same may be served either personally or by leaving a copy at the last place of abode, trade or dwelling of the defendant, with any person there dwelling, or by leaving the same at the dwelling if no person be found there The transcript, on its face, appears all right, but "the proceedings in the cause" are not set forth as the 142nd section requires. When the proceedings are examined we find an affidavit of the plaintiff which authorised the issuing of an attachment against the defendant; we find the attachment and the summons both issued on the same day; we find the summons and the claim of the plaintiff served "by nailing them to the door of the defendant's last residence," but it is no where shewn that it was served by leaving a copy at the last place of abode, trade or dealing of the defendant with any person there dwelling, or by leaving the same at the dwelling and shewing that no person was found there. The summons required the defendant to appear and answer on the 28th of May, 1861. He did not appear, and it was adjourned to the July court. Again he did not appear, and it was adjourned to the September court. He did not then appear, and judgment was given against him.

The transcript ought to have shewn, at least, that the suit was commenced by attachment, and that the summons had been served so as to warrant the subsequent proceedings, but it shews none of them. On the contrary it shews that "the defendant was duly served with a copy of the summons;" but he was not duly served. These are strong reasons why the transcript should shew that the proceedings were commenced by attachment, for there may have been goods or money in the clerk's hands applicable to the judgment. A defendant, against whom a judgment has been obtained by attachment, cannot be examined as to his effects under a judge's order, but under this transcript as it now stands the defendant might be subject to such examination by the judge of the county court, who would have no official knowledge that the proceedings in the inferior court were by attachment. In accordance with the opinions expressed in the two cases referred to, we do not think this transcript can be sustained to authorise its being made a judgment of the county court, on which the writs could be issued, by virtue of which the defendant's lands were sold. We think the plaintiff must be nonsuited.

Per cur.—Rule accordingly.

COMMON LAW CHAMBERS.

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

IN THE MATTER OF JOHN CARMICHAEL.

Habeas corpus—Certiorari—Vacation—Return to writs—Remand of prisoner—Invalidity of warrant—Amending warrant.

Held, 1 That a warrant reciting a coroner's inquisition, and stating the offence as follows—that J. C "stands charged with having inflicted blows on the body

of the said D. F." and not showing the place where the blows, if any, were inflicted, or the offence, if any, was committed, is bad.

Held, 2. That the person to whom a writ of *habeas corpus* is directed, commanding him to return "*the* cause of taking and detainer," must return the original and not merely a copy of the warrant (*In re Ross*, 10 U. C. L. J. 183, to the contrary doubted).

Quære, 1. As to the power of a judge sitting in chambers, on an application of a prisoner for his discharge on a bad warrant, to remand him and in aid of the prosecution to order the issue of a *certiorari* to bring up the depositions, &c.

Quære, 2. As to the power of a court or judge, upon reading the depositions, to amend a bad warrant of a coroner, or issue a new one for the purpose of detaining a prisoner in custody.

(Chambers, August 20, 27, 1864.)

On 8th August last, Mr. Justice Adam Wilson, upon the application of prisoner, who was in custody under a coroner's warrant, directed the issue of a writ of *habeas corpus* to the keeper of the common gaol in and for the united counties of Lanark and Renfrew commanding him to have the body of John Carmichael under safe and secure custody, together with the day and cause of his being taken and detained, by whatsoever name he may be called or known, before the presiding judge in chambers, in Osgoode Hall, Toronto, immediately after the receipt of the writ, to do and receive all those things which the presiding judge should consider of him according to law.

On 12th August last, the attorney for the prisoner notified, in writing, the committing coroner, the county crown attorney, and the gaoler, that under the writ the prisoner would be brought before the presiding judge in chambers, at Osgoode Hall, on Saturday, the twentieth day of August last, at eleven o'clock in the forenoon, in order that he, the prisoner, should be discharged out of custody, as to the commitment by which he was then detained in the custody of the keeper of the common gaol.

On 20th August last the sheriff returned the writ as commanded, with schedule thereto annexed, Chief Justice Draper being the presiding judge in chambers.

Robert A. Harrison for the prisoner thereupon moved that the writ and return be filed, which was granted.

He then read the return, which was as follows:

"By virtue of the annexed writ to me directed, I have the body of John Carmichael, named in the said writ, ready before the presiding judge in chambers, as in and by the said writ I am commanded. I do further humbly return and certify, that the said John Carmichael was delivered into my custody as keeper of the common gaol of the united counties of Lanark and Renfrew, on the twenty seventh day of June, A. D. 1864, and by me as such received, and has from thence hitherto been kept and detained under and by virtue of a warrant under the hand and seal of John D. Clendenning one of Her Majesty's coroners in and for the united counties of Lanark and Renfrew, which said warrant is in the words and figures following:

'To Thomas Culbertson, N. Dewar and other Her Majesty's constables and officers of the peace for the united counties of Lanark and Renfrew, and also the keeper of Her Majesty's gaol of Perth, in said united counties.

'United counties of Lanark and Renfrew, to wit:

'Whereas by an inquisition taken before me, one of Her Majesty's coroners for the said united counties, on the days and year hereunder written, on view of the body of David Fitzgerald, lying dead at the village of Osceola, in the township of Bromley, county of Renfrew aforesaid; John Carmichael stands charged with having inflicted blows on the body of the said David Fitzgerald: These are, therefore, by virtue of my office in Her Majesty's name to charge and command you or any of you forthwith safely to convey the body of the said John Carmichael to Her Majesty's gaol of Perth, and safely to deliver the same to the keeper of the said gaol; and these are likewise by virtue of my office, in Her Majesty's name, to will and require you the said keeper to receive the body of the said John Carmichael, and him safely keep in the said gaol, until he shall be thence discharged by due course of law; and for your so doing this shall be your warrant.

'Given under my hand and seal at Osceola aforesaid, this twenty-fourth day of June, one thousand eight hundred and sixty-four.

(Signed) 'JOHN D. CLENDINNEN,
'*Coroner United Counties Lanark and Renfrew.*'

"And I further return and certify, that up to six of the clock in the afternoon of the eighteenth day of August instant, no other warrant or writ against the said John Carmichael has been placed in my hands. The answer of

"ROBERT KELLOCK,
"*Keeper of Common Gaol, United Counties Lanark and Renfrew.*"

DRAPER, C. J.—Is not the original warrant annexed to the writ?

Mr. Harrison—No. It has been decided by Mr. Justice John Wilson in Chambers that a copy is sufficient: the gaoler retaining the original for his protection (*In re William Ross*, 10 U. C. L. J. 133).

DRAPER, C. J.—That is not my view of the law. The return must be amended, and the original warrant annexed. The gaoler is required to return "*the* cause of his being taken and detained, &c.," not a *copy* of it. The warrant may be a forgery.

The return was then amended by the insertion before the words "The answer of," &c., of the words "I further certify and return the original warrant above mentioned, which is hereto annexed;" and the original was accordingly annexed.

Mr. Harrison, upon reading the writ and return as amended, moved for the discharge of the prisoner upon the following grounds:

1. That the warrant of commitment disclosed no offence in law (*Reg. v. Breden*, 16 U. C. Q. B. 487).

2. That it showed no jurisdiction, inasmuch as the place where the offence, if any, was committed, was not shewn (*In re Beebe*, 10 U. C. L. J. 19; *Regina v. Evett*, 6 B. & C. 247).

3. That the warrant was, in other respects, informal, defective and void (Jervis on Coroners, 2nd edn. 388).

S. Richards, Q. C., said although the warrant might or might not be defective, still as it appeared the prisoner was charged with a very grave offence, before any argument on that point were had, he desired to have the depositions before the judge, and for that purpose would at once apply for a writ of *certiorari*, to be directed to the coroner and the county crown attorney, commanding them to certify the depositions; and in the meantime that the prisoner be remanded.

Mr. Harrison contended that upon the materials before the judge (a void warrant) the prisoner was entitled to his discharge, and protested against a remand, the custody being illegal.

DRAPER, C. J.—I shall remand the prisoner, and in the meantime order the writ of *certiorari* to issue as asked.

The following remand was thereupon made and signed:

Upper Canada, } To the keeper of the common gaol of the united
to wit. } counties of Lanark and Renfrew:

John Carmichael being brought before me, the presiding judge in chambers, at Osgoode Hall, in the custody of the keeper of the common gaol of the united counties of Lanark and Renfrew, by virtue of a writ of *habeas corpus*, tested the eighth day of August instant, issued out of Her Majesty's court of Queen's Bench, at Toronto, to the said keeper directed, now upon reading the said writ and return thereto, and the said John Carmichael having applied for his discharge from custody under the warrant returned as the cause of his detention in custody, I do order that the said John Carmichael be not now discharged, but that he be remanded into custody in the said gaol, and to the custody of the keeper of the said gaol, until Saturday, the twenty-seventh day of August instant, and that on that day the said keeper do have the body of the said John Carmichael before the presiding judge in chambers, at Osgoode Hall, under this order and the said writ of *habeas corpus*.

Dated this 20th day of August, 1864.

(Signed) WM. H. DRAPER, C. J.

The writ of *certiorari*, issued on the same day, was in the following form:

Victoria, &c.

