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VOL. IV. TORONTO, AUGUST, 1858. No. 8.

THE UPPER CANADA LAW JOURNAL

AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

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

PRINTED AND PUBLISHED BY MACLEAR & CO., 17 & 19 KING STREET EAST, TORONTO.

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LEGISLATIVE COUNCIL,
Toronto, 4th September, 1857.

EXTRACT from the Standing Orders of the Legislative Council.

Fifty-ninth Order.—"That each and every applicant for a Bill of Divorce shall be required to give notice of his or her intention in that respect specifying from whom and for what cause, by advertisement in the official Gazette, during six months, and also, for a like period in two newspapers published in the District where such applicant usually resided at the time of separation; and if there be no second newspaper published in such District, then in one newspaper published in an adjoining District; or if no newspaper be published in such District, in two newspapers published in the adjoining District or Districts."

J. F. TAYLOR,
Clerk Legislative Council.

10-tf.

LAW SOCIETY OF UPPER CANADA,

(Osgoode Hall.)

Easter Term, 21st Victoria, 1858.

During the Term of Easter, the following Gentlemen were called to the degree of Barrister-at-Law:—

William Baldwin Sullivan, Esquire.
Henry Massingberd. "
Alexander Forsyth Scott, Esquire.
Ward Hamilton Bowlby. "
Anthony George Lefroy, Esquire.

On Tuesday, the 25th day of May, in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows:—

University Class:

Mr. Edmund John Hooper, B.A.

Junior Class:

Mr. Henry Robertson.
" Theophilus Begue.
" Edward Robinson.
" David Lennox.
" John Hoskins.
" James Graham Vansittart.
" Augustus Roche.
" John Bell Gordon.
" Patrick William Darbey.
" Edward James Denroche.
" Alexander Forbes, junior.
" Richard Stotesbury McCulloch.
" Morgan Coldwell.
" Thomas Babington McMahon.
" Kenneth Goodman.
" Robert Smith.
" William Torrance Hays.
" George Augustus Hamilton.
" William Henry Walker.
" John Downey.
Mr. Frederick Nash.
" James Frederick Smith, junior.
" Octavius Prince.
" Hamilton Douglas Stewart.
" Robert Kerr Robb.
" Thomas Ferris Nellis.
" Franklin Metcalfe Griffin.
" Thomas Wellesley McMurray.
" Michael Joseph McNamara.
" John Joseph Landy.
" Jabez Manwaring Moffatt.
" Thomas James Fitzsimmons.
" Edward Clarke Campbell, junior.
" Gilbert James Wetenhall.
" Henry Mann Briggs.
" Edmund Baynes Reed.
" Pedro Alma.
" Robert John Keating.
" John Elley Harding.
" Joseph Aloysius Donovan.
Mr. John McLean Stevenson.

Note.—Gentlemen admitted in the "University Class" are arranged according to their University rank; in the other classes, according to the relative merit of the examination passed before the Society.

Ordered—That the examination for admission shall, until further notice, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripedes, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Farnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively. Mathematics, (Euclid, 1st, 2nd, 3rd 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd 3rd and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 3, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class:

In the same subjects and books as for the University Class.

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books, or Legendre's Geometrie 1st and 3rd books, with the propositions, and such works in Modern History and Geography as the candidates may have read: and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

Ordered—That in future, Candidates for Call *with honours*, shall attend at Osgoode Hall, under the 4th Order of Hil. Term, 18 Vic., on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the latter of such days.

Ordered—That in future all Candidates for admission into this Society as Students of the Laws, who desire to pass their Examination in either the Optime Class, the University Class, or the Senior Class, do attend the Examiner at Osgoode Hall, on both the first Thursday and the first Friday of the Term in which their petitions for admission are to be presented to the Benchers in Convocation, at Ten o'clock A. M. of each day; and those for admission in the Junior Class, on the latter of those days at the like hour.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament, 20 Vic. chap. 63, and the Rule of the Society of Trinity Term, 21 Vic. chap. 1 made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries 1st Vol., Smith's Mercantile Law, Williams on Real Property; Williams on Personal Property, Story's Equity Jurisprudence; The Statute Law, and the Practice of the Courts.

Notice.—A thorough familiarity with the prescribed subjects and books will, in future, be required from Candidates for admission as Students; and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

Notice.—By a rule of Hilary Term, 18th Vict., Students keeping Term are henceforth required to attend a Course of Lectures to be delivered, each Term, at Osgoode Hall and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

Ordered.—That the Subjects of the Lectures, next Term, be as follows: Trusts—S. H. Strong, Esquire, Damages—J. T. Anderson, Esquire.

ROBERT BALDWIN,
Easter Term, 21st Victoria, 1858. *Treasurer.*

STANDING RULES.

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

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

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

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

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

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

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

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

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

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

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IS published monthly in the City of Toronto, at $4 per annum if paid before 1st March in each year; $5 if paid afterthat period.

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10th. It exchanges with more than fifty cotemporary periodicals published in England, the United States, Upper and Lower Canada.

11th. It has now reached the fourth year of its existence, and is steadily increasing the sphere of its usefulness.

12th. It has advocated, and will continue to advocate sound and practical improvements in the law and its administration.

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REMITTANCES.

July, 1858.—W. L., $5; F. F. W., Owen Sound, $10; J. D. W., St. Thomas, $10; Municipality of Walsingham, $4; Bureau of Agriculture, $5; Township of Etobicoke, $4.

DIARY FOR AUGUST.

1. SUNDAY..... *9th Sunday after Trinity.*
7. Saturday..... Articles, &c., for admission to be left with Sec. of Law Society.
8. SUNDAY..... *10th Sunday after Trinity.*
15. SUNDAY..... *11th Sunday after Trinity.*
21. Saturday..... Long Vacation ends
22. SUNDAY..... *12th Sunday after Trinity.*
23. Monday..... TRINITY TERM begins.
29. SUNDAY..... *13th Sunday after Trinity.*

"TO CORRESPONDENTS."—*See Last Page.*

The Upper Canada Law Journal.

AUGUST, 1858.

LAW, EQUITY, AND JUSTICE.

Is Law not Equity? Is Equity not Law? Ought there to be either Law or Equity which is not Justice? Such are the questions which one more often hears asked, than satisfactorily answered. Were we driven to an answer without reflection, we should, we fear, do as Talleyrand did before us. When asked, "What is meant by civil?" he said, "It is something that is not military." When asked, "What is meant by military?" he said, "It is something that is not civil." So of Law: we might reply that it is something which is not Equity; and of Equity, that it is something which is not Law; and that either may or may not be Justice.

Law in general involves a command, enjoining what is right, and prohibiting what is wrong. It is the exercise of a sovereign will, which ought always to accord with the dictates of justice. By reason of its universality, we are told, Law may operate unjustly in particular cases. To prevent injustice in such cases, we are told, Equity interferes. The difficulty is to prevent Law, which is designed for good and to apply to all cases, from itself doing wrong in some cases.

Law is administered by judges; men like ourselves, of finite knowledge; men like ourselves, subject to the frailty of mortal flesh. But is it necessary that one portion of the judges should be instructed that Law is one thing and Equity another? Is it not a demoralizing *a priori* to admit that there can be Law which is not Equity, or Equity which is not Law? To allow judges to administer law which is not equity, would be to abet the infliction of wrong; to allow judges to administer equity which is not law, would be to abet the exercise of tyranny.

For the preservation of liberty, there must not only be law, but law well understood. At one time, equity was not law. Equity, in its infancy, was the creature of judges; and as the judges were often capricious, so was equity their creature. Therefore it was that Selden described equity as a "roguish thing." Sometimes, he said, equity judges went according to conscience, sometimes according to law, sometimes according to rules of court. For law, he said, we have a measure, and know what to trust to; but equity is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. It is all one, he said, as if they should make one standard for the measure that we call a foot—a chancellor's foot. What an uncertain measure, he exclaims, would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot, &c. It was, he said, the same thing of the chancellor's conscience.

Such might have been equity at one time, but such is not equity in our generation. Equity is now administered by rules, as well understood as any rules of law. In a word, equity is law. If, then, equity is law, why should there be one class of judges to dispense equity, and another class to dispense law? Simply because such *has* been the case. Why, then, has such been the case? Let us see.

A reference to our early legal history here becomes indispensable. We shall be as brief as possible.

We know little of the law of England before the Roman conquest. Rude customs there were, partaking more or less of the principles of justice. Whatever is written to the contrary, it is now generally believed that the law of England at the time of the conquest was in great part derived from the laws of Rome, which had been previously introduced by the Romans during their dominion of the island, a dominion which lasted for nearly three centuries. After the Roman invasion, our ancestors, ignorant of their obligations to Roman jurisprudence, withstood all the attempts of the Roman ecclesiastics to introduce that jurisprudence, systematized in the shape of the Codes of Theodosian and Justinian. Then it was that, riled with defeat and subjection to a foreign power, they clung with the tenacity of a death grip to all that was left of their laws and institutions. Then it was that, ignorant of the origin and composition of those laws and institutions, they again and again exclaimed, "*Nolumus leges Angliæ mutari!*" Then it was that they refused to exchange the Roman law unsystematized and leavened with rude local traditions, for Roman law systematized and refined by the master minds of the Roman Empire. This it was which is the real origin of courts of law and equity in England.

On the one side there were those who would retain, conserve, and not improve; on the other there were those who desired both to conserve and to improve. The rivalry, however, was not to be tempered. Each class of advocates started its own courts, the one called Law and the other Equity. The base common to both was justice. This previously was the base of the common law of England. It was wide enough, had the people been so disposed, to have admitted of an enlarged system of jurisprudence, embracing all that

is at present known as Law *and* Equity. Perhaps we wrong our ancestors in asserting that there was not such a disposition. The Statute of Westminster, the second, (13 Elw. I.) was passed to effect some such purpose. Its design was, as has been truly said by Sir Richard Bethell and others, to *expand* the common law of England, so as to render it applicable to the emergencies of an advancing state of society. New writs were directed to be framed, as new occasions might present themselves, but the direction was not in spirit obeyed. The judges of the courts of common law then, too much like some of the judges of courts of common law of the present day, were opposed to reform. During the reign of Edward III. they declined to act upon writs to which the then existing formulæ of pleading did not apply. Here, then, the growth of reform was snapped. Common law was, through technical rules of pleading, closed against the advancing tide of jurisprudence, the stream of which became divided, and that which was turned from courts of common law took another channel. Hence courts of equity. William of Wareham, king's chancellor, afterwards invented the writ of subpœna, and such portions of natural equity as were ignored by courts of law fell under his control and that of his successors; the result of which was the establishment of Chancery or Equity as a tribunal distinct from Law.

It is for us who live in more enlightened times to profit by the errors of our ancestors. We have suffered by reason of their obstinacy, and the least we can do is if possible to turn their failings to good account. Let us *begin* where our ancestors *left off*. Had the Statute of Westminster been carried out in spirit, there would not now be any courts of Chancery. As early as the reign of Henry VI. it was observed by one of the judges, that if actions on the case had been allowed by courts of common law as often as occasion required, the writ of subpœna would have been unnecessary, that is, the whole of the present jurisdiction of the Court of Chancery would have formed part of the ordinary jurisdiction of courts of common law.

What then was the reason given by our ancestors for refusing to extend the action on the case? Does it, whether good or bad, still exist? The reason was, as we have already said, the then technical rules of *pleading* which were at once the glory and the disgrace of English jurisprudence. They have fallen; they are no more. Special demurrers, the delight of legal chicanery, are now abolished. The rules of pleading, such as do exist, are all but common to courts of law and equity. There is in truth no more technicality required in the one set of tribunals than in the other. Form, in each, is made subservient to substantial practice. Why not then open the portals of the common law, and admit that portion of administrative justice which is dispensed by courts of equity? That something of this kind should be done, is the feeling of every reflecting being; that it *must* be done, is the resolve of many enlightened jurists.

How else are we to account for the endeavors of the admirers of common law to seize a part of equity, and of the admirers of equity to seize a part of common law? At the present moment there are two bills of this nature before the English Parliament, both of which we give in other columns. The one which is introduced by the Solicitor General, an admirer of equity, proposes to confer upon equity courts the power to award damages and to try issues of fact by jury, two notable peculiarities of courts of common law. The other, introduced by Mr. Atherton, an admirer of common law, proposes to confer upon courts of common law the power to entertain suits for specific performance in all cases in which courts of equity can do so; to grant injunctions against breaches of contract, or the commission or continuance of wrongful acts, in like manner as in equity; to grant equitable relief by way of plea or replication, wherever the same can be had in equity; to try equitable titles, now only triable or recognizable in courts of equity; and, incidentally, to do many things now peculiar to courts of equity. Of the former bill we wholly disapprove; we disapprove of it both in principle and in detail. Of the latter we wholly approve in principle, but not in detail.

Common law is, as we have seen, the parent fold—the system which *ought* to have been, but was *not*, expanded. Equity is the offshoot—the lesser of the two. If one is to absorb the other, according to the law of nature if not of expediency the greater must absorb the lesser. Our figurative idea of the stream of justice does not even here fail us. It would be as absurd to expand equity so as to take in common law, as it would be to expand a rivulet so as to take in an ocean. The lesser must be absorbed by the greater. Hence, then, we believe the true course for all friends of fusion to adopt is gradually to extend the existing jurisdiction of courts of common law, so as to embrace bit by bit the existing jurisdiction of equity; and while doing so, by careful attention, to adopt the machinery of the common law courts, so as to admit of the additional and increased strain. Any other course must end in confusion, and make the day of fusion more remote than ever. We object, then, to Mr. Atherton's bill, because it essays to do in a jump that which can only be done by gradual process; because it essays to engulph equity without any attention whatever to the adaptation of the machinery of the common law courts.

It is only natural to expect opposition to the fusion of law and equity, from the judges of the two systems respectively. There is, to speak plainly, without intending to

offend, selfishness even in a judge. The work of the judges during the process of fusion will unquestionably be increased. More than this, the judges will be called upon to deal with subjects of which, owing to the hitherto unnatural mode of legal education, they are lamentably ignorant Besides, judges for the most part are men past the meridian of life, when the impulsive gives place to the conservative. They have settled down to a daily routine, which habit has made easy, and had rather not be disturbed by novelties. The judges in the reign of Victoria will in this respect be found to resemble the judges in the reign of Edward III.; but we hope their opposition will be less successful.

In England, as it is, the judges of the courts of common law have succeeded in frustrating the intention of the legislature of 1854. They have killed off the laudable object of the legislature, which gave to them power to grant injunctions and specific performance of contracts. Perhaps the fault has not been exclusively theirs. It may be that the legislature is to blame for not simultaneously improving the machinery of the common law courts and their organization. To the latter, Mr. Atherton has wisely directed his astute attention. He proposes that common law judges may summon equity judges to their aid, and *vice versa*. This is precisely what a valued correspondent long since proposed in the columns of this Journal. Some allowance must be made as well for the inability as the indisposition of existing common law judges to administer equity, as of equity judges to administer common law. The only way of getting over the difficulty is by fusing the *judges* as well as the jurisdictions of their respective courts. It will be very unpleasant to them, no doubt, but if they cheerfully acquiesce, they will receive the thanks of posterity. When the fusion is in part effected, students will study the *whole* law, as now administered by courts of law and equity. A new race of lawyers will spring up, from the ranks of which men can be elevated to the bench to whom it will not be a burthen, and in whom it will not be a presumption to administer law and equity,—in other words, *complete and substantial Justice*.

LIABILITY OF CORPORATIONS.—PUBLIC JOURNALS.

The old rule of non-liability of corporations for acts done which require the exercise of a *reasoning mind*, has been much modified of late years; and it is clearly established that actions of tort or of trespass will lie against corporations aggregate, and that an indictment will lie against them both for acts of commission and of omission, to be followed up by fine, though not by imprisonment. It was nevertheless supposed that the liability did not extend to acts which were grounded on express malice. However, in a recent case (*Whitehead* v. *the South Eastern Railway Company*), the Court of Queen's Bench in England has decided that an action for libel lies against a corporation aggregate, where malice in law may be inferred from the publication of the words.

In giving judgment in this case, Lord Campbell referred to the great injustice that might be done to individuals, if the remedy for wrongs authorized by a company were confined to the agents employed. He referred to associations of the kind being so common, as to be extended to the conduct of a public journal. *The Solicitor's Journal* in England, is carried on by a joint stock company; and in Upper Canada, we know of many newspapers conducted in the same manner.

The case referred to shows, that not merely the corporation as a body is liable in an action for defamation, but also the individuals who compose it.

The case we refer to was decided on 29th of last April.

LIABILITY OF STEAMBOAT PROPRIETORS. "EXCURSION TRIPS."

We are, in Canada, no less fond of "*pleasuring*" than our neighbours to the South. We have our Firemen's—our Temperance, our Orange, our Odd Fellows' excursions; and the Sons of St. George, St. Patrick, and St. Andrew, have their pleasure trips at times. Those from places on the lakes are commonly on steamboats.

For the information of all and sundry, we notice a very recent decision (on the 15th of June last) of the Court of Queen's Bench, in England (*Dalyell* v. *Tyrer and others*).

The facts of this case were briefly these. One Hetherington was the lessee of and worked the Rock ferry, from St. George's pier-head, at Liverpool, to Rock Ferry Point, on the opposite side of the Mersey; and the plaintiff had a season ticket, for which he had paid Hetherington, for crossing the ferry. On the day in question, being a regular day, and additional boats being required for the service, Hetherington had engaged, for the sum of £10, a steamer of the defendants, who were the trustees of a steam tug company, to cross and re-cross the said ferry, and to convey across all persons who should be presented to them for ferriage. The plaintiff crossed on the defendants' steamer along with a large number of other persons; and as the steamer was putting to at the Rock Ferry Point, a rope with an iron hook at the end of it was, by direction of the master, thrown ashore and attached to a ring, with a view of swinging the steamer around; but the strain on the rope was so great that the hook broke, and the detached piece started back and injured the plaintiff severely. The jury found that there was negligence in the manner of swinging the vessel, and rendered a verdict for the plaintiff, with £600 damages.

Leave was reserved to the defendants to move to have the verdict entered for them, if the court should be of opinion that the plaintiff was not entitled to recover against the defendants, in respect to the negligence proved.

The court held that the crew of the steamer being appointed by and so remaining the servants of the owners, the plaintiff could maintain his action against the owners for the personal injury caused to him by the negligence of the crew, although he contracted with Hetherington and paid *him* for his p[illegible]; and the verdict in favor of the plaintiff was sustained.

In giving judgment, Erle, J., said—It is clear to me the defendants were in possession of the ship, having command of the servants navigating her, and were in possession of the tackle which broke and caused the injury; therefore they would be responsible for the damage if the plaintiff had been standing on the pier a mere stranger. What difference is there, if, with the consent of the defendant, the plaintiff is on board their vessel? That circumstance would not take away the right which as a stranger he might have had; nor does the fact of the money not being payable by the plaintiff to the defendants take away the right of action.

The principle of this case would appear to be applicable also to travelling by railways.

HARRISON'S COMMON LAW PROCEDURE ACTS, IN ENGLAND.

It is with honest pride we reproduce, among "Book Reviews," in this number, a review of Harrison's Common Law Procedure Acts, taken from the English *Jurist*, one of the first, if not the first legal authority in England, and a periodical as influential in the colonies as it is in England.

Of the work it is said, it is "almost as useful to the English as the Canadian lawyer, and is not only the most recent, but by far the most complete edition which we (the *Jurist*) have seen of these important acts of parliament."

Of the editor it is said, "he has not been content with industriously collecting the numerous decisions which are now scatterred through our reports upon these statutes, but has displayed both skill and judgment in their arrangement, and in deducing, wherever it was possible, those principles of which the decisions are either suggestive or illustrative."

This notice cannot be more pleasing to Mr. Harrison than it must be a source of pride to Canada and to Canadian enterprize. The work is we believe the first law book written and published in Canada, or any other British colony which has recommended itself to the profession of the mother country. If anything more were wanting to crown the success of the work it is the growing demand for copies of it in England—a demand which we regret to learn cannot long be supplied, as neither the editor nor the publishers anticipated it.

