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DIARY FOR OCTOBER.

1. Saturday... { Last day for notice of Trial for Toronto Fall Assizes. Chancery Examination Term, Niagara and Brockville, ends.
2. SUNDAY... 16*th Sunday after Trinity.*
3. Monday..... County Court Term begins.
4. Tuesday ... Chancery Examination Term, Hamilton and Ottawa, commences.
8. Saturday... Chancery Examination Term, Hamilton and Ottawa, ends.
9. SUNDAY... 17*th Sunday after Trinity.*
10. Monday..... Toronto Fall Assizes.
11. Tuesday ... Chancery Examination Term, Barrie and Cornwall, commences.
15. Saturday... Chancery Examination Term, Barrie and Cornwall, ends.
16. SUNDAY... 17*th Sunday after Trinity.*
23. SUNDAY... 18*th Sunday after Trinity.*
30. SUNDAY... 19*th Sunday after Trinity.*
31. Monday..... Last day for notice of Hearing, Chancery.

IMPORTANT BUSINESS NOTICE.

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

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

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

TO CORRESPONDENTS—*See last page.*

The Upper Canada Law Journal.

OCTOBER, 1859.

LOCAL EQUITY JURISDICTION.

Subjoined we publish a paper, bearing the above title, which was read by J. Smale, Esq., Barrister-at-Law, at the annual meeting of the National Association for the Promotion of Social Science, held in Liverpool in October last.

The writer of the paper is a barrister of considerable experience in Equity practice, and well known to the profession in connexion with Mr. DeGex, as a reporter of cases decided in the High Court of Chancery by Knight Bruce, when Vice-Chancellor. The reports of DeGex & Smale are known to all at all conversant with Chancery books.

It is the aim of the writer to prove that it is in England desirable to decentralize the administration of justice in respect of equitable rights, and that the machinery for so doing is almost at hand. He refers to the successful working of the Palatine Court of Lancaster, and argues therefrom that similar local equity courts might be established in every county in England.

We quite agree with these views. There is no reason why the principles which effected a decentralization of the administration of common law by the establishment of County Courts, should not also be extended to equitable rights. In the first place, such a change is demanded in the interest of suitors; in the second place, it is demanded in the interest of existing courts. The more the administration of equity is decentralized, the less there will be to be administered at head quarters, and the less the delay of administration there.

If in modern legislation there is one feature more noticeable than another, it is that of localization in the administration of justice. Times are changed. The facilities for travelling are now very great, and it is much wiser for a judge either to reside among or to visit suitors in a particular county to determine their differences, than to drag all such to the seat of the courts, and there detain them until sickened by the neglect of their proper business, and impoverished by a residence among strangers. What would the equity judges in England think of going circuit? The proposition, probably, would only be entertained to be the subject of laughter. Yet in Upper Canada there are Chancery as well as common law circuits. Equity judges hold their sittings in the chief towns of the Province at fixed dates, for the purpose of taking evidence, and the gain to the public by this simple change is incalculable.

So with regard to the subject in hand, we are in advance of the mother country. In 1853, equity jurisdiction was conferred upon our county courts (16 Vic. cap. 119); and were the fees allowed for work done in these courts at all commensurate to the skill required, the system would be in most respects satisfactory. When 2s. 6d. only for instructions, and 6d. for an attendance are allowed to solicitors, we can well understand how solicitors refrain from availing themselves of the act. If the Legislature intend this step to be more than an empty pretence, it must make it worth the while of respectable solicitors to do work in the courts.

Still we contend that the principle is none the less good. The Legislature, no doubt, meant well, and would have done well had it been in the matter of costs a little more considerate. The act, though short, is comprehensive. In certain cases enumerated—such as partnership, accounts, legacies, administration, foreclosure of mortgages, redemption of mortgages, waste—under certain restrictions, jurisdiction is given to county courts. The judge of the county court is made the sole judge in all suits within his jurisdiction, and is to determine in a summary manner all questions of law or equity, as well as of fact, arising therein, unless he or either of the parties think proper to have the facts tried by a jury. The rules of decision are of course to be as nearly as possible the same as those which govern the Court of Chancery. Either party may, upon giving proper security, appeal to the Court of Chancery against any order or decree made by a county judge under the provisions of the act, and power is given to the Court of Chancery to make rules for the government of county courts in the premises.

We are confident that the time will come in England when some similar system will be in operation there. Public opinion is too potent to be much longer made to bow at the shrine of judicial ease. It is only a question of

time. If law and equity are not to be united, the administration of each must be made as far as possible simple and expeditious. If equity were to follow more closely the example of law, as to expedition and cheapness, there would be fewer advocates for fusion, and less outcry against Chancery delays.

It is not a little singular that in many law reforms we have taken the lead of the mother country. We did so as to county courts, and other changes in the mode of administering justice. We are beginning to feel our strength, and to acquire the confidence of manhood. We are not trammelled by the ruin and decay of expiring customs, and their handiwork, obsolete statutes. Formerly we were content to await a change in the laws of the mother country, and then with fear and trembling endeavored to follow; but now, when we need a law we make it, and have done with it. It is not now so much a question whether England *has* done so, as whether we *shall do* so—whether the change is one which the interests of this Province demand. In this spirit, several most important laws have been passed. Instance the institution of local county crown attorneys, and the decentralization of the administration of equity. The former, though doing pretty well, is suffering from the same cause as the latter—too niggard an allowance to the professional men whose services are invoked, and whose good will and hearty support is necessary to the complete success of the measure.

LOCAL EQUITY JURISDICTION.

(By JOHN SMALE, BARRISTER-AT-LAW.)

Read at the Annual Meeting of the National Association for the Promotion of Social Science, held at Liverpool in October last.

I propose to occupy the attention of this department for a very short time with a few remarks on the importance of localizing the administration of justice in respect of equitable rights; in other words, to consider whether it is desirable and practicable so to constitute local tribunals as that they may be fitted to determine those questions between litigants, and to afford those administrative benefits for which the Queen's subjects ordinarily now resort to the High Court of Chancery.

In no part of the country could the establishment of a local equitable jurisdiction be so properly raised as in the County Palatine of Lancaster, in which, by virtue of ancient charters, a local Court of Chancery has always existed, and which has within a few years grown into considerable importance—a local jurisdiction, co-extensive in its powers within the County Palatine with the High Court of Chancery, and in which a great number of causes have been decided and promptly disposed of, to the entire satisfaction of the suitors.

The jurisdiction extends over persons and property, when either is within the limits of the County Palatine; it is said to be exclusive when as well the subject-matter as the parties in litigation are within the limits, and old authorities are cited for this proposition; but it does not appear to be so now universally in practice. In other cases the jurisdiction is concurrent with that of the Courts of Westminster. See 13 & 14 Vict. c. 43; 17 & 18 Vict. c. 82. Other statutory authority: 16 & 17 Vict. c. 137, ss. 29, 35, & 37; 11 Geo. 4 & 1 Will. 4, c. 35; 2 Will. 4, c. 38.

The judicial authority of the Palatine Court of Chancery was but little resorted to, and the office of Vice-Chancellor was for many years little better than an honorable sinecure; but the Vice-Chancellors, Sir William Page Wood and Sir Richard Bethell, successively felt the importance of bringing home to the manufacturers of Lancashire and the merchants of Liverpool the advantages of having their equitable rights and remedies judicially determined, as it were, at their own doors; and the first act of modern time, regulating the practice of the Court, was passed in 1850. In consequence of this act by such men, the business of the Palatine Court of Chancery became more important.

The present Vice-Chancellor James, emulating his predecessors, increased the number of equity sittings, so that the Court sits four times at Manchester, and as many times at Liverpool, in each year. The ordinary work of the Court is carried on by three registrars, one of whom is always to be found at each of these places and at Preston, who is daily engaged in disposing of the greatly increased and increasing chamber business of the Court. These officers perform the same duties as the registrar and judge's chief clerk in the High Court of Chancery. The number of suits and petitions disposed of in the last year by this Court was considerable, being an increase on the business in years, before the Palatinate Chancery Acts passed, exceeding eight-fold, dealing with cases in which property to a large amount was involved. From these decrees and orders the right of appeal is now to the Chancellor of the Duchy and the Lords Justices of England, or any two of them, by which in practice the appeal is to the Lords Justices alone; but although there have been some appeals, I believe that no decree or order of the Vice-Chancellor of the Palatine Court of Lancaster has been reversed by their Lordships.

Here, then, we are in a county in which the energies of a succession of three able judges have built up an equity jurisdiction as efficient as that of the superior courts at Westminster, and which has worked itself into public support by force of its own merits, notwithstanding the prestige of the superior courts at Westminster, over which it has in practice no other advantages than that it is a *local* court where equity is satisfactorily administered, whilst it is subject to the prejudice with which among the many every apparent novelty is regarded.

We start, then, on the present inquiry with the fact that it is not only practicable to have local equity courts, but that one at least is now in a most efficient and satisfactorily working condition. I need scarcely add that the costs to the suitor of redress in this Court are in effect much less than in the courts in Westminster Hall.

This brings us shortly to consider the rise and progress and results of the County Courts Acts, as a preliminary to the more precise consideration of whether similar legislation in respect of localizing equitable jurisdictions would probably be attended by similar results.

Vague speculations in favor of local jurisdictions to a limited extent were obtaining attention before 1830. In various populous districts the want of a local court was so much felt, that each successive session passed special Local Courts Acts, with the imperfections incident to isolated efforts to meet special evils. It remained for Lord Brougham to bring the whole subject before the public; and after the speech of that great statesman in the House of Commons, on the 29th of April, 1830, the question assumed at once a national importance. But this beneficial measure, like all others of great importance, was not obtained per saltum; it had to be fought for year after year, and session after session, until, after discussions extending over fifteen years, the local courts were matured and established in 1845, limited in jurisdiction to £20, which in 1850 was extended to £50. From the county courts return of the 19th of July, 1858 (Sessional Paper, No. 445), it appears that the amount of money for which plaints were entered in 1857 was £1,937,745; judgments obtained, £978,592; paid into court under judgment, £776,711.

It may be safely affirmed that in nearly half of the cases at least the debts that have been recovered would have remained unpaid, whilst in the cases in which the law would have been put in force, the poor debtor would, under the old system, have been mulcted, in heavy and ruinous costs; whilst it is to be observed that hitherto at least the ready remedy of these cheap courts has had no effect in increasing the litigious disposition of the people.

On the whole, it may be safely affirmed that within a period of about eleven years the county courts have taken such root as to form one of the institutions of the country, which no man would have the hardihood to attempt to destroy, while the enlargement, rather than the curtailment, of their jurisdiction may be contemplated.