[L. S.] To John D. Clendenning, one of Her Majesty's coroners of the united counties of Lanark and Renfrew, and to Donald Fraser, crown attorney for the said united counties, greeting:

We being willing for certain reasons that all and singular the examinations, informations and depositions taken by or before you the said John D. Clendenning, touching the commitment of

John Carmichael to the custody of the keeper of the common gaol of the united counties of Lanark and Renfrew, for causing the death, by violence, of David Fitzgerald (as it is said), and all inquisitions taken before you the said John D. Clendenning, as such coroner, touching such death, be sent by you before the Honorable William Henry Draper, Chief Justice of our Court of Queen's Bench, at Toronto, do command you and each of you that you and each of you send, under the hands and seals of you and each or one of you the said John Clendenning and Donald Fraser, before our said Chief Justice, at his chambers at Osgoode Hall, in the city of Toronto, immediately after the receipt of this our writ, all and singular the said examinations, informations, depositions and inquisitions, with all things touching the same, as fully and perfectly as they have been taken by or before you the said John D. Clendenning, and now remaining in the custody or power of you the said John D Clendenning, or you the said Donald Fraser, together with this our writ, that we may cause further to be done therein what of right and according to the law and customs of this Province we shall see fit to be done.

Witness The Honorable William Henry Draper, C. B., Chief Justice of our said Court of Queen's Bench, at Toronto, this twentieth day of August, in the year of our Lord 1864, and in the twenty-eighth year of our reign.

(Signed) L. Heyden.

On the 27th August last, the writs of *habeas corpus, certiorari*, and order of remand, were returned into chambers, and the matter came on for argument before Mr. Justice Morrison, then presiding in chambers.

Robt A. Harrison, for the prisoner, objected to the reading either of the *certiorari* or return, 1st, because the writ was improperly issued in vacation, upon the authority of a single judge sitting in chambers; 2nd, because such writ is improperly tested in vacation; 3rd, because such writ is made returnable before the Chief Justice, and not before any other judge sitting in chambers; 4th, because the issue of said writ in aid of the prosecution, on an application by the prisoner for his discharge on a void warrant, was without precedent (*per* Denman, C. J., in *Reg.* v. *Dean*, 2 Q. B 731); and contended that even if the depositions were read, there was no power to make or execute a second or valid warrant; so that under any circumstances the prisoner was entitled to his immediate discharge

S Richards, Q. C, contra, argued, 1st, that the writ was properly issued; 2nd, that if returnable only before Chief Justice Draper, the hearing should be enlarged before him; 3rd. that upon reading the depositions, the offence of murder was disclosed; 4th, that the warrant was sufficient; 5th, that even if not, there was power either to grant a new warrant or again remand. He cited *Rex* v *Marks*, 3 East. 157; *Ex parte Krans*, 1 B. & C. 258; 1 Chit. Cr. Law, 129.

Morrison, J. (having taken several days to consider)—I am of opinion that this warrant is bad. I do not think I have any right to look at the depositions in aid of it. They are not properly before me. Even if I were to look at them, I, sitting as a judge in chambers, have no power to amend the coroner's warrant. The custody is illegal, and I order the discharge of the prisoner.

Order accordingly.

In re Malloch.

Attorney and client—Taxation of bills—Services not strictly professional—How charged for.

An attorney, upon the request of his clients, on the 27th March, 1863, delivered to them a bill of costs for services performed. They afterwards, disregarding this, obtained an order upon him to deliver a bill of costs of all causes and matters wherein he had been concerned for them. The attorney complied with this order by the delivery of new bills in all causes and matters wherein he had been concerned for his clients, including the services for which his former bills had been delivered. No objection was made to the taxation of the new bills, till after it was pretty well ascertained that the balance would be against the clients, when they endeavored to hold the attorney to his first bill, which, with a receipt endorsed upon it, would have made a balance against him. *Held*, that the clients having applied for new bills, and having taken the risk of the balance being in their favor on the new bills, could not afterwards be allowed to revert to the old bill, to the prejudice of the attorney. *Held* also, that the attorney was entitled to charge in his bills for service of garnishee papers, the same having been performed at the request of the clients, and the charges therefor appearing in his ordinary bill of costs.

(Chambers, Sept. 8, 1864.)

McMurray, on behalf of Thomas Alfred Evans and Samuel Eddy Evans, formerly clients of Mr. Malloch, on the 1st July last, obtained a summons upon him to show cause why the master should not review his taxation of the bills of costs produced before him under the order of Morrison, J., made on the 30th May last, on the grounds: 1st, that a great portion of the costs taxed and allowed to Mr Malloch, were the same costs and charges which were contained in a former bill of costs rendered by Mr. Malloch to his clients, and which were paid and settled in full on the 27th March, 1863, as appears by the receipt endorsed on the bill, and the same should not be charged a second time, but only such costs should be charged as were incurred subsequent to the settlement; 2nd, that many of the charges made in the bills and allowed by the master were for services rendered by Mr. Malloch not of a purely professional nature, but were for such services as are usually charged by and paid to a sheriff's bailiff, and the same should not therefore have been allowed; 3rd, and on grounds disclosed in the master's report, and in the affidavits and papers filed.

This summons was enlarged from time to time from the 7th day of July, when it was first returnable, until the 5th day of September last, when it was finally heard before Mr. Justice Adam Wilson.

It appeared that on the 9th day of May last, Mr. McMurray, on behalf of the Messrs. Evans, applied for and obtained a judge's summons, calling on Mr. Malloch to show cause why he should not deliver to the Messrs. Evans a bill of costs of all causes and matters wherein he had been concerned for them; and why he should not give a detailed statement, with dates, items and amounts, of all monies received by him at any time for the Messrs. Evans; and also produce all books, &c, in any wise connected with the business of the Messrs. Evans; and why he should not also render an account of his professional charges and costs, and submit to have the same taxed by the master; and why he should not pay the costs of the application.

The papers on which this summons of the 9th of May was granted were an affidavit made by Mr. McMurray, dated the same 9th day of May, and sundry copies of papers attached to it. The affidavit verified these copies, and stated that Mr. Malloch, as the deponent believed, and had been informed, had collected large sums of money for the Messrs. Evans, under an order dated the 12th day of July, 1862, to attach monies due to John Bishop, the debtor against whom the Messrs. Evans had obtained a judgment; that Mr. Malloch had never rendered any account of monies received by him under the order, although frequently requested so to do, and that he had only paid to his clients the sum of $212, as the deponent had been informed; that the charges on the bill on which his receipt of the $100 was endorsed, appeared to be very large and exorbitant; that the deponent believed there were several sums still due under the attaching order, which the Messrs. Evans had been prevented from collecting, in consequence of not having received any account of monies received by Mr. Malloch under the order; and that deponent had written to Mr. Malloch on the 19th April last, for an account of monies received by him, and a statement of monies remaining unpaid under the order, but he had not received any answer to the same.

One of the copies of papers attached was a letter from the Messrs. Evans to Mr. McMurray, dated the 15th April last, in which it was said: "Mr. Malloch has only remitted us $212 in two years; and after furnishing us with the accompanying account for $284, he consented to deduct therefrom $124, as you will observe by the receipt on the back of the account, and promising to remit us the difference, which he has not done."

Another of the papers was the bill of costs referred to, amounting to $284 80. At the foot of the bill was the following minute: "The above charges are the ordinary professional charges for services like those mentioned in the above bill. Brantford, 17th October, 1862. (Signed) Hardy & Hardy, Barristers, &c., Brantford." And on the back of the bill was endorsed: "Brantford, 27th March, 1863.—Received from Messrs. Evans & Evans the sum of one hundred and sixty dollars, in full of within account to date. (Signed) George W. Malloch."

Upon this summons and papers filed, an order in the terms of the summons was made, on the 30th May last, directing the delivery of a bill of costs, and the reference of it to the master.

In pursuance of the order of the 30th May, to deliver a bill,

Mr. Malloch did render two bills of costs, one amounting to £96 4s. 3d., and the other to £25 15s 4d.,—total £121 19s. 7d.; the former of which was taxed at £61 1s., and the latter at £14 11s. 4d., making together £75 12s. 4d.

When the taxation was before the master, Mr. McMurray, on the 11th June, made affidavit that the bill of costs firstly rendered, amounting to $264 80, and on which the receipt for $160 was endorsed, was sent to him by the Messrs. Evans, and appeared to have been paid and settled in full between the Messrs. Evans and Mr. Malloch, at $160, up to the 27th March, 1863; and that many of the charges in the said bill were the same as those charged in the bill then under taxation.

When the summons under consideration was taken out, Mr. McMurray, on the 1st July, filed an affidavit, which stated, that "At the time of taking out the order in this matter, I was totally unaware of the settlement above referred to, by and between the said Evans & Evans and the said Malloch, and that the said Malloch would render the same account over again." He also added, he immediately raised this objection before the master, when he found the new bills were for the same costs and charges almost entirely as those contained in the first bill, and that the same had been nearly all paid and settled between the parties; and that there ought to have been about £50 found by the master as due to the Messrs. Evans; while, if his report stand, and the first bill, so settled, were ignored, they would, instead, be indebted to him.

The report of the master, which is dated the 13th June last, found that there was the sum of £75 12s. 4d. allowable to Mr. Malloch on the bills which were taxed; that Mr. Malloch had collected for the Messrs. Evans £141 10s. 6d., and had paid to them £66 15s. = £74 15s. 6d., leaving due to Mr. Malloch £16 10s.; and, as more than one-sixth had been disallowed from the bills, that Mr. Malloch should pay the costs of the application.

Several affidavits were filed by Mr. Malloch, in answer to this application.