We have been informed that as Mr. Harrison is too much occupied with other engagements, he will not undertake to issue a second edition, and that as the first edition is now nearly exhausted, the publishers Maclear & Co, King Street East, Toronto, have raised the price from $6 to $8 per copy.

HISTORICAL SKETCH OF THE CONSTITUTION, LAWS AND LEGAL TRIBUNALS OF CANADA.

(*Continued from p.* 156.)

The Count of Frontenac having been involved in many quarrels with the Intendant, and otherwise failed to give satisfaction, was recalled, and his place supplied by the appointment of Monsieur C. Fevre de la Barre, whose commission was dated in May, 1682. To him was confided, among other duties, that of taking cognizance of all differences which might arise in the colony either between the seigniors or the common people. His appointment was that of governor and lieutenant-governor of Canada, Nova Scotia, Acadia and Newfoundland and other Northern dominions of France. With him was appointed Monsieur Demeulles as intendant. To the latter was expressly given the power to hear all complaints and to render justice to all men,—to prosecute all crimes of whatsoever kind,—to preside over the Sovereign Council,—to superintend all superior officers of justice, and in administering justice to observe the Custom of Paris, including the Prevôté and Vicompté; with the advice of the Council to make police regulations, and in certain cases power alone to determine disputes of a civil nature. Both the Governor General and Intendent were instructed to keep on good terms with the Count de Blanac, Governor General of the West India Islands with a view to trade and to the mutual advantage of the colonies.

Mr. de la Barre was active in the performance of his duties. No sooner did he arrive in the colony, and finding it to be exposed to the hosility of the Five Nations, than he adopted measures to consult public opinion. He convoked a general assembly, consisting of the Intendant, Bishop, officers of the army, members of the Sovereign Council, inferior court Judges, and the principal members of the Colony. This was the first occasion on which the people were consulted by their rulers in the management of public affairs. Though informally convoked, the assembly was by no means a failure. A report was made to the Governor, in which the critical position of the colony was candidly

and thoroughly reviewed. The enmity of the Five Nations was the prominent topic of consideration. Their sympathies with the English and Dutch of New York were mentioned, and the many overt acts of hostility commented upon. In fine, a war against them was recommended. The report was favorably received by the Governor and by him was transmitted to France. There also it met with a favorable reception. Two hundred troops were despatched to the colony, and the vessel which conveyed them also conveyed intelligence that Governor Dongan, of New York, had been directed by the English Government to preserve a good understanding with the French of Canada. The Governor of New York, if so instructed, certainly disregarded his instructions. He in many ways encouraged the traders of New York to interfere with the trade of the great lakes, and to be rivals of the French for the acquisition of that trade. The result was the gathering of an army of 600 Canadians 130 regulars. and 200 Indians, at the head of which de la Barre placed himself, and on 9th July, 1684, left Quebec on an expedition against the Five Nations, and the New York traders. The demonstration was so formidable and so unexpected that the refractory Indians at once sued for peace. Peace was agreed upon, and de la Barre at the head of his army returned to Quebec.

The infirmities of age rendered de la Barre incapable of longer filling his high post with the activity and energy which it required. He was in consequence recalled. His successor, who was appointed in January, 1685, was the Marquis of Denonville. He was accompanied by Mr. de Saint Vallier, the successor of Laval, Bishop of Quebec. The first public act of Dennonville was to recommend the erection of a Fort at Niagara; on the one hand to prevent the traders of New York from dealing with the Indians, and on the other to prevent the Indians dealing with the New York traders. He also caused a large supply of provisions to be stored at Cataraqui, or Kingston. These preparations alarmed both the Indians and the people of New York. Governor Dongan wrote to Denonville, asserting that the Five Nations were subjects of Great Britain, and that hostile demonstrations against them would be deemed an infraction of the treaties existing between Great Britain and France. To this the latter replied, that the claim of Great Britain to the land possessed by the Five Nations was unfounded, for that the French had possession of the Country many years before the English settled in New York. Of this correspondence the result was many warlike demonstrations on the one side and the other. The French attacked with success, all the English Factories at Hudsons Bay, with one exception—Fort Nelson. These factories were seven years afterwards recovered by the English—and were again taken by the French. In 1796 they were retaken by the English, and by the peace of Utrecht, France renounced all claim to them. So matters continued for several years. Peace and war alternately ruled the colony. The battles of France and Great Britain, which in Europe aroused the world, were in Canada repeated in minature.

Owing to the few judges who sat in the Sovereign Council, and to the difficulties which arose whereever they were interested in disputes before it, the King of France, in April 1685, made a change. He declared that if any member of the council were a party to a suit pending before it, on the simple requisition of any party to the suit, it might be carried before the Intendent and other judges to be chosen by him for the purpose. One year afterwards Demeulles was as Intendent, succeeded by Monsieur de Champigny, whose commission was dated on 24th April, 1686. This year is memorable as having seen the conclusion of a Treaty between France and Great Britain, as to the limits of their respective dominions in America. Denonville was recalled, and on 15th May, 1689, the Government of the Province was again committed to the Count of Frontenac. The appointment took the colony by surprise. It was made upon the solicitation of the Marechal de Bellefont and his friends, who became responsible for the Count's conduct.

Subscribers to this Journal in arrears for Vols. II. and III., or either of them, are requested to take notice that our books are now being made up, and that all arrears will be without further intimation collected by due course of law.

To make room for a report of *The Queen* v. *Cumming* in appeal, we have been constrained to omit some original matter which will appear in our next.

THE CANADA DIRECTORY.

We regret to learn that owing to the scarcity of money, the enterprising publisher of this work is likely to be a sufferer. There are we are informed no less than 4000 copies unsold, which if not soon sold will be a great loss to Mr. Lovell. If there is any patriotism in Canada such a result ought to be prevented. The Directory of which the value is now well known, is much more than value for the small sum necessary to procure a copy. No lawyer, clerk or bailiff should be without it. Magistrates and municipal officers must also if they know what is to their advantage purchase copies. Let one and all hasten to serve the publisher, and in doing so in truth well serve themselves.

The attention of the profession is directed to the advertisement in this number of a new Law Book published by Little, Brown & Co, Boston,—"Andrews on the Revenue Laws of the United States."

LEGAL CURIOSITIES.

We find in "The Forum," by David Paul Brown, of Philadelphia, rare precedents of old Presentments, four of which, for the edification of our readers, we subjoin.

"The 4th of y^e^ month, 1702.

"We, y^e^ Grand Jury of y^e^ Citty of Philadelphia, peesnt Sarah Stivee, wife of John Stivee, of this citty, for being dressed in man's cloathes, contrary to the nature of her sects, and in such disguise walked through the streets of this citty, and from house to house, on or about the 26th of 10th month, to the grate disturbance of well minded persons and incoridging of vice in this place; for this and other like enormities, we pray this honourable bench to suppress.

"Signed in behalf of the rest,

"ABRAHAM HOOPER, *Foreman.*"

"Philadelphia, the 4th of the 12th Month, 1702.

"We, y^e^ Grand Jury for y^e^ Citty of Philadelphia, present John Smith of this citty, living in Strawberry Alley, for being mask'd or disgised in woman's apparrell, walking openly through the streets of this citty, and from house to house, on or about the 26th of y^e^ 10th month last past, it being against y^e^ law of God, y^e^ law of this Province, and the law of Nature, to the staining of the holy profession and incoridging of wickedness in this place.

"Signed in behalf of the rest,

"ABRAHAM HOOPER, *Foreman.*"

"Philadelphia, y^e^ 4th of the 12th Month, 1702.

"We of y^e^ Grand Jury for the Citty of Philadelphia, do present John Joyse for having of to wives at once, which is boath against the law of God and man.

"Signed in behalf of the rest,

"ABRAHAM HOOPER, *Foreman.*"

"Philadelphia, this third day of November, 1703.

"We do also present Jon Furnis and Thomas McCarty and Thomas Anderson and Henery Flower, barbers, for triming people on first days of the weeks, commonly called Sunday, contrary to the law in that case made and provided.

"Signed in behalf of the rest of the jurors,

"JOHN REDMAN, *Foreman.*"

PENDING ENGLISH MEASURES OF LAW REFORM.

THE CHANCERY AMENDMENT BILL.

[*Mr. Solicitor General.*]

1. This Act shall commence and take effect from and after Nov. 1, 1858, and may be cited and referred to as "The Chancery Amendment Act, 1858."

2. In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

3. It shall be lawful for the Court of Chancery to cause the amount of such damages in any case to be assessed or any question of fact arising in any suit or proceeding to be tried by a special or common jury before the Court itself; and the Court of Chancery may make all such rules and orders upon the sheriff or any other person for procuring the attendance of a special or common jury, for such assessment of damages or the trial of such question of fact, as may be made by any of the superior courts of common law at Westminster, and may also make any other orders which to the Court of Chancery may seem requisite (see 20 & 21 Vict. c. 77, ss. 35-7); and every such jury shall consist of persons possessing the qualifications and shall be struck, summoned, balloted for, and called in like manner, as if such jury were a jury for the trial of any cause in any of the said superior courts; and every juryman so summoned shall be entitled to the same rights and subject to the same duties and liabilities as if he had been duly summoned for the trial of any such cause in any of the said superior courts; and every party to any such proceeding shall be entitled to the same rights as to challenge and otherwise as if he were a party to any such cause; and generally for all purposes of or auxiliary to the assessment of damages or the trial of questions of fact by a jury before the Court itself, and in respect of new trials, the Court of Chancery shall have the same jurisdiction, powers, and authority in all respects as belong to any superior court of common law, or to any judge thereof for the like purposes.

4. Any questions of fact and any questions as to the amount of damages which shall be so ordered to be tried by a jury before the Court itself shall be reduced into writing in such form as the Court shall direct, and at the trial the jury shall be sworn to try the said question, and a true verdict to give thereon according to the evidence; and upon every such trial the Court of Chancery shall have the same powers, jurisdiction, and authority as belong to any judge of any of the said superior courts sitting at nisi prius.

5. The powers of making general rules and orders given by the 15 & 16 Vict. c. 86. s. 63, shall extend to and include the summoning of jurors and witnesses, the assessment of damages and the trial of questions of fact, and generally the course of procedure of the Court in relation to all the matters aforesaid

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AMENDMENT OF ENGLISH COMMON LAW PROCEDURE ACT.

[*Mr. Atherton.*]

It recites that doubts have arisen as to the extent of the power of equitable interference of the superior courts of common law under the provisions of the C. L. P. A. 1854, and it expedient to remove such doubts, and still further to assimilate the jurisdiction and practice of such courts to the jurisdiction and practice of courts of equity.

1. In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement, it shall be lawful for any of the Superior Courts of common law to entertain and adjudicate upon such application, and to exercise the same jurisdiction which the Court of Chancery now exercises in such cases; and such application may be made and enforced by action of *mandamus* in the manner provided for by the C. L. P. A. 1854.

2. In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach or threatened breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, it shall be lawful for any of the Superior Courts of common law, or for any judge thereof, to entertain and adjudicate on any such application or claim for an injunction, and to exercise the same jurisdiction that the Court of Chancery now exercises in such cases; and such application or claim for

an injunction may be made and enforced in the manner provided for claiming and enforcing writs of injunction by the C. L. P. A. 1854.

3. The courts of common law shall, by way of plea, replication, or in any other manner to be provided for by the rules of the said courts, give the same relief, absolute, conditional or other, in actions of ejectment and all other actions and proceedings in any of the said courts as the Court of Chancery is now or shall hereafter be empowered to give in like cases; and the said courts of common law may provide and direct such relief by decree, judgment, order, or otherwise, and make and enforce the same, in like manner as the Court of Chancery is now or shall hereafter be empowered to direct, make and enforce the like decrees, judgments, orders, or other proceedings, and for that purpose exercise the same jurisdiction, and have the same powers which the Court of Chancery now exercises and has, or may hereafter be empowered to exercise and have, in such cases.

4. It shall be lawful for any of the Superior Courts of common law, or any judge thereof, in any action of ejectment already commenced or to be commenced after the passing of this Act, and at any stage of such action, to make an order restraining the setting up of the legal title, and directing the real title to be tried in such ejectment, in any case in which it shall be made appear to the satisfaction of such court or judge that a decree or order to the same effect would be pronounced by the Court of Chancery upon application made for the purpose of having a party restrained from setting up the legal title, but upon such terms or condition as to the said court or judge shall seem just.

5. For the purpose of carrying this Act into effect, it shall be lawful for the said courts of common law, or any judge thereof, to refer to any one of the masters or officers of the said courts any matters to be inquired into or reported upon, or otherwise dealt with, which the court of Chancery, or any judge thereof, may refer to the chief clerks or any of the officers; and such masters and officers of the said courts of common law shall have the same powers and jurisdiction in such matters as the chief clerks or other officers of the Court of Chancery now have and exercise or may hereafter have and exercise in like matters; and parties and witnesses may be summoned to attend and give evidence before such masters and officers in the manner to be provided by the rules to be made as hereinafter mentioned; and the said masters and officers are hereby empowered to administer an oath and receive affirmations to and from all persons attending before them; further, it shall be lawful for any of the said courts of common law or any judge thereof, to refer any of the matters over which jurisdiction is entered upon the said courts or judge by this Act or C. L. P. A. 1854, and which before the passing of these Acts were cognisable before the Court af Chancery, to any of the chief clerks or officers of the Court of Chancery, and in any such matters to take the opinion of any of the conveyancing counsel nominated by the Lord Chancellor, and to obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in the same manner as the Court of Chancery, or any judge thereof, now does in like matters: provided that the said masters and officers of the said courts of common law shall, unless the court or judge otherwise order or the parties consent, inquire into such matters by the oral examination of witnesses and parties, and not on affidavits, depositions, or other written proofs, or on written interrogatories.

6. This Act and the C. L. P. A. 1854, shall be construed as one Act, and on all judgments, orders, and decrees, and the like proceedings given or made by any one of the said courts of common law under this Act, or the C. L. P. A. 1854, error may be brought as on a special case by virtue of the C. L. P. A. 1854.

7. Judges of courts of law to make rules &c.

8. Rules and orders to be laid before Parliament.

9. It shall be lawful for any of the Superior Courts of common law, or any judge thereof, to sit, with the assistance of any judge of the Court of Chancery, upon the request of the Lord Chief Justice or Lord Chief Baron, as the case may be, if any such judge of the Court of Chancery shall find it convenient to attend upon such request.

10. Commencement of Act.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

SOUTHAMPTON, July 8, 1858.

GENTLEMEN,—In common with many other Clerks of Division Courts, I am frequently appealed to on questions of Division Court Law, and although not obliged to give advice or information, I would like to be in a position of knowing the Law on some questions, among which are the following:—

1st. A assigns all his debts and effects to assignees for the benefit of his creditors, and as the agent of the assignees in his own name, amongst others, sues B, on an open account. B puts in an offsett for a larger sum than A's claim and on the trial obtains judgment for the excess of his offset over A's claim. A at the same sittings, obtains judgment against a number of other parties, for debts previously assigned; under these circumstances can the judgments obtained by A be levied on under execution issued in favor of B?

2nd. Would a Division Court Clerk be right in applying money paid to him in satisfaction of judgments in *favor* of A in payment of judgments obtained *against* A. If not, could the Bailiff levy on money in the Clerk's hands, belonging to parties, against which he, the Bailiff, held executions.

3rd. Can a Bailiff levy on a Cooking Stove, in a house in which there is no fire-place, or any other stove; or would the fact of the stove being the article for which the debt was contracted, on which the judgment was obtained make any difference?

4th. It frequently happens that parties, present themselves and produce claims which they wish sued, the Clerk demands a deposit, sufficient in his judgment to cover costs, supposing that judgment will go by default, it turns out at the trial that the defendant contests the claim and obtains a verdict, and is allowed payment for, say three witnesses, whose pay and mileage amount to more than the deposit, in such case is the Clerk obliged to pay over the deposit, as far as it goes, to the defendant, or his witnesses, if so, in what way can he, the Clerk, obtain his own costs, and if he is not how can the defendant recover his witnesses' fees? *This* is in my practice a frequent occurrence, and, in many cases, involves much loss either to myself or defendant.

If consistent with the objects for which the *Law Journal* is published, I shall feel obliged by an answer to the foregoing queries.

Yours truly

J. EASTWOOD.

ANSWERS.

1st. We think not.

2nd. The question is a difficult one, and there is yet no decision exactly in point but the case of Calverly v. Smith, reported in the 3rd Vol. of this Journal, page 67, would seem to bear against the Bailiff's right to levy on money in the Clerk's hands. The Clerk would clearly have no right to apply the the moneys as mentioned.

3rd. We are of opinion that he may—a cooking stove cannot be considered as a fixture.

4th. The deposit is to cover the fees to Clerk and fee fund. It cannot be made liable in any way for the payment of witnesses' fees, other than in reference to other sums ordered to be paid. Costs when ordered to be paid are enforcible by execution against the party who is ordered to pay them.

In the case supposed, the defendant produces proof to the Clerk that he has paid his witnesses, whereupon the Clerk taxes costs and issues execution against the plaintiff for the amount of the defendant's verdict and costs.

We repeat, in no case is the Clerk obliged to make payment to the defendant out of the sum deposited by plaintiff towards costs. Moreover, the Clerk cannot claim from a party entering a cause more than the fees payable on the proceedings.—Such party is not obliged to make any deposit as security for the defendant's costs in case he, the defendant, should have a verdict in his favor.]

E— asks "what steps he should take where he finds he cannot maintain his action, and desires to withdraw it without rendering himself liable to the defendant for costs."

The Plaintiff desiring to withdraw a suit should forthwith give notice to the Clerk of the Court, and to the defendant. It will be better to serve a written notice on the defendant which may be in the following form:—

In the ——— Division Court, County of ———
A. B Plaintiff.
v.
C. D. Defendant.

Take notice, that I have withdrawn my suit herein, and give you notice that you are not required to appear to the summons served on you.

Dated, &c. A.B.

To the above-named defendant

Should the withdrawal be shortly before the sittings, the defendant may have sued out subpœnas for witnesses, and in such case he will be entitled to be paid the sum disbursed.

To the Editors of the Law Journal.

PRESTON, 17th July, 1858.

GENTLEMEN,—You have no doubt seen the Bill No. 12, "An Act to amend the Division Court Acts of Upper Canada," as the same has been amended in Committee, and since there are several most impracticable clauses contained in the same, I beg to offer a few remarks.

In Section 1, it speaks of certain duties of the Judges of Division Courts *in vacation*, pray can you inform me when the Judges of Division Courts are in vacation?

Section 6, provides that the Plaintiff's books, if kept to the satisfaction of the Judge, shall be admitted as evidence. Now I think that the same privilege should be extended to Defendants, while in fact now this privilege is frequently granted by Judges.

Section 11, provides that "the bed and bedding and household utensils not exceeding altogether the value of £10, and the tools and implements of the trade of a debtor, or other property, not exceeding in value £10, shall be protected from execution." According to this clause the Bailiffs will have to make a Return of "Nulla Bona" to at least three-fourths of those executions that are handed to them, on which, under the present law, they could only "*make money*" by levy and sale. But if the object of that clause is to diminish the credit system, so extensively carried on in this Province, it will greatly tend to accomplish that object, although at the same time it will most materially reduce the fee fund.

Section 12 gives power of appeal to the County Court on judgments over £10. This clause, in my opinion, will create more evil than good. The same Judge that presides over the Division Courts most invariably presides over the County Courts. The greater number of cases in Division Courts are decided by the Judge alone; in fact, I have only had *three jury cases* in my court during the last *ten years*. The appeal therefore will be made from the decision of the Judge of the Division Court to the County Court, over which the same Judge presides; and it appears to me very doubtful whether, under these circumstances, the right of appeal will prove beneficial to suitors.

Sections 13 & 14. The return required to be made by the Clerk of a Division Court, to the Clerk of the County Court, of all monies paid into his hands by the Bailiff in his Division, will not only prove superfluous, but also incomplete, and therefore useless for reference.