Are then the subjects for judicial investigation in equity and at common law so dissimilar, that a system which has been eminently successful in facilitating the administration of justice in one class of cases is unsuitable for the other set of questions?

We shall best appreciate this question by considering the peculiar objects of jurisdiction in equity, as distinguished from the ordinary remedies at common law.

It is the special object of the common law to protect personal liberty, and to give remedies or redress for injuries to property, and to defend it against ouster, trespass, nuisance, waste, destruction, or disturbance. The common law, by its practice, ordinarily compels the parties in litigation to reduce their disputes to simple questions of fact, or law, as between a single plaintiff or class constituting plaintiffs, all in the same interest, and a single person or class constituting defendants, all in the same interest, leaving the questions, or series of questions, of fact to a jury, and the question, or series of questions, of law to the judge; and it must be admitted that the simplicity of the common law has proved its ability readily to adapt its questions to tribunals less artificial than those of the high courts of common law in Westminster Hall.

The powers and duties of a court in equity are, however, more complex, and the questions raised are also between more than two parties—sometimes very many parties—each seeking a remedy or right different from that of the other parties in the same suit.

Sir James Mackintosh has said of equity, that "it is a jurisdiction so irregularly formed, and often so little dependent on general principles, that it can hardly be defined, or made intelligible, otherwise than by a minute enumeration of the matters cognisable by it."* Not admitting the premises, the conclusion of this eminent author, judge, and jurist, must be accepted, I shrink from adding to the numerous definitions of equity jurisprudence, and I must refer to Lord Redesdale's admirable work on equity pleading, first published in the year 1780, annonymously, and which is still the only work of authority, by an English author, on the subject of which it treats. Time does not allow me to quote at length the language of Lord Redesdale,† or of the great ornament of the American bench, Mr. Justice Story,‡ but I assume that no person will venture to form an opinion on equity jurisdiction who is not familiar with the out-line of equity jurisprudence, as expounded by one one these eminent judges.

Limited as is this paper, it is important shortly to enumerate the principal subjects in which an equity court gives relief. It remedies the results of accident and mistake—it relieves from actual and positive fraud, or from such inequitable bargains as are classed under the term constructive frauds—it settles and adjusts the rights of persons beneficially entitled under trusts, and it exercises a salutary control over trustees of all kinds—it protects clients from their legal advisers, and children and wards from undue influence—it determines the rights of mortgagors and mortgagees, and the priorities between several incumbrancers—it determines the rights as between sureties and principal debtors and their creditors—it ascertains and enforces a just contribution between debtors—it protects against waste—it settles questions relating to confusion of boundaries, rights to dower, patition, and rents—and it administers the estates of deceased persons, doing justice between their creditors, legatees, devisees, and real and personal representative—and in all these matters it takes and adjusts, and works out all the accounts between all parties, and distributes the funds or liabilities in litigation, as the case may be, between or among two to two hundred and more claimants, each having or being subject to the most varied rights or liabilities.

In aid of all these rights, and to protect property during litigation in the common law, or other courts, it extends its extraordinary jurisdiction by injunction, and by another extraordinary exercise of power it decrees and enforces the specific performance of contracts, as between vendors and purchasers of estates and other property.

Indeed, it may be said generally, that there is not a wrong relating to property, from which a court of equity, either in exercise of its own inherent jurisdiction, or in aid of the jurisdiction of other courts, has not a remedy.

Now, whoever compares the questions which arise in county courts with those above enumerated must admit that high as should be the mental qualification for the due discharge of the duties of a county court judge, a very large amount of acquired learning, both in principle and practice, as distinguished from general talent and scholarly attainment, is necessary in a judge in equity in the first instance, so as to enable him to decide rightly either without any bar or with the aid of an incompetent advocacy. This consideration leads to the conclusion that, so long as the practice in law and equity remains distinct, and until the whole bar shall be educated to practise in both departments, the propriety of which is a moot question, on which it would be irrelevant here to enter, it will be unwise to entrust any important equitable jurisdiction to the judges, who have by study and practice specially fitted themselves to preside with advantage to the country and honour to themselves in the county courts.

We know that custom has so long prevailed in separating the spheres of study of common law and equity lawyers, that even where incidentally a question of equity comes before a gentleman of the common law bar he usually gives his opinion on the legal points, and declines to give any opinion on the equitable question, referring it to an equity barrister, and that the latter in the same way hands over questions of common law to the practitioners on that side of Westminster Hall. Now, if in London, with all its appliances, the most learned members of the bar thus shrink from giving opinions on matters to which they have not devoted their special attention, will the responsibilities of office, will the necessity to decide in remote districts questions as nice as can arise before the Lord Chancellor, will the absence of all learned aid, enable a common law barrister, when elevated to a judgeship, to pronounce such decisions as will satisfy the public mind?

But the eminent persons who, from practising in one department all their lives, have, on the instant, crossed to the other side of Westminster Hall, will be cited as practically and entirely proving the contrary of the propositions just advanced. I admit that a Gifford, a Lyndhurst, a Brougham, a Cranworth, a Truro, and a Chelmsford, may possibly with advantage step over the barriers which separate the courts of law and equity. These are the powerful intellects from whose eccentric movements, the ordinary courses of ordinary men are not to be estimated. On the other hand, could not each one of us, if it were not invidious to do so, on the instant enumerate a list of eminent lawyers, who, great in their own department, would have been "in endless mazes lost," if they had had to wander out of the beaten track, the via trita of their lives?

It must be remembered that, although among the judges of

* Life of Sir T. Moore, 1. p. 457.
† Mitford's "Equity Pleading," p. 111, Jeremy's edition.
‡ Story's "Equity Jurisprudence," secs. 30, 31.

the county courts there are men whose attainments would have done honour to the bench, yet that ordinarily these judgships are not the prizes to which the highest aspirants for office among lawyers usually look, and that the less elevated the rank in the profession from which judges are selected, the less likely is it that they will be found competent to grasp not only the subjects of their previous study and practice, but subjects so vast, so intricate, and in many respects so perplexing as daily exhaust the attention of the most eminent of our equity lawyers.

I assume, on the whole, that it must be conceded that, in order that the administration of equitable justice locally may be efficient, the judges must be men who thoroughly understand its principles and practice.

It remains to be remarked, that the judicial work of the county court judge ordinarily begins and ends with the trial.

Not so with a case in equity. At the hearing, questions of law, or fact, or both, are sometimes decided; at other times, they are merely indicated, and are left to be worked out at chambers, and a decree or order is pronounced, or rather is sketched out. Now, the union of learning, and acuteness, and labour, that must be brought to bear to fill up this sketch, and which elaborates the written decree or order, can be appreciated only by those who are familiar with the actual practice of the registrar's office, where all these decrees are drawn up with careful accuracy.* Then, again, inquiries are to be made; intricate, inaccurate, and defective accounts are to be unravelled; the affairs of a family or of a partnership are to be settled in a manner that raises innumerable questions, each sometimes equal in difficulty to any that can form the sole question in a cause in a county court, or at law, in Westminster Hall. All this machinery elaborates at last a certificate of results, which in time forms the foundation for reconsideration; or if the cause shall have escaped that ordeal, then for final adjudication, in the presence, as very frequently happens, of numerous parties, each having an interest conflicting with that of every other party, or between the creditors, relatives, and legatees of some clever testator, who has created every possible difficulty by his self-satisfying autograph will, or of some intestate who has little else to bequeath to posterity but the arrangement of his embarrassed affairs.

A Court which has to give to any locality the benefits of equitable justice must, to meet all the objects above indicated, be not only presided over by a judge learned on all these subjects, but have able officers representing the registrars, competent to reduce the decrees into proper written form, and also supplying the place of chief clerks. under the judge's direction, to pursue the inquiries and adjust the accounts, and settle the priorities and rights of the parties.

These considerations lead up to the conclusion that any alteration which localises equitable trials without all these provisions, may possibly increase litigation, but that it will be without the result of an adequate administration of justice.

To supply the machinery of competent judges and officers, necessary to insure any prospect of success to local equitable jurisdiction throughout England, would require an expenditure for which the public is not as yet prepared. Discussions in Parliament would, doubtless, do much towards a due appreciation of the question. But this effect is usually of slow growth. It seems therefore desirable that an attempt should at once be made, if possible, to set up some one court within some one district, to demonstrate what such courts should be and what they can accomplish. This might be done if the consent of the judge and the suitors were obtained, and by a very short Act of Parliament constituting the Chancery Court of the Duchy of Lancaster to be such a court, with exclusive jurisdiction over all cases in which the subject-matter chiefly lies within the locality, and to an extent in amount or value, to be settled after due consideration, and giving to the vice-chancellor of the court in this county as its judge the most ample authority, and indeed, direction to simplify the practice and pleading by such orders as should, in his judgment, tend to render the proceedings as simple and inexpensive as possible.

Among the advantages of this plan would be the following:—

1. That it would at once relieve the High Court of Chancery from a portion of its labours, which has been proposed to be done by the appointment of a fourth vice-chancellor, and thus render the plan unnecessary.

2. That the machinery is already complete and in operation

3. That the expense of the experiment thus limited to one locality would, under *any* circumstances, and with whatever result, be small.

4. That the judge and officers being the only persons conversant with a local practice, as already localised, they are at once best able to appreciate the difficulties and wants of a local equity court, and to improve the working of the system, if powers sufficiently large for the purpose were entrusted to them. It does not become me to do more than allude to those personal qualities and attainments which eminently fit the judge of the courts, now held within this hall, to superintend the formation of a code of practice and procedure fitted for local courts generally, and to work out the proposed experiment.

5. The court, when the plan shall have worked itself into a regular shape, would form a system which might be gradually and safely extended.

6. The plan would avoid the enormous loss incident to the miscarriage of any general scheme.

7. But the working of this proposal would be no impediment to any ventilation, by discussion, of the general subjects in Parliament or elsewhere.

8. The time which would elapse before this plan would be so far matured as to be introduced throughout England, would afford an opportunity for the consideration of the question whether, and to what extent the various provisions already made for disposing of matters of local jurisdiction may not be improved.

It appears to me that much may be done by re-arranging the duties of the various judicial and quasi-judicial officers throughout the country, to provide, at a comparatively small cost to the country, the additional judicial and administrative strength necessary to introduce a local equitable jurisdiction throughout England.