In his affidavit of the 16th July, he said, "The bill firstly rendered was given as a mere statement of the indebtedness of the Messrs. Evans to him, and was given at the request of one Edwin Evans, the agent of the Messrs. Evans, for the purpose of striking a balance, but not for the purpose of taxation; and it was agreed that he (Mr. Malloch) should hand the accounts to some professional person in Brantford, to have them revised by him; and that such professional person should say what were proper charges against the Messrs. Evans, and which was to have been the only taxation between them; and that the account was accordingly referred to Messrs. Hardy, practising attornies in Brantford. That if he had known the Messrs. Evans intended to rely upon the bill and receipt referred to, he should have asked the court for leave to render a new bill, upon the grounds above stated; and also upon the ground, that the receipt was obtained from him by fraud and misrepresentation, inasmuch as Edwin Evans, after admitting the correctness of the account, said that his employers were anxious to make as much out of Bishop's estate as possible, and agreed, if Malloch would reduce the amount of his account, that he (the agent) would thenceforth retain Malloch as the attorney of the Messrs. Evans, and that he (Malloch) should have all their legal business in Upper Canada; and that the costs on such a retainer would yearly amount to a considerable sum; and that he (the agent) would immediately send Malloch a large amount of business—more than sufficient to compensate for the loss that would be sustained by any deduction on the account; and that he (Malloch), relying upon this engagement, agreed to take $160 in full, with the understanding that if the Messrs. Evans failed to carry out the agreement, they should return to him (Malloch) the receipt, to be cancelled; and that the Messrs. Evans had not fulfilled the agreement.

Mr. James Kerby made affidavit that he heard the agreement made betwen Malloch and Edwin Evans just mentioned, and that he (Kerby) advised Malloch to make the deduction for the consideration mentioned.

George G. Laird made affidavit, that Mr. McMurray, for the Messrs. Evans. did not object to the taxation of the new bills rendered by Malloch; and that it was not until the master had finished the taxation in which he had been engaged for several days, and had ascertained the gross amounts thereof, that Mr. McMurray produced a statement of account and receipt attached, which had been delivered by Malloch to the Messrs. Evans; and claimed that the master should act upon such statement or account, which the master, on cause shown, refused to do.

Mr. Malloch, on the 26th July, made another affidavit, to the effect, that before the order was made for taxation, he wrote to Mr. McMurray to send him the bill before then rendered to the Messrs. Evans, as he could not, without such bill, make out the bill he was called upon to deliver; to which Mr. McMurray answered on the 14th May: "I cannot assist you in any manner with your bills, but will do all I can for you in reason." That on the return of the summons calling upon him to show cause why his bills should not be delivered and taxed, he sent an affidavit, which he believes was filed, to the effect that he had already rendered his bill to the Messrs. Evans, which they must have. That he believed the application to deliver a bill was with the speculative view, that if on taxation the bill delivered was found to be less than the settlement, then the Messrs. Evans would accept such a settlement; but if it were found to be larger than the sum mentioned in the receipt, then the Messrs. Evans would rely upon the receipt for a settlement.

Mr. McMurray, in an affidavit of the 23rd August, stated, that the Messrs. Evans did not consider the bill delivered in October, 1862, with the receipt of March, 1863, endorsed upon it, as a settlement; that they considered the charges to be exorbitant, and were desirous of having the same taxed as it stood, considering it a basis for settlement, without opening it up further than by taxation; that they believed Mr. Malloch was bound by the delivery of the first mentioned bill; and that he believed the Messrs. Evans were and are satisfied to allow the bill for serving the attaching orders to stand at the sum mentioned in the receipt, subject to any costs and charges which may have been incurred since such settlement.

R. A. Harrison showed cause. The new bills were expressly called for. No objection was raised to such new bills till the taxation had proceeded to great length before the master. When the objection was raised to the new bills, the master heard the parties, and decided against the objection. There had been no delivery of such a prior bill as was binding upon the attorney; but if there had been, it was upon such terms that Malloch should have been relieved from the bill so procured from him. And as to the charges, which are said to be of the character usually made for services performed by a bailiff, they ought to be paid, because the services were performed, and were such services as could be conveniently and economically performed by the clerk in the attorney's office. He cited 1 Ch. Arch. Pr. 9 ed. 106; *Smith* v. *Taylor*, 7 Bing. 263; *Ex parte Glass*, 9 U. C. L. J. 111.

McMurray, in support of the summons, insisted that the attorney was bound by his first bill; that there was no intention to have a new bill, but to have the former one referred for taxation; and that the attorney should not have been permitted to furnish such new bill; nor should the master have acted upon it, nor allowed the charges for the services before mentioned. He cited *Jones* v. *Ketchum*, 3 U.C. L.J. 167; *Loveridge* v. *Botham*, 1 B.& P.49.

ADAM WILSON, J.—The revision is asked chiefly because a greater portion of the costs taxed and allowed to Malloch were rendered in a former bill, which was paid and settled by the Messrs. Evans, in March, 1863.

This being the case, it is singular that the Messrs. Evans should have taken out an order upon Mr. Malloch to deliver a bill of costs of all causes and matters wherein he had been concerned for them, without any limitation as to time or otherwise, and should have accepted such new bill as a proper delivery, and should have proceeded with the taxation upon it, and should for the first time have objected to it after the result of the taxation and balancing of the accounts had been ascertained.

There are three views with respect to the conduct of the Messrs. Evans. 1st. They may have refused to recognize the former bill and the payment upon it as a settlement of the matters contained in it, and may have deliberately desired to procure a taxation and accounting, without regard to the former bill, and to have a new bill because the charges in the first one were large and exorbitant. 2nd. They may have desired to hold Mr. Malloch to the first bill,

and to have that taxed, only disputing the fact of a settlement of it having been finally made. 3rd. Or they may have accepted the first bill as a settlement, and desired only to have such costs taxed as had been incurred subsequent to the settlement.

The summons of the 9th May, and the order made upon it, of the 30th of that month, take the first ground, for nothing can be more comprehensive than their language. The papers also, which were filed by the Messrs. Evans on that occasion, contain the first bill rendered, and a statement made by Mr. McMurray, "that the charges in the bill on which the receipt of the $160 is endorsed, appear to be very large and exorbitant."

The request made by Mr. Malloch to Mr. McMurray, after the summons to deliver a bill had been served, to send him his former bill to enable him to make out a new bill, shows Mr. Malloch's idea, that he was called upon to deliver new bills altogether; and the letter of Mr. McMurray, refusing to assist Mr. Malloch in any manner with his bills, shows that Mr. McMurray was calling for new bills altogether, and did not desire to accept of the first bill as one which was to be binding either on his clients or on Mr. Malloch.

The reference of the new bill to the master, with the first one in their attorney's possession all the time, is a very strong indication to the like effect against the Messrs. Evans, as well as the fact that the objection to the taxation of the new bill was never raised until after the result of the reference to the master had been ascertained.

If the second ground be relied upon, it is not unreasonable, according to the facts which have been stated by Mr Malloch, that he should have claimed the right to deliver a new bill. But it is extraordinary that the Messrs Evans should not have asked specially for further details and particulars of the identical bill, which would have bound down Mr. Malloch to this particular bill, and effectually have excluded him from interposing any other bill in its stead.

The third ground is not tenable; because it appears from Mr. McMurray's affidavit of the 9th May, that he considered the charges in the first bill to be "very large and exorbitant," and it was upon this affidavit, and the papers then attached to it, upon which the summons and order to deliver a bill "of all causes and matters" wherein Malloch had been concerned for the Messrs. Evans, were granted. He must therefore have taken out the summons to procure a reference of these large and exorbitant items, for he manifestly did not assent to them. This is a perfect answer to the third ground.

There is a passage in Mr. McMurray's affidavit of the 1st July, above quoted, which cannot be quite correct. Perhaps it is some oversight or mistake, for it certainly does not square with the other facts of the case.

Mr. McMurray, as has been said, and as appears, had the first bill in his possession, with the receipt of the $160 endorsed upon it, when he applied for the summons, on the 9th May; for it appears to have been transmitted to him by the Messrs. Evans, on the 15th April; and he annexed a copy of it to his affidavit of the 9th May, when he applied for the summons; and he stated in that affidavit, that the charges in the bill appeared to be very large and exorbitant; and he also declined, on the 14th May, to assist Mr. Malloch with his old bill in any manner. The order to deliver a bill was not granted till the 30th May, long after all these proceedings had taken place After all this, and after the taxation had been concluded, Mr. McMurray, in his affidavit of the 1st July, says, as before quoted: "At the time of taking out the order in this matter, I was totally unaware of the settlement above referred to by and between the said Evans & Evans and the said Malloch, and that the said Malloch would render the same account over again."

Now, he must have been aware of the settlement, one would think, when he took out the order; for the bill, which was in his possession, and which he had so often referred to, had upon its back the receipt before mentioned of $160 in full "of the within account to date." And if the ground which he is taking in the present application, and set forth at large in his summons, be correct, "that a greater portion of the costs allowed to Malloch are the same costs which were rendered in the former bill by Malloch to his clients, and which were paid and settled in full on the 27th March, 1863, as appears by the receipt endorsed on the bill, and the same should not be charged a second time, but only such costs should be charged as have been incurred subsequent to the settlement," then it is quite clear that Mr McMurray must have been, or should have been at all events, aware of this settlement when he took out the order; for his argument at present is, that his order did not call for more than a bill of those charges which had accrued since the time of the settlement. But it is this very position which cannot be reconciled with the fact of his perfect knowledge of the settlement all this time.

I think, therefore, that the Messrs. Evans did intend at the first, and have intended throughout, down to the close of the taxation, not to recognize the first bill delivered at all, or to admit that it had been settled, but intended to go back to the beginning of their transactions with Mr. Malloch, and to have a settlement with him, as if the settlement of March, 1863, had never been made. Their whole proceedings correspond with this view, and no other view but this one could have been taken by Mr. Malloch, or by the master, or can now be accepted.