Not all the monies that are paid into court are paid over by the Bailiff; the above mentioned return would therefore only show a part of the monies received by the Clerks, and consequently not be a satisfactory reference for suitors. Moreover, suitors are now allowed to examine the books of the Division Court Clerks at their respective offices, where *a full* statement of all monies paid in on suits may be obtained; while, at the same time, it will frequently be found to be more convenient for suitors and others to call at the office of the Division Court Clerk, for information respecting monies paid in on suits, than at that of the County Court Clerk. In many instances even, a part of a claim is paid to the Clerk, and only the balance to the Bailiff. What satisfaction would it be in such a case to a plaintiff, to find that in a judgment which he holds, say to the amount of $85, the Bailiff's return shows only $25 paid! He has after all to enquire of the Clerk of the Division Court, and then finds that the other sum of $60 has been paid by defendant to the Clerk, before the execution was issued, and that the Bailiff was only ordered to levy for the balance. Hardly one suitor out of a hundred will avail himself of the privilege of searching at the office of the Clerk of the County Court, where he can only obtain a limited information; and will therefore prefer to call, as at present, at the office of the Division Court Clerk, where he can get full information, and also find the Bailiff's return, made according to Rule 13 and certified by Rule 7.

Section 15. In the event of this clause becoming law, which makes Division Court clerks eligible to the office of County Court clerks it may happen that one and the same person may make a return to *himself*.

Section 17. The quarterly return required to be made under oath of fees charged against each suit, the amount actually received and paid to such clerk, together with all sums received as arrearages, will not only heap an immense deal of labour upon clerks, but will prove to be a most complicated work, if not a task almost impossible to perform, and after all be not a reliable reference.

To make out a list of the fees charged against each suit, *entered* from one quarter of a year to another, and state the amount actually paid to the clerk, *may* be done, but with great labour; but to mark down every subsequent charge of fees in suits that have been entered *previously* to the last quarter, together with all sums received as arrearages, and verify such return on oath, is next to impossible.

For instance, a party calls to search for several claims—the searches extend over several years—on some of the suits orders are given for execution, or for transcripts, or for judgment summonses—the clerk will charge his fees accordingly, and will therefore be required quarterly to refer back to each suit on which he has made any charge since his last return, to bring the charges for these additional fees into his return. At a subsequent time, he receives from the plaintiff a certain amount of fees towards these additional charges, he places

this amount to the credit of the plaintiff, and again has to refer back to those suits in making out the required return of *all sums received as arrearages.*

Although the Division Court Act of 1853, sec. 14, provides that "*the fees upon every proceeding shall be paid in the first instance by the plaintiff or defendant, on or before such proceeding, and the Bailiff's fees upon execution shall be paid to the Clerk of the Court;*" yet it is a general custom for clerks to take no deposit for fees, in the first instance, from such plaintiffs that sue for a number of claims, and that are otherwise safe. With such the clerk settles from time to time; paying over monies paid into court, after deducting fees in suits that are then not paid. This, however, is a private arrangement between the clerk and the plaintiffs, and can in no wise effect the fee fund. And even on those suits on which the clerk takes a deposit for fees in the first instance, he can never calculate the exact sum required; he does not know the mileage the bailiff will charge; he does not know whether the suit will be paid before or after court; whether it will be a defended or undefended suit; by all of which the fees will be either more or less. He can therefore only *suppose* a sum for fees.

By section 15 of the Division Court Act of 1853, the clerk is required to make his quarterly return for the fee fund, and pay over all sums charged for fees due to the fee fund during the past quarter of the year. This I take to mean on all suits entered, whether he has actually *received* the fees in the first instance or not; at least, this has been the practice in this county; and I cannot for a moment allow myself to think that the legislature, in framing that act, did intend it otherwise, although the clause only states "*of fees received,*" not as in the affidavit to form 66,—Clerk's return of emoluments, "*received and receivable.*"

If then the spirit of the Act is that *every suit entered* during each quarter is to be taken as if the clerk had received the fees for the same in the first instance, and that he is to make his return accordingly; and since there are no fees on any suit chargeable to the fee fund after judgment is rendered (for all subsequent fees belong either to the clerk or the bailiff); the clerk, in making out the return for the fee fund, never requires to refer to any other suits but to those entered in the last two quarters. But if, as contemplated by the proposed bill, the clerk would have to make a return of all sums received as arrearages, he would have to make such return from all the suits entered in the Procedure Book, which might sometimes require him to refer to several thousand suits, and then perhaps only for the sake of a fee of four pence, for fee fund fees on an entry of suit, paid to him by plaintiff a year or two years after entry of suit.

Should, however, the meaning of the words "*fees received,*" in the 15th section in the Division Court Act of 1853, be intended literally, without including "*receivable,*" as above explained, then I would beg to suggest that the 15th sec. be amended by adding, after the words "*of the fees received,*" the words "*or receivable.*"

As the law at present stands, the government has from each court a quarterly return of all the fees due to the fee fund, and also a semi-annual return of the clerk's emoluments (both returns are verified under oath of the clerk); and a return of the bailiff's fees is also required to be made according to the Act, which bailiff's return is to be filed in the office of the Clerk of the Division Court, also under oath. The whole of these fees appear in the books of the Clerk of the Division Court; they are open to the inspection of any party, and abstracts may be taken from them. And should there be any defect in these entries, there is ample law now to punish either clerk or bailiff for neglect of duty.

But with all the returns required to be made in the proposed Bill, no person will be able to state with certainty what total amount of fees has been charged or paid in each suit, unless he refers to all the returns; since it is not an uncommon occurrence that, after a lapse of time, additional costs are made for which fees are charged, or money paid in part on old suits, which charges and payments would appear in another quarterly return, as would also the payments of such additional fees, thereby making such returns for references very complicated and on that account not very reliable.

Section 16 provides that the net salary of a Division Court Clerk shall not exceed $2000 annually, with allowance for assistant.

Section 18, that the fees received *quarterly*, above $500, and required to pay salaries of assistant, shall be paid over *quarterly* to the credit of the fee fund.

These two clauses will not accomplish that which appears to be their object. If the net salary of a clerk shall not exceed $2000 a year, his fees received during *a year*, not during a quarter of a year, should be the guide. One quarter year may pay considerable over $500, and that surplus the clerk would be required to pay into the fee fund; while for another quarter that yields less than $500, he does not get the deficiency refunded, although he has to pay to his assistant a *yearly* salary, which is equal for every quarter, whether the fees exceeds $500 or not. Moreover, this clause opens a door to negligence, if not also to fraud. For if a clerk knows that his fees of $500 for one quarter are made, he may not care for taking in any more suits, or do any more work, and thereby not only the plaintiffs will suffer, but also the fee fund. To those that will say that the clerk may be punished for his neglect of duty, I only beg to reply, that it is always easier to do wrong than to detect and punish the wrong doer. If therefore the salary of a Division Court Clerk shall not exceed $2000 a year, then I am of opinion that the fees received during the whole year, and not for each quarter by itself, should be the guide.

Upon the whole, the Bill has omitted many necessary amendments and additions to the Division Court Acts, so frequently complained of by the public; and shows that the framer of the Bill has exhibited only a very limited knowledge of the practical working of the Division Court Acts.

Respectfully yours,

OTTO KLOTZ.

[We can add nothing to what our correspondent says. His remarks are pertinent and forcible, and carry with them the weight due to observations from a man of Mr. Klotz's intelligence and experience.

We would merely notice that the 16th, 17th, and 18th sections of the Bill of which he speaks appear to have been drawn without any regard to the existing provisions of law. They will be found, moreover, utterly impracticable. The returns cannot be made as required, and it would be impossible to check or properly audit them.

The 13th and 14th sections of the Bill are uncalled for and unnecessary. The statute and rules already provide a ready means for obtaining the object sought by these sections.]—EDS. *L. J.*

To the Editors of the Law Journal.

Wentworth County.

GENTLEMEN,—In the communication from Brantford, published in your number for June, concerning a suit between two clerks of Division Courts, your correspondent has not given you a true version of the transaction. B., clerk of the Division Court, sent A. his bill of costs, amounting to £15 8s., including disbursements to bailiff for fees charged on executions returned no goods. A. demanded particulars of items in one suit, and it was furnished to him. B. wrote several letters to A., demanding a settlement of his account, and no notice was taken of them: even a demand to send enough to pay his disbursements was treated with the same contempt. At last B. sued A.; and in court, having reason to believe his account correct, made affidavit to that effect. The difference between

the first judgment and the second was a great portion for disbursements to bailiff, which the Judge would not allow, and the balance for copies and statements of claims made according to the practice of the court, and sanctioned by a former Judge, but considered as unnecessary by the present Judge.

At this moment B. is still waiting for the payment of his claim, and has no prospect of recovering the amount, for the reason that A.'s goods and chattels are under a bill of sale. A. received the amount of B.'s claim at least nine months ago from a third party, and now he is not satisfied by enjoying the fruits of his rapacity, but tries to injure the character of a brother clerk, who stands higher in public opinion in his own county than will ever the individual who penned the Brantford communication.

Your obedient servant,

A. B.

[We deem it but just to insert the above. We of course must speak upon the facts before us, assuming them to be correct. Having published A. B.'s letter, the matter must end so far as we are concerned, for our remarks in the June number related only to a statement of facts then before us.—EDS. *L. J.*]

MANUAL ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—BY V——.)

[CONTINUED FROM PAGE 158, VOL. IV.]

ACTIONS AGAINST BAILIFFS FOR ACTS DONE IN THE COURSE OF THEIR DUTIES.

For the protection of Bailiffs and other officers of the Courts, it is enacted, "that all actions and prosecutions to be commenced against any person for anything done in pursuance of this act shall be laid and tried in the County where the fact was committed, and shall be commenced within six calendar months after the fact was committed, and not afterwards or otherwise, and notice in writing of such action and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and no plaintiff shall recover in any such action if tender of sufficient amends, shall have been made before such action brought, or if after action brought a sufficient sum of money shall have been paid into Court with costs by or on behalf of the defendant, and it shall be lawful in any such action for the defendant to plead the general issue and to give any special matter arising under this Act under such plea." (13 & 14 Vic. c. 53 s. 107).

If a bailiff have reasonable grounds to believe that he is acting in pursuance of the statute and does the act complained under a bona fide belief that his duty as Bailiff makes it incumbent on him to do it he is entitled to the protection afforded by this section, notwithstanding the act done may in point of law be unauthorized by the statute: (Booth v. Clive, 10 C. B. 827; 1 Cox & M. Co., C. cases 439; Cann v. Clipperton, 10 A. & E., 582; Lidster v. Borrow, 9 A. & E., 654; Cook v. Leonard, 6 B. & C. 355; Hughes v. Buckland, 15 M. & W., 346; Horn v. Thornborough, 3 Ex., 846.) And where bailiffs of a Court took in execution certain goods as the goods of the defendant, (though they afterwards proved to be the goods of a third party) having in so doing acted under the bona fide belief that this act was authorized by the statute, the Court held that that they were not deprived of the benefits of its provisions by reason of their having previously taken an indemnity from the judgment creditor. (White v. Morris et al, 11 C. B., 1015; 18 L. T., Rep. 256; see also Eslob v. Wright, 1 Cox M. & H., 527). In the notice of action given under this clause, the Court in which the action is intended to be brought should be specified, and where a notice of action against the Clerk and Bailiff of a County Court stated that the action was to be brought in the Court of Common Pleas, it was held by Lord Campbell *in the case last cited* that such notice would not support an action in the Court of Queen's Bench.

As this work is mainly intended for the information of bailiffs, it seems proper to notice in detail the steps that should be taken by a bailiff who seeks to defend himself under the 107th section of the D. C. Act. Should the action be brought in the Superior Court the officer will of course obtain professional assistance, and such actions need not be dwelt upon, but in the majority of cases the action will be in a Division Court, and notice under this section must be given in the proper way, and in sufficient time to enable the officer to avail himself of its protection. With respect then to actions in the Division Courts it will be noticed that according to the provisions of the section 107, the following are requisites in actions against Division Court officers:—

1st. The action must be laid and tried in the County where the fact was committed.

2nd. It must be commenced within six months after the act was committed.

3rd. A calendar month's notice of action must be given.

If the plaintiff fail to comply with any of these requirements, such non-compliance will be a defence to the action. If a defendant (bailiff) would avail himself of any of the three grounds of defence, viz:—that the action is not in the proper county; that it has not been commenced in due time; or that notice of action has not been given, he should give notice thereof to the plaintiff under the 43rd section of the Division Court Act, which provides that the defendant may avail himself of any relief or discharge under any statute *on delivering a notice thereof in writing* to the to the plaintiff, or leaving it at his usual place of abode, if within the Division, or if living without the Division by leaving it with the Clerk of the Court at least six days before the trial or hearing.

THE MAGISTRATE'S MANUAL.

BY A BARRISTER-AT-LAW—(COPYRIGHT RESERVED.)

[*Continued from page* 159, VOL. IV.]

IV.—ATTENDANCE OF WITNESSES.

Summons.—It is a common thing for a prosecutor to appear with his witnesses voluntarily. Should it however, be made to appear by the oath or affirmation of any credible person, whether prosecutor or not, that any one within the jurisdiction of the justice is likely to give material evidence for the prosecution, and will not voluntarily do so, the justice may issue a summons under his hand and seal requiring the attendance of such person. The summons ought to require the person named in it to appear

at a time and place mentioned therein before the justice who issued it, or before any other justice of the peace for the same territorial division as may be at the place named at the time named. The object of the attendance, viz.,—to testify what the witness knows concerning the charge made against the party accused ought also to be stated in the summons.*

Form of Summons.—The summons may be in this form.

† Province of Canada, (*County or United Counties, or as the case may be*) of ——

To E. F. of ——, (*laborer*):

Whereas information hath been laid before the undersigned, one of Her Majesty's Justices of the Peace in and for the said (*County or United Counties, or as the case may be*) of ——, that A. B. (*&c., as in the Summons or Warrant against the accused,*) and it hath been made to appear to me upon (*oath*), that you are likely to give material evidence for (*prosecution*); These are therefore to require you to be and appear before me on —— next, at —— o'clock in the (*fore*) noon, at ——, or before such other Justice or Justices of the Peace for the same (*County or United Counties, or as the case may be,*) of ——, as may then be there, to testify what you shall know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

Given under my Hand and Seal, this —— day of ——, in the year of our Lord ——, at ——, in the (*County, &c.,*) aforesaid.

[L. S.] J. S.

Service of Summons.—The summons may be served by any person capable of testifying to the fact. It ought to be served either personally on the person to whom it is directed, or upon some person for him at his last or most usual place of abode.‡

Warrant in case of disobedience.—It is the duty of the person served, that is, the person named in the summons, to attend at the place and time mentioned therein. If he neglect or refuse to do so, and no just excuse be offered for the neglect or refusal, proceedings may be had to compel his attendance. It is for the person who served the summons, either by oath or affirmation to testify to the same. Then the justice or justices before whom it was the duty of the person summoned to have appeared, may issue a warrant for his apprehension. It must be under the hand and seal of the justice or justices issuing the same, and may be directed to all or any of the constables or peace officers of the County or other territorial division, or the justice or justices who signed and sealed it. It ought to require the person or persons to whom it is directed to bring and have the person named in it before the justice or justices who issued it, or before such other justice or justices of the peace for the same territorial division as may be at the place and time mentioned. It may be backed in the same manner as other warrants already mentioned, and when so backed may be executed within the jurisdiction of the justice who backed it. ‖

Form of Warrant.—The warrant may be in this form.

§ Province of Canada, (*County or United Counties, or as the case may be*) of ——

To all or any of the Constables, or other Peace Officers, in the said (*County or United Counties, or as the case may be*) of ——.

Whereas information having been laid before —— (*one*) of Her Majesty's Justices of the Peace in and for the said (*County, &c.,*) of ——, that A. B., (*&c., as in the Summons*); And it having been made to appear to (*me*) upon oath that E. F. of ——, (*laborer*) was likely to give material evidence for the prosecution, (*I*) did duly issue (*my*) Summons to the said E. F., requiring him to be and appear before (*me*) on ——, at ——, or before such other Justice or Justices of the Peace for the same (*County or United Counties or as the case may be*) as might then be there, to testify *what he should know concerning the said charge so made against* the said A. B. as aforesaid; And whereas proof hath this day been made upon oath before (*me*) of such Summons having been duly served upon the said E. F.; And whereas the said E. F. hath neglected to appear at the time and place appointed by the said Summons, and no just excuse has been offered for such neglect; These are therefore to command you to bring and have the said E. F. before (*me*) on —— at —— o'clock in the (*fore*) noon, at ——, or before such other Justice or Justices of the Peace for the same (*County or United Counties or as the case may be*) as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under (*my*) Hand and Seal, this —— day of —— in the year of our Lord ——, at —— in the (*County, &c.,*) aforesaid.

[L. S.] J. S.

Warrant in first instance.—It is not however necessary for the justice to issue a summons before issuing a warrant for the apprehension of a witness. If satisfied by oath or affirmation of the probability that the person required as a witness will not attend to give evidence unless compelled to do so, the justice instead of issuing a summons, may, in the first instance issue his warrant, The warrant so issued may be backed like other warrants, and with the like effect.*

Form of such Warrant.—The warrant in the first instance for a witness may be in this form.

† Province of Canada, (*County or United Counties, or as the case may be*) of ——

To all or any of the Constables or Peace Officers in the said (*County or United Counties, or as the case may be*) of ——:

Whereas information has been laid before the undersigned (*one*) of Her Majesty's Justices of the Peace, in and for the said (*County or United Counties, or as the case may be*) of ——, that (*&c., as in the Summons*); and it having been made to appear to (*me*) upon oath, that E. F. of ——, (*laborer*), is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so; These are therefore to command you to bring and have the said E. F. before (*me*) on ——, at —— o'clock in the (*fore*) noon, at ——, or before such other Justice or Justices of the Peace for the same (*County or United Counties or as the case may be,*) as may then be there, to testify what he shall know concerning the said charge so made against the said A. B. as aforesaid.

Given under my Hond and Seal, this —— day of ——, in the year of our Lord ——, at ——, in the (*County, &c.,*) aforesaid.

[L. S.] J. S.

Commitment of Witness refusing to testify.—If on the appearance of the witness either in obedience to the summons or under a warrant he refuse to be examined upon oath or affirmation, or having taken the oath or affirmation refuse to answer such questions concerning the subject matter of the charge as may then be put to him, without giving any just excuse for his refusal, in any such case the justice then present and having jurisdiction may commit him. The committal may be to the common gaol of the County where the witness so refusing may then be, there to remain and be imprisoned for any time not exceeding ten days, unless he shall in the meantime consent to be examined and to answer.‡

Form of Warrant of Committal.—The warrant must of

* 16 Vic. cap. 179, s. 8. † *Ib.* Sch. L., 1. ‡ *Ib.* sec. 8. ‖ *Ib.* 16 Vic. c. 179. sec. 8. § *Ib.* Sch. L. (2).

* 16 Vic. c. 179, s. 8. † *Ib.* Sch. L. (3). ‡ 16 Vic. c. 179, s. 8.

course be under the hand and seal of the justice issuing it and may be in this form.

* Province of Canada, (*County or United Counties, or as the case may be*) of ——

To all or any of the Constables or other Peace Officers in the (*County or United Counties, or as the case may be*) of ——, and to the Keeper of the Common Gaol at ——, in the said (*County or United Counties, or as the case may be*) of ——:

Whereas A. B. was lately charged before ——, (*one*) of Her Majesty's Justices of the Peace in and for the said (*County or United Counties, or as the case may be*) of ——, for that (*&c., as in the Summons*); And it having been made to appear to (*me*) upon oath that E. F. of ——, was likely to give material evidence for the prosecution, (*I*) duly issue (*my*) Summons to the said E. F. requiring him to be and appear before me on ——, at ——, or before such other Justice or Justices of the Peace for the same (*County or United Counties, or as the case may be*) as should then be there, to testify what he should know concerning the said charges so made against the said A. B. as aforesaid; And the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a Warrant in that behalf, to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, hath now refused so to do, (*or* being duly sworn as a witness doth now refuse to answer certain questions concerning the premises which are now here put to him, and more particularly the following) —— without offering any just excuse for such refusal; These are therefore to command you, the said Constables Peace Officers, or any one of you, to take the said E. F. and him safely convey to the Common Gaol at ——, in the (*County, &c.*) aforesaid, and there to deliver him to the Keeper thereof, together with this Precept; And (*I*) do hereby command you, the said Keeper of the said Common Gaol to receive the said E. F. into your custody in the said Common Gaol, and him there safely keep for the space of —— days, for his said contempt, unless he shall in the mean time consent to be examined, and to answer concerning the premises; and for so doing, this shall be your sufficient Warrant.