In addition to the sixty county court judges, we have about one hundred recorders of cities and towns, and a number of revising barristers. Now all the duties of recorders and revising barristers might well be performed by the county court judges. thus ultimately producing a great saving in these salaries. Again, we have a number of commissioners, and registrars in bankruptcy, and commissioners in insolvency, and commissioners and inspectors of charities. Now, the questions which most frequently come before these judicial persons are merely equitable, and surely such arrangements could be so made as that bankruptcy, insolvency, and public charities should be committed to the same judicial officers as the lawyers to whom the local administration of equity shall be entrusted.

This arrangement of judicial duties would go far to supply the necessarily increased judicial force which the establishment of local equitable courts would require.

There are other judicial or quasi-judicial functions, including those performed under the Court of Probate, now separately provided for, which might well be merged in the local court jurisdiction in law or equity.

But further, it is not improbable that some system of registration of titles will ere long pass into a law, over which it will be proper that gentlemen well versed in real property law

* The variety and intricacies of decrees in Chancery can be best in some degree understood from "Seaton on Decrees in Chancery."

should preside, ...ose presence will be always required, but whose learning ... id active superintendence need but seldom to be resorted to.

Now the local equity judge will well perform all the duties of such an officer. Indeed, the Master of the Rolls, at this moment *ex-officio* has the patronage, and is also the superintendent, of the Chancery Enrolment Office, and he is consulted on all questions of difficulty by his officer the clerk of Enrolments; and in reference to such enrolments he exercises a general superintendence and control, which a local equity judge could exercise, in the same way as the Master of the Rolls now superintends the enrolments as they are made in Chancery.

The limits which are set to this paper do not enable me to illustrate the subject as fully as I could have wished to have done; and in submitting these few observations for consideration, I must omit several other suggestions which might usefully have been made in their support.

The conclusions to which this paper point are shortly—That the successful operation of the county courts, and the fact of one equity court of local jurisdiction being in satisfactory operation, show the practicability of local equity courts in England; but that the peculiar difficulties of equity jurisprudence and practice render caution necessary in establishing such local courts. That there being one efficient equity court with local jurisdiction in existence, it would be the most prudent course at once to give to that court exclusive jurisdiction, to at least some sufficiently large though limited amount—a jurisdiction which it already has concurrently with the High Court of Chancery; and that it would be necessary to give to the judge all the powers which he may require to enable him to diminish the costs of procedure, and to expediate the decision of causes. That efforts should in the meantime be made so to arrange the existing judicial strength of the country in local affairs, as to render the appointment of a sufficient number of equity judges in due time not only desirable, but practicable, and no excessive burden to the country.

The course here suggested may be thought by some persons too full of delay to be adopted. Many will say, "Mora omnis ingrata est," and stop there. Lord Bacon, however, adopting this complaint, turned it into one of his aphorisms, and he said, "Mora omnis ingrata, sed facit sapientiam;" and this general, if not universal proposition is especially applicable to legal changes, as to which it behoves us to ascertain that they are not merely a reform, but an improvement.

The association will not forget that its labours are directed to no party or ephemeral purpose; that the reforms they propose are intended for posterity; and if it be true that he who is about to set out on his voyage of life can afford to wait a tide or two, surely this association, seeking reforms for a long future, can afford, in order effectually to perfect its measures, to prove by safe steps their efficiency, thus insuring their final success; keeping its plans before the public and biding their time, so that a wiser and better measure may be the result of the delay.

HOW TO READ LAW.

The following remarks from our contemporary the *Law Times*, are deserving of earnest attention from law students.

No task is more unprofitable than that of reading law books by the dozen, without plan or method. We always mistrust the man who boasts of his extensive reading, and nothing to back it. Give us your practical man. Give us the man whose knowledge of law is sharpened by practice. Give us the man who not only knows a good deal, but knows how to apply the knowledge which he has acquired. Memory is at best treacherous. Artificial aids are not without their value. It is a great aid to the recollection of a branch of law, to have been familiar with a case in which that branch of law has been called in question. Even the reading of reports is to be preferred to the uninterrupted reading of many text books. To fix the law in one's mind, there must have been the application in some case or other to actual facts.

We pronounce reading of law, independently of practice of the law, to be positively injurious. A smattering of things in general, breeds confusion of ideas. Better a clear idea of one rule of law, than an obscure one of every rule. The true plan of acquiring a knowledge of the law is as pointed out in the following remarks—viz., *first*, learn the history of the law; *secondly*, its principles; and, *thirdly*, its practice. Law learned in this manner will be retained and ready for use, when if learned differently it may be neither the one nor the other.

DO NOT TRUST TOO MUCH TO READING.

You can do nothing without it, but it will not do everything for you. You must master the principles of law by reading, but reading alone will not teach you the practice of the law. You will learn more from the actual conduct of a single action or suit through all its stages, than if you were to commit to memory the entire of the text-book that is your guide in the proceeding. Remember, then, to learn, first, the history of the law; then, the principles of the law; lastly, the practice of the law. Do not trouble yourself about the practice until you have mastered the principles. Stephens' Blackstone gives you the best outline of the whole law of England; but you must not be content with an outline—you must stamp upon your memory the principles of each of its branches. This done, you may turn to the practice. That will be best acquired by combining reading and observation. Mark the actions and suits that are begun in the office; watch them closely through all their stages, at every stage turning to your text-book to read all that is there written about it. The pages will then have a meaning which they had not before, and will be remembered because they will be associated with proceedings which you have actually seen. Little profit comes of reading a book of practice right through. The best memory would not retain it unconnected with something tangible and definite. If you are so unfortunate as to be in an office where actions and suits are few, the next best thing to a real one is an ideal one. If you have a fellow-clerk, constitute yourselves plaintiff and defendant in some imaginary quarrel, and carry it through every stage of an action, drawing your own pleadings and processes with the help of your text-book. For this purpose there is none that we have seen to be compared with Paterson's and Macnamara's New Common Law Practice; for this reason, that it gives every form of procedure in its proper place in the text, so that you see before you at the same place the document you are to use, and the instructions how to use it. Thus in the memory each proceeding is preserved where it is wanted, and the mind's eye sees the whole machinery of an action, with its parts put together in their right places and in working order. Perhaps we have a parent's partiality for the plan pursued by the authors of this work, for it was suggested to them here; but certainly the result appears to accomplish all that we had anticipated from such an arrangement for a book of practice.

And now for a few hints as to the use of the pen in law studies. It is beneficial for two purposes. First, after having read, it is a very profitable task to close the book, and try to express upon paper the principle, or rule, or exception, that is the result of what you have read. You will learn thus whether you understand what you have been reading. Secondly, it is desirable to copy verbatim the forms and precedents, because the objects with these is to write the very words upon the memory. Therefore, when you read a book of practice, make it a rule to extract the principles of the law in your own language, and to copy laboriously the forms of practice in the language of the book.—London *Law Times.*

NOTICE OF THE LAW JOURNAL.

The English *County Courts Chronicle*, in the issue of this month, thus speaks of the *Law Journal*:—"This able, interesting, and well conducted publication, not merely maintains its high position, but seems to increase in value and reputation with each succeeding month. The question of commitments by local court judges, appears to have excited as much discussion among our friends on the other side of the Atlantic as at home; and a very able leading article on the subject, occupies a prominent place in the August number of the *Upper Canada Law Journal*. The concluding portion of the article contains so much sound, practical common sense, that we make no apology for giving it entire to our readers." (Then follows the article referred to.) Our cotemporary concludes thus. "The now cause célèbre of *Swynfen* v. *Lord Chelmsford*, next claims our attention, and we are glad to find quite coincides in opinion with that of the *Law Times*, expressed upon this most important subject." The other leaders are, on Criminal Law Amendment, Chancery Agency, and Consolidated Statutes. It is needless for us to say that the Reports are as correct and as judiciously selected as ever."

If we have attained a measure of success in the conduct of this journal—the only publication of the kind in British North America—it arises in grea part from this, that we have studied as models of imitation the *Law Times* and the *County Courts Chronicle*: the former occupying the whole field of legal knowledge, the latter especially devoted to the County Courts, — tribunals answering to our Division Courts, — and our aspirations are to place the *Law Journal* in the same position towards the profession, officers of the Courts, and public functionaries in Upper Canada, in which the periodicals we have named most deservedly stand towards the profession and others in England.

In our advertising columns will be found the card of Mr. H. J. Gibbs, who has established in Quebec, the present seat of Government, an Agency for the transaction of business with the Government departments.

We call attention to the advertisement, because an agency of the kind is much required; and because Mr. Gibbs is the right man for it. He is no stranger in Upper Canada, and most assuredly no stranger to us. We can cordially recommend him as a prompt and thoroughly business-like man.

Members of the legal profession, who often find it necessary to write to the seat of Government for exemplifications of letters, patent and other documents necessary in the conduct of causes, will do well to avail themselves of his services. The advantage of an agent on the spot in matters of the kind is to avoid confusion and delay, which, if done, is well worth any small fee that may be charged for services effectually performed.

ORDERS IN CHANCERY.

WEDNESDAY, THE 13TH OF APRIL, 1859.

The Judges of the Court of Chancery, under and in pursuance of the powers vested in them under the statute in that behalf, do hereby Order and Declare:

I. That from and after the first day of July next, the fee payable to, and to be received by, the Registrar of this court, on the setting down of each cause, other than those ordered to be taken *pro confesso*, shall be the sum of ten shillings.

II. The judges of this court, taking notice of the inconvenience and expense occasioned to the suitors in the court, by reason of the non-attendance of the solicitors of the parties or some of them at the times when such causes are called on to be heard, or during the hearing thereof, by reason of which non-attendance such causes are struck out of the paper, and cannot be restored without an expense which ought not to be sustained by the parties; or the hearing thereof is unnecessarily postponed, not only to the inconvenience of the parties to such causes, but also to the inconvenience of parties in other causes; do think proper hereby to order, in conformity to what the rules and practice of the court already require, that the solicitors for the several parties in all causes do attend in court when such causes are appointed to be heard, and during the hearing thereof. And that whenever, upon the hearing of any cause, it shall appear that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally, or by some person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award.

III. In future the evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the Registrar before the case is closed, in accordance with the order to that effect.

When judgment is reserved, the exhibits used upon the hearing must be deposited with the Registrar for the use of the court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the Registrar, shall be handed to the party depositing the exhibits, and the other retained for the use of the court.

When this order has not been complied with, the case will not be considered as standing for judgment.

IV. From and after the first day of July next, every bill and answer filed; and every affidavit to be used in any cause or matter, shall be written in a plain, legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be, shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or

affidavit substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the court.

Wm. Hume Blake, C.
J. C. P. Esten, V. C.
J. G. Spragge, V. C.

DIVISION COURTS.

THE D. C. ACT.—DECIMAL CURRENCY.