But what is it, after all, of which the Messrs. Evans complain? It is not that Mr. Malloch has received more on the taxation than he was entitled to; because it cannot be supposed that after so long and rigid an opposition, the master has allowed to Mr. Malloch anything to which he was not strictly entitled. It is true, it is said he has been allowed for services which ought to have been performed by a bailiff; but I am not satisfied that such services ought to have been performed by a bailiff, and I am rather inclined to think that they were more properly performed by a clerk in Mr. Malloch's office, who was under his own inspection. The allusion to a bailiff's services and charges should not have been made against a professional gentleman, and more particularly by another professional gentleman, unless the allusion were really called for, and was fully justified; and I think I must say I do not think it was. The courtesy which should govern gentlemen of the same profession, should induce them rather to spare the use of epithets, even when they might be strictly warranted, than to resort to them when they are not called for or cannot be justified.

I should have thought, after the decision of the master, this matter would have been permitted to end; but it has been followed up when no injustice has been done—when all that is now complained of was occasioned by the applicants' own special proceedings to re-open the whole transaction, and when perhaps great hardship would be imposed upon Mr. Malloch by holding him to a bill delivered under special circumstances, and on a special bargain, which has been since broken by the Messrs Evans;—I say broken, because, although this fact has been directly sworn to for some months past by Mr. Malloch, the parties principally concerned in the fact have not yet thought proper to answer it.

I must therefore discharge this application, and direct that all the costs attending it shall be paid by the Messrs. Evans to Mr. Malloch.

Summons discharged with costs.

In the matter of George Bigger.

Habeas corpus—Where custody not for criminal or supposed criminal matter—Imperial statute 56 Geo. III cap. 100, not in force here—No right to go behind writ or warrant on habeas corpus to determine legality of custody

Where, upon the return of a writ of *habeas corpus*, it appeared that the prisoner was in custody under a writ of *capias*, issued out of County Court, regular on its face, but which, it was contended, had been improperly issued, a judge sitting in Chambers refused to discharge the prisoner.

Quære—As to the right of a judge sitting in Chambers in Upper Canada to order the issue of a writ of *habeas corpus*, where the custody is not for criminal or supposed criminal matter; the Imperial statute 56 Geo III. cap. 100, not being in force in this colony (*In re Hawkins*, 9 U. C. L. J. 298, doubted).

(Chambers, Sept. 14, 26, 1864.)

On the 27th August last, Ann Moore, of the township of Morris, in the county of Huron, widow, having commenced an action against George Bigger, in the county court of the united counties of Huron and Bruce, made affidavit, at Goderich, in the said united counties, that the defendant was justly and truly indebted to her in the sum of $105, for goods sold and delivered by her to defendant; that she was informed, and verily believed, that defendant was about "to leave the country," and with intent to

defraud her of her said debt; that defendant stated to "several" that he was "going to leave this country," and that defendant was making away with his property.

Susannah Denison, also of the township of Morris (not described by addition of calling or otherwise), made affidavit that she had heard read the affidavit of plaintiff, and that the same was in all respects true; that defendant informed her it was his intention to "leave the country at once," and unless forthwith arrested plaintiff would lose her debt.

The judge of the county court, upon reading these affidavits, made an order for a writ of *capias* to issue, which was accordingly issued out of the county court, and defendant was arrested thereunder, and placed in close custody.

Mr. Justice Adam Wilson, upon the application of defendant's counsel, showing the foregoing facts, ordered a writ of *habeas corpus* to issue, directed to the judge of the county court, the sheriff, and the keeper of the common gaol.

The writ was in the following form:

Victoria, &c.

[L.S.] To the judge of the county court of the united counties of Huron and Bruce, the sheriff of the said united counties, and the keeper of the common gaol in and for the said united counties:

We command you the said sheriff and the said gaoler severally, that you have before the presiding judge in chambers, at Osgoode Hall, in the city of Toronto, forthwith, the body of George Bigger, detained in the common gaol of the united counties of Huron and Bruce, in the custody of you the said sheriff, and of you the said *gaoler, as it is said, under safe and secure conduct, together with* the day and cause of his taking and detainer, by whatsoever name he may be called therein, and this writ. And we command you the said judge, that you do forthwith certify to this court, at the place aforesaid, all things touching the same had, taken or done by or before you the said judge, that we may further cause to be done what of right and according to law we shall see fit to be done.

Witness The Honorable William Henry Draper, C.B., Chief Justice, at Toronto, in the county of York, this ninth day of September, in the year of our Lord, 1864.

(Signed) L. HEYDEN.

Per statutum tricesimo primo Caroli secundi Regis.

(Signed) ADAM WILSON, J.

The judge, as commanded, returned the original affidavits and other proceedings had or taken before him. The sheriff returned, that George Bigger was arrested by him on the 27th August last, on a writ of *capias*, issued out of the county court of the united counties of Huron and Bruce, against George Bigger, bearing the date last mentioned, and purporting to be issued upon the order of the county judge, under which said writ he detained the prisoner. The gaoler returned, that he held the prisoner in custody under a warrant from the sheriff, which he annexed to his return.

The writ was returned before Mr. Justice Hagarty, on the 14th September last, and was on that day, upon application of prisoner's counsel, filed.

HAGARTY, J. — How was this writ issued in vacation? It does not appear that the prisoner is in criminal or supposed criminal custody, and the English statute 56 Geo. III. cap. 100, extending the statute of Charles to other cases, is not in force in this colony.

Mr. Harrison—Mr. Justice Adam Wilson has held, after argument, that a judge in Chambers has power at common law to order the issue of a writ of *habeas corpus*, although the custody be not for criminal or supposed criminal matter (*In re Hawkins*, 9 U. C. L. J. 298).

HAGARTY, J.—I have examined the case to which you refer, and the authorities there cited, and I cannot bring my mind to the conclusion at which Mr. Justice Adam Wilson has arrived.

By consent of parties, the prisoner not being present, the further hearing of the argument was enlarged till a future day.

On the 26th September last, the case was argued before Mr. Justice John Wilson.

Robt. A. Harrison, for the prisoner, argued, 1st, that the *habeas corpus* was properly issued; 2nd, that if not properly issued, advantage of the irregularity, if any, could only be taken on an application to quash the writ; 3rd, that the *capias* was issued upon affidavits, which did not, under the statute, authorize their issue, and so the custody was illegal; 4th, that if the custody were illegal, though the writ for arrest and detention was on its face legal, there was power to go behind it and examine the materials on which it issued, and if none, or if not sufficient, to discharge the prisoner; 5th, that an application to a judge of the superior court was not a conclusive but a concurrent remedy. He referred to *In re Hawkins*, 9 U C.L.J 298; *In re Ross*, 10 U.C.L.J. 133; *Ex parte Dakins*, 16 C. B. 77, 93, 94; *Perrin* v. *West*, 3 A. & E. 405; *Ex parte Foulkes*, 15 M. & W. 612; *Ex parte Kinning*, 4 C. B. 507; *Ib.* 10 Q. B 730; *Dood's case*, 2 De G. L. J. 510; *Ex parte Lees*, El. B. & El 828; *Eggington's case*, 2 El. & B. 717; *Carus Wilson's case*, 7 Q. B. 984; *Graham* v. *Sandrinelli*, 16 M. & W. 191, 194; *Brown* v. *Riddell*, 13 U. C. C. P. 460.

Gwynne, Q. C., contra, contended 1st, that the writ was improperly issued; 2nd, that the objection was open to him in showing cause against the prisoner's discharge; 3rd, that the court could only look to the face of the cause for detention by the writ of *capias*; 4th, that, it being regular on its face, the prisoner must be remanded; 5th, that defendant's only remedy was to apply to the judge of the court out of which the writ issued. He cited *In re Cobbett*, 3 L. T. N. S. 631.

JOHN WILSON, J.—I do not think the writ of *capias* should have been issued upon such defective materials as appear to have been used in the county court. This also, I believe, is the opinion of my brother Hagarty. But I am unable to see my way to the discharge of the prisoner on the present application. I must remand him. He may, however, if so advised, apply at any time for another writ, either to the full court or to another judge.

Prisoner remanded.

PRUDHOMME v. LAZURE.

Certiorari—Application for, by plaintiff, refused.

Held, that a plaintiff is not entitled to a writ of certiorari to remove his own plaint from a Division Court, he having deliberately selected that tribunal for the trial of it.

(Chambers, October 3, 1864.)

A summons was granted by Mr. Justice John Wilson, on the application of the plaintiff, to shew cause why a writ of *certiorari* should not issue, to remove a plaint from the first Division Court of the County of Carleton, to the Court of Common Pleas.

The ground of the application was, that the defendant had put in a set off to the plaintiff's claim, which it was alleged would bring up difficult questions of law.

It appeared from the affidavits, that the plaintiff was aware of this claim of the defendant, for on a former occasion defendant had sued for it, and the now plaintiff had obtained a *certiorari*, which, however, was rendered abortive by the then plaintiff abandoning his suit.

O'Brien, shewed cause and took the objection that a plaintiff cannot remove his own cause from a Division Court by *certiorari*. He referred to *Dennison* v. *Knox*, 9 U. C. L. J. 241, and the cases there cited.

MORRISON, J.—I must discharge this summons—the plaintiff can discontinue in the Court below at a trifling expense, whereas a proceeding to compel defendant to appear in the Court above, is full of doubt and attended with considerable expense. I am told that other judges have granted orders of this kind, but I do not consider that a plaintiff has a right to remove his plaint from the court he has deliberately selected.