Given under (*my*) Hand and Seal, this ——, day of ——, in the year of our Lord ——, at ——, in the (*County, &c.*) aforesaid.

[L. S.] J. S.

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

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

REGINA v CUMMINGS.

*Embezzlement by bank clerk—Form of indictment—Contra formam statuti—*12 *Vic., ch.* 121, *sec.* 40.

The prisoner, being a clerk in the Bank of Upper Canada was placed in an office apart from the bank, and entrusted with funds for the purpose of paying persons having claims upon the government, which payments were made upon the cheques of the Receiver General, whose office was in the same building. While so employed a deficiency was discovered in his accounts which he at first ascribed to a robbery, but he afterwards confessed that he had lent the moneys entrusted to him to various friends. It also appeared that on a certain day he had received a cheque from the Receiver-General for £1439 15s., for coupons on government debentures held by the bank, and had credited himself in account with that sum as if paid out by him on the check, making no entry of the coupons, thus covering his deficiencies by so much, and making it appear that he had paid out the amount of the check in cash, when he in fact had paid nothing.

The indictment contained two counts: *the first* charging that on, &c., the prisoner being a clerk, then employed in that capacity by the bank, did *then* and *there* in virtue thereof receive a certain sum, to wit., £1439 15s. for and on account of the said bank, and the said money feloniously did embezzle. *The second*, that he, as such clerk, received a certain valuable security, to wit, an order for the payment of *money*, to wit, £1439 15s. for and on account of the said bank. and the said valuable security feloniously did embezzle. On this indictment he was convicted of embezzlement.

Held, that the indictment was not supported by the evidence. (Draper, C. J. and Burns, J. dissentientibus.)

(The effect of the omission of the conclusion, *contra formam statuti*, also considered).

EMBEZZLEMENT.—At the trial, at Toronto, before *Draper*, C. J., the evidence established that the prisoner, being a clerk in the Bank of Upper Canada, was in that capacity placed by the Bank in charge of an office in a building apart from the Bank, but in the same town; and funds were from time to time supplied to him by the Bank, for the purpose of enabling him to make payments to salaried officers and others who had claims upon the government, which payments were made by him upon cheques drawn by the Receiver-General upon the Bank.

It was an arrangement made by the Bank for the convenience of the government and its officers, the room occupied by the defendant for that purpose being within the same building as the Receiver-General's office.

While the defendant was so entrusted by the Bank with large amounts of money in their bills, out of which to make disbursements upon cheques drawn upon the Receiver-General, it turned out that there was a large deficiency in his funds, which he at first ascribed wholly to an alleged robbery of the funds from the safe in his office; but he afterwards confessed that he had from time to time lent large sums of money to several parties named, not upon any transactions or claims of such parties with or upon the Bank or the government, but relying, as he said, that those to whom he had lent the Bank funds, without the authority or knowledge of the Bank, would replace the money.

It was not proved in the case whether he derived or intended to derive any gain to himself by such loans, either in the shape of interest, or by a participation in any profits that might arise from the use of the money by those to whom he had lent it.

All these loans had been concealed from the knowledge of the Bank, no entry of them having been made in the accounts which he rendered to the Bank of each day's transactions

In addition to the prisoner's own confession of his having made this misappropriation of the moneys of the Bank entrusted to him for the special purpose mentioned, it was proved that on a certain day (12th of March, 1857) he had received a cheque from the Receiver-General for £1439 15s. which he had delivered in at the Bank, and had entered in his account as shewing a disbursement made by him in cash to the Receiver-General out of the funds entrusted to him for that purpose, such entry apparently acquitting him of that amount. But it was afterwards discovered, and was proved upon the trial, that this was not a true account of the transactions.

The prisoner had paid out no money to the Receiver-General upon the cheque in question, but the cheque was given to him by the Receiver-General to cover a demand made by the prisoner, as Bank clerk, upon the government for coupons which were held by the Bank on their own account, or on behalf of others, in respect of interest that had accrued on government debentures lying in the Bank; and the prisoner, by omitting to make any entry in his book of these coupons, which he gave up in exchange for the cheque, in effect concealed from the knowledge of the Bank the real nature of the transaction, and covered his deficiencies to that extent, by making it appear that he had paid out £1439 15s. of the money of the Bank upon that cheque, and keeping out of view the delivery by him to the Receiver-General of the coupons on account of which alone he had obtained the cheque. If he had made the proper entries, this transaction of the coupons could not have affected the state of his cash account, and he would have had the £1439 15s. still to account for.

This was submitted to the jury as evidence of his fraudulent intention, and as shewing a misappropriation of the funds to that extent at least; for the £1439 15s., which ought to have been in his hands as much as if no cheque had been drawn upon him, was not forthcoming. And indeed it was plain from his own admissions that that amount was only a part of his deficiencies, which was covered from view by this omission to enter the coupons as delivered out by him.

The prisoner was indicted on two counts. The first charged that on the 11th of March, 1857, he being a clerk then employed in that capacity by the Bank of Upper Canada, did then and there in virtue thereof, receive a certain sum of money, to wit, £1439 15s. for and on account of the said Bank of Upper Canada, and the said money feloniously did embezzle.

The second count charged that the prisoner, on the 11th of March, 1857, being a clerk, &c., and employed, &c., (as in the

* 16 Vic. c. 179 Sch. L. (4).

first count) did then and there in virtue thereof receive a certain valuable security, to wit, an order for the payment of £1439 15s., for and on account of the said Bank of Upper Canada, and the said valuable security feloniously did embezzle.

There was no conclusion of the offence in either count being contrary to the statute.

The jury found a general verdict—"Guilty of embezzlement," —upon which verdict judgment was given.

The defendant under statute 20 Vic., ch. 61. applied to the Court of Queen's Bench, for a new trial, or for such other order as the Court might think fit to make.

That Court discharged his application and confirmed the conviction.

The defendant then under the same statute appealed from the Court of Queen's Bench to the Court of Error and Appeal in Upper Canada.

Galt and *Harrison* for the crown. *D. B. Read* and *C. Patterson* for the prisoner.

The authorities cited on the argument appear in the opinions expressed by the learned judges.

BLAKE, C.—The indictment in this case contains two counts only. The second was abandoned upon the argument and the question before us turns, therefore, upon the first which is in the words "The jurors &c., present that Moses Cumming on &c., at &c., and being a clerk then employed in that capacity by the Bank of Upper Canada did then and there in virtue thereof receive a certain sum of money to wit, &c., for and on account of the said Bank of Upper Canada, and the said money did embezzle." The charge against the prisoner, therefore, was that *being a clerk in the employment of the Bank of Upper Canada*, he did, in the virtue of that employment, *receive* a sum of money *on account of the said Bank* which he subsequently embezzled.

Now that is the precise felony created by the 39 Geo. III. ch. 85, continued by 7 & 8 Geo. IV. ch. 29, sec. 47 of which latter enactment the 39th section of the Provincial Statute, 4 & 5 Vic., ch. 25, is a literal transcript. But it is quite clear as well from the language of that act, as from the decisions upon it, that the prisoner could not have been convicted under it. If guilty of any crime it was not the crime of embezzling money *received* by him on *account* of his employer but of embezzling money *entrusted* to him *by his* employer a different felony created by a subsequent statute 6 Vic., ch. 27, sec. 31, & 19 Vic., ch. 121, sec. 4, subjecting the prisoner to a different punishment, 4 & 5 Vic. ch. 25, sec. 38, & 19 Vic., ch. 121, sec. 40.

It is argued however that the conviction of the prisoner in this case may be supported as a conviction under the statute 19 Vic., ch 121, sec. 40, upon two grounds. It is said in the first place that the term "embezzlement" has been employed by the Legislature in a much larger sense than that attributed to it by the 39 Geo. III. ch. 85, in a sense which would embrace the felony created by the 6 Vic., ch 27 continued by 19 Vic., ch. 121, and it is argued that as the prisoner was charged with and convicted of embezzlement, he may be held to have been charged with and convicted of the felony created by the recent Statute.

Embezzlement is defined to be "the act of appropriating to himself that which is received in trust for another." And it is quite true that the term has been frequently employed by the Legislature in that its popular sense both before and since the Statute 39 Geo. III. ch. 85 But embezzlement in that large sense was not criminal at common law nor has it been rendered so by statute. The Legislature has from time to time specified different classes of cases, all coming within the meaning of the term embezzlement in its popular sense which it has declared to be criminal; but I cannot accede to the argument that because the felony created by the 39 Geo. III. ch. 85, and the felony created by the 19 Vic., ch. 121, are both termed embezzlement, therefore a conviction under an indictment framed under the former statute can be supported upon evidence exclusively applicable to the latter.

It is argued, however, that the indictment in this case pursues the form prescribed by the statute 18 Vic., ch. 92, and must therefore be deemed sufficient. But it is impossible to suppose that that the Legislature meant to provide that the form given in that statute should apply to the various and widely different offences coming under the general denomination "embezzlement." The Legislature did not intend I apprehend to frame a form of indictment for embezzlement which should be universally applicable, but only to furnish the form of an indictment for one species of embezzlement, as a model upon which indictments for other species of embezzlement might be framed. The particular species of embezzlement selected by the Legislature as an example is obviously that declared to be felonious by the 39th section of the 4 & 5 Vic., ch. 25. The offence is described in the precise language of that section which has been constantly adhered to since the 39 Geo. III and cannot have been intended to embrace that sort of embezzlement made felony by the 6 Vic., ch. 27, sec. 31, inasmuch as that species of embezzlement is confined strictly to Bankers clerks whereas the prescribed form applies to clerks of every description.

I am therefore of opinion that the prisoner is at the least, entitled to have the judgment of the Court of Queen's Bench on the motion for a new trial reversed. I say that he is entitled to that relief at the least because I am by no means clear that he is not entitled to more; but that point has not been discussed and as a majority of my learned brothers think that this is not the appropriate time for that discussion, a view however in which I am unable to concur, I refrain from expressing my opinion on the further important points which the case involves.

DRAPER, C. J. C. P.—I am of opinion that this appeal should be dismissed. There are points upon which I purpose to offer a few observations. 1st The general form and substance of the indictment. 2nd. The necessity of its concluding contra formam statuti. 3rd. The sufficiency of the evidence.

I The 39th George III., c. 85, followed by 7 & 8 George IV. in England affords the foundation for our Statute 4 & 5 Vic., cap. 25 s. 39. Embezzlement under these acts meant the intercepting money, &c., in its way to the possession of the master, by the clerk or servant who received it, for or in the name or on account of his master, and appropriating the same or any part thereof to his own use. The chattel money or valuable security was never in the possession of the master, otherwise than by being in the hands of the clerk or servant. It was embezzled before it came into the master's possession. By these acts the offender was to be deemed feloniously to have stolen the money or article embezzled although it had been in the possession of the master or only by being in the actual possession of the clerk or servant embezzleing it.

Another series of acts was passed in England for the punishment of clerks, &c., of Banks, and of other public companies; and several enactments were passed in this Province, by which the embezzlement of money, bills, bonds, notes, &c., belonging to a Bank, or belonging to any one else but lodged or deposited with the Bank was declared to be felony. The first act of this description applicable to the Bank of Upper Canada, was the 6 Vic. c 27, s. 31, which defined the offence, and declared it to be felony. The 34th section of the same act prescribed the punishment for this and some other felonies (forgeries) made punishable by the same Statute. When the Legislature passed the Statute 10 & 11 Vic. relative to forgery, they repealed the clauses of the 6th Vic., ch 27 as to the offence, and repealed sec. 34 which provided for the punishment of all the felonies created by this latter act, and consequenitly embezzlement as created by this statute was punishable as a felony under sec. 24 of 4 & 5 Vic., cap. 24. The 19 & 20 Vic. cap. 121, sec. 40, re-enacted almost verbatim, the 31st clause of 6 Vic. cap. 27, declaring the offence to be felony; and by sec. 41 providing that felonies under that act should be punished by imprisonment at hard labour in the Provincial Penetentiary for any time not less than two years, or by imprisonment in any other Gaol or place of confinement for any less term than two years.

Before this last mentioned act was passed, the Statute 18 Vic. cap. 92 had come into force, the 47 section of which enacts that "indictments may be in the following forms in *charging the offence* to which such indictments severally relate; and in *offences not enumerated* herein the said forms shall guide as to the manner in which such offences shall be cherged so as to avoid surplusage and the averment of matter not required to be proved." Then follow various forms of indictment headed "Simple Larceny," "False Pretences," "Embezzlement," "Stealing Money," "Murder," "Manslaghter," "Perjury," "Subornation of Perjury." There

is no formal conclusion to any one of these forms. The form given under the head "Embezzlement" is followed precisely in this indictment, so that the prisoner is indicted for embezzlement in the form provided by the act for that offence, and it cannot be said that "*Embezzlement*" is an *offence not enumerated* in the 47th section. It must however be conceded that this form cannot be considered applicable to all cases of embezzlement, for it concludes with the words "*feloniously did embezzle*," which is inapplicable to embezzlement against the 41st section of 4 & 5 Vic. cap. 25, which declares the offence to be a misdemeanor. But, allowing this exception, I think we must hold one of two things, either that the Legislature were giving a general form for the indicting of all persons who by any act of embezzlement had committed felony, or that they had at least provided a form for the indicting of persons charged with embezzlement as a substantive felony. In this latter character embezzlement is not an offence known to the common law. The earliest English Stat. 21 Henry VIII., cap. 7, does not apply to cases of the present discription, and this and the 39th Geo. III. cap. 85 were the only Statutes in the Province affecting embezzlements until the 4 & 5 Vic. cap 25. It is to be observed that this, like the corresponding acts of the Imperial Parliament declares that the clerk or servant who embezzles contrary to its provisions shall be deemed to have *feloniously stolen* the article embezzled—in effect makes the act of embezzlement proof of a larceny. The Bank acts for the first time make the embezzlement a distinct felony in itself. That the Legislature may well have intended to include offences against the 4 & 5 Vic. as among those to which the form of indictment given by the 18 Vic. is applicable, we may well conclude, notwithstanding the three last words, for it describes the facts constituting the crime in the words of that act. Still in the concluding words "feloniously did embezzle" it departs from the enactment which was more correctly followed by the usual form, which setting forth the act of embezzlement stated that so the accused, the said money or chattels, &c., feloniously *did steal*. The argument deducible from the words "feloniously did embezzle" is that the form of indictment given is suited to the offence of embezzlement as a substantive felony. The argument deducible from the description of the acts charged as embezzlement following the language of the 4 & 5 Vic., is that it must at least include offences against that act. I am disposed to concede this, but I cannot go so far as to hold that it applies to the latter only and is not a form suitable and intended for a felony under the Bank Act. If either is to be excluded, I think it doing less violence to the language used to treat the form as suitable to cases in which the embezzlement is in itself *eo nomine* a felony, than to those in which it is declared to be a felony of a character previously known to the common law, viz., larceny; and the more so as it had been previously determined that indictments under the 39 Geo. III. must contain all the requisites of an indictment for larceny at common law. (See Carrington's Criminal Pleading 319; Headge's Case, R. & Ry. 160.)

It may however be objected that it cannot be held that this form is suitable to the offences under both Statutes, because the punishments are different. With every respect for contrary opinions, I think this objection more specious than substantial. Under the Stat. 4 & 5 Vic. the punishment was imprisonment in the Provincial Penetentiary for any term not exceeding fourteen years, nor less than seven years, or by imprisonment in any other prison &c. for any term not exceeding two years. The 6 Vic. chap. 5, sec. 2 left the maximum of imprisonment in the Penetentiary untouched but changed the minimum from seven to three years. The 14 & 15 Vic. cap. 2 sec. 2 in effect reduced the minimum to two years. Under the 6 Vic. cap. 27, since the 10 & 11 Vic. cap. 9 was passed the punishment of embezzlement was (4 & 5 Vic. cap. 24, sec. 24; 6 Vic. cap. 5; and 14 & 15 Vic. cap. 2) imprisonment in the penetentiary for any term not less than two years without limiting any maximum; or imprisonment in any other prison not exceeding two years. And under the 19 & 20 Vic. cap. 121 the punishment was precisely similar, so that for offences under the 4 & 5 Vic. and the 19 & 20 Vic. the difference was that the court could not award imprisonment in the Penetentiary for more than fourteen years in the one case; in the other there was no limit fixed. The question is not whether practically there is the slightest danger that a sentence exceeding the limit of fourteen years would be imposed, but whether the fact that sentences of imprisonment different in duration though alike in other particulars may be imposed, presents an insurmountable difficulty to the crime under each statute, being stated in an indictment in precisely similar words. In Reg. v. Johnson, (3 M. & S. 539) the Court of Kings Bench held that counts under the statute 39 Geo. III. might be joined with counts for larceny at common law; and I have no idea that the prosecutor would have, at the opening of his case, been put to his election as to which of the two statutory or the common law count he could proceed upon, though he would have been limited to one state of facts relating to one simple act of offence. The judgment at that time for grand larceny was death, unless the convict prayed his clergy. If he did, and the offence was against the statute, he might be transported for fourteen years, though if convicted for larceny only at common law, the sentence of transportation could not exceed seven years. In principle I do not think there is any difference between the two cases, though the judgment was death unless the benefit of clergy was prayed; the prayer was a mere form; the secondary punishment was that really imposed by law for the offence; and I see no greater difficulty in the court awarding the proper legal sentence according as the conviction was for embezzlement against the 4 & 5 Vic., or the 19 & 20 Vic., than in the case of Reg. v. Johnson, according as the conviction was for the statutory or the common law larceny. At the most this is but an argument against a particular construction of the statute, the effect of which is to prove that when the Legislature gave a form intended as an indictment for *feloniously embezzling*, that form is only applicable to cases of embezzlement in which the offender by the express words of 4 & 5 Vic. is to be deemed guilty of feloniously stealing.

Upon the whole as to this question I conclude either that the form given in sec. 47 of 18 Vic. cap. 92 is suited for all felonious embezzlements, *i. e.*, as well for offences against the 4 & 5 Vic. cap. 25, sec. 39 as for those created by 19 & 20 Vic. cap. 121, sec. 40 and other similar enactments; or that if it is to be restricted in its application the words and the conclusion "*feloniously did embezzle*" point to an intention to give it as a form for felonious embezzlement as an independent offence rather than for embezzlement declared to be a different felony having a well known legal designation.

II. It is objected that the indictment does not conclude *contra formam statuti*.

The 46 section of 4 & 5 Vic. cap. 24, appears to be still in force. It is a transcript of sec. 20 of the Impl. Stat. 7 Geo. IV. cap. 64, but it does not extend to the omission of the words "*contra formam statuti*," and its avowed intention is to prevent arrest of judgment after verdict or outlawry, or by confession, default, or otherwise.