The Consolidated Statutes will probably be brought into force in December next; and as many doubtful points have been settled, we recommend officers of the Division Courts to an early examination of the Consolidated Act.

It is not contemplated to distribute the Consolidated Statutes generally; but as all officers of courts of justice ought to be provided with the body of the law which is to guide them, we do not see how the Government can avoid supplying clerks with a copy of the Division Court Consolidated Act at least. No doubt it will be printed in convenient form by some enterprising publisher for every Court in Upper Canada, as has been done in former years. The Queen's Printer is not likely to have struck off any extra numbers of any particular Act. But we would now direct special attention to one point,—that sums of money are mentioned in the Consolidated Statutes in decimal currency, and that the entries in books and accounts will be in dollars and cents after the 1st January next. Clerks should keep this in mind when ordering a new supply of forms, and otherwise prepare themselves for the coming change.

NEW RULES.

The alterations in the Division Courts Acts, since 1854, when the Rules were issued, have loudly called for a revision of the present Rules. Now there are strong additional grounds for urging it. The Courts will be henceforward governed by a single statute: all the provisions affecting them being brought into one act.

The language used in this act is much simplified, and several doubtful points definitely settled by the Legislature. An improved and simplified act needs a corresponding improvement in rules, and all the references require to be amended in the rules and forms.

The existing rules are "continued in force," but *subject to the provisions* of the new act. As the rules now stand, we fear they will be found embarrassing in practice to officers and suitors. In some particulars they are calculated to mislead (unless great care be taken) rather than to assist.

Under these circumstances, we would, on behalf of officers and suitors, earnestly urge a revision of the Rules and Forms, so as to make them harmonize with the consolidated act, and to adapt them in language and arrangement to its subject matter.

This ought to be done early next year; and as it is desirable that the rule making judges should act on the fullest information, we recommend the judges and officers of the courts to communicate their ideas as soon as possible through this journal. In such communications the subject might be placed under two heads; *first*, as to changes desirable in the existing rules and forms—what rules should be omitted, and in what particulars the retained rules and forms might be improved in language; *second*, what new rules and orders should be given.

We make no doubt but that the judges would be anxious to hear in this way from their brother judges and officers of the Courts, as well as from suitors, and to learn the views of all as to the best mode of giving full value to the statutary enactments, and simplifying procedure in the courts.

It would would be quite out of the question to expect these gentlemen to correspond with the numerous body who will be engaged in working out the law, or with those who are to avail themselves of the Division Courts jurisdiction; but all the advantage of a correspondence may be gained by the plan we suggest, and we trust that all concerned will see in our proposal additional evidence of our desire to promote the efficiency of the Courts, and the interests of such of our subscribers as are officially or otherwise connected with these valuable tribunals,—the Upper Canada Division Courts.

CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Will you allow me to put a case, and ask your opinion on it? It is a matter of very general interest to the country at large; and I may remark that no particular case has arisen in my practice, which makes me desirous of obtaining your opinion.

Jones owns in fee simple a lot of land. He sells to Smith, who does not record his deed until after a certificate of judgment against Jones has been recorded by a judgment creditor. Some time after the registration of the certificate of judgment, Smith records his deed. Which holds the land: the certificate or the deed to Smith?

Or again: suppose the conveyance to Smith to have been a mortgage, under circumstances similar to the above; which would hold: the certificate or the mortgage?

In other words, is the 3rd section of 13 & 14 Vic. cap. 63, in force—and if not, by what act was it repealed? And has there been any decision of the courts to the effect, that in the second case put (that is, the mortgage), as Jones had conveyed his legal title, even though the certificate of judgment was first recorded, it could only bind Jones's interest, that is, his equitable title?

The deed or mortgage must be supposed to be dated before the registration of the certificate.

Oblige me by replying to this in your next issue.

Your obedient servant,
Inquirer.

October 12, 1859.

[Our correspondent will find all his questions answered in the article on the "Law of Registered Judgments," in our last number. In reading that article for answers to his queries, he will have to consider the following rules, which seem to be deducible from the Act:

1. That registration is *prima facie* evidence of title in the party whose name appears in the last deed, &c., of a lot of land.

2. That those (purchasers, mortgagees, or judgment creditors) who neglect to avail themselves of the Registry laws will have to suffer the consequences of their neglect.

3. That subsequent conveyances or judgments may cut out *prior* conveyances or judgments, by obtaining prior registration.

And from these he will see that in the cases he presents, the following will be the result:

1. Jones's deed (or mortgage, for by the act they stand in the same position) to Smith, not having been registered, owing

to the *neglect* of Smith, is cut out by the *subsequent* judgment registered against Jones, for *prima facie* the title is in Jones. See *Bank of Montreal* v. *Stevens*, in the article referred to.

2. Had the judgment been obtained *prior* to the deed (or mortgage), but not registered until after the execution of the deed, the judgment would not bind, owing to the *neglect* of the judgment creditor to register his judgment. See *Thirkell* v. *Patterson*, in same article.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—Permit me, for the first time, to request an answer, in your next number, to the following questions on the case here supposed, as it is one of general interest.

1.—A had a chattel mortgage on the goods of B, but neither took possession of the goods nor filed the mortgage, as provided by the statute 20 Vic. chap. 3.

2.—B happens to get sued in the Division Court by C, (but before judgment is entered against him,) A, by a warrant, directed an agent of his to take possession of the goods of B, sell the same and remit him the money, the agent did not do so, but instead took a bond from B with sureties to the effect that the goods should be forthcoming when required by A, and then left the goods where he found them, viz., in the possession of B who carried on the business as usual in his own name.

3.—After this C issues execution against B, bailiff seizes the goods above named in B's possession. A then comes forward and claims first as owner of the property, and secondly as being in possession of the same, stating the goods were only rented to B, claiming under the chattel mortgage at this time run out, and by virtue of the seizure made by his agent under the warrant.

4.—Which party have the legal right to the goods, A or C?

I am, Gentlemen,
Yours truly,
A SUBSCRIBER.

P. S.—Can you give any decided cases in point?

[This question is one of general law, which we have repeatedly told our correspondents we do not profess to answer. However, as it comes from a Division Court Clerk, to whom an answer may be of some use, as such we make an exception in his favor.

Our correspondent's plea of not having troubled us before with any queries is not with us a good one, as it has always been one of our chief objects to induce our readers, especially amongst Division Court Clerks, to correspond with us on any matters or questions of general interest which may come under their notice. It is the best proof that can be given that our labours are not in vain.

As to the question before us, we consider that the goods were liable to C's execution, the provisions of the act not having been complied with in regard to renewing the chattel mortgage by A.

A's agent having taken a bond for the goods to be forthcoming, but still leaving them in B's possession, would not protect them from B's execution creditors; as there evidently should be some actual if not continued change of possession, the chattel mortgage not having been renewed. See *Street v. Hamilton*, U. C. O. S. 568.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—For the required information in regard to the working of the 91st clause of the Division Court Act, 1850, I submit a statement of the result of the Judgment Summonses issued from and out of this Court, for the period of eighteen months—viz., from 1st January 1858, to 30th June 1859:—

		AMOUNT.
Number issued for the year 1858.....	46	$1471 09
Number issued for half-year 1859.....	15	463 02
Total.....	61	$1934 11

1858.	1859.	TOTAL.	
11	3	14	Summonses not served.
4	2	6	" withdrawn.
4	1	5	" dismissed.
6	3	8	Order not complied with.
7	2	9	Paid in part.
8	3	11	Paid in full.
7	1	8	Commitments issued.
46	15	61	

If plaintiffs had not availed themselves of the provisions of the said clause, the result would have been far different.

I am, Gentlemen, your obedient servant,

JOHN ALLCHIN,
Clerk 5th Div. Court Co. Waterloo.

New Hamburg, Sept. 29, 1859.

To the Editors of the Law Journal.

MESSRS. EDITOR:—Under the "Amended Tariff of Fees" receivable by Clerks of Division Courts, one shilling is set down for transmitting papers to another Division or County for service; and one shilling for receiving papers from another Division or County for service, entering the same in a book, handing the same to bailiff, and receiving his returns.

When a bailiff makes his return to execution on transcript of judgment, it is usual for the Clerk to make a formal return to the Clerk who issued the transcript. In some cases this is absolutely necessary. For instance, where plaintiff wishes to proceed against lands in the County Court, as in such cases the particulars of issuing execution and return, "*nulla bona*," must be shown.

Now, there is nothing said about any fee for *transmitting these returns* to the issuing Clerk. One or two of my correspondents charge a shilling for making return to transcript; but the majority, like myself, do not.

What do you think about the legality of the charge? Should I refuse to allow the shilling in settling with other offices? It is certainly of importance that the practice should be uniform, and still more that it should be strictly legal and correct.

W. S.

October 10, 1859.

[The item on the amended tariff of fees does not cover the service referred to by W. S.

Our correspondent seems to be under some misapprehension in respect to the transcript of judgment. Under sec. 3 of 18 Vic., c. 125, the Clerk of any Court in which a judgment is entered upon application of the judgment creditor is required to prepare a transcript, and transmit it to the Clerk of any other Division Court Clerk named by the creditor. This transcript of judgment with certificate is entered by the receiving Clerk in the proper books, and it then becomes a *quasi* judgment in the Court of the receiving Clerk; "and all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court.

As we understand the provision, the official duty of the transmitting Clerk ceases when he has performed the duty referred to. He is not compellable to take any further steps without special order of the judge. But he may, and as a fact does in most cases thereafter act as agent for the judgment creditor or as the medium of communication between him and the receiving clerk.

The "instance" given does not touch the point. The pro-

vision is, that in case an execution be returned *nulla bona* a transcript of judgment setting the bailiff's return, &c., may be obtained *by the parties;* and upon filing the transcript with the Clerk of the County Court, the judgment creditor has the same remedy as if the judgment was obtained in the County Court. For this transcript the fee of 25 cents may be charged.—Eds. L. J.]

To the Editors of the Law Journal.

London, 20th Sept., 1859.

Gentlemen,—I find that not only in the locality in which I reside, but in other places in the country, magistrates think they have the power to bring almost every kind of work within the Master and Servants Act. I have known suits before magistrates, for threshing done by a threshing machine; upon contracts with railroad companies and other corporations, for wages earned months after the employment ceased, &c.; all which is clearly illegal;—and I thought that by mentioning the matter in your valuable paper, I might do something towards keeping magistrates as well as other parties out of trouble, and induce persons who are aware of similar facts in other localities, to draw attention to them, and give instances of actions brought before magistrates beyond their jurisdiction, and which should have been brought in the Division Courts.