Summons discharged with costs.

IN RE MCDERMOTT.

Attorney's bill—Act respecting railways—Taxation of costs—By whom.

Held, that Con. Stat. C., cap. 66, s. 11, sub-s. 12, respecting railways, and providing for the taxation of the costs of a railway arbitration by the judge of the County Court, does not deprive the court or a judge of their general jurisdiction under Con Stat. U. C., cap 35, to refer a bill of costs to taxation by the master of one or other of the Superior Courts of Common Law, it being shown that some of the items contained in the bill were in respect of work done in one of the Courts.

(Chambers, October 5, 1864.)

James Patterson, obtained a summons calling upon Henry McDermott, an attorney, to show cause why the bill of costs, fees,

charges and disbursement in the matter of the reference between Charles Widder and the Buffalo and Lake Huron Railway Company, and delivered by him to that company, should not be referred to the master for taxation, and why the said McDermott should not give all proper credits, and why the master should not tax the costs of the reference and certify what upon such reference should be found due in respect of such bill and demand and the costs of such reference, on grounds disclosed in affidavit and papers filed.

The affidavit on which the summons was obtained, was that of E. B. Wood, solicitor of the company, showing that the bill of costs sought to be referred, had been served on the secretary of the company on 1st September, that in the belief of the deponent the award in respect of which the charges were made was invalid, that notice of desistment under sub sec. 16 of sec. 11 of Con. Stat. C., cap 66, respecting railways, had been served on the arbitrators before they made their award, and also upon McDermott the attorney for Widder, that under the operation of the statute the company became liable to Widder for costs by him incurred and damage sustained by such desistment, that the bill sought to be referred was served on the company, as containing the items of the damage and costs incurred by Widder on the reference, that the company were ready and willing to pay the amount of the bill or what should be found to be due thereon upon taxation.

The bill which amouted to £126 3s. 1d., contained charges for proceedings had on the reference, including items for business done in the Court of Queen's Bench, such as applying for and obtaining writs of subpœna, to compel the attendance of witnesses.

John McBride, showed cause, contending that the only power to tax a bill of the nature of that delivered, is under Con. Stat. C., cap. 66, sec. 11, sub-sec. 12, which provides that the costs of the arbitration if not agreed upon, may be taxed by the County Judge, and that the taxation should be had before him, and not before the master of the court.

Robert A. Harrison, supported the summons, contending that under Con. Stat. U. C., cap. 35, the court or a judge possesses a general jurisdiction to refer an attorney's bill for work done in either of the Superior Courts of Common Law to taxation, that where a bill delivered contains some items of that kind it draws with it the remaining items in the bill, though not for work done in a court so as to render the *whole bill liable to taxation by the* officers of the court, that the special provision under the railway act, to which reference was made by Mr. McBride, is not intended to exclude the general jurisdiction of the court or a judge over attorneys in regard to their bills of costs, but rather is cumulative to it, the language being "may" not *must*, which by the interpretation act is permissive, not obligatory. He referred to Con. Stat. U. C., cap. 85, sec. 27; Con. Stat U. C, cap. 2, sec. 18, sub-sec. 2; *In Re Greenwood*, 10 U. C. L. J. 131.

JOHN WILSON, J.—I am of opinion that this summons must be made absolute. It seems to me that Con. Stat. C., cap. 66, sec. 11, sub-sec. 12, does not deprive the court or a judge of their general jurisdiction, under Con. Stat. U. C., cap. 35, to refer an attorney's bill to taxation. I think this is a bill that ought to be referred to the master of this court under the latter statute, and shall so order.

Order accordingly.

IN THE MATTER OF THADDEUS K. CLARKE.

Foreign Enlistment Act, 59 Geo. III cap. 69, s. 4—Form of Warrant of commitment.

A warrant of commitment under the Foreign Enlistment Act, 59 Geo. III cap. 69 s 4 reciting that Thaddeus K Clarke "was this day charged (not saying upon oath) before us," and without showing any examination by the magistrates, upon oath or otherwise, into the nature of the offence, commanding the constables or peace officers of the county of Welland to take the said Thaddeus K. Clarke into custody, was held sufficient.

A warrant of commitment under the statute, committing the prisoner until "discharged by due course of law," sufficiently complies with the statute, which provides for a commital until delivered by due course of law.

A warrant executed by two parties, and concluding "given under our hand and seal," held sufficient.

(Chambers, October 6, 1864.)

On the first day of October last, Mr. Justice Morrison, sitting in Chambers, upon the application of prisoner, who was detained in the custody of the keeper of the common gaol in and for the county of Welland, granted a writ of *habeas corpus* directed to the gaoler, commanding him to have the body of Thaddeus Kinsley Clarke under safe and secure conduct, together with the day and cause of his being taken, &c., before the Chief Justice of Upper Canada or other Judge of one of the Superior Courts of Common Law for Upper Canada, presiding in Chambers, immediately after the receipt of the writ, to do and receive, &c.

The learned judge who granted the writ indorsed upon it, at the request of prisoner's counsel, a memorandum to the effect that the presence of the prisoner was not required before the Judge.

On the sixth day of October last, the writ was returned by the gaoler, and to the writ as part of the return was annexed the following warrant:

Province of Canada, County of Welland, to wit: } To all or any of the Constables or other Peace Officers of the County of Welland, and to the Keeper of the Common Gaol in and for the said County of Welland.

Whereas Thaddeus K. Clarke, of Port Colborne, was this day charged before us, John Thompson and Matthew F. Haney, two of her Majesty's justices of the peace in and for the said county of Welland, on the oath of John J. Neff, that he the said Thaddeus K. Clarke, at Port Colborne, in the county of Welland, on the seventeenth day of September, one thousand eight hundred and sixty-four, did engage John J. Neff and Henry Miner to go to Buffalo and enlist as soldiers in the military service of the United States of America.

These are therefore to command you, the said constables or peace officers, or any one of you, to take the said Thaddeus K. Clarke and him safely convey to the common jail at Welland aforesaid, and there deliver him to the keeper thereof, together with this precept.

And I do hereby command you, the said keeper of the said common jail, to receive the said Thaddeus K. Clarke into your custody in the said common jail, and there safely to keep him until he shall be discharged by due course of law.

Given under my hand and seal this twenty-ninth day of September, in the year of our Lord 1864, at Humberstone, in the said county of Welland.

(Signed) JOHN THOMPSON, J. P. [L S]
(Signed) M. F. HANEY, J. P. [L.S.]

Robert A. Harrison asked leave to file the writ and return, and upon filing it moved for the discharge of the prisoner upon the following grounds:

1. That it was not shown that the prisoner had been charged *on oath*.
2. That it was not shown that the magistrates had examined into the nature of the offence *upon oath*.
3. That it was not shown that the magistrates had in any manner examined into the nature of the offence charged.
4. That unless there was both a charge on oath and an examination on oath, there was no jurisdiction to commit for trial.
5. That all things necessary to show jurisdiction should be made to appear on the face of the warrant.
6. That the warrant was for the commital of the prisoner until "*discharged* by due course of law," and not until "*delivered* by due course of law," which is the language of the statute.
7. That the warrant being executed by two justices, and only one seal, and given under "*my* hand and seal," &c., was bad.

He referred to Imperial Statute 59 Geo III. cap 69, s 4.

S. Richards, Q C., showed cause. He argued—

1. That the maxim *omnia presumuntur rite esse acta* must be held to apply to warrants of this kind.
2. That a different rule prevailed in the construction of warrants granted by magistrates exercising a summary jurisdiction.
3. That it was not necessary in the warrant either to show a charge on oath or a hearing on oath.
4. That the expressions "discharged by due course of law" and "delivered by due course of law" were synonymous.
5. That the teste warrant, according to the decision *In re Smith*, 10 U. C L. J. 217, was sufficient.

Harrison, in reply, referred to Con. Stat Can. cap 102, sch. B.

JOHN WILSON, J.—The statute 59 Geo III. cap. 69, s 4, enacts "that it shall and may be lawful for any justice of the peace,

&c., on information *on oath* of any such offence, to issue his warrant for the apprehension of the offender," &c., and "it shall be lawful for the justice of the peace before whom such offender shall be brought to examine into the nature of the offence *upon oath*, and to commit such person to gaol, there to remain until *delivered* in due course of law," &c.

I cannot presume as against this warrant that the magistrate failed to perform his duty in respect to the taking of the information and the examination into the nature of the indictable offence. Unless the contrary be shewn, I must presume that he did what the statute says he ought to have done.

This disposes of the first five objections raised against the warrant of commitment.

I do not attach any importance to the sixth objection, for I think the warrant substantially complied with the statute.

The seventh objection is not tenable in the face of my decision *In re Smith*, 10 U. C. L. J. 247.

I therefore remand the prisoner.

Order accordingly.

TORRANCE ET AL v. HALDEN ET AL.

Debtor in custody—Time for charging in execution after render—Supersedeas.

In case of a surrender of a debtor by his bail after judgment, plaintiff must proceed to execution within two terms after the surrender and notice, and a render in vacation is to be deemed as a render of the preceding term, so as to make that term count as one

Where judgment was obtained on 14th January, defendant at the time being on bail, and he was on 21st May following, in the vacation preceding Trinity Term, surrendered by his bail, of which notice was given to plaint.'s. and the whole of Trinity Term allowed to elapse without any thing being done towards execution, defendants was superseded.

(Chambers, October 7, 1864.)