The Stat 14 & 15 Vic. cap. 100 (Lord Campbell's Act) goes further, (sec. 23) by rendering it unnecessary to state any venue in the body of an indictment, and then by declaring (sec. 24) that no indictment shall be held insufficient for want of any of the matters, or by reason of any of the errors of omission or commission therein set forth, and which except as to venue, the want of a proper or formal conclusion, and the statement of value or price, or the amount of damage, injury, or spoil, is similar to the 7 Geo. IV. cap. 64. The substantial difference is that the 7 Geo. IV. only prevented arrest or reversal of judgment for any of the enumerated defects; the 14 & 15 Vic. prevents such formal objection being entertained at any time. Section 25 of the Impl. Act is re-enacted verbatim by sec. 26 of our own stat. 18 Vic. cap. 92. Our statute however has no section corresponding with sec. 24 of Lord Campbell's Act. Instead thereof sec 25 only provides "that no indictment for any offence shall be held insufficient for want of the averment of any formal matter or matters unnecessary to be proved." The 25 sec. of the Impl. Stat. was apparently meant to provide for matters not included in the preceding section, in which certain formal matters are enumerated and declared unimportant. The 25 sec. provides a mode for dealing with matters of special form as the 24th section does for matters of general form. Since this act the omission to conclude an indictment *contra formam statuti* can only be taken advantage of in England by demurrer, if indeed the words "for want of a proper or formal conclusion" do not prevent the objection being raised in any form, which it seems

to me they do. The omission of these words is at most a formal defect. If improperly introduced, they may be rejected as surplusage, (Rex v. Matthews, 5 T. R. 162) The recitals by way of preamble to both the Imperial Statutes and our own show an intention to supercede merely technical and formal objection in criminal proceedings. The former Act in express language points out the want of a formal or proper conclusion as one of such objections. Our Statute first provides that every objection for want of form shall be taken by demurrer, and next that no indictment shall be held insufficient for the want of any formal matter or matters unnecessary to be proved. I think therefore that this objection, if available at all, can only be so on demurrer, and certainly feel clear that it affords no ground for a new trial.

III. The last point is the evidence. It was proved that the Prisoner was, in March, 1857, and for a considerable time before, and to the end of July of that year a Clerk of the Bank of Upper Canada. That he was employed in Toronto, not in the Bank itself, but had an office in a building occupied by some Government Departments, and that his chief duty was to receive money from the Government for the Bank and to pay checks drawn by the Receiver General upon the Bank. His duty and practice were to render every evening to the Bank an account of that day's transactions entered in a book and headed "Cash." The Balance appearing at the close of one day's transactions being carried forward to the next, and it professed to shew, and, if correct, did shew the amount of cash remaining at the close of each daily account in the prisoners charge. The Bank was in the habit of delivering to the prisoner coupons for the half yearly interest on Government debentures which they had paid to the holders, either at the parent institution or at its branches or agencies. They kept an account of these transactions in their books headed "Coupon account," and when any coupons entered in this account were handed to the prisoner to get the money, he was required to put his initials opposite to the entry as an acknowledgement that he had received these Coupons for Collection; for the Bank had no account opened in its books in the prisoner's name. When the prisoner received payment (which was made by checks) from the Receiver General for the coupons he presented it was his duty to give credit on one side to coupon account for the amount, and on the other to make a corresponding entry of the Receiver General's check; one entry thus balancing the other. The principle part of the money disbursed by the prisoner in paying the Receiver General's Checks, was received by him directly from the Bank. On the 11th March, 1857, the prisoner presented coupons to the amount of £1439. 15s. and obtained in return the Receiver General's check on the Bank for that sum. In the daily account for the 11 March, 1857, he made an entry of this check as one paid by him making no corresponding entry on the other side to the credit of Coupon account, either then or at any other time. He thus in effect accounted for the expenditure of £1439 15s without acknowledging the receipt for the like sum obtained through the medium of the check for the coupons. Of this particular transaction the evidence was precise. Besides this there was proof of the prisoner's admissions that his Cash account with the Bank was deficient in the sum of £2750, which he said he had lent to two parties then in Toronto, and in two other sums £1500, and £800, which he also said he had lent, and he stated he expected he would have had these moneys repaid to him, and then that his cash balance would be all right. None of these loans were entered by the prisoner in his Cash book, nor was there any proof of his authority to make them, nor beyond the proof afforded by the Prisoner's admissions which were given in evidence in support of the prosecution, was there evidence given that they had been made, though no doubt of the fact was suggested, except as matter of inference from this Coupon transaction of £1439. 15s. there was no evidence of the time at which the prisoner disposed of the monies of the Bank so as to create the admitted deficiency in his cash account. I left these facts to the Jury as sufficient to establish that the prisoner made the entry of the Receiver General's Check on the 12 March; 1857, and omitted to make the proper corresponding entry, for the fraudulent purpose of concealing an appropriation by him of that amount to his own purposes or to purposes other than those which were within the scope of his authority or duty, and that this was evidence from which they might infer a case of embezzlement by him of that particular sum, and on that occasion. According to the case of R. v. Groves 1 Moo. C C. 447, this was more than sufficient. It is true that in R. v. Owen Jones 7 C. & P. 833 Bolland, B. and in R. v. Chapman, 1 C. & K. 119 Williams J. held that a prisoner could not be convicted of embezzlement unless he was shewn to have received some particular sum from his employer, and to have converted the whole or part of it to his own use, though Bolland, B. adds unless he also denied the receipt or the like. And in Reg. v. Lloyd Jones, 8 C. & P. 288 Alderson, B. held also that it was not enough to prove a general deficiency of account, that some specific sum must be proved to be embezzled, as in larceny some particular article must be proved to be stolen, and he stated that there were peculiar circumstances in R. v. Groves. I must say that I cannot see any distinction in favor of the prisoner to be drawn from R. v. Groves as reported by Moody, and it was a decision of the 12 Judges. And the case of Reg. v. Wright 4 Jur. N. S. 310 in which the conviction was upheld, resembles this case very closely in its circumstances and in principle cannot I think be distinguished. If the indictment therefore is to be viewed as charging an offence against the 19 & 20 Vict. ch 12? I think there is no ground for granting a new trial (see also R. v. Moah 2 Jur. N. S. 213.)

At the same time I have no doubt that a conviction for embezzlement cannot be sustained upon this evidence under the 4 & 5 Vict. ch. 25 because the weight of evidence establishes that the money embezzled was in the actual possession of the Bank, at the time of the fraudulent appropriation, see R. v. Chapman, C. & K. 119; R. v. Holloway, 1 Temp. & M. 40; Reg. v. Hall, *ib.* 47; R. v. Bakewell, Russ & R. 35; R v. Aslett *ib.* 67; McGregor's case 2 Leach 933; Hobbs' case, Russ on Crimes, 1st Edition 1243; Waite's case, 1 Leach 28; Whittenham's case, 2 Leach 912; Hammon's case, 2 Leach 1083; R. v. Lester, 2 Jur., N. S. 1124; R. v. Baily *ib.* 1171; R. v. Hawkins, 1 Temp. & M. 328; R. v. Jennings, 4 Jur. N. S. 146. Nevertheless if on the evidence given the jury had on the trial (the indictment being held as framed under 4 & 5 Vict. ch. 25) convicted the prisoner of larceny, I should have considered the conviction right. This however was not submitted to them. From the first I supposed the prisoner would be convicted under the Bank act. I adverted to this act in my charge to the Grand Jury and throughout the trial considered the prosecution to be rested on it, and I did not feel satisfied that the 16 sec. of 18 Vict ch. 92 applied to indictments for embezzlement under the 19 & 20 Vic. ch. 121, and I was not asked on the part of the prisoner so to submit the case. In my opinion therefore the appeal should be dismissed.

1st. Because I think the indictment proper in form under the 18 Vic., ch. 92, to admit evidence of an embezzlement against the 19 & 20 Vic, ch. 121 and that the evidence abundantly proved the prisoner guilty of an offence against that act.

2nd. Because the objection that the indictment does not conclude *contra formam statuti* is untenable and certainly so on a motion for a new trial.

If however it is held that the indictment can only be treated as shewing an offence against the 4 & 5 Vic., ch. 25, then I agree the conviction for embezzlement cannot be supported, because I think the weight of evidence shewed that the money taken had been and was at the time of the offence committed in the possession of the Bank and therefore the conviction ought to have been for larceny.

MACAULAY, Ex C. J. C. P. — This is an appeal from the discharge of a rule nisi for a new trial granted by the Court of Queens Bench, under the provisions of the Statute 20 Vic. cap. 61.

The verdict having passed upon the first count, I have considered the question whether the evidence as reported in the printed case supports the conviction.

The indictment follows the form for embezzlement contained in the 18 Vic., cap. 92.

It appears to me that this form relates to the general Statute respecting embezzlement by clerks and servants, 4 & 5 Vic. cap. 25 sec. 39, and that the evidence went to prove a case of embezzlement under the special Act 19 Vic. cap. 121, sec. 40. The terms of those Statutes having been adopted from similar indictments in

England, the decisions upon cases that have arisen there apply to them.

The term "embezzlement" does not in itself express an offence known to the Common Law; and yet the form in our Stat. 18 Vic. cap. 92, treats it as being an indictable felony. Embezzlements are only made indictable as such by Statute. Some Statutes enact that under certain circumstances embezzlement shall be a felonious stealing, others that under other circumstances it shall be a felony; and others that under still different circumstances it *shall be a misdemeanour.* (*4 & 5 Vic. c. 25, s. 39; 18 Vic. c.* 96, s. 24; 19 Vic. c. 121, s. 40.) In some, the punishments are similar (4 & 5 Vic. c. 25, s. 39; 18 Vic. c. 96, s. 24). In others they differ (19 Vic. c. 121, s. 41).

There is not therefore any general offence of embezzlement by Statute, unless it is the 4 & 5 Vic. c. 25, s. 39, which is the principle Act on the subject. Reference may be made to 4 & 5 Vic. c. 25, ss. 3, 38, 39, 40, 41: 18 Vic. c. 96, s. 24: 6 Vic. c. 27, ss. 31, 34: 19 Vic. c. 121, s. 40: 8 Vic. c. 4, s. 16: 18 Vic. c. 92, ss. 7, 16, 20, 47, 19, 25.

As applies to the present case the substance of the 4 & 5 Vic. c. 25, s. 39, is that if any clerk by virtue of his employment *receives* or *takes into his possession* any money *for or in the name or on the account* of his master, and fradulently embezzles the same or any part thereof, he shall be deemed to have feloniously stolen the same from his master, although such money was not received into the possession of such master, otherwise than by the actual possession of his clerk, and that such offender being convicted thereof shall be liable to be imprisoned at hard labour in the Penetentiary for any term not exceeding fourteen years nor less than two, (see 14 & 15 Vic. c. 5 s. 2,) or to be imprisoned in any other prison or place of confinement for any term less than two years. (Ib)

The substance of the 19 Vic. c. 121, s. 40 is that if any clerk of the Bank of Upper Canada secretes, embezzles, or absconds with any money *entrusted* to him as such clerk, whether the same belong to the said bank, or belonging to any other person to be lodged and deposited with the said Bank, the clerk so offending, and being thereof convicted, shall be deemed guilty of felony, and (sec. 41) shall be punished by imprisonment at hard labour in the Penetentiary for any term not less than two years, or in any other prison, &c. The expression used in the first act is "receives or takes into his possession any money *for or in the name or on the* account of his master, and *fraudulently embezzles* the same, shall be deemed to have feloniously stolen the same." This expression in the last act is "secretes, embezzles or absconds with any money entrusted to him as such clerk, whether, &c, shall be deemed guilty of felony, &c." The punishment in the first Act is imprisonment in the Penetentiary for any term not exceeding 14 years, &c.; and under the last Act it is imprisonment in the Penetentiary *for any term* not less than two years, &c.

The two Acts differ therefore in the descriptions of embezzlement to which they relate in the decriptions of the offence committed by such embezzlement, and in the extent of the punishment that may be inflicted. Although they agree in declaring the offence under each to be felonious, and the punishments, similar in their nature, are only liable to differ in degree.

Questions of technical nicety have arisen in England repecting the correct form of indictment, and the nature of the proof in prosecutions under the 39 Geo. III. c. 85, and 7 & 8 Geo. IV. c. 29, s. 47, from which our Act 4 & 5 Vic. c. 25, s. 39 is taken. And a special Act existed there in substance like the 19 Vic. c 121, s. 40, and the state of the law and of the authorities when the form contained in the 18 Vic. c. 92 was prescribed by the Provincial Legislature should be considered.

That form as expressed in the 47th section is sufficient in charging the offence to which it relates, and the material point is to what offence it does relate. It alleges that A. B. on &c. at &c., being a servant or clerk then employed in that capacity by one C. D., did then and there in virtue thereof, receive a certain sum of money, to wit, the amount of £- ——, for and on account of the said C. D, and the said money feloniously did embezzle," treating it on the face of the indictment as if such embezzlement was a substantive felonious offence, and omitting the conclusion "contrary to the form of the Statute."

The form sanctioned in England under 7 & 8 Geo. IV. c. 29, s. 47 is "That J. S. late of ——, on &c. at &c. being then and there employed as clerk to J. N., did, by virtue of his said employment &c. receive and take into his possession certain money &c., to wit, to the amount of £———, for and in the name and on the account of the said J. N. his master, and the said money then and there fradulently and feloniously did embezzle, and so the Jurors, &c., say that the said J. S. then and there in form and manner aforesaid the said money the property of the said J. N. his said master *from the said J. N., feloniously did steal, take, and carry away*, against the form of the Statute, &c."

Our Statutory form omits the allegation of larceny, which in England had been held necessary, and it alleges a felonious embezzlement, which in England was not required to be laid as felonious, if the indictment stated that the party feloniously stole. (R. v. Creighton, R. & R. C. C. 62.) A comparison of the two forms shews that our statutory form is an abridgemnt of the form used in England, and that both relate to the general Statutes already mentioned.

That the above recited English form would not be valid to support a prosecution under the Act specially relating to the Bank of England; see *15 Geo. II. c. 12, s. 13; 35 Geo. III. c. 66, s. 6;* 37 Geo. III. c. 46, s. 6, in which the terms "entrusted," and secrete, embezzle, and abscond are used is, I think clear from the difference of such form in the Books of Precedents, and from the principles of the English decisions.

The question is, whether the abridged form sanctioned by our Legislature can be applied indiscriminately to all Statutes rendering embezzlement felonious; or whether a person convicted under such a count can be intended to have been convicted under either or under both of the Statutes which have been mentioned.

That it can be intended that such a conviction was under the 4 & 5 Vic. c. 25, s. 39 is, I think, evident. Can it consistently with such intendment be at the same time intended that the conviction was under the 19 Vic. c. 121, s. 40? Or may it be said that the form is a general one, applicable to all felonious embezzlements, and that the conviction must have been under one Statute or the other, and that it is a matter of indifference under which?

Had the form in the Statute been, and had the indictment charged that "being a clerk &c. of &c., he was as such clerk *intrusted* by A. B. (or the Bank of Upper Canada) with a certain sum of money to wit, the amount of £———, of and belonging to the said A. B. (or Bank) and feloniously did secrete or embezzle and abscond with the money, or that being such clerk, &c., he feloniously secreted, *embezzled, and absconded with a sum of money entrusted to him* as such clerk, &c.:" or had the words "entrusted" and "embezzled" been alone used, and the words "secrete" and "abscond" been omitted, it might well have been intended that the case came within the special Act 19 Vic. c. 121, s. 40. Could it in such an event be equally intended that it came within the 4 & 5 Vic. c. 25 s. 39? If not, it would show that the terms are not identical. Had the form in the Statute used the expression "entrusted," instead of "receive for and on account of;" and secrete, embezzle, and abscond," instead of "feloniously embezzled" alone, it would not have so pointedly referred to the 4 & 5 Vic. c. 25, s. 39 as it does, and might have been susceptible of general application, rather than the form as it is. But such are not its terms. It was contended in England that the words "received for and in the name and on account of the English Act applied to money received from as well as to money received for the master, but such a construction has been rejected by the Courts, and the true force and meaning of the Act held to be that it applied only to money received from third persons for the master. Whether the term "*entrusted*" in the other act would apply equally to either state of circumstances no case that I have seen decides.

There is much room for the argument, that as usual it only relates to cases in which the money being in the full possession of the master has been entrusted to the clerk by the master whether belonging to the master, or belonging to another to be lodged with the master, and not to cases in which the money has been "entrusted" to the clerk by a third person for the master, and therefore not in his full possession. The Act being special for the protection of a Bank, may possibly warrant a more extended construc-

tion in furtherance of the object; but if it would, its language has not been adopted in the indictment under consideration.

I lay no stress upon the want of a conclusion against the form of the Statute. I think that the form given by the 18 Vic. c. 92 dispenses with that, as it also dispenses with an express charge of larceny; but then the form adopts the express language of the 4 & 5 Vic c. 25, s. 39, so far as it goes, and brings it within the rule that an indictment in the terms of a Statute will suffice. (4 & 5 Vic. c. 24 s. 47.) Although the form does not contain all that is in the 39th section of that Act, it creates no new law or offence. It is framed in reference to the existing law, and to some offence already known to the law, as embezzlement; and no such offence is so shewn except by reference to some Statute. And the only Statute which the form indicates, or in my opinion was intended to indicate is the 4 & 5 Vic. c. 25, s. 39. The 41st section of that Act mentions another speecies of embezzlement by agents to which the form is clearly not adapted. That section makes the offence a misdemeanor only; but renders the offender liable to the same punishment as under section 39. Had the present indictment charged the offence in the terms of the 19 Vic. c. 121 s. 40, I should have considered the want of a conclusion contrary to the form of the Statute equally immaterial. Had it concluded against the form of the Statute, there being two or more, the question would still be the same, to which must the Court intend it to relate? Had it concluded against the form of the Statutes, it would I apprehend be demurrable, for uncertainty—the only Statutes on the subject being distinct and separate and not cumulative; but concluding against the form of the Statute it would not be demurrable being good on the face of it, and the only question would be to what Statute did it relate? Had it expressly mentioned contrary to the 4 & 5 Vic. c. 26 s 39, no doubt it would have been good; but had it concluded as against the 19 Vic. c. 121, s 40, would in have been equally valid? This would be presenting the question in another shape, and in my opinion the indictment would have been demurrable, because it did not follow the language of the Statute and saying it was against the Statute without stating a case that came within it, could not cure the objection.

As framed the appellant could not have demurred, for the indictment is perfectly good on the face of it as under the 4 & 5 Vic. c. 25, s. 39 at all events (and there is nothing to indicate that the appellant was called upon to answer a charge under any other Statute). Being convicted, suppose he had been sentenced to 21 years' imprisonment in the Penetentiary, would such a judgment be bad in error or appeal? It certainly would unless it must have been intended that the party was convicted under the 19 Vic. c. 121 s. 40, which intendment would be an inference drawn from the sentence passed, and not from the internal relation of the indictment to the Statute. And as a conviction under the 4 & 5 Vic. c. 25 s. 39 the sentence would be illegal for excess. Of course the sentence cannot aid the construction, but it might invalidate the judgment if irrespective of the sentence, the necessary intendment was that the conviction was under a Statute which did not authorize so severe a punishment.

The 6 Vic. c. 27 from which the 19 Vic. c. 121 was taken cannot affect the case. The 32nd, 33rd, and 34th sections of that act were also repealed by 10 & 11 Vic. c. 9 s. 22; and the 31st section was repealed by the 18 Vic. c. 121, ss, 1 & 40, on the 1st January, 1857, previous to the prosecution.

It has been held that when an Act of Parliament upon which the indictment had been framed was repealed after the bill had been found by the Grand Jury, but before plea, the judgment must be arrested; R. v. Denton, 1 Deary C. C. 3, 17 Jurist 454, 21 L. J. M. C. 207. Also in Reg. v. Swan, 4 Cox C. C. 108, according to the marginal note, that where a Statute creating an offence is repealed, a person cannot afterwards be proceeded against for an offence within it committed while it was in operation, even although the repealing Statute re-enacts the penal clauses of the Statute repealed.

The 19 Vic. c. 121 and other similar Acts being really private Acts, though declared public and to be judicially noticed, the case of Birkenhead Docks, (18 Jurist 883) may be mentioned, but I have throughout considered this case quite irrespective of any such distinctions.

The adjudged cases appear to me to establish

1st. That under an ordinary indictment for larceny, embezzlement of money, received by a clerk or servant for or on account of his employer, and fraudulently converted while in transitu (as it is termed) could not be proved, and that although the English Act which is identical with the 4 & 5 Vic. c. 25 s. 39 made embezzlement within it a larceny, it was necessary to charge the offence specially in the terms of, as against the Statute, and not at Common Law, it not being a Common Law offence.