J. T.

[We have heard something of this before, and some cases of the kind have come under our own notice, upon appeal from convictions by justices of the peace, which were quashed by the Court of Quarter Sessions. A similar case is now, we understand, before the Court of Queen's Bench.

We shall be happy to hear further on the subject. To use a common expression, magistrates should be very careful lest they "burn their fingers" in assuming jurisdiction under the Master and Servants Act. The law was not intended for the recovery of *debts*.—Eds. L. J.]

U. C. REPORTS.

IN CHAMBERS.

(Reported by C. E. English, Esq., M.A., Barrister-at-Law.)

McKenzie v. John Keene and Anna Keene, (Administratrix of the late Thomas Weir.)

Practice—Stay of Proceedings—Writ of Certiorari.

Setting aside judgment and execution in Division Court by a County Judge thereof.

A order for a writ of certiorari to bring up a case from a Division Court will not be granted after judgment and execution regularly issued and money made and paid over, although a new trial may have been granted subsequently by the Judge of the Division Court.

Quære.—Can a Division Court Judge set aside a judgment and execution regularly made on an application to him for a new trial, when the papers were not regularly filed with the Clerk of the Court.

26th March, 1859.

The particulars of this case appear in the judgment.

Robinson, C. J.,—The Plaintiff sued in a Division Court of the County of Hastings upon a demand for 78 dollars, against the late Thomas Weir, and got judgment in his favour 2nd November, 1858.

Immediately after the trial the defendants applied for a new trial to the Judge of the Division Court; and instead of leaving the affidavits and papers on which they moved with the clerk, they left them in the hands of the Judge (which was contrary to the 52nd rule of the Division Courts).

The plaintiff opposed the application, and filed affidavits.

Sometime after the new trial was moved (not stated when) the Judge not having yet decided upon the application, the Clerk of the Court although, (as stated,) he knew of the application for a new trial, yet as he did not know of it *officially*, the papers never having been left with him, issued an execution against the goods, in the hands of the Administratrix, and the money was made and paid over to the plaintiff.

After the money had been so paid over, the Judge granted a new trial and sent his order to that effect to the Clerk.

The defendants applied to the judge for an order upon the plaintiff to pay the money into Court, to abide the event of a second trial, but the Judge refused alleging that he had no means of compelling obedience to such an order. He thought the new trial must proceed; and if the defendants were successful, they might sue the plaintiff for the money as being wrongfully retained.

Under these circumstances the defendants applied to me in Chambers under the 85th sec. of the Division Court Act, 13 and 14 Vic., chap. 53, for a writ of certiorari to remove the case into this Court.

1st.—In the expectation that if this Court were in possession of the case, it would compel the plaintiff to pay the money received by him into the court.

2nd.—Because as the defendants allege there are difficult questions of law to be determined, and also a question of forgery, or no forgery, of a receipt.

I decline to grant a certiorari in the face of the statement that execution has issued and that the money has been made and paid over to the Plaintiff under it.

The defendant may apply in term, if so advised.

The delivery of the affidavits and papers on which a new trial was moved, to the *Clerk*, is made by the Division Court rules, a stay of proceedings, and that is a proper and convenient regulation.

The failure to do it in this case led to the issue of execution, because, according to the practice, the proceedings on the judgment were not stayed.

Whether the Judge can, under the circumstances, set aside his judgment and execution is for him to consider; but while all remains as it is, the case is disposed of and a certiorari cannot properly go in a cause not pending.

Summons refused.

Corlay v. Roblin.

Practice—Writ of certiorari—Full costs—Affidavits—Irrevelant matter—Costs.

An order for a writ of certiorari to issue to bring up a case into a superior court, entitles the defendant to the full costs of that court, if he succeeds in the action, without any certificate of the judge who tries the cause.

Costs for superfluous or irrevelant matter introduced into affidavits will not be allowed, and in extreme cases the Judge will disallow costs for the whole affidavit.

The particulars of this case appear in the judgment.

Richards, J.—This was a summons dated 23rd June, calling on defendant to shew cause why the taxation of costs before the master should not be set aside, on the grounds that such costs were taxed without an order of any judge, or why the taxation should not be reversed and the master be directed to tax merely Division Court costs to the defendant.

The action was originally commenced in the First Division Court of the County of Hastings, and a trial was had before the judge, who directed in favor of the plaintiff.

A new trial was obtained on the condition that the defendant should summon a jury to try the cause.

The case was afterwards taken up into the Superior Court by certiorari; and on the trial a verdict was entered for the defendant.

The learned judge, by whom the certiorari was directed to issue, made no order in relation to the costs; and the master, on the taxation of costs, allowed the defendant full costs of defence, but declined to tax the costs of procuring the certiorari and of the writ itself, as there had been no direction given in relation to these costs by the judge who ordered the certiorari to issue.

For the plaintiff it was contended, that the judge having omitted to give any direction as to the costs, the defendant was not entitled to more than Division Court costs; he himself having taken the case into the Superior Court. He referred to *Brookman* v. *Wereham*, 20 L. J. Q. B. 278, S. C. 2 L. M. P. 233, *Levi* v. *McRae*, 22 L. J. Q. B. 311, and Pro Statute 13 & 14 Vic., cap. 53 sec. 79, 85, and Chitty's Archd. Vol. 1 page 446 to 449, 9th edition.

Defendant contended, that *prima facie* he is entitled to costs, having succeeded in the action, the Superior Court not being

ousted of jurisdiction; that if the judge made no special provision as to costs, he left them to be disposed of by the usual course of the law which would give them to the defendant. If the plaintiff was dissatisfied with the course taken in removing the cause into the Superior Court, he could have applied to the judge who granted the order to vary its terms or to the full Court to quash the writ of certiorari on shewing proper grounds. He referred to *Porter* v. *Radway* reported in 6 Ex. 184.

He further urged that the judge's omitting to order as to the costs, could only affect the costs of obtaining the certiorari which the master had refused to tax to the plaintiff.

RICHARDS, J.—By section 78 of the U. C. Division Court Act 13 & 14 Vic., cap. 53, it is provided that in any action brought in any County or Superior Court for any cause which might have been entered in a Division Court, and the plaintiff shall obtain judgment for a sum to which the jurisdiction of a Division Court is limited, no more costs shall be taxed against a defendant than would have been incurred in the Division Court, unless the judge who tried the cause shall certify it a fit one to be withdrawn from the Division Court, and commenced in the County or Superior Court. Section 85, that any suit brought in a Division Court may be removed into the Court of Queen's Bench or Common Pleas by certiorari, when the debt or damage claimed shall amount to ten pounds and upwards, provided leave be obtained from one of the judges of the said Courts in cases which shall appear to him fit to be tried in either of the Superior Courts and not otherwise, and upon such terms as to payment of costs and upon such other term, as he shall think fit.

There is no doubt, if it were not for the enactments limiting the amount of costs to be recovered in actions brought in the Superior Courts, plaintiffs under the statute of Gloucester would in all actions in which damages are recoverable, be entitled to tax costs against defendants.

The statute 23 Hen. VIII cap. 15, and 4 Jac. I cap. 3, gave costs to defendants on a verdict for them in those cases where costs would be recoverable against them; if the verdict had been for the plaintiffs. There can be no doubt if the plaintiff had originally brought this action in the Superior Court, and the defendant had obtained a verdict that the latter would have been allowed full costs of defence without a certificate of the judge who tried the same.

I see nothing in the facts of the present case to limit the right defendant would have had, merely because he has obtained a judge's order to bring up the case to the Superior Court. Most of the statutes on the subject are to deprive a plaintiff of costs, they do not seem to extend to the case of the defendant. It is probable the Legislature thought the power given to the judges to impose terms on ordering a certiorari to take the case up to the Superior Court would sufficiently protect all parties.

It is urged that as the judge did not impose any terms as to the payment of costs, therefore the defendant is not entitled to his costs though he has succeeded in his case, or at all events is only entitled to Division Court costs, he having taken the case into the Superior Court.

The plaintiff who instituted the action in the Superior Court, is still the plaintiff and has control of his own suit, when the case is in the Superior Court, it is disposed of there like any other action; and if the terms of the order on which the certiorari issued, were not satisfactory to the plaintiff, he should have applied to the judge who made the order, to amend it by imposing terms as to costs, if the judge has power to do this after having made the order, or to the full Court to quash the certiorari on the ground that the facts were not properly brought before the judge who made the order, so as to enable him to exercise his discretion as to imposing proper terms, *Parker* v. *Bristol and Exeter Railway*, 6 Ex. 184, is an authority on this point.

The plaintiff having failed to do this and having taken his case down to trial without any specific terms being imposed, cannot now, I think, claim that it is necessary the judge who granted the order should have directed that full costs should be allowed defendant if he succeeded. The costs are not allowed by virtue of the power to impose terms, but under the general law relative to costs. The judge who granted the order decided that the case appeared to him to be a fit one to be tried in the Superior Court, otherwise he would not have directed the certiorari to issue. If the judge who tries a case in a Superior Court where a verdict is rendered for a plaintiff, for an amount within the jurisdiction of an Inferior Court gives a similar certificate; *that* entitles a plaintiff to tax full costs.

It must be assumed, I think, that it was proper for the defendant to take his case into the Superior Court; and, having succeeded, I can see no reason why he is not entitled to his full costs.

The only question on which I have any doubt is as to the costs in discharging this summons. The Clerk of the defendant's attorney, in the affidavit he has made in reply to that filed on behalf of the plaintiff, has thought proper to introduce some statements charging improper conduct on the part of the plaintiff's attorney, without stating what the acts are which he considers improper.

These statements appear to me unnecessary and unwarranted, from everything that appears on the papers filed, and would, I apprehend, be struck out of a bill of Chancery, or perhaps in affidavits filed there, as impertinent. Ther, should the judge before whom the matter is brought, allow the defendant the costs of preparing such an affidavit, and ought be not to mark his disapproval of such a course by depriving the defendant of his costs in relation to this matter altogether. Perhaps, if the costs of that affidavit be disallowed, that will be sufficient.

It may as well be observed here, that there seems to be a disposition on the part of some practitioners to introduce extraneous matters into their affidavits on application in Chambers. It is probable such affidavits will not be allowed in the costs if the attention of the presiding judge is drawn to the subject; and I mention it now in connection with the matter referred to in this case, that such a practice may not be resorted to in the future.

On the whole, I think this summons must be discharged with costs; but no costs to be allowed to the defendant for the affidavit filed on his behalf.

Summons discharged with costs.

BRASH v. LATTA.

Practice—Render by Bail—Charging defendant in execution—Computation of time.