Defendant, John Henry Halden, on 27th September last, obtained a summons calling on the plaintiffs to show cause why he should not be superseded as to this action and discharged from custody therein, upon the ground that the plaintiff had not caused him to be charged in execution in due time according to the rules and practice of the court, and on grounds disclosed in affidavits and papers filed.

The affidavits filed, show that the action had been commenced by the issue of a writ of summons on 27th November, 1863, that a writ of *capias* for the arrest of defendant issued on 16 December, 1863, that on 21st of same month defendant having been arrested, put in special bail, that final judgment was obtained on 14th January last, that on 21st July last, defendant was rendered in discharge of his bail and notice thereof served, that ever since he had been a prisoner in close custody, that no *ca sa.* had been issued and, although three terms had elapsed after judgment, he had not been charged in execution.

S. Richards, Q.C., showed cause. He contended that as defendant was not a prisoner in close custody at the time judgment was rendered, he was not within the meaning of Rule 99 (Har. C. L. P. A. p. 637) which requires the defendant to be charged in execution within the term next after judgment, that the only rule at all applicable, is the English Rule in K. B. of H. T. 26 Geo. III. which provides for the prisoner's discharge if not charged in execution within *two* terms after render, and as Trinity Term only had elapsed since his render, he argued his application for discharge was premature. He cited *Brash v. Latta*, 5 U. C. L. J. 226; *Curry v. Turner*, 9 U. C. L. J. 211.

Robert A. Harrison, in support of the summons, admitted that our Rule No. 99 was inapplicable, but argued that upon the proper construction of the English Rule of K. B., H. T., 26 Geo. III. the vacation in which the debtor was surrendered related to the preceding term which was Easter in this case, so as to make that one term, which, added to the Trinity Term, made the two terms necessary to enable defendant to obtain the benefit of the English Rule. He referred to *Borer v. Baker*, 2 Dowl. P. C. 608; *Foulkes v. Burgess*, 2 M. & W. 849; *Baxter v. Bailey*, 3 M. & W. 415; *Thorn v. Leslie*, 8 A. & E. 195.

JOHN WILSON, J.—It is admitted by both parties that the practice as it existed before the Common Law Procedure Act is to govern this case.

The old practice in the Kings Bench was governed by the Rule of H. T., 26 Geo. III, and in the Common Pleas by the Rule of E. T., 8 Geo. I. Tidd, in the 9th Edn. p. 360, lays down this Rule as follows:—"In case of a surrender in discharge of bail after final judgment obtained, the plaintiff should cause the defendant to be charged in execution within two terms next after such surrender and due notice thereof, of which two terms the term of the surrender is one." And at p. 563, Tidd says, "In case of a surrender in discharge of bail after final judgment obtained, unless the plaintiff shall proceed to cause the defendant to be charged in execution within two terms next after such surrender and due notice thereof, of which two terms the term wherein the surrender was made shall be taken as one, the prisoner shall be discharged out of custody by *supersedeas*. Lush in his Practice at p. 657, lays down the same rule. In case of a surrender after judgment the plaintiff must proceed to execution within two terms inclusive; a render in vacation being deemed a render as of the preceding term so as to make that term count as one. See also *Thorn v. Leslie*, 8 A. & E. 195; *Baxter v. Bailey*, 3 M. & W. 415; *Borer v. Baker*, 2 Dowl. P. C. 608.

I am of opinion that this defendant ought to have been charged in execution during last Trinity Term, and that as he was not so charged there must be a *supersedeas*.

Order accordingly.*

CHANCERY CHAMBERS.

(*Reported by* ALEX GRANT, Esq., *Barrister-at-Law, Reporter to the Court.*)

HARRIS v. MYERS.

Contempt—Non-payment of money ordered—Practice.

The court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one who has been guilty of a contempt of court, it may imprison him for a stated period, allowing him to be discharged if he pay the costs of his contempt before the expiration of such period.

The court will entertain applications affecting the liberty of the subject during long vacation.

Poverty is no excuse for delay in making an application to the court, as in such case the party can apply in *formâ pauperis*.

Spencer applied on the 1st September, 1864, for an order to release the defendant from custody, and to discharge the order for his arrest. It appeared that an order had been made by his Honor Vice-Chancellor *Esten*, directing the defendant to pay certain past due rents to the receiver appointed in the cause, and also to execute to such receiver a deed of attornment, to secure the payment of accruing rents, or in default that he should be committed. The defendant had disobeyed this order, and had been committed to gaol, where he had been since the 27th May, 1864. It was alleged that the decree directed the defendant to pay the past due rents, but did not direct him to execute any deed of attornment, and counsel contended that the order granted by his Honor Vice-Chancellor *Esten* was therefore wrong, it being in reality, in respect to the direction to execute the deed of attornment, an order *nisi*, not founded on any previous order, which he contended was clearly irregular by analogy to the ordinary mode of enforcing production, as to which an order *nisi* was never granted without a previous order to produce being taken out and served. He contended that the order was therefore good only as concerned the payment of the past due rents, and as to that, the defendant could not be detained in gaol, as it would be contrary to the statute. He also contended that the defendant had a right to have the deed of attornment settled under the direction of the court.

Hodgins, contra, urged that the defendant had been guilty of laches in moving against the order.

Spencer, in reply, excused the delay on the ground that long vacation had intervened, and that the defendant was too poor to pay fees to get his discharge.

VANKOUGHNET, C., said that the intervention of long vacation was no excuse for the delay, as the court would always hear applications affecting the liberty of any one during vacation, nor could the court listen to the plea of poverty, as the party can in such case come to the court *in formâ pauperis*. But apart from

* A similar order was made by Mr Justice John Wilson, in a case of *Crathern et al. v. Halden et al*, where the facts were substantially the same as in the foregoing case.—Eds. L. J.

any delay in the matter, his Lordship declined to enter into the merits of the order made by his Honor Vice-Chancellor *Esten*, as he could not review that order, the proper course to do so being an appeal to the full court. His Lordship then said he would make an order discharging the defendant upon his executing the deed of attornment, without keeping him any longer in gaol for the non-payments of the rents, remarking that the court will not now put or detain a person in gaol merely for the non-payment of money, but that where a person has been guilty of a contempt which he has cleared without paying the costs of it, the court may order him, as a punishment for his contempt, to be imprisoned for one, two, or three months, or longer, according to the magnitude of his offence, unless he, before the expiration of the time limited, pay the costs of his contempt, upon which he would be discharged In this case his lordship thought that the defendant had been punished enough already, and would allow him to be discharged upon his executing the deed of attornment, giving the plaintiff the same right as if, executed within the time appointed, the plaintiffs to have their costs, to be obtained by *fi. fa.* in the usual way.

Baxter v. Finlay.

Advertisement for sale—Puffing.

Advertisements for sales under the direction of the court should be as short as possible, the short style of the cause and a short description of the property and improvements is sufficient, and no merely formal parts, such as convey no information to intending purchasers, should be inserted therein The practice of puffing animadverted upon.

This was an application for a vesting order of property in which infants were concerned. *Taylor* contra, for the infants, alleged that no notice had been given to them of the settlement of the advertisement and other proceedings in the master's office.

Vankoughnet, C., decided that the want of notice to the guardian vitiated the sale, and that there must therefore be a re-sale: and as to the advertisement. his Lordship remarked that the mode in which advertisements were drawn up was very much longer than there was occasion for, so as unnecessarily to increase the expense of the suit without any benefit to any one concerned. His Lordship said it was quite sufficient to insert the short style of cause, and that it was unnecessary to describe the property by metes and bounds, as the court always recognized a description such as "lot A, in the first concession," as a legal description. His Lordship also animadverted upon the practice of puffing, which he had noticed in several advertisements. He said it was proper that an advertisement should contain a truthful description of all improvements on the property, such as buildings, &c., but that anything like puffing was very improper. His Lordship also said that he had directed the master here to settle advertisements in the manner indicated, and had also instructed the registrar to send similar directions to the deputy masters throughout the country, but that notwithstanding, he had a short time since seen an advertisement in which the style of the cause occupied the half of a column of a newspaper.

Reporter's note.—His Honor, *V. C. Sprague*, in settling an advertisement for sale in *Buchan v. Wilkes* on the 23th June, 1864, struck out the dates of the final order, and other formal parts, as being unnecessary and conveying no information to intending purchasers It is presumed that, in conformity with these decisions, solicitors and deputy masters will frame and settle advertisements for sale accordingly.

Grainger v. Grainger.

Foreclosure—Bills filed on registered judgments—Stat. 24 Vic., ch. 41—Proceedings in Master's office.

On proceeding in the master's office, upon a reference as to incumbrances in foreclosure cases it is not necessary to make search in the office of any deputy-registrar of the court to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed.

This was a foreclosure suit, and a decree had been obtained with the usual reference to the master to inquire as to incumbrances. The master, when the decree was brought into his office, said that he would require to be satisfied that no bill had been filed on or before the 18th of May, 1861, in any of the outer counties, on a judgment registered against the defendant, which he held to be necessary under the 24 Victoria, ch. 41, which, in his opinion, gave the plaintiff in any such suit a lien upon the lands of the judgment debtor for all purposes.

Edgar, for the plaintiff, appealed from this direction contending that in order to satisfy the requirements of the master it would have been necessary to make a search in the office of every deputy-registrar in the province; and even then it would be impossible to ascertain whether some unknown assignee of a judgment creditor might not have filed a bill.

After conferring with the other members of the court.