2nd. That an indictment as against the 4 & 5 Vic. c. 25 s. 39 is not sustained in evidence by proof of a larceny at Common Law, or by proof of the embezzlement of money received by a clerk for his master as distinguished from money received for his master from a third person and embezzled before it passed from the persons possession of such clerk, and came to the separate or exclusive possession in law of the master and thenceforth only remaining in the charge or custody of the clerk as distinguished from the possession in Law.

That the difficulty arose originally out of technical subtlety, is admitted in many cases; but the distinction, instead of being explained, away having been recognized both by judicial decisions and by Statute has been fully established. And the question presented is, whether under an indictment charging the appellant with having received money for and on account of the Bank and feloniously embezzled the same, it can be proved that he received money from the Bank and afterwards embezzled it, or it might be put less forcibly perhaps as whether under a charge of having embezzled money with which he was entrusted for the Bank, it could be proved that he had embezzled money with which he hab been entrusted by the Bank.

It appears to me the current weight of authority is against the proof received under the allegations contained in the indictment, on the ground of a material variance between the allegation and the proof. I do not think the Statute 18 Vic. c. 92 (which excluding the forms) is taken in a great measure from the Impl. Stat. 14 & 15 Vic, c. 100, can help the case. The 16th section provides for a result that has not attended the trial of this case, and it recognizes the distinction between embezzlement and larceny as respects the form of indictment. At the same time I doubt not there may be embezzlement by a clerk or servant of money received from as well as of money received for the master. The difference is that in the first case the offence is a larceny at Common Law, when not a mere breach of trust, in which event it may be a question whether the misapplication of the money would strictly speaking be embezzlement at all, (see R. v. Hawtin, 7 C. & P. 281; R. v. Tholey, 1 Moo. C. C. 343,) and in the second case the offence however fradulent, would not be a larceny or indictable at Common Law. The 19 Vic. c. 121 s. 40 was I suppose intended to extend the embezzling money entrusted to a clerk or servant to cases beyond the Common Law, for it does enhance the punishment beyond that appointed for larceny, in which respect it is unlike the Statute 15 Geo. II. c. 13 s. 12, and the other acts for the protection of the Bank of England, which do I believe enhance the punishment.

The 19 Vic. c. 121 s. 41 prescribes the same punishment as the 4 & 5 Vic. c. 25 s. 3 does for simple larceny, that is imprisonment in the Penetentiary for any term not less than two years, a punishment inconsistent in point of extent with the 38th and 39th sections of the last act respecting larceny and embezzlement by clerks and servants in which the discretion to imprison is limited to 14 years and is not left indefinite as in the 3rd section and in the 41 section of the 19 Vic. c. 121. Had no punishment been specified in the last Act a question would have arisen what sentence could be legally passed upon a person convicted of an offence declared by Statute to be without more (see 4 & 5 Vic. c. 24 s. 24, and the remarks of Le Blanc, J, 2 Leach C. C. 962).

The 20th sec. of the 18 Vic., cap. 92 merely relates to the description of the subject matter embezzled, whether money or securities for money, and it provides that the averment of money having been embezzled, shall be sustained by proof that the embezzlement was of any thing constituting money as therein defined, leaving the question of what in Law amounted to embezzlement as it was before.

It appears to me the form in 18 Vic., c. 92, is intended to apply to embezzlements, under the 4 & 5 Vic., c. 28 s. 39, and that under such a form it is not competent to the Crown to prove a

case of embezzlement of money intrusted to a clerk by his employer, as distinguished from a case of money received by such clerk, for and on account of his master. They are quite different allegations, requiring different forms of expression to specify, and different kinds of proof to sustain them. The utmost the 18 Vic., cap. 92 has done, is to authorise a modified form of indictment according to the circumstances of the case. The 47th sec. says, "Indictments may be in the forms given, charging the offences to which they relate, and that in offences not therein enumerated, the said forms shall guide as to the manner in which offences shall be charged, &c." Then to what offence does the form in question relate? It may be said to *embezzlement*; but embezzlement of what? the answer is of money, &c., received by a clerk for and on account of his master. If there was a specific substansive offence, known to the law as embezzlement, (like larceny) or if there was only one statute or one state of circumstances or form of expression applicable to the offence of embezzlement, there could be no question to what the form related, but the term embezzlement not indicating any offence at Common Law, and being mentioned in different Statutes, some rendering it a felonious stealing, others simply felonious, and others a misdemeanor only, and such Statutes varying also in the mode of expression and in the degree of the punishment, the true meaning of the 47th section, and the propriety of providing for modifications in the forms are apparent.

If embezzlement is only an indictable offence by Statute (as by the 4 & 5 Vic c. 25, s. 39) and the necessity of formerly existed to conclude the indictment as against the form of the Statute shew, the consequence is, that one description of embezzlement is provided against by the 4 & 5 Vic., c. 25, s. 39, and another by the 19 Vic., c 121, s. 40, and so in other Acts, and as the form in 18 Vic, c. 92 applies in the language therein used, to the former statute only, it follows that the offence as under the 19 Vic., c. 121, s. 40, is one "not enumerated," and as to which the form was to guide in charging it. But the form having been followed *tatedem verbis* and not modified, it seems to me that one description of embezzlement has been charged against the appellant, and another of a substantially different description has been proved.—This I take to be contrary to the rules of Criminal Jurisprudence, as administered under the Law of England.

ESTEN, V. C.—This appeal is from a conviction under the 19th Vic., cap. 121, or the 6 Vic., cap. 27, it is immaterial which; and both of which acts relate to the Bank of Upper Canada. As it is conceded on the one hand that the conviction can only be sustained under one or other of these statutes, so I think it cannot be successfully contended that the evidence is not sufficient for that purpose. The only real question relates to the form of the indictment, and whether it is properly framed as an indictment under one or other of the statutes which have been mentioned. One objection is that it wants the usual conclusion of *contra formam statuti*. I am not quite satisfied that this conclusion has been dispensed with by the enactments which have taken place on this subject; but assuming that it has the question remains whether from the form of this indictment it can be deemed to be an indictment under one or other of the statutes which have been mentioned, and not rather an indictment under 4 & 5 Vic., cap. 25; and so not sufficient to warrant this conviction. It seems to me that where a statute creates a new offence under particular circumstances without which the offence would not exist, all these circumstances ought to be stated in the indictment. I have observed that in all the cases that have been cited, of indictments under statutes, the particular circumstances under which the statute enacts that the offence shall arise, are minutely and precisely stated. Surely the prisoner should be able to gather from the indictment, whether he is charged with an offence at the common law or under statute, or if there should be several statutes applicable to the subject, under which statute he is charged. In the present case the indictment states that the prisoner was a clerk in the employ of the Bank of Upper Canada, and in virtue of his office received certain moneys on account of the bank, and such moneys did feloniously embezzle. Now the proper construction of this indictment appears to me to be that the moneys in question were received from third persons. The construction may no doubt be strained so as to cover the actual facts, but it would be by departing from the plain and ordinary meaning of the words. It seems to me that an indictment under this statute ought to state that the moneys or effects embezzled were entrusted to the clerk by the bank without which circumstance the offence created by the statute could not arise. The provision in the statute 4 & 5 Vic., cap 24, sec. 47, is to the effect that, after verdict it shall be sufficient if the offence be described in the words of the act creating it. It does not appear to me to dispense with the necessity of stating the circumstances under which the offence was committed, and without which it could not have been committed. Neither I think can the form of indictment given in the appendix to the 18 Vic., cap 92, sec 47, help the case. That appears to me to be the form of an indictment for embezzlement under the 4 & 5 Vic., cap. 25. It is impossible that the Legislature could intend that that form should apply to all the diversified cases of embezzlement which might be created by subsequent statutes, under every variety of circumstances. Suppose the prisoner in the present case to have been authorized to receive moneys on account of the Bank as well as to pay them, and that he had received moneys on account of the bank from third parties and embezzled them as well as committed the offence of which from the evidence he appears to have been guilty. He could not tell from this indictment with which offence he was charged, or rather he would conclude, and it appears to me would properly conclude that he was charged only with the offence of embezzling moneys which he had received from third parties. I have looked at all the cases that were cited, and have read the Judgments that were delivered in the Court below, with much attention. It is with much diffidence that I venture to differ from them, but after the best consideration that I have been able to give to the case, I think that this indictment must be regarded as an indictment for embezzlement under 4 & 5 Vic., cap. 25, s. 39, which it is conceded that the evidence is insufficient to sustain, and therefore that this conviction must be reversed.

SPRAGGE, V C.—The evidence given upon the trial was of an offence made penal by the Upper Canada Bank Act 6 Vic., cap. 27, continued by 19 Vic., cap. 121.

The essence of this offence is that the prisoner being a servant of the Bank, and in that capacity intrusted by the bank with any bill, note, money or security, secretes, embezzles or absconds with the same.

The offence created by 4 & 5 Vic., cap. 25, sec. 39, is a different offence though of the like nature, and applies generally to all clerks and servants, and consists in any clerk or servant or person employed as such receiving or taking into his possession by virtue of such employment any chattel, money or valuable security for or in the name or on the account of his master, and fraudulently embezzling the same or any part thereof, and it is enacted that every such offender shall be deemed to have feloniously stolen the same from his master.

The indictment upon which the prisoner is convicted is according to the form given by Stat. 18, Vic., cap. 92, under the head of "Embezzlement." It needs but to read that form with the 39th section of the 4 & 5 Vic., to see that it is a form given to describe the offence created by that section of the Act.

At that date certainly if was felony in a Bank servant to embezzle moneys entrusted to him as such by the bank; that was one species of embezzlement, and the statute giving the power as well as the statute creating the offence designates by the term embezzlement the offence created by 4 & 5 Vic, to which I have referred.

Two questions seem to present themselves, as to the form of indictment under which this conviction has been had: one, whether the form given by the statute is by the statute made sufficient to describe the offence of embezzlement of whatever type or description of embezzlement the offence may consist, for if so it must I apprehend be held sufficient, although it may describe one or more species of the offence very inaccurately; the other question is whether this indictment does in sufficient and appropriate terms sets forth the offence of which evidence has been given against the prisoner.

As to the first point, I think that the forms are given as guides to simplify forms of indictment. The 47th section says,—"Indictments may be in the following forms in charging the offences to which such indictments severally relate; and in offences not enumerated herein the said forms shall guide as to the manner in which offences shall be charged, &c." It cannot be contended I

think that the forms given are intended to apply to cases to which they are not applicable, so as to misinform a prisoner as to the nature of the offence with which he stands charged. If upon reading a form we find that its language points to an offence differing substantially from the one committed, we have not I think the aid of the statute for saying that form may be adopted. It is true that the language of the 47th clause is that in "offences not enumerated" the forms given shall guide, and that "embezzlement" is one of the offences enumerated, and that but one form is given for that offence; but it is clear that the use of the forms given is discretionary with the person framing the indictment, and I think it is clear also that one description of embezzlement only was contemplated by the Legislature as applicable to the form given—because the form follows the statutory description of one species of embezzlement, and because the statute in which the form is given in the 16th section, that same species of embezzlement is referred to, and that only, and it is not strange that it should be so, for while that described was created for the protection of the whole community, the other was for the protection of two or more chartered banks, and is contained not in any Statute of Criminal Law, but only in Bank incorporation Acts.

Upon the second point I think that this indictment so far from properly describing the offence of which evidence has been given, does not describe that offence at all, but a different offence.

It may be said indeed that a Bank clerk entrusted with moneys by a bank does in a sense receive such moneys for and on account of the bank, but no person desiring to use language intelligibly would describe the one in words used for the other. The plain natural meaning of the language of the 4 & 5 Vic., and following it of this indictment is that it speaks of moneys received by a clerk or servant from third persons for his employer. The plain natural meaning of the Bank Acts is that they speak of moneys received from the bank itself by the servant of the bank, moneys with which he is in that way intrusted by the bank; two things essentially different as I think and which cannot be appropriately described in the same terms at least with that plainness which is necessary in the description of a criminal offence. If in this I am wrong it follows I think as a necessary consequence that the 4 & 5 Vic., created the same offence as by the Bank Acts was created afterwards. And it was by that statute made a felonious stealing for any clerk or servant whether employed by a bank or otherwise, to secrete, embezzle or abscond with moneys or securities entrusted to him by his employer; for if the words of this indictment describe that offence, that statute necessarily described it also, for the two indisputably described the same thing. I speak under correction, but I believe that the 39th clause of 4 & 5 Vic., has never been so interpreted, that there has been no conviction, perhaps no indictment under it for an offence of the nature created by the Bank Acts. I may add that the provision in the Bank Acts was of course essentially unnecessary if the offence had already been created by 4 & 5 Vic. And the Legislature may be said to have stultified itself by enacting in regard to Bank clerks and servants particularly that which was already the law with regard to all clerks and servants.

The clause in the Bank Acts is pretty good evidence that in the contemplation of the Legislature the offence thereby made criminal was not previously a criminal offence.

My opinion therefore is that the indictment does not charge the offence of which evidence has been given at the trial, and that the judgment of the Court below refusing the prisoner's application for a new trial should be reversed.

It is not necessary that I should express any opinion as to whether the indictment is not defective for not concluding *contra formam statuti*. I have however considered the point, and inasmuch as the statute 18 Vic., cap. 92 gives a a form of indictment for embezzlement, an offence created by statute (its being a different Statute can make no difference) with the conclusion *contra formam*, I incline to think the absence of that conclusion was a defect But for the form given I should doubt whether consistently with the English decisions that conclusion has been dispensed with by any Provincial enactment.

I have examined the authorities to which we were referred in argument, and should have been prepared to sustain the conviction if the indictment had been proper, upon the facts set forth in the "statement of case"—submitted to the Court. I think there is nothing in the supposed intention of the prisoner to return the money or the same amount of money to the Bank, or rather his speculation that he would be enabled by the return of the money (supposing that he had lent the whole of it) to replace the amount of it. The false entry as to the £1439 15s., I think made the offence complete: Hall's case, Russ. & R. 463; the Queen against Goodenough, 6 Cox C. C. 206, and the case of the Queen against Trebilcock; 4 Jur., N. S., 123, are against this objection. My opinion is also against the objection that it was necessary to prove the taking by the prisoner, of some particular amount from the moneys entrusted to him. It appears from the "statement of case" that he misappropriated "large sums of money," and that the £1439 15s. was only a part of his deficiencies; that sum I suppose was fixed upon because of the false entry in regard to it. It is clear I think that if the evidence had been of a deficiency of that precise amount, and a false entry to cover it, it would have been sufficient for conviction, and it seems to me immaterial what became of the difference between that amount and the actual deficiency. It may be that that also was embezzled or it may be that the prisoner could not account for it so as to shew it not embezzled. The fact remains that he was deficient in and embezzled that amount—involving the fact that moneys to that amount had been in his hands and were not forthcoming. To require proof of more would render conviction impossible unless the prisoner chose to confess in what particular sums he had taken the moneys entrusted to him from the bank safe for his own purposes.

The point appears to be settled by the case of the Queen v. Wright, reported among the Crown cases reversed, in the current volume of the *Jurist*, p. 313. There the prisoner was local agent of a Banking Company, and admitted the taking of money to the amount of £3021 9s. 9d. He was indicted for larceny and the jury found him guilty of larceny as a clerk, in having stolen some moneys received from customers which had before such stealing been placed in the bank safe and included in the monthly accounts furnished by him. It was objected that to establish the larceny it was necessary to prove a specific taking of some specific amount at a particular time, and the objection was overruled.

It was thereupon directed by the Court of Appeal that the order of the Court of Queen's Bench refusing a new trial be reversed, and that the rule for setting aside the verdict and for granting a new trial be made absolute; and that the judgment passed upon the appellant be vacated and the prisoner be remanded to the same custody and be detained upon the same warrant and authority as before the verdict was rendered, until therefrom discharged by due course of law.*

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Toronto, 7th July, 1858.

GENTLEMEN,—I see, from the last number of your able publication, that the Court of Appeal has given judgment, granting a new trial to Cummins, the bank robber; and I also see that there was a difference of opinion among the Judges who delivered judgments in the case.

Where is a person to look for a report of the judgments of the Court of Error and Appeal? Whose duty is it to report the cases decided in that court? Is it the duty of Mr. Grant, or is it the duty of each reporter, to follow the appeals from

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* The Chief Justice of Upper Canada concurred with the majority of the Court in granting a new trial; but Mr. Justice Burns dissented. Justices McLean and Hagarty, being stockholders in the Bank of Upper Canada declined to take any part in the case. Mr. Justice Richards, not having been present at the argument, also declined to give judgment.

decisions of his own court into Appeal? How is this? It would appear that what is everybody's business is nobody's business; and that where there are three reporters handsomely paid for the little they do in superintending the publication of cases reported by the judges themselves, they are all so busy doing the little which they profess to do, that, between them, the most important decisions in Canada are not at all reported. Hoping you will insert this communication, and by doing so draw the attention of the profession and of those in authority to the matter in question,

I am, Gentlemen,
With great respect,
Your obedient servant,
ENQUIRER.

[The decisions of the Court of Error and Appeal are not, as as rule, reported. Whether it is the fault of the reporters jointly or severally, we are unable to state. The remedy is under s. 5 of 18 Vic. cap. 128, in the hands of the Law Society, which body ought, we think, to do something in the premises. It is a disgrace that the most important decisions of our courts are, as soon as pronounced, thrown aside, instead of being published for the information of the entire profession. In other columns we publish the judgments delivered in the *The Queen* v. *Cummings*.—EDS. *L. J.*]

To the Editors of the Law Journal.

Holland, 16th July, 1858.

THE MAGISTRATE'S MANUAL, Journal No. 7.—*Apprehension without a Warrant.*

GENTLEMEN,—A case of "false imprisonment" against a constable for the arrest of plaintiff, on charge of felony, *without warrant*, tried on the Northern Circuit, England, was decided in favour of defendant, in consequence of the law in a case cited from Henry Blackstone's Reports, the name of which I am unacquainted with, but believe it to be very important.

Gentlemen, yours, most obediently,
HENRY CARDWELL.

[We can find no such case in Henry Blackstone as that alluded to by our correspondent. The most important case of the kind lately decided is *The Queen* v. *Light*, 27 *Law Journal*, Mag. Cas. p. 1, in which it is laid down, in general terms, that a constable, as a conservator of the peace, in common with all Her Majesty's subjects, may apprehend a person who there is reasonable ground of supposing is about to commit a breach of the peace; and that a constable who witnesses an assault has authority to arrest the offender at the time of the assault, or as soon after as he conveniently can, not only to prevent a breach of the peace, but where his object is to secure the man for the purpose of taking him before a magistrate.—EDS. *L. J.*]

To the Editors of the Law Journal.

London, C. W., 17th July, 1858.

GENTLEMEN,—Please answer the enclosed questions through the valuable columns of your Journal.

1. A., being indebted to sundry persons, assigns his stock in rade and personal property generally to two of his creditors, or the benefit of all others who may execute the same within a number of days therein limited, upon the usual trusts; notice of which is duly inserted in one of the newspapers published in the city where assignor resides.

Is this an assignment existing at and supported by common law, and requiring neither registry nor affidavit of bargain, being totally independent of 20 Vic., cap. 3; or does it come within the meaning of that statute, or any other, and require to be registered, with an affidavit of the assignees, or one of them, in the County Court Office, similar to a chattel mortgage, to render it valid?

2. Supposing the property assigned to be both real and personal.

What is the proper course, and what registry if any is necessary to support it?

I am inclined to think that the assignment just mentioned s independent of the statute, and requires neither affidavit nor registry. And as to the second, that it should be registered as to the real and left alone as to the personal property.

Yours truly,
A SUBSCRIBER.

[Our Correspondent is referred to *Taylor* v. *Whittemore et al*, 10 U. C. Q. B. 440; *Heward* v. *Mitchell et al*, Ib. 535; and Ib. 11 U. C. Q. B. 625; a perusal of which cases will put him in possession of all the information he desires.—EDS. *L. J.*]

To the Editors of the Law Journal.