Our Rule of Court, Trinity Term, 20 Vic., No. 99, applies to a defendant who though not a prisoner at the time of the trial, is rendered by his bail during the same vacation.

A defendant who has surrendered himself in discharge of his bail, during vacation, though not a prisoner at the time of the trial, will become supersedable, unless the plaintiff charge him in execution, during the Term next succeeding such trial.

July 11th, 1859.

This was a summons dated 24th June, 1859, calling on the plaintiff to shew cause why the defendant should not be superseded as to this action, the plaintiff not having charged the defendant in execution, in due time after the trial of this cause.

It appeared from the affidavits filed. that defendant was arrested on a writ of *Capias* in this cause, on the 16th November, 1858, and gave bail to the action. That the declaration was filed and served 16th February, 1859, and the cause taken down to trial in April, 1859, and a verdict rendered for plaintiff for £50 damages, the cause being a country cause. That defendant was rendered by his bail on the 11th of May, to the Sheriff of the County of Hastings. That judgment was entered on the first, and a writ of *capias ad satisfaciendum* issued, but had not been placed in the Sheriff's hands on 23rd of June, the day defendant made his affidavit, where he stated he was a prisoner in close custody.

By an affidavit made by defendant on the 29th of June, defendant stated that on the 23rd of June, he was in close custody on the writ of *capias ad respondendum* issued in this cause. That the door of the gaol was forcibly broken (whilst he was in an adjoining room) for the purpose of assisting one Alexander M. Ross, to escape. That he left the gaol on that day, and shortly afterwards ascertained that his escape would compel the officers to pay the amount for which he was imprisoned, whereupon he at once returned and surrendered himself to the gaoler, and was a prisoner in close custody as a debtor, having returned voluntary rather then subject the officers of the Court, to lose on his account.

On the same day, a notice of defendant's recapture and being in custody and detained as a prisoner, on the *capias* issued in this cause, was served.

Patterson contended, that under Rule 99 of our Courts, defendant was entitled to his discharge, for by that rule the plaintiff is bound "to cause the defendant to be charged in execution, within the Term next after the trial or judgment." He referred to *Bower* v. *Baker*, 2 Dowl P.C. 608, as an authority to shew that defendant not being in custody at the time of the trial, made no difference, that he was, in fact, surrendered after a trial in a vacation, and being in custody any part of the vacation it would relate to the preceding Term, and being in custody during part of the vacation, he must be considered in custody during the whole of it. He also referred to *Baxter* v. *Baily*, not only as confirming *Bower* v. *Baker*, but as shewing that the defendant having been surrendered by his bail, sufficiently implies notice of the render, if notice were necessary. He also referred to *Foulkes* v. *Burgess*, 2 M. & W. 849, in further support of *Bower* v. *Baker*.

On the other side reference was made to *Thorn* v. *Leslie*, 8 A. & E. 197, as shewing that *Bower* v. *Baker* was not good law, and also to *Colborne* v. *Hall*, 5 Dowl P.C. 534. It was urged, that the rule only applied to prisoners imprisoned at the time the rule professes to refer to them, thus, when it refers to trial, it means a trial when defendant is in custody, as also to judgment under the same circumstances. That there is nothing to shew that the defendant ever gave notice of render, that the rules of Court require that to be done, and such was the English practice at the time our rules of Court were made. That in the case referred to, reported in M. & W., the affidavit shewed the defendants had been surrendered in discharge of his bail. That all the affidavits shew here, is, that defendant was surrendered by his bail. That the affidavits also shew, that at the time the summons issued, defendant had escaped from gaol, and was out of custody. Reference was made to 9 Tidd's Practice, at page 360, as shewing the practice and rules in England, which should govern this case.

RICHARDS, J.—The English Rule in Q. B. of Hil. Term, 26 Geo. III., amongst other things provided, "In case of a surrender in discharge of bail, after a trial had or final judgment obtained, unless the plaintiff shall cause the defendant to be charged in execution, within two Terms next after such surrender, and *due notice thereof*, of which two Terms, the Term whereon such surrender shall be made shall be taken as one. * * * The prisoner shall be discharged out of custody by *supersedeas*." A previous part of the same rule provides as follows, "And in all cases after such trial shall be had or final judgment obtained against any *prisoner in custody* of the Marshal or in any other gaol or prison, unless the plaintiff shall cause such person to be charged in execution, within two Terms next after such trial shall be had or final judgment obtained, of which two Terms the Term on which such trial shall be had or final judgment obtained, shall be taken as one. * * * The prisoner shall be discharged out of custody by *supersedeas*."

The English Rule of Hilary Term, 2 William IV., is as follows: "the plaintiff shall proceed to trial or final judgment *against a prisoner*, within three Terms, inclusive, after declaration, and shall cause the defendant to be charged in the execution, within two Terms, inclusive, after such trial or judgment, of which the Term in or after which the trial was had, shall be reckoned one. Our rule of Hil. Term, 13 Vic., No. 31, is precisely like this, except there is added to it the further words, "And when judgment shall be entered up in vacation, then the plaintiff shall cause the defendant to be charged in execution, before the end of the succeeding Term."

Our rule of Trin. Term, 20 Vic., No. 99, is as follows, "The plaintiff shall proceed to trial or final judgment *against a prisoner*, in the Term next after the issue is joined, or at the sittings or Assizes next after such Term, unless the Court or a Judge shall otherwise order, and shall cause the defendant to be charged in execution, within the Term next after such trial or judgment." The rule is a transcript of the English Rule, No. 124 of Hilary Term, 1853.

The first question to be decided is, whether our rule of 20 Vic., applies to the defendant's case, he not having been a prisoner at the time of the trial, and if he is to be viewed as a prisoner at the time of the judgment only, then the Term next after such judgment has not passed, and defendant consequently is not supersedable.

Bower v. *Baker*, reported in 1 A. & E. 860, & 2 Dowl Practice Cases 608, decided under the English Rule of Hil. Term, 2 Wm. IV., 85, is to the effect, that if a trial take place in vacation, and the defendant surrenders after it and before the following Term, he ought to be charged in execution, in that Term. It was argued in that case, that the rule did not apply, as defendant was not a prisoner at the time the trial took place. The rule of Hil. Term, 26 Geo. III., was also referred to. Lord Denman in giving judgment says, "It is true there may be some doubt on the construction of this rule, as to whether it applies to the case of a prisoner actually in custody at the time of the trial, or to one who surrenders afterwards during vacation. But as the application concerns the liberty of the subject, we think it better to hold, the defendant ought to have been charged in Easter Term, (the Term following the vacation in which he was rendered) and, therefore, not having been so charged, he is now supersedable." The facts are more distinctly set forth in the report of the case in A. & E., from which it appears, that although the case was tried in Hilary vacation on the 26th March, and defendant surrendered in the same vacation on the 29th March, yet the judgment was of Hilary Term, and, therefore, defendant was, under this rule, entitled to be charged in Easter Term, being the second Term, inclusive, after the judgment.

Foulkes v. *Burgess*, 2 M. & W. 851, recognizes *Bower* v. *Baker*, and *Baxter* v. *Baily*, 3 M. & W. 415, affirms it. But Baron Park in the latter cases says, "the first point (that is defendant being on bail at the time of the verdict, and therefore not a prisoner) does not depend solely on the rule of Hilary Term, 2 Wm. IV., but also on the rule of this Court, 26 & 27 Geo. II. (He then read the rule similar to that in Q. B. of Hilary Term, 26 Geo. III., as to charging the defendant in execution, within two Terms after surrender, and due notice thereof, which I have quoted above, and then proceeds,) The question, then, is whether a surrender in vacation has or has not for this purpose, a reference to the preceding Term, and the case of *Bower* v. *Baker* decides that it has."

In *Thorn* v. *Leslie*, 8 A. & E. 195, it was contended in argument, that a surrender in vacation did not relate back to the preceeding Term, under the rule of B. R. of Hilary Term, 26 Geo. III., and *Smith* v. *Jeffys*, 6 T. R. 776, was referred to as authority on that point, Mr. Justice Pattieson remarked, "That applied to the case when the trial was in the vacation in which the render took place."

The render was not allowed to relate back to a Term preceeding the trial.

In giving judgment LITTLEDALE, J., observes, "The judgment was signed a year before the render. Then has the prisoner been in custody for two Terms? That depends upon the question whether the render relates back to the Term preceding the vacation in which it was made. By the practice, it does so relate *when the judgment is of an earlier Term*. We cannot extend the rule as to dating judgments from the day on which they are signed to the render."

I may here remark, that Mr. Justice Littledale, had occasion to consider the doctrine of relation to the time of entering judgments, in the Practice Court in *Colborne* v. *Hall*, 5 Dowl 534, decided previous to *Thorn* v. *Leslie*.

Mr. Justice Patticson in giving the Judgment in *Thorn* v. *Leslie* observes, the rule as to the relation of the render is decisive, unless the new rules have made any alteration. * * * *Smith* v. *Jefferys* shews merely, that if the trial be in vacation, and the render afterwards in the same vacation, the Plaintiff has the *two following Terms*. It does not apply here. There is indeed a case of *Bower* v. *Baker*, in which it was held, that in the case of a surrender after trial, both being in the same vacation, the plaintiff had only one Term. I cannot accede to that decision, except upon the ground that the judgment there, from what cause does not appear, was entered up as of the Term preceding the trial, so that, perhaps, by the same fiction, the verdict also may be considered as having taken place in that Term."

Baxter v. *Baily* seems to me to decide in effect, that *Bower* v. *Baker* can only be supported on the ground that the defendant was surrendered in discharge of his bail, and that under the old rule of Hilary Term, 26 Geo. III., it was necessary to charge him within two Terms, inclusive, after the surrender *and notice thereof*.

If the English rule of Hil. Term, 2 Wm. IV., did not apply to a prisoner who had been rendered by his bail, then I do not think our rule of 20 Vic. No. 99 can, and this case is therefore unprovided for.

If I am right on this point, then rule No. 168 of 20 Vic., comes to our aid: it declares that in all cases unprovided for by statute or rule of Court, the practice as it existed in our Courts before the passing of the Common Law Proceedure Act of 1856, shall be followed.

By the rules of Q B. U. C., Michaelmas Term, 4 Geo. IV., No. 1, it is provided, that in future the practice of this Court, * * is to be governed, when not otherwise - -ovided for, by the established practice of the Court of Queen's Bench in England.