Spragge, V. C., (before whom the point was argued.) But for the 11th section of the Act 24 Vic., ch. 41, registered judgments would in all cases have ceased to be a lien from the 18th of May, 1861: and the only effect of that section is that the act shall not affect suits then pending in which registered judgment creditors are parties. The master has treated it as if the incumbrances were preserved for all purposes, instead of being confined to the suits in which the judgment creditors were parties. It is only their rights *in those suits* that are preserved, and it is unnecessary, therefore, to make them parties to other suits.

Reporter's note.—It has been considered by several of the practitioners that the effect of this decision was to exclude any such judgment creditor from all claim, both upon the proceeds of the estate and on the estate itself; this view, however, may be questioned, for it is submitted that if there were any such judgment creditor with bill filed on or before the 18th of May, 1861, who, for any reason, was entitled to priority over either the plaintiff or an incumbrancer added in the master's office, although the purchaser of the estate under the decree for sale, would take a good title, such judgment creditor would have a right, before the fund was distributed, to be paid his claim in priority to those subsequent to himself; whatever doubt there may be as to his right to call upon any of the subsequent incumbrancers to refund, and, in the event of foreclosure, that he would be entitled to call upon the party, who had obtained the final order, to pay him his claim, or stand foreclosed.

INSOLVENCY CASES.

(In the Insolvency Court of the County of Wentworth)

Worthington v. Taylor.

Withdrawal of attachment—Rights of other creditors intervening.

A creditor issuing an attachment under the Insolvent Act of 1864, cannot after the expiration of five days from the return day of the writ, withdraw the attachment so as to prevent another creditor from intervening for the prosecution of the cause.

(Hamilton, September 22, 1864)

Craigie, on behalf of Robert J. Hamilton, a creditor of the insolvent, applied, under sub-sec. 13 of sec. 3, for an order to hold a meeting of the creditors for the purpose of giving their advice upon the appointment of an official assignee; and a summons was granted calling upon the plaintiff to shew cause why the said Robert J. Hamilton should not be allowed to intervene for the prosecution of the cause, and why the order asked for should not be granted.

McKelcan, on the return of the summons for the plaintiff, shewed cause on an affidavit setting forth that the writ of attachment in this cause was issued at the instance of the plaintiff on 2nd September: that it was ordered to be withdrawn on the 17th September, and returned by the sheriff to plaintiff's attorney as withdrawn on 19th September; and that the sheriff had made no return to the court of what he had done under the writ, nor was the writ filed in court. He argued that he had control of the writ: that it is a private proceeding by plaintiff, at all events until the writ is returned into court: that he has the same control over the writ as he would have in the case of an attachment against an absconding debtor, or in the case of any other process in a suit: that it would be a hardship if the plaintiff could not withdraw his writ, when the proceedings may be irregular, or he may have issued the writ wrongfully or unadviseedly. In such a case he should not be compelled to go on when by doing so he might subject himself to an action. The practice in these matters should be analogous to the practice in the county court in cases of attachment.

Craigie, in support of the summons, contended that after the expiration of five days from the return day of the writ, if no petition to set it aside be filed, or if a petition has been filed and dismissed, the defendant is an insolvent, and his estate is subject to compulsory liquidation. The creditors have then acquired an

interest in the estate, and it is not in the power of the attaching creditor to withdraw his writ or to settle with the insolvent; that the effect of the delay in moving against the attachment, or of the discharge of the petition to set it aside is to make it like an adjudication in bankruptcy under the English statutes. He cited *Anon*, 11 W R 810; *Ex parte Ludbrook*, ib. 1006; *Anon.*, 9 W. R. 199; *Ex parte West*, 19 L. & Eq. Rep 483.

LOGIE, Co. J.—After the expiration of five days from the return day of the writ of attachment, the plaintiff cannot settle with the defendant or withdraw his writ. His estate is then in insolvency, and subject to compulsory liquidation; and the creditors have acquired such an interest in the estate as to entitle them to intervene under sub-sec 13 of sec 3. If the debtor does not petition to set aside the attachment within the proper time, or if his petition be dismissed, he could maintain no action against the attaching creditor. In the one case he must be taken to have assented to the action of the creditor, and in the other the dismissal of the petition is evidence that the estate has become subject to compulsory liquidation, and therefore of the correctness of the plaintiff's proceedings.

The creditor applying is entitled to the order asked for.

Order accordingly.

LUXTON v. HAMILTON AND DAVIS.

Appointment of assignee—Partnership.

(November 10, 1864)

At a meeting of creditors held for the purpose of giving their advice upon the appointment of an official assignee, it was held that the creditors of the individual partners had the right, as well as the creditors of the firm, to vote in the choice of an assignee.

GENERAL CORRESPONDENCE.

Our judges—Their labors and pay.

TO THE EDITORS OF THE UPPER CANADA LAW JOURNAL.

GENTLEMEN,—The loss of the learned and the good Vice-Chancellor Esten, gives rise to a question, not a new, but perhaps an important one. *Why kill our judges?* This question is really at issue while the present way of working these functionaries is in practice. They are certainly overworked, and their lives shortened by the care, work and anxiety which their excessive duties involve.

The great and good Talfourd died in the midst of one of those christian-like charges to the jury which, like all his deliverances, had many sermons in it. And where are Wigram and Knight Bruce? aye, and where the intellectual Sir Creswell Creswell? The Divorce Court may be a good institution, but its labors have killed one of the best judges in the world. It seems but yesterday that Mr. Creswell sat, for the first time as judge, at an old northern town, where the bar and the people had been accustomed to "hang upon his accents," as he led the circuit with Knowles and others. And just so in Canada. Sir John Robinson was "done to death:' so was Sir James Macaulay. Chancellor Blake was driven from a life of eminent usefulness by the excessive sedentary work of a chancellorship. The present Chancellor, with less than half his earnings as counsel, has double the work, and, being young, may probably last a few years yet. But why not so arrange our courts that there may be rather less work, and, if not more pay, more inducements for men of real fitness to leave the lucrative bar for the ill-paid bench? It is a matter well worth the consideration of the legislature, and I hope it will be taken up at the opening of the session.

There should be a widows and childrens pension list, such as to enable a judge to feel that he cannot leave his family in want. There should be an increase in the number of judges of *all* the courts, so as to lighten their labors; and these reforms should be applied to *all* the courts, including the county courts. I know of counties where, to fill the office of a county court judge efficiently, requires somewhat incongruous qualities. In order to master the travelling he must have something like the fitness of a private in the flying artillery, and the endurance of a Cossack. He must, of course, also be a good lawyer, with a sound judicial mind, and constantly apply himself to the reading of books which his salary does not enable him to purchase, and which his rough work through townships, requiring the use of either the saddle or a sound pair of feet, scarcely give him time to look at. Add to this, the business that occurs every day in chambers while the judge is away on perhaps a week's circuit; and even judges cannot be in two places at the same time; and the consequences to suitors and solicitors are often very expensive consequences. It is a false idea of economy to suppose that the people would be more taxed by the additional expenditure which a pension list would involve.

The present state of things does not afford sufficient inducement to men of the highest rank in the profession to accept judicial offices, as long as the honor is so overbalanced by the pecuniary sacrifice, and the deep responsibility and heavy work.

Yours, &c, OBSERVER.

[Without endorsing all the views of our correspondent, we can, without hesitation, support much that he has written.

It has always appeared to us that the pittance doled out to our judges of superior and inferior jurisdiction is a disgrace to such a colony as Canada. No man can, with proper consideration for his family, leave a lucrative practice at the bar in order to accept a judgeship, unless possessed of sufficient property to enable him to live independently of his official salary. Judges are expected to keep up a certain position in society, for which their salaries in Upper Canada are wholly inadequate. The life of a judge is, in Canada, so far as pay is concerned, a life of respectable penury.

It may be said that men can be found to accept the office of judge, whether superior or inferior, at existing salaries, and an increase, therefore, would be waste and extravagance. This is no answer to our argument. There is no office, no matter how trifling the remuneration, that some man can not be found ready and willing to accept. But in judicial offices we want the best men, and to secure them high salaries must be paid. So far, we believe, we have in Upper Canada procured the best men; but we have great apprehension for the future. The respectable poverty of those holding judicial offices serves little to encourage those who may be needed to succeed them. There are judges on the bench now who would only be too glad to return to the bar; but having once put their hands to the plough they do not like to turn back.

The bench is the palladium of our life, our liberty, and our property. That economy which forces men to impair the dignity or usefulness of the bench is false economy. Our judges are not so numerous that increase of salary would seriously affect the revenue. It is notorious that bank clerks in England, and bank managers in Canada receive double the pay of our Chief Justices and Chancellor. Moral courage on the part of the government is all that is required. Now that great changes in our judicial as well as our legislative system are contemplated, a favorable opportunity will present itself for placing our judges on a comfortable and respectable footing. We trust the Attorneys-General for Upper and Lower Canada will not allow the opportunity to pass unheeded.

There is no doubt also of the fact that our judges of superior jurisdiction, and most of our judges of inferior jurisdiction, are overworked. No man who has much to do with the courts can deny this proposition. With increase of population we have increase of litigation, and with increased litigation we need an increased number of judges. We cannot on the present occasion suggest details. One thing, however, we must mention, and that is, the want which all in Toronto feel during term, and during the assizes holden in Toronto, of an additional judge to hold Practice court and Chambers. If an additional judge were appointed, so that during term the two courts would be full, and a judge left to hold Practice court and Chambers a great point would be gained. Some persons advocate the appointment of a judge whose duties would be exclusively confined to matters of practice; but to this we do not assent. We think it necessary for the efficiency of the bench that each judge should in turn hold Practice court and Chambers, so as to keep alive the knowledge of the practice in all its details, necessary to the satisfactory discharge of judicial duties as well during term as on circuit. The present mode of leaving to a great extent undone or insufficiently done, chamber business during assizes in Toronto, is productive of delay and expense, and therefore injurious to suitors. The mode of hurrying through chamber cases during term either without argument or with insufficient argument, is no less baneful. The only remedy that we can suggest is the appointment of an additional judge, all the more necessary in view of the fact that counties are yearly becoming disunited and independent, increasing the number of circuits and the sphere of judicial duty.—Eds. L. J.]