GENTLEMEN,—I feel very much the want of some table or list of offences, showing at a glance what offences are punishable at law; what cases may be summarily disposed of before magistrates, and the number of Justices of the Peace required for adjudication; what cases must be sent to sessions or assizes; and the nature and amount of punishment that may be inflicted in each case. This, with references to the statutes giving the authority, would greatly facilitate the duties of magistrates, and save them from running into error, or from the painful position of not knowing what to do.

I write that the want may be known, for Mr. Keele's book does not supply it, and that some gentleman competent for the task would undertake the preparation of a table such as I speak of. I am satisfied a large edition could be sold, and I trust there will be found sufficient spirit to undertake it.

Yours,
A J. P. OF FOURTEEN YEARS STANDING.

July 21, 1858.

Township Clerk's Office,
Baden, July 19th, 1858.

To the Editors of the Law Journal.

GENTLEMEN,—I hope you will excuse me for troubling you with this letter; I do so with a view to obtain some information on a matter in question, and will you be kind enough to inform me what can be done under the following circum-

stances:— A Path Master in *one* Road division, asking another Path Master in a *second* or another Road division, for Gravel to gravel the road in the *first* road division, the Path Master of the second road division refusing the same to the Path Master of the first road division, on the ground that the *second* road division has not gravel enough to gravel its own road—and thereupon the Path Master of the first road division applied to the Municipality of the Township, and the said Municipality granted, that the Path Master of the first Road Division should take gravel out of the second road division, for the use of the first road division, although the second road division is short in gravel, and the Municipality bought sufficient gravel for the use of said first road division, but it is a little farther to haul than what the gravel can be got in second road division, and after the gravel is carried away from the second road division, the second road division is obliged to draw the gravel back again from the bought gravel, at a distance as far again as the first road division has to draw it from the same place as the bought gravel, which is another defence that was set up. The Path Master of the second road division, under the authority of the law and in the discharge of his official duty, forbid both the council and the Path Master of the first road division, to take or carry away any gravel from his, the second road division, as he considered that neither the council nor the Path Master, has any right or anything to do or to say in the road division to which he is Path Master, concerning any work or materials whatever, so long as he, the Path Master, lives up to his instructions which he received to lay out statute labour. The above are all plain facts, and much more could be said on the subject. The point in question is this:—has a Path Master in one division a lawful right to go into another Path Master's division, to carry or take away stone, sand, gravel, or earth, or any other material, or obstructing the road in any other way, shape or form, such as cutting up the road by drawing gravel, or digging holes along the side of the road for taking out sand or earth to fill up yards or gardens (or as the case may be). Now, Gentlemen, will you be good enough to give me your opinion to the foregoing transaction, as the same will be very interesting to parties, and very important to your obedient servant, as cases of similar nature may occur.

I am, Gentlemen, yours very respectfully

MICHAEL MYERS, *Township Clerk.*

[We are not aware of any general enactment regulating the duties of Path Masters. The 4 & 5 Vic, cap. 2, s. 5, which formerly did so, is repealed by 18 Vic., c. 77. The Path Master is now, so far as we understand the law, an officer of the Municipality and bound to discharge such duties as may be prescribed by the Municipality (12 Vic., cap. 81, s. 31, sub ss. 5 and 6).—EDS. L. J.]

To the Editors of the Law Journal.

Perth, 21st July, 1858.

GENTLEMEN,—How is the sheriff to execute a writ of replevin, issued to replevy, say, ten bushels of wheat, which the defendant has taken and mixed up with a thousand bushels of his own wheat? The plaintiff knows this; shows the heap of wheat to the sheriff, and tells him to replevy his ten bushels. Can the sheriff just measure out ten bushels of wheat from the heap, and replevy it to the plaintiff? If so, how, on the trial, will the plaintiff prove property; that is how identify the wheat? Would the act of defendant estop him from calling on plaintiff to identify?

Oblige, yours truly,

D.

[Since the passing of 14 & 15 Vic. cap. 64, the action of replevin is commenced by the issue of a writ, the form of which is given in the Act. The sheriff is not to serve a copy of the writ of replevin on the defendant until he shall have replevied *the property therein mentioned*, or until he shall have replevied *some part thereof*; and *cannot replevy the residue, by reason of the same having been eloigned out of his bailiwick* by the defendant, or by reason of the *same* not being in the possession of the defendant, or of any person for him. (s. 1.) Were we to adhere to the strict letter of this provision, replevin would not lie in the case suggested by our correspondent. And though not free from doubt, our opinion is that such would be the construction put upon the enactment by the courts. We have not been able to find any decided case leading to a conclusion, either one way or the other, though we have with much care consulted the reports. Should any of our readers be able to throw additional light upon the point, we shall be too happy to be put in possession of their views.—EDS. *L. J.*]

MONTHLY REPERTORY.

COMMON LAW.

EX. CUMMINS v. BIRKET RE GORDON. *Feb.* 1.

County Court—Reference of matter of account to Judge—Duty of Judge—Order referring.

A County Court Judge to whom matter of account is referred by a Judge's order, is bound to obey the order, whether the matter referred be mere account or not. A Judge at Chambers made an order referring an action for delapidation, in which the defendant had paid money into Court, and the plaintiff had replied damages *ultra*, to the Judge of the County Court of Essex.

In Essex there are many districts of the County Court, and several Judges who have jurisdiction in different districts. The premises with reference to which the action was brought were situate in the C. District, over which Mr. G. had jurisdiction.

Held, first, that the order was properly made, as the question was one of mere account. Secondly, that it appeared sufficiently by the order that Mr. G. was the Judge to whom the matter was referred.

A Judges order referring an action to the arbitration of a County Court Judge on the ground that it is a matter of mere account is subject to review by the Court.

IN RE GOODS OF JOHN PERCIVAL WILLMOTT,—(DECEASED.)

Will—Memorandum—Codical—Incorporation.

A executed his will in February, and a codicil on the same paper in December; below the signature to the will, and before the commencement of the codicil, there was a memorandum deposed by the drawer of the will to have been written on the paper before the execution of the will.

Held, that as the codicil referred merely to the will, such memorandum was not entitled to probate.

IN RE GOODS OF THOMAS CADYWOLD, (DECEA*Mar* 2.SED.)

Will—Marriage and birth of a child—Revocation.

A. in 1828 made a will prior to and in contemplation of marriage providing for his intended wife, (whom he had made an executrix) and for the issue of such marriage.

Held, that the marriage which came together with the birth of a child operated as a revocation of such will.

LATHAM & DEE v. WOOLBERT. *Jan.* 20, 28.

Will—Responsive allegation—Undue influence—Incapacity.

The admission of a responsive allegation, pleading the personal testamentary history of the testatrix; that her husband had by undue influence procured from her various prior wills in his favor and had procured the will in question at a time, when by reason of extreme illness she had not testementary capacity, was opposed.

Held, that the earlier part of the allegation though in itself admissible, as not affecting the issue, would, if taken together with the averment of incapacity, be such evidence as a judge could not with propriety withdraw from the consideration of a jury at a trial of the present issue, and should therefore be admitted.

IN RE GOODS OF SOPHIA HYNDERSON LUDLOW, SPINSTER (DECEASED). *Feb.* 27.

Administration with Will annexed—Residuary clause—Construction —"Things."

In a will which contained specific bequests of several articles of plate, furniture, &c., the last specific bequest being that of £30.

Held, that a bequest to R. S. of "the residue of my things," would not entitle R. S. to a grant of administration as resudiary legatee.

C. P. EX PARTE EVERSFIELD.—IN THE MATTER OF THE PLAINT OF EVERSFIELD v. NEWMAN AND ANOTHER. *April* 22.

County Court—Prohibition—Judge's order for Statement of ground.

A Judge's order for a writ of prohibition need not shew on the face of such order the ground upon which the County Court is without jurisdiction.

C. P. HOLLINGHAM v. HEAD. *April* 16

Evidence—Irrelevancy.

In an action for goods sold and delivered, the defence being that they were not to be paid for except in a certain event which had not happened, evidence is inadmissable to shew that the plaintiff has before made similar contracts on similar terms.

Quœre—If the plaintiff could be asked such a question with a view to testing his memory or his credit.

EX. C. LINDUS v. MELROSE, ET AL. *Feb.* 23.

Joint Stock Companies—Promissory note made by the Directors of a Joint Stock Company—Liability of Company—Personal liability of Shareholders.

A Promissory Note in the following terms:—"London, December, 31st, 1856, Three months after date—We promise to pay to Mr. F. or order £600 for value received in stock on account of the L. & B. company limited"—is signed by three directors of a company incorporated under 19 & 20 Vic. ch. 47 and countersigned by the secretary of the same company.

Held to be a note binding on the company, and not personally on the directors who signed it.

EX. NEWTON v. BECK, Public Officer of the North Wales Banking Company.

Detinue—Title to Deeds of Mortgaged Property.

Where A. having mortgaged to the plainttff delivered to him a forged deed which purported to be the conveyance to himself and afterwards deposited the genuine deed with B. as a security for an advance of money.

Held, that plaintiff could maintain detinue against B. for the deed.

C. P. STANSFIELD ET AL, (*Assignees of Thomas White,*) *v.* THE MAYOR AND CORPORATION OF PORTSMOUTH. *Feb.* 9.

Landlord and tenant—Covenant as to removal of fixtures—Construction.

The defendant let to the bankrupt certain premises, upon which he covenanted to erect fixtures for ship building, and to leave them at the end of the term: provided that this covenant was not to include any fixtures other than ship building fixtures, which he might erect during the term: provided also, that in case the lessee became bankrupt, the plaintiffs might re-enter and take possession of the shipbuilding fixtures. The lessee became bankrupt.

Held, that the assignees were under these provisions entitle to the possession of the premises for a reasonabletime in order tod remove the fixtures other than shipbuilding fixtures.

EX. *Jan.* 16. 18.

VOSE *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Master and servant—Negligence.

Where a servant in the ordinary course of his employment is killed by the negligence of one who is not his employer, his widow may maintain an action against the latter.

C. C. R. REGINA *v.* AARON MILLER. *Jan.* 23. *Feb.* 1.

Constitution of jury—Juror by mistake answering for and personating another juror—Question of law or fact—Jurisdiction of this court under 11 *&* 12 *Vic. c.* 78*—Mistrial—Writ of error—Mischievous consequences of holding such mistake a ground for a new trial, when no practical injustice has been done, and to a prisoner when acquitted—Impolicy of leaving an innocent man in such case to the discretion of the adviser of the crown—Form of entering order for venire de novo.*

A panel of petit jurors contained the names of Joseph Henry Thorne and William Thornily. The name of Joseph Henry Thorne was called from the panel as one of the jury to try the prisoner upon a charge of murder, and, as was supposed, Joseph Henry Thorne went into the box, and was sworn without challenge. On the next day, and after the prisoner had been convicted, it was discovered that William Thornily had, by mistake, answered to the name, gone into the box, and been sworn as Joseph **Henry Thorne, the prisoner having been offered his challenge when the supposed Joseph Henry Thorne came to the book.** In the "*Case of a juryman*," 12 East, 231, such a mistake was held not objectionable as a mistrial, or in arrest of judgment, or upon writ of error; but as ground of challenge only. The learned judge who presided at the trial having reserved the point for the consideration of this court, and referred to the decision above.

Held, by the majority of the court (POLLOCK, C. B., ERLE, J., WILLIAMS, J., CROMPTON, J., CROWDER, J., WILLES, J., CHANNELL, B., BYLES, J.): that the conviction must be affirmed.

Held by the minority (LORD CAMPBELL, C. J., COCKBURN, C. J., (*dubitante*), COLERIDGE, J., WIGHTMAN, J., MARTIN, B., WATSON, B.): that 11 & 12 Vic. c. 78 gives this court jurisdiction to deal with the question reserved; that the mistake had caused a mistrial: and that this court had jurisdiction, and ought to direct a new trial.

Quœre—whether the point reserved is a question of fact which, if at all, can only be taken advantage of by writ of error; or whether it is a question of law arising on the trial within 11 & 12 Vic. c. 78.

Quœre—whether this court is bound to recognize the statement of a judge in a case reserved under the Act as equivalent to a record and incontrovertible.

Held, by POLLOCK, C. B., and WILLIAMS, J.,: that supposing there had been a mistrial, it was not within the jurisdiction of this court to set aside the verdict and order a new trial; but,

Held, by ERLE, J., CROMPTON, J., CROWDER, J., WILLES, J., CHANNELL, B., and BYLES, J.: that there had been no mistrial.

Held, also, by ERLE, J., CROMPTON, J., and CHANNELL, B., (CROWDER, WILLES, and BYLES, J.J., inclining to the same opinion); that upon the statements in the case this court had no jurisdiction in the matter.

EX. SHAW *v.* STANTON. *Jan.* 20.

Landlord and tenant—Covenant for quiet enjoyment—Construction of the covenant where the demised premises lie below the premises occupied by the tandlord.

By a covenant in a lease demising a bed of coal, the lessor covenanted that the lessee should possess, have, occupy, and enjoy the same during the term, without any let, suit, hindrance, molestation, or disturbance of him, his heirs, or assigns. During the term the lessor, in working a quarry of iron stone lying over the demised bed of coal, bored a hole into the bed of coal, removed part of the barrier between the quarry and the mine, and let in a quantity of water.

Held, that the lessee was entitled to recover damages in an action on the covenant not only in respect of boring the hole into the bed of the coal, but also in respect of the damage resulting from removing the barrier.

C. P. WARD (*appellant*), REDDIFER (*respondent*). *Feb.* 12.

County Court appeal—Practice—Signature of case by County Court Judge.

Where the parties agree upon the case to be stated for the opinion of the court above, the duty of the County Court judge is to sign the case simply; and the court will not look at any remarks appended by him.

Quære—whether the County Court judge may refuse to sign a case?

Q. B. *Jan.* 26, 30. *Feb.* 23.

BLACKMORE (*Administratrix, &c.*) *v.* THE BRISTOL AND EXETER RAILWAY COMPANY.

Railway Company—Liability to stranger for injury from defective machine—Privity.

A railway company, where goods were sent by mileage rates left the unloading of the goods to the consignee, and provided at their station, to be used if necessary by the consignee, gratuitously a crane for the unloading of heavy goods. A consignee to whom certain blocks of stone had been sent by mileage rate, having received notice from the company to remove the blocks from the station, came with two men for the purpose; and being unable with their help to move one of the blocks by the crane, he called a bystander not a servant of the company, to assist, who accordingly did so. The chain of the crane was defective to the knowledge of the company, and it broke while the block was being raised, in consequence of which the man so giving his assistance was killed.

Held, in an action by his administratrix, under Lord Campbell's Act, that the company was not liable for the injury.

The gratuitous lender of an article unfit for use to his knowledge is not liable to a person, whose user of it he has not foreseen, for an injury caused by the unfitness.

EX. *Jan* 26.

MCMANUS *v.* THE LANCASHIRE AND YORKSHIRE RAILWAY COMPANY.

Railway companies—carriage of cattle—Special condition—Reasonableness—Injury by defective truck—Statute 17 & 18 *Vic. c.* 31.

A railway company, upon receiving horses to be forwarded by a goods train, required the sender to sign a ticket containing the following memorandum: "This ticket is issued subject to the owner's undertaking all risks of conveyance, loading, and unloading whatsoever, as the company will not be responsible for any injury or damage, howsoever caused, occurring to any live stock of any description travelling upon the Y. and L. Railway, or in their vehicles." The horses were put by the servants of the company into a truck, which was to external appearance, and so far as they knew sufficient, but which in point of fact was insufficient for the purpose, and during the journey the horses were by reason thereof injured.

Held, first, that the condition was reasonable; secondly, that the damage by reason of the insufficiency of the truck was a "risk of conveyance," and that the company was protected from liability by the notice.

CHANCERY.

V. C. S. DAVIES *v.* NICHOLSON. *March* 1, 2.

Liability of a specific legatee of leasehold—Assent of executor to the legacy of creditor's suit.

When an executor assents to a specific legacy of leaseholds and puts the legatee in possession, the assent must generally speaking be considered as amounting to a release by the executor of his right to call upon the specific legatee for contribution and indemnity. The plaintiff in a creditor's suit cannot claim to make the specific legatee liable for payment of his debt, there being no averment in the bill and no evidence to prove that the testator's general estate is insufficient to meet the demand.

M. R. ELLIS *v.* COLEMAN. *Feb.* 24, 25

Specific performance—Contract by Directors—Misrepresentation.

Where directors of a Company engage that their Company will do certain acts (which are in fact *ultra vires*) there is no equitable relief against the directors personally, either by way of specific performance or on the misrepresentation. The remedy is in such cases by an action for damages.

V. C. K. HOWARD *v.* KAY. *March* 5

Will—Contribution—Conversion—Public stocks—Long Annuities

Where a testator directs the sale and conversion of all his property, except such portion as consists of money in the public funds and directs the proceeds to be invested, that direction does not apply to long annuities.

L. C. & L. L. J. IN RE THE HULL AND LONDON FIRE INSURANC. COMPANY. *Feb.* 25.

Joint Stock Company—Winding up—Shareholder—Untrue representation—Agency on behalf of Company.

Three persons became shareholders in a Company on a representation, not fraudulently, but as to the event proved untruly made by the solicitor and another, who was a promoter of the Company, that two men of wealth would become shareholders.

Held, that having signed the deed without enquiry as to the truth of the representation, and continued to act as shareholders after they discovered its untruth, they were properly made contributories.

L. C. & L. L. J. VANSITTART *v.* VANSITTART. *March* 5.

Husband and wife—Articles of separation—Parent and Child—Public Policy.

In consideration of the abandonment by a married woman of proceedings against her husband for a divorce on the ground of adultery and cruelty an agreement for a separation was signed by husband and wife, a trustee being named in the agreement on behalf of the wife, but not made a party to it.

The agreement after providing for a certain separate income for the wife and for the protection of the husband, upon payment of such income, from the wife's debts contained certain provisions as to the children of whom two were to remain in the wife's custody, and two with the husband; liberty to both parents to visit the children at school; provision as to their protestant education; husband in case of death of either of the children with the wife to be at liberty to place another with her.

Demurrer allowed to a bill by the wife for specific performance of the above stated agreement on the ground that the provisions as to the custody and education of the children were such as could not be enforced against the wife and were also against public policy.

M. R. BIRLEY *v.* BIRLEY. *March*, 12, 17.

Power—appointment—Fraud on power.

An appointment to an object of a power in pursuance of a bargain that he shall hold in trust or partly in trust for persons not object of the power is void whether a benefit be or be not stipulated for by the appointer.

REVIEW OF BOOKS.

THE LAW LIBRARY. Published monthly, at $10 per annum. Philadelphia: T. & J. W. Johnson & Co., Law Publishers, No. 535 Chesnut Street. Toronto: A. H. Armour, & Co.

We have to thank the publishers for Nos. 288 to 295 inclusive, of this valuable and widely esteemed library. The contents of these numbers are Powell on the Practice of the Law of Evidence: Lewin on the Law of Trusts and Trustees: Haynes on outlines of Equity, and Ross on Commercial Law. The advantage to the profession of receiving the latest and best editions of English law works in a convenient and permanent form is immense. When to this is added the cheapness of the publication as compared with the selling price of the original editions in separate form, the advantage is increased ten fold T. & J. W. Johnson, & Co., deserve the thanks of the entire profession in America. Their "Law Library" and "English Common Law Reports" have gained for them a reputation which no recommendation of ours can increase. Their readiness to oblige and general curtesy is well known to the many who are in the habit of dealing with them.

THE UNITED STATES INSURANCE GAZETTE, AND MAGAZINE FOR JULY.—New York, G. S. Currie, No. 79 Pine Street,

The LOWER CANADA JURIST, FOR AUGUST.—Montreal, John Lowell St. Nichol's Street.

THE UPPER CANADA COMMON PLEAS REPORTS for July, Toronto, Henry Rowsell, are received.

It is needless for us to do more than to state that we see no reason to retract one word of what we have often hitherto written in praise of these useful serials.