In this view of the case, without deciding whether *Bower* v. *Baker*, is to be followed, or whether *Thorn* v. *Leslie*, is to be regarded as the more correct view of the law, (which last case seems to be adopted in Chitty's Archbold, 8 Edition, page 1058). It seems to me, defendant fails as he does not shew that due notice of his surrender in discharge of his bail, was given before the end of last Term, as required by the rule of Geo. III. It is not necessary to say much as to the necessity of notice of the render of a defendant being given, before a plaintiff can be considered as called upon to charge him in execution.

By our law, a defendant may be surrendered in discharge of his bail, in any county of Upper Canada. If his being so rendered makes it necessary for a plaintiff to charge him in custody, within two Terms, it seems to me, only reasonable that he should have notice of the render, and the rule requires it.

But the defendant contends, that *Baxter* v. *Baily*, is an authority in his favour, to shew that on an affidavit similar to the one filed in this case, the Court held, it sufficiently shewed defendant had notice of render.

The Imperial Stat. 10 Geo. IV., & 1 Wm. IV., cap. 70 sec. 21, points out the mode in which a render shall be effected, and giving notice in writing to the plaintiff's Attorney, is a part of the proceeding, on the completion of which, the bail shall thereupon be wholly exonerated from liability as such. The affidavit in *Baxter* v. *Baily*, was made by the plaintiff, and he states, that the defendant on the day therein mentioned, was rendered *in discharge of bail.* This, of course, might imply that the defendant had given him notice of such surrender, and after making such affidavit, he could not deny having recieved notice, and the Court held, that it sufficiently shewed plaintiff had recived the notice required to be given.

In this case, however, the only affidavit in relation to the render, is made by the defendant himself, and his words are, "That I was rendered by my bail in this cause, to the Sheriff of the County of Hastings, on the eleventh day of May last." This certainly does not necessarily imply that notice of the surrender was then given, I think the notice material, and if it was given, defendant ought to shew it.

On the whole, I think the application fails, but as it seems to have the authority of *Bower* v. *Baker*, and some other cases, to a certain extent in its favour, and is an application by the prisoner to obtain his liberty, the summons will be discharged without costs.

If the notice of render was given in due time, and defendant is advised, after carefully considering the cases referred to on the subject, to apply again, on shewing the time the notice was given, he can do so. The doctrine is clearly established, if a prisoner is once supersedable he is a' ays so, and it is equally clear, I have no doubt, that a prisoner may renew his applications from time to time, for his discharge from imprisonment, particularly if he brings forward any new matter.

Summons discharged without costs.

KEYS v. MURPHY.

Judgment by default—Special indictment—Declaration and notice to plead.

In cases where the writ might have been specially endorsed under the 61st section C L. P. Act 1856, but was not the declaration should be filed with a *notice to plead* endorsed and the judgment by default thereon should be by *nil dicit.* And the usual judgment by default for non appearance to a specially endorsed writ signed under such circumstances is irregular.

July 1st, 1859.

This was an application either to set aside the service of the writ of summons and declarations alleged to have been served in this cause, together with the judgments by default for non appearance, and the writs of *fieri facias* issued thereon and all proceedings under the said writs on the grounds,

1st. That the writs had never been served.

2nd. That the declaration and notice to plead had not been served.

3rd. That the plaintiff was not entitled to sign judgments for non appearance after filing declarations.

Or to revise the taxation of costs on entering judgment in these cases on the ground that the plaintiff was not entitled to the costs of the declaration filed in this cause, the actions having been brought for liquidated demands.

The evidence as to the service of the writs of summons and declarations was very conflicting.

The particulars of these cases sufficiently appear in the judgment.

RICHARDS, J.—The judgment rolls filed in these causes are in the form of judgments for non-appearance to a specially endorsed writ, the writs were not specially endorsed.

The defect in that respect was intended to be supplied by filing a declaration under the 61st section of the Common Law Procedure Act of 1856 (similar to the 28th section of the English statute of 1852) This declaration was not endorsed with a notice to plead in eight days as is required by the statute, there was however, a notice to plead served on the defendant more than eight days before the signing of judgment.

The judgment signed after the filing and serving of a declaration should be by *nil dicit*, such judgment when for a debt or liquidated demand in money is final under 93rd section of the English C. L. P. Act and the 142nd of our own, where the damages are substantially a matter of calculation, it may be referred to the master under the 94th section of the English Act and 143 of our own statute.

After the declarations were filed and served they should have been copied on the rolls and judgment entered by default. This has not been done, and the judgment rolls are nearly in the form of a judgment on a specially endorsed writ, which the plaintiff was not entitled to enter as such writs were not served.

In Chitty's Forms, 7th edition, at page 60, it is stated, referring to the 28th section of the English Act (and to the 61st section of our own,) "a declaration is in this case filed against defendant with a notice to plead in eight days; a. he judgment will be signed by default for want of a plea, if he does not plead accordingly." He then refers to the form of the judgment, post index "judgment by default," under that head, at page 496, a form is given for judgment by *nil dicit* in an action for a debt or a liquidated demand in money. The form directs that the declaration should be copied and then to proceed on a new line.

"And the defendant in his proper person says nothing in bar or preclusion of the said action of the plaintiff whereby the plaintiff remains therein, undefended against the defendant.

Therefor it is considered that the plaintiff do recover against the defendant the said £ —— and £ —— for costs of suit which said money in the whole amount to ——"

The forms then shew judgment on an assessment under a writ of inquiry, also when ascertained by the master.

In a note at the same page it is stated that by the English C. L. P. Act of 1852, at section 90, in actions where the plaintiff seeks to recover a debt or liquidated demand in money, judgment by default shall be final, judgment by default is final in those cases in which the writ may be specially endorsed under the 25th section of the C. L. P. Act of 1852.

Judgment by default is interlocutory when the action is for the recovery of unliquidated damages. In that case damages must be assessed by a writ of inquiry or by one of the masters under the 93rd section of the C. L. P. Act.

At page 59 in referring to section 28 of the English C. L. P. Act, it is laid down, "in this case, and when the writ is not specially endorsed it will be seen that the statute requires that a declaration shall be filed and judgment cannot be signed unless defendant makes default in pleading within the limited time, viz: eight days from the filing of the declaration. It does not require that there should be any notice of the filing and such notice is not requisite unless the plaintiff is proceeding under a judge's order expressly ordering it. The judgment would be a judgment by default for want of a plea. It will also be seen that the judgment will be final if the declaration is for a debt or liquidated de-

mand which might have been specially endorsed under the 25th section, and the amount claimed is endorsed on the writ as required by sec. 8, and that execution may be issued for the amount really due."

I have not felt myself warranted in setting aside the service of the writs, declarations, &c, on the grounds suggested on which there are conflicting affidavits.

The order will go to set aside the judgments in both cases for irregularity, and the executions issued thereon, and all proceedings taken thereon, and on the defendants undertaking to bring no action the order will go to set aside the judgments and subsequent proceedings with costs. Order accordingly.

COMMON PLEAS.

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

Grand Trunk Railway Company v. Lees.

Chattel Mortgages—Renewal.

Chattel mortgages filed under 12 Vic. c. 74, do not require refiling under 20 Vic. c. 30.

Interpleader issue, to try whether certain locomotive engines and railway cars, seized by the sheriff of Leeds and Grenville on a writ of *fi fa.* issued at the suit of the defendant against the goods of the Ottawa and Prescott Railway Company, were at the time of the delivery of that writ to the sheriff the property of the plaintiffs as against the defendant. The trial took place at Brockville, in April last, before *McLean*, J. The plaintiffs put in and proved an indenture, dated 26th July, 1855, made between the Ottawa and Prescott Railway Company of the first part, and the Commercial Bank of the second part; reciting that the Commercial Bank held certain bills of exchange and promissory notes (set forth), made by or for the benefit of the Ottawa and Prescott Railway Company; and that the said Ottawa and Prescott Railway Company were indebted to the Commercial Bank in a further sum of money paid, amounting in the whole to £29,578 17s. 10d.; whereby it was witnessed that in consideration of such debt, and of 5s. 1d, the Ottawa and Prescott Railway Company did grant, bargain, sell, assign, &c., to the Commercial Bank and their assigns, the personal property specified in schedule A, to the said indenture annexed, on condition that the conveyance should be void on payment of the said sum and interest in one year, with usual covenants and a power of sale. All the chattels above mentioned were specified in schedule A. This was filed on the 1st August, 1855, in the office of the clerk of the county of Leeds and Grenville, together with affidavits of execution, and of *bona fides*, in the usual form. On the 9th July, 1856, it was refiled, with a statement showing the amount then due on the mortgage to be £26,756 1s. 7d.; and it was refiled on the 7th July, 1857, with a statement showing the amount then due on the mortgage to be £26,897 11s. 3d. There was no renewal or refiling after this. On the 26th March, 1858, the Commercial Bank assigned the mortgage, &c., to the plaintiff, for a consideration of £27,930 7s. 9d., which was paid, and the bills and other securities held by the Commercial Bank against the Ottawa and Prescott Railway Company were given up to the latter, when the consideration money was paid to the Bank by the plaintiffs. This assignment was made with the concurrence of the president of the Ottawa and Prescott Railway Company. The money paid by the plaintiffs to the Commercial Bank was raised by the sale of preferential bonds, issued under the 19 & 20 Vic. cap. 3. The president of the Ottawa and Prescott Railway Company, on the 27th March, 1858, left with the deputy receiver-general a letter as follows: "Please pay to the Commercial Bank of Canada, as order, the sum of £27,930 7s. 9d. currency, ex Grand Trunk Relief Acts of 1856 and 1857, on account of the Ottawa and Prescott Railway Company, with interest from the 11th instant;" dated 27th March, 1858, and signed by the president of the Ottawa and Prescott Railway Company; which letter, however, was never acted upon.

On these facts a verdict was taken for the plaintiffs, with leave to the defendant to move the court, on any objections which he can urge in term; the court to have authority to act upon the evidence and to draw any inference, in the same manner as a jury could do.

In Easter term, *Patterson*, C. S., obtained a rule *nisi* accordingly, on the following grounds: first, that the conveyance under which the plaintiffs claim is void as against the defendant, for want of compliance with the provisions of the Chattel Mortgage Registry Acts, the property having remained in the possession of the mortgagors; secondly, that the plaintiffs cannot legally hold or own the property in question under the conveyance, or in the manner shown by the evidence; and, thirdly, that the mortgage was paid and discharged by payment to the Commercial Bank of £27,930 7s. 9d. of the money raised under the provisions of the 19 & 20 Vic. cap. 3, and 20 Vic. cap. 1]; and that immediately after that payment, the property revested in the Ottawa and Prescott Railway Company, and so remained vested, and was liable to seizure.