To the Editors of the Upper Canada Law Journal.

Magistrates—Illegal commitments by—Commitment of witness for want of sureties to appear.

Omemee, Nov. 17, 1864.

Gentlemen,—In the *Cobourg Sentinel*, of the 22nd ult., I noticed one statement in the Hon. Judge Morrison's charge to the Grand Jury, that I am at a loss to understand, viz.: "I see also that there is a person in custody for want of sureties that he will appear as a witness. This is altogether illegal, because many persons in this way might be most cruelly treated. The magistrate who did so is liable to an action of false imprisonment, and could be made pay heavy damages for sending a man to gaol under circumstances which did not warrant it."

The Magistrate's Hand-Book, by the late R. Dempsey, Esq., page 26, seems to be at complete variance from the judge's opinion; and I, as well as other justices of the peace here, am at a loss to understand the matter satisfactorily, and would therefore most respectfully solicit your opinion, in the next issue of your truly valuable journal, if you deem it worth your notice.

I am, Gentlemen, your obedient servant,

C. Knowlson, *J. P.*

[We have not seen the "Magistrate's Hand-Book," to which our correspondent refers; but it is no sufficient excuse for a magistrate to say he has been misled by an erroneous statement of the law in a text-book treating of his duties. The law is clear enough, that such a commitment is illegal, although the common practice, with few exceptions, certainly has been to commit a witness in a criminal charge for want of sureties. Mr. Justice Morrison's warning was appropriate, and his caution not unnecessary; and in speaking, the learned judge gave no uncertain sound. Let us suppose a case. Our correspondent himself, say, is distant from home, at a place where he is not known, and happens to see a felony committed. Well, the offender is brought before a magistrate on the charge. Our correspondent appears, gives evidence, and the party charged is committed for trial. The magistrate says, "Mr. K., you must find sureties for your appearance to give evidence at the trial." He replies, "I am a perfect stranger here; I know nobody, and have not the means of securing bailsmen, even if I found persons willing to be bound for me. I am perfectly willing to attend at the trial, and give evidence as to what I saw, and enter into my own recognizance to do so." "But," the magistrate says, "that will not do; you must find sureties, or I shall commit you with the accused till he is tried." Mr. K., naturally enough, might say, "Well, that is rather hard. I accidentally witnessed the commission of a felony; I promptly gave information of the fact, and I have every wish to see justice done; yet I am to go to gaol, because I am unable to do what is unreasonably required of me. If I am to be punished for thus doing my duty, I shall take good care that hereafter I see nothing that may bring me into trouble; or if I do see it, will keep the knowledge to myself. I will give no aid to Justice, if she makes use of my own act to imprison me without crime."

We need not argue out the point. Every one may see, on reflection, that the law, as laid down by the learned judge, may well be vindicated, and that the practice condemned is cruel and unjust. Magistrates should always pay strict attention to the judges' charges. Theirs are no hasty, ill-considered utterances. Upon new points, the judges frequently confer together in England and Ireland, and probably do so here. At all events, a magistrate may feel quite sure that he is not wrong, when he avoids a course which one of the judges pronounces to be illegal and improper.

If a witness refuses to become bound himself, upon being required so to do by the magistrate, he may be committed to

gaol until he conform, or until the trial can be had, and there would be nothing illegal or unjust in this.—Eds. L. J.]

REVIEWS.

THE INSOLVENT ACT OF 1864, WITH NOTES, TOGETHER WITH THE RULES OF PRACTICE AND THE TARIFF OF FEES FOR LOWER CANADA. By the Hon. J. J. C. Abbott, Q. C., M.P.P. Quebec: Printed by George Desbarats and Malcolm Cameron, Printers to the Queen's Most Excellent Majesty, 1864.

We have to thank the editor of this useful and much needed manual for an early copy of it. He having been to a great extent the father of the Act, is perhaps, of all others, the best fitted to explain its provisions.

A good system of insolvency is, as we explained in our issue for September, when reviewing the Act, necessary in every mercantile community. Since then it has become more familiar to many of our readers. It is unnecessary therefore for us to recapitulate further what we then said. We have seen no reason to change the opinions which we then expressed.

The Act is now being subjected to the touchstone of experience. In our last issue we published three decisions as to the interpretation of some of its decisions. In this number we publish some additional decisions. No great difficulty has so far been felt in the endeavor to work out the Act. New measures, like new men, require time to beget the confidence of the public. The more we become acquainted with the details of the Act the better we shall like it.

Time was given by the Legislature to the Judges of the Superior Courts of Common Law and of the Court of Chancery in Upper Canada, or any five of them, of whom the Chief Justice of Upper Canada, or the Chancellor, or Chief Justice of the Common Pleas should be one, to frame and settle such forms, rules and regulations as should be necessary under the Act, and to fix and settle the costs, fees and charges to be paid to and collected by attorneys, solicitors, counsel and officers of the courts. Similar powers were given to the judges of the Superior Courts in Lower Canada. The judges of the Superior Courts of Lower Canada have, as appears from the publication before us, taken the lead of their professional brethren in Upper Canada: though we have reason to believe that the latter will not be long behind them. The Lower Canada Rules are embraced in four pages of the work before us. The tariff of fees are embraced in less than three pages. We are not in a position to pronounce an opinion either on the Rules or Tariff framed by the Judges of Lower Canada. Some of the fees however, we may mention, seem to be liberal, and worthy of acceptance by men of talent. Thus,

Attorney's fee, on behalf of plaintiff, for rendering proceedings to appointment of official assignee	$30
Attorney's fee, if matter contested, additional	20
Counsel fee at enquiry	10
Attorney's fee on behalf of defendant, if not contested	10

So on petitions in appeal,

Attorney's fee for petitioner, if not contested	$10
If contested	20
To attorney for respondent	15
Claimants attorney on claim	20
Contestants attorney	20
To applicant's attorney, if not contested	15
If contested with *enquete*	25
If contested with *enquete*	35

If the judges of Upper Canada desire to secure the support of leading men in the profession, in the carrying out of the provisions of the act, they will not be less liberal than the judges of Lower Canada. It is to be hoped that they will not allow themselves to be guided by any analogy to County Court fees. In those courts the fees paid to counsel and attorneys bear no due proportion to the amount disbursed in a suit, and are in themselves contemptible. The labor performed is quite equal to that required in the Superior Courts. The skill required is quite as great, and the only fees allowed are not more than half what is allowed in the Superior Courts. The consequence is, that even successful litigants are often compelled to bear costs between attorney and client, which in reason and justice should be thrown upon their adversaries.

We do not quite approve of the system which has grown up in Canada, of throwing all sorts of work upon judges of Superior and Inferior jurisdiction. The judges, generally speaking, have more than enough to do in the performance of the duties which they are sworn to perform, without acting as scriveners to the legislature. It is usual in England, to employ skilled barristers for purpose of preparing general rules when required, in aid of a new system of bankruptcy, insolvency, or other branch of the administration of justice. It is usual also, liberally to pay the barristers for their responsible work. Here, the legislature is mean enough to throw the work without pay, upon overworked judges, all paid for work they are sworn to perform. We trust such legislative meanness will soon cease to exist in Canada. It is unworthy of our country.

The notes appended by Mr. Abbott to each section of the insolvency act, are copious, but of course much dependent upon the French laws of Lower Canada. This will will have a tendency in some degree, to restrict the circulation of the book to Lower Canada. But while drawing copiously from the fountains of the French Civil Law, the editor has not been unmindful of the many currents of English cases, which serve to illustrate his argument and explain his text. The book is almost as useful in Upper as in Lower Canada, and unless some other and better work solely devoted to the working of the law in Upper Canada soon appear, we must cheerfully recommend it to the consideration and support of our readers.

The reputation of the author, both in the Legislature and at the bar in Lower Canada, is of itself sufficient to secure for his book a passport wherever his name is known; and with such materials as he had at command, Mr. Abbott has acquitted himself ably and well.

APPOINTMENTS TO OFFICE, &c.

VICE CHANCELLOR FOR UPPER CANADA.

The Honorable OLIVER MOWAT, Q C., to be one of the Vice Chancellors in and for Upper Canada, in the room and stead of the Hon. James C. P. Esten, deceased. (Gazetted November 19, 1864.)

NOTARIES PUBLIC.

JAMES FREDERICK DENNISTOUN, of Peterborough, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted November 19, 1864.)

WILLIAM HOPE, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted December 3, 1864.)

JAMES PETER WOODS, of Stratford, Esquire, Barrister at-Law, to be a Notary Public in Upper Canada. (Gazetted December 3, 1864.)

WILLIAM HALPENNY, of Renfrew, Esquire, to be a Notary Public in Upper Canada. (Gazetted December 3, 1864.)

REGISTRAR.

JOHN MENZIES, Esquire, to be Registrar of the North Riding County of Lanark. (Gazetted December 3, 1864.)

TO CORRESPONDENTS.

"L. S."—Under "Division Courts."

"OBSERVER"—"O. KNOWLSON"—Under "General Correspondence."