THE COMMON-LAW PROCEDURE ACT, 1856, AND THE COUNTY COURTS PROCEDURE ACT, 1856, AND THE NEW RULES OF COURT; WITH NOTES OF DECIDED CASES; TOGETHER WITH AN APPENDIX, CONTAINING THE COMMON-LAW PROCEDURE ACTS of 1857. By ROBERT A. HARRISON, Esq., B. C. L, Barrister at Law.—Toronto: Maclear & Co. London: Stevens & Norton. 1858

"These are the acts which have revolutionised the law of Upper Canada, after their progenitors had exercised a like radical influence in the old country. They are in effect an amalgamation of our Procedure Acts of 1852 and 1854, together with an act applying them in a great measure to the county courts of Canada. The work is, therefore, almost as useful to the English as the Canadian lawyer, and is not only the most recent, but by far the most complete edition which we have seen of these important acts of Parliament. The editor has not been content with industriously collecting the numerous decisions which are now scattered through our reports upon these statutes tes, but has displayed both skill and judgment in their arrangement, and in deducing, wherever it was possible, those principles, of which the decisions are either suggestive or illustrative. As an example of this, we turn to the note on the inspection of documents, (p. 332), where the editor states that "the object of this enactment is to enable either party to a suit at law to obtain inspection and discovery of documents in the possession of his adversary, without having recourse to a Court of equity for that purpose. The principle involved is that which the commissioners asserted as an indisputable proposition, viz. that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction .... 'Inspection' and 'Discovery' are not by any means synonymous terms, though sometimes so used. An application for inspection of a document presupposes a knowledge that such document exists; but an application for discovery presupposes ignorance of the document, a knowledge of which it is sought to obtain."

The rules are then stated, which have then been established with regard to inspection at common law under the stat. 16 Vict. c. 19, (equivalent to our stat. 14 & 15 Vict. c. 99, s. 6), and under the Common-law Procedure Act. The garnishee and mandamus clauses are fully commented upon, (pp. 360 451): and no less than eight pages of valuable notes are devoted to equitable pleading, (pp. 467–475)."—*The Jurist*, London, July 3, 1858.

THE DIVISION COURT DIRECTORY.

The following is a list of the limits of the Division Courts of the County of Grey, established at the June Quarter Sessions, 1858:

COUNTY OF GREY.

First—Town of Owen Sound. Town plot of Brooke, and Townships of Derby Keppel, Sydenham, and Sanamack. *Clerk*—WILLIAM SMITH Owen Sound

Second—Townships of Bentinck and Glenelg, and all that part of the Township of Normanby situate North of the centre of the allowance for Road between 11th and 12th Concessions and between Lots 35 and 36 in the 2nd and 3rd Concessions and between Lots 12 and 13 in the 1st Concession West of the Garafraxa Road, and all that part of the Township of Egremont North of the centre of the allowance for Road between Lots 12 and 13 in 1st Concession, and Lots 28 and 29 in the 2nd and 3rd Concessions East of the Garafraxa Road and between the 15th and 16th Concessions. *Clerk*—WILLIAM JACKSON, Durham Village.

Third—The Township of St. Vincent and the West half of the Township of Euphrasia. *Clerk*—JOHN WILLIAMS, Meaford Village.

Fourth—The Township of Collingwood, the East half of Euphrasia, and East half of Osprey. *Clerk*—THOS J. ROURK, Collingwood P.O.

Fifth—The Townships of Artemesia, Proton and Melancthon, the West half of Osprey, and the Ranges lying parallel to the Toronto and Sydenham Road, in the Township of Glenelg. *Clerk*—JOHN W. ARMSTRONG, Artemesia

Sixth—The Townships of Holland and Sullivan. *Clerk*—HENRY CARDWELL, Chatsworth P.O., Holland.

Seventh—All that part of the Township of Normanby situate South of the centre of the allowance for Road between the 11th and 12th Concessions, and between Lots 35 and 36 in the 2nd and 3rd Concessions, and between Lots 12 and 13 in the 1st Concession West of the Garafraxa Road: and all that part of the Township of Egremont lying South of the centre of the allowance for Road between Lots 12 and 13 in the 1st Concession East of the Garafraxa Road, and between the 15th and 16th Concessions of Egremont aforesaid. *Clerk*—JACOB N. YEOMANS, Mount Forrest P.O., Egremont.

APPOINTMENTS TO OFFICE, &C.

COUNTY CROWN ATTORNEYS.

SAMUEL S MACDONELL, Esquire, Barrister at Law, to be County Crown Attorney for the County of Essex.—(Gazetted, July 17, 1858)

NOTARIES PUBLIC.

THOMAS HOLMES, of the Township of Wawanosh, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, July 17, 1858)

THOMAS ELLIS, of the City of London, Esquire, to be a Notary Public in Upper Canada.—(Gazetted July 17, 1858.)

WILLIAM COOKE, of the Town of St. Catharines, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, July 17, 1858)

CORONERS.

WILLIAM H. DRAKE, Esquire, M. D, to be Associate Coroner for the County of Essex.—(Gazetted, July 17, 1858)

NATHANIEL OSBORNE WALKER, Esquire, M. D., to be Associate Coroner for the County of Norfolk.—(Gazetted, July 24, 1858.)

EDMAND NUGENT, Esquire M. D. to be Associate Coroner for the County of Middlesex.—(Gazetted, July 31, 1858)

SPECIAL COMMISSIONERS.

WILLIAM RUSSELL BARLETT, Esquire, to be a commissioner under the several Acts for the protection of Indian Lands in Upper Canada from trespass and injury.—(Gazetted, July 24, 1858.)

FROOME TALFOURD, Esquire, Reverend FREDERICK MACK, and JOHN F. ELLIOT, Esquire to be Commissioners under the Act 20 Vic, cap. 26.—(Gazetted, July 24, 1858.)

RETURNING OFFICERS.

GEORGE ROSS, Esq., to be Returning Officer for the Village of Renfrew.—(Gazetted, July, 31, 1858)

JOHN EASTWOOD, Esquire, to be Returning Officer for the Village of Southampton.—(Gazetted, July 31, 1858.)

TO CORRESPONDENTS.

John Eastwood—E—Otto Klotz.—A. B., under Division Courts.

Enquirer—Henry Cardwell—A Subscriber.—A. J. Pay., 14 Years' Standing.—Michael Myers—D.—under General Correspondence.

NEW LAW BOOK.

Just published by LITTLE, BROWN & Co., 112 *Washington Street, Boston.*

ANDREWS ON THE REVENUE LAWS. A Practical Treatise on the Revenue Laws of the United States. By C. C. ANDREWS. 1 Vol., 8vo. $3. 50.

"This the first Treatise on the Revenue Law which has been published in this country; the other books on the subject having been merely compilations of the Statutes. A practical Treatise thus illustrating the law and its operation, is well calculated for a guide and text book to Custom House officers, and practitioners generally, and must necessarily be valuable to the importer. Mr. Andrews has performed his task with industry and care, and made a good and useful book."—*Boston Courier.*

August 1858. 3 ins.

J. RORDANS, LAW STATIONER,

ONTARIO HALL, CHURCH STREET, TORONTO, C. W.

DEEDS Engrossed and Writings copied; Petitions, Memorials, Addresses, Specifications, &c., prepared; Law Blanks of every description always on hand, and printed to order; Vellum Parchment, Hand made Medium, and Demy ruled for Deeds, with Engraved Headings. Brief and other Papers, Office Stationery, &c. Parchment Deeds red lined rnd ruled ready for use. Orders from the Country promptly atrended to. Parcels over $10 sent ftee, and Engrossments, &c., returned by first Mail.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, 11th June 1858.

HIS Excellency the Governor General in Council, having had under consideration on the 22nd ultimo, the Departmental Circular of the Customs Department, dated 29th April 1853, by which importers of goods, in every case, are allowed to deduct the discount actually made for cash, or that which, according to the custom of Trade, is allowed for cash, has been pleased to rescind the same, and to direct that no such deductions be allowed hereafter, and that the duties be collected upon the amount of the invoice without regard to such discount; And notice is hereby given that such Order applies to goods then in bond, as well as goods imported since the passing of the Order in question.

By Command, R. S. M. BOUCHETTE,
Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons and more have formed themselves into a Horticultural Society, in the County of Hastings, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vic., cap. 32, and have subscribed a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written bnd signed as by law required, to the Minister of Agriculture.

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The Belleville Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics.
Toronto, dated this 8th day of Feb., 1858.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, October 30, 1857.

NOTICE IS HEREBY GIVEN, That His Excellency the Administrator of the Government in Council has been pleased, under the authority vested in him, to direct an order that, in lieu of the Tolls now charged on the passage of the following articles through the Ottawa Canals, the Tolls hereinafter stated shall be hereafter collected, viz:

IRON ORE, passing through all or any portion of the Ottawa Canals, to be charged with a toll of *Three Pence* per ton, which being paid shall pass the same free through the Welland Canal.

RAIL-ROAD IRON, to be charged *One Shilling* per ton, including Lachine Section, St. Ann's Lock and Ordinance Canals, and having paid such toll, to be entitled to pass free through the Welland Canal, and if having previously paid tolls through the Chambly Canal, such last mentioned tolls to be refunded at the Canal Office at Montreal.

The toll on BARREL STAVES to be *Eight Pence* on the Ordnance Canals, and *Four Pence* on the St. Ann's Lock and Lachine Section, making the total toll per thousand, to and from Kingston and Montreal, the same as by the St. Lawrence route, viz: *One Shilling* per thousand.

By command,
R. S. M. BOUCHETTE
Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons, and more have organized and formed themselves into a Horticultural Society for the Village of Fergus, in the County of Wellington in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic., cap. 32, and have subscribe a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration, written and signed as by law required, to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of the said Society, as "The Fergus Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics.
Toronto, dated this 8th day of Feb., 1858.

CANADA
WESTERN ASSURANCE COMPANY.

CHARTERED BY ACT OF PARLIAMENT.

CAPITAL—£100,000, *in Shares of £10 each.—Home Office, Toronto.*

President—Isaac C. Gilmor, Esq.; *Vice-President*—Thos. Haworth, Esq; *Directors*—George Michie, Walter Macfarlane, T. P. Robarts, M. P. Hayes, Wm. Henderson, R. Lewis, and E. F. Whittemore, Esquires; *Secretary & Treasurer*—Robert Stanton, Esq.; *Solicitor*—Angus Morrison, Esquire; *Bankers*—Bank of Upper Canada.

Applications for Fire Risks received at the Home Office, Toronto, Corner of Church and Colborne Streets, opposite Russell's Hotel. Office hours from 1 o'clock A. M. until 3 o'clock P. M.

ISAAC C. GILMOR, *President.*
ROBERT STANTON, *Sec. & Treas.*

With Agencies in all the Principal Towns in Canada.

Toronto, January, 1858. 11

NOTICE.

PROVINCIAL SECRETARY'S OFFICE,
14th January, 1858.

TO MASTERS OR OWNERS OF STEAM VESSELS.

NOTICE IS HEREBY GIVEN, That on and after the opening of Navigation in the Spring of the present year, a strict compliance with the requirements of the several Acts relating to the inspection of Steam Vessels will be insisted on, and all penalties for any infraction thereof rigidly enforced.

By Command,
E. A. MEREDITH,
Asst. Secretary.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Town and Township of Niagara, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds, to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the said Society as "The Niagara Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the City of Hamilton, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of of the said Society as "The Hamilton Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the City of Kingston, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture:

Therefore, I, the Minister of Agriculture, hereby give notice of the said Society as "The City of Kingston Agricultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics.
27th January: 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Village of Elora, in the County of Wellington, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Viet. cap. 32, and have subscribed a sum exceeding Ten pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as the "Elora Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 10th March, 1858.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Parishes of St. Joachim, Ste. Anne and St Fereol, in the County of Montmorency, in Lower Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Viet. Cap. 32, and have subscribed a sum of not less than Ten pounds to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The St. Joachim Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 9th March, 1858.

OPINIONS OF THE PRESS.

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

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

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

The Upper Canada Law Journal and Local Courts Gazette, for June. Toronto—Maclear & Co, Publishers; Messrs. ARDAGH and HARRISON, Editors.

This is a most excellent publication. The present number contains very able original articles on the following topics—'The work of Legislation,' 'Consolidtaion of the Laws of Upper Canada,' and 'Law Reforms of the Session—tieneral Review (continued, The reports of important cases tried in the LocalCourts, are full and very interesting. Altogether this magazine is conducted with much ability, and it richly deserves to be widely patronized.—*Thorald Gazette.—June 9, 1858.*

THE UPPER CANADA LAW JOURNAL for May is full of is interesting articles—instructive alike to the profession and the general public. The editorials, as usual, evince the sound knowledge and legal experience of the writers under whose management the journal is now published.—and the opening one, on the 'Power of a Colonial Parliament to Imprison for Contempt,' embraces an amount of interesting record from opinions of high authorities, upon which the author is led to conclude that the power *to commit for contempt cannot justly be exercised by the Provincial Parliament.* The other principal articles are—'Remuneration to Witnesses in Criminal Cases,' 'Law Reforms of the Session—General Review,' 'University of Toronto—Law Faculty,' 'Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," &c. An original essay on the latter subject is to be commenced in the next issue, and continued monthly till completed, and it is promised that the aim of the writer will be to narrate—not to discuss. His materials are, we are informed, the best that can be had, consisting of several French and English, manuscripts now out of print. To this may be added all the information that can be from *Edits Arrets*, and *Ordonnances* of the French Government and of the Province of Quebec together with the *Ordonnances* and acts of Parliament of the Provinces of Upper and Lower Canada. No pains are to be spared, either in research or compilation, that can be made tributary to th object of the writer. The period embraced will be nearly three centuries—that is, from the settlement of Canada by the French to the present day. This is a subject so fruitful in details of a most interesting character, that if the promises referred to are carried out—(as we have every reason to expect they will, from the deservedly high reputation of the editors)—the *Law Journal* will considerably increase its popularity as a reliable record. —*Colonist May, 14th, 1858.*

The Upper Canada Law Journal for January, has been received. As usual, its contents are exceedingly valuable.—*Kingston Whig.*

This is a very useful monthly, containing reports of important law causes, and general information connected with the administration of justice in Upper Canada. Although more particularly intended for the profession, yet every man of business may learn much from it that may be of real advantage to him. It has hitherto been published in Barrie, but will henceforth be in Toronto. We rejoice to see that Robert A. Harrison, Esq., B C L, is to be connected with the journal. He is a young gentleman that has already highly distinguished himself in his profession, and with literary talents of no ordinary kind, he will prove to be of great advantage to the Law Journal.—*Brampton Times.*

We are pleased to notice that this able monthly is, for the future, to be edited and published in Toronto, and that Robert A. Harrison, Esq., B.C.L., is become a joint Editor. His accession to the editorial staff must prove to the profession to whom he is now so well known as the author of so many works in general use, no small gain. With Mr. Harrison is associated W. D. Ardagh, Esq., who has for some time been favorably known as an Editor of the *Journal*. Notwithstanding the public caution of the *Journal* in Barrie, it has under the management of the Hon. James Patton acquired a very wide and extended circulation. Now that it is to be published in Toronto, it is reasonable to expect that its circulation will be increased. It is a paper which should be in the hands of every Judge, Lawyer, Coroner, Magistrate, Clerk, and Bailiff in Upper Canada. We hope, however, that the conductors will see fit to widen the list of *their exchanges and so increase the circle of their usefulness.*

It is a great mistake to suppose that Judges, Lawyers, Division Court Clerks, or Bailiffs are the sole persons interested in the administration of justice. The public at large have a deep interest in, and feel a lively sympathy with the sentiments of a writer who propounds measures of law reform calculated to advance the public good. No discussion however well attended upon subjects of legal interest, can be satisfactorily carried on by the lay press.

The public require to be informed [illegible] as to the existence of an abuse which needs a remedy, but as to the nature of the remedy required. For such information the more proper and more prudent course is to turn to the columns of a newspaper conducted by men whose whole lives and training peculiarly befit them for the expression of sound views. The number of the *Journal* before us which is that for August is complete with legal lore. The Editorial Department bears marked evidence of knowledge and ability.—*Toronto Times.*

Somewhere it has been said that to know a people thoroughly, it is necessary to study their laws—to ascertain how life and property are protected. This ably conducted Journal tells us how the laws enacted by government are administered in Upper Canada. It tells us—what everybody knows—that law is expensive, and it adds that cheap justice is a curse, the expense of the law being the price of liberty. Both assertions are certainly truisms, yet a litigious and quarrelsome spirit is not invariably the result of that combativeness which belongs to such men as those who, under any circumstances, and at whatever cost, will assert their rights. It is not our purpose to review the *Journal*, but to praise it, seeing that praise is deserved. The articles are well written, the reports of cases are interesting, and the general information is such, that the *Journal* ought not only to be read, but studied by the members of the bar, the magistracy, the learned professions generally, and by the merchant.

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

We have to return our thanks to the conductors (or publishers, we do not know which,) of this valuable publication for the present January number, together with an ample index for, and list of cases reported and cited in the second volume of these reports for the year 1858.

The ability with which this highly important and useful periodical is conducted by W. D. Ardagh and Robert A Harrison, B. C. L., Esquires, Barristers at Law, reflects the greatest credit upon these gentlemen, and shews that the esteem in which they are held by their professional conferes and the public, is deservedly merited and nothing more than they are entitled to. We have much pleasure in earnestly recommending the members of the bar for this section of the Province to support the *Upper Canada Law Journal, by their subscriptions.—taking leave to assure them that it is well worthy of it, and that they will find it a valuable acquisition to their libraries as a legal work of reference and high authority.* It is printed and published by Messrs. Maclear, Thomas & Co., of 16 King Street East, Toronto, and the typographical portion is very creditable to that firm.—*Quebec Mercury.*

In its first number of the fourth volume this interesting and valuable publication comes to us highly improved in appearance with a much wider range of editorial matter than formerly. The *Journal* has entered upon a broader career of utility, grappling with the higher branches of law, and lending the strength of a full, fresh intelligence, to the consideration of some very grave wants in our civil code. The necessity of an equable and efficient "Bankruptcy Law" is discussed in an able article, instinct with astute and profound thought, coupled with much clear, subtle, legal discrimination.

It is the intention of the Proprietors to institute in the pages of the *Journal* a "Magistrate's Manual;"—provided that that body meet the project in the proper spirit, and contribute an adequate subscription list to warrant the undertaking. To prosecute this contemplation, could not fail to be productive of incalculable advantage, as well to the community as to the Magistracy. We sincerely hope that this latter body will bestow a generous patronage, where so laudable an effort is made for their advantage.

The *Law Journal* is presided over by W. D. Ardagh, and R. A. Harrison, B. C. L., Barristers-at-Law. It is a periodical that can proudly compare with any legal publication on this Continent. We wish it every success. —*Catholic Citizen.*

This Journal which is published monthly, appears this week much improved in size, appearance and matter. It was formerly published in Barrie, but has for some numbers back been published in Toronto, and has acquired aid in the editorial staff by the addition of Mr Harrison, who is well known in the profession from his numerous publications on legal subjects. Under the management of Mr. Ardagh and Mr. Harrison, this Journal promises fair to become an important publication, not merely to the legal profession, but to other important classes of the community, as particular attention is given to Municipal affairs, County Courts and Division Courts; Magistrates' duties also receive a considerable share of consideration. It will contain original treatises and essays on law subjects, written expressly for the *Journal*, besides reports from the Superior Courts of Common Law and the Court of Chancery. Proper selections will also be made from English periodicals. To the profession the reports from Chambers of decisions under the Common Law Procedure Acts, and the general practice, are of particular interest. These the *Journal* supplies, being formerly reported by Mr. F. Moore Benson, and latterly by Mr. C. E. English, M. A. We would advise all municipal officers, Division Courts officers, Magistrates, and particularly the profession, to patronize this publication, as it cannot be sustained without their aid. The subscription is only $4 a-year in advance.—*Leader.*

The January number of this valuable Journal has come to hand, and is as usual replete with legal decisions, articles on commercial law, &c., &c. We republish from this number, an able article on the subject of a Bankrupt Law for Canada.—*Canadian Merchants' Magazine.*