Bell (of Belleville) showed cause. He contended that, as to the second objection, there was no reason why the Grand Trunk Railway Company might not become owners or mortgagees of chattel property; and as to the third, that although the authority given to the Grand Trunk Railway Company to raise money by preferential bonds under the statute was coupled with a direction as to the uses to which that money should be applied, yet the money was their own, and they complied with the condition of assisting the Ottawa and Prescott Railway Company by advancing this sum to satisfy the Commercial Bank, and had a right to secure the repayment. As to the first objection, he argued that the statute 20 Vic., from its very language, could not apply to chattel mortgages executed before it was passed; that there could be no refiling, therefore, of this mortgage under this statute, and that the former statutes were repealed.

Wilson, Q. C., *contra*, abandoned the second objection. He argued that the statute showed that the legislature contemplated a gift, and not a loan, to the Ottawa and Prescott Railway Company; and the letter or draft of the 29th March, 1858, showed that the latter company so understood the arrangement; and if so, the assignment of the security given to the Commercial Bank was void as against a creditor, being without consideration. He relied principally on the last objection, insisting on the necessity of refiling the mortgage in order to maintain its efficacy. The year subsequent to the last filing expired in the month of July, 1858, and from that time it became void as against creditors, inasmuch as the Ottawa and Prescott Railway Company remained in possession. He insisted also that the assignment should have been filed in like manner. He referred to *Kissock* v. *Jarvis*, 6 U.C.C.P. 393.

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

The first objection taken is the most important. Under 12 Vic. cap. 74, it is by sec. 1 enacted, that every mortgage of goods and chattels which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed in the manner directed; and by sec. 3, every mortgage filed in pursuance of the act shall cease to be valid as against creditors, &c., after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed, be again filed. This latter enactment has been construed to require a refiling from year to year, in order to keep the mortgage alive.

The mortgage in question was executed on the 26th July, 1855. It was filed, in compliance with the foregoing statute, on the 1st August, 1855, and was duly filed on the 9th July, 1856, and another on the 7th July, 1857;—so that the provisions of the 12 Vic. were complied with.

On the 27th May, 1857, the 20 Vic. cap. 3, was passed, the 14th section of which repealed the 12 Vic. cap. 74, with this saving, that all mortgages registered under the provisions of that act shall be held and taken to be as valid and binding as if the said act had not been thereby repealed.

It is, I think, impossible to hold that this expression can be construed as keeping alive the provisions of the repealed act, as to refiling mortgages which had been executed and filed while it was in force. The saving clause is to keep mortgages registered, valid and binding, which is widely different from declaring that they shall cease to be valid—unless refiling shall be continued—under the 3rd section of the repealed statute.

We must therefore look to the provisions of the new enactment,

and, so far at least as refiling chattel mortgages or bills of sale of chattels, they appear to me to be wholly prospective. The 8th section is in its express terms confined to every mortgage (or copy thereof) "filed in pursuance of *this act*," and it declares such mortgage shall cease to be valid unless there be a refiling, in manner prescribed.

There is a broad generality in this language of the first section, which may be and possibly was intended to cover all chattel mortgages executed before the passing of that statute, which had not been filed under the provisions of the former act. But granting that such mortgages must, in order to their validity, be filed in compliance with this last enactment, this case will not come within it, for the mortgage in question was filed under the 12 Vic.

The result, then, is that the last act wholly repeals the 12 Vic. cap. 74, and makes no provision for refiling mortgages already filed in accordance with its provisions. Their validity must for the future depend on the rules and principles of the common law, and the mortgage in question is only impeached on the ground of the necessity of refiling.

The second objection calls for no remark: it was properly treated by Mr. Wilson as without the support of any authority.

Nor can I say that I have any doubt as to the third. It would have been a misappropriation of the funds raised by the issue and sale of these preferential bonds, and a fraud upon the lien of the province, if the Grand Trunk Railway Company had, without the sanction of the legislature, loaned or given any part of such funds to aid other railway companies in the construction of their lines. It was necessary, therefore, that they should have authority to employ a part of their funds for such purposes, and the legislature seem to have employed language capable of a construction stronger than that of a mere permission so to appropriate £100,000. But when, in an act passed, as the title expresses it, "to grant additional aid," or, as it is set forth in the preamble, "to grant facilities in aid" of the Grand Trunk Railway, "for objects and under conditions hereinafter mentioned," the aid is only that of enabling them to borrow money on their own bonds, which bonds are to be preferred, in order of payment, to the claim of the province. It is, I think, too much to contend that the words "to enable the company to assist the Prescott railway as a subsidiary line," necessarily means to *give* and not to *loan* money to the latter company. If it be *aid* to the one company to enable them to borrow, it must, I think, be *assistance* to the other to give them a right to call upon the Grand Trunk company to lend. In my opinion, neither of the objections is sustainable, and the rule must be discharged.

CHAMBERS.

COMMERCIAL PERMANENT BUILDING SOCIETY. v. ROWELL AND BOXALL.

Ejectment—Appearance and notice of claim—Costs.

A notice of claim under the statute may at the same time deny the title of the plaintiffs and shew in what respect it is defective.

This was an action of ejectment and the plaintiff's by this application, called upon the defendants to shew cause why the appearance and notice of claim filed in this cause, should not be set aside with costs on the following grounds:

1st. That the appearance had no date, which objection was afterwards waived.

2nd. That the defendants claimed under two titles.

3rd. That the defendants asserted title to be in one French, and did not claim through him but claimed under one Catharine Drummond.

4th. That defendants thereby set up two distinct titles to the property.

The notice of claim was in the words following, that is to say:

Take notice that the defendant Joseph Rowell denies the alleged title of the plaintiffs to the property mentioned in the writ of summons issued in this cause, inasmuch as the mortgage under which the plaintiffs claim is void, and the legal estate in the property in question is outstanding and vested in one James French, under a certain mortgage, executed by the defendant Joseph Rowell, to the said James French, on the 3rd day of June, A.D 1850. And further take notice that the defendant Joseph Rowell, claims title to the said property under and by virtue of a certain indenture of lease made by one Catharine Drummond, to the said Joseph Rowell; and also take notice that the defendant John Boxall, claims title to the possession of the said property, as tenant under the said defendant Joseph Rowell.

Dated, &c.,

The defendants contended that they set up but one title. That they only denied the title of the plaintiffs, and shewed why they did so, i.e., because the mortgage under which they claim is subject to a prior mortgage given to one French, and that they claimed as tenants under Catharine Drummond?

RICHARDS, J.—Considered that the defendants while shewing their own claim had a right to deny the title of the plaintiffs, and to shew why they did so, and that that was all that was done in this notice.

He said, as the plaintiffs had made this application with costs he must dismiss it with costs.

Summons discharged with costs.

CHANCERY.

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

SCHOOL TRUSTEES v. FARRELL.

Mistake—School property—Volunteers—Municipal Councils—Preparation of Deeds.

A school site had been granted to certain parties, in 1831, and a school house erected thereon; but, by mistake, the wrong site was conveyed. The grantor subsequently made a mortgage on his estate, but exempted the portion reserved for a school site. He died shortly afterwards, leaving his son and heir-at-law, a minor. The defendant, during the minority of the heir, obtained a lease of the premises, excepting the site in question; but, on the coming of age of the heir, obtained a deed from the said heir, without any reservation of the school site, About the same time, or a little before, he also obtained an assignment of the mortgage, so as to perfect his title. He then claimed the land on which the school-house was erected, on the ground that, in consequence of the mistake, no title was vested in the trustees;—whereupon the trustees of the school section filed a bill against him, and it was

Held, that he had express notice of the trustees' title; and that even if the trustees were volunteers as to this piece of land, the defendant was also a volunteer; and being prior to him, they had a right to the aid of equity to have his title to said piece of land cancelled, or a conveyance thereof from said defendant.

Held also, that the Township Council was a necessary party to the suit.

Held further, that it was the duty of the defendant to prepare the proper deeds of the lot, so as to have the mistake rectified.

In this case the amended bill was filed by the trustees of school section No. 4, in the township of West Gwillimbury, against one John Farrell, Richard Callaghan, and the Municipality of the Township of West Gwillimbury.

The bill, after reciting the act 56 Geo. III. cap. 36, which enacted that the inhabitants of any township or place might meet together and make arrangements for common schools in such township or place, and elect three trustees to manage the same, stated that the inhabitants of the townships of West Gwillimbury and Tecumseth did so meet together, on or about the 12th June 1831, and elected three trustees; that about the same time one Thomas Machell, since deceased, conveyed the said trustees a certain lot of land for said school, but that, owing to a mistake in the description thereof, the lot was described as commencing at the "north east" instead of the "south west" angle of said Machell's property; that the trustees took possession of the lot at the *south west* angle, and built a school-house thereon, during the lifetime and with the consent of said Machell; that in 1835 said Machell gave a mortgage on his property to one William Pegg, but expressly reserved the school lot, according to its correct description, and in the same year died intestate, leaving his eldest son and heir-at-law, Andrew Machell, him surviving; that shortly afterwards (in 1836) the defendant Farrell obtained a lease of said property from the widow, reserving the lot in question; that the school-house had been and was then used; that said Farrell had express notice of said trustees' title; that in 1849, on the coming of age of said Andrew Machell, said Farrell obtained a deed from him, without any reservation of the said school lot, and also obtained an assignment from Pegg of his mortgage on the land; and that under the deed Farrell claimed the school lot, insisting that the trustees had no title thereto. The bill then prayed that the mistake in the deed of 1831 might be rectified, and that Farrell might be decreed to convey to them the lot which was intended to be conveyed to the trustees by the elder Machell.

The defence set up by the answer of Farrell was, that neither the deed under which he claimed, nor the assignment to him of Pegg's mortgage, contained any reservation of the school lot; that he heard, shortly after going to the place, that there was no title to the school site; that the conveyance to the trustees was voluntary, there being no consideration money therefor; and that said conveyance to the trustees, not having been registered, could not affect his registered title. The other defendant, John Callaghan, as surviving trustee under the original deed, submitted to act as the court should direct, and the bill was *pro confesso* against the Municipality.

Evidence was given in support of the facts set out in the bill.

The following is a summary of the statutes relating to common school property:

1816.—56 Geo. III. cap. 36, provided (sec. 2), that it should be lawful for the inhabitants of any town, township, village or place, to meet together annually, before the 1st June in each year, for the purpose of making arrangements for common schools therein; and (sec. 3) that so soon as they should build or provide a suitable school-house, furnish twenty scholars, and in part provide for the payment of a teacher, then it should be lawful for such inhabitants to elect three trustees to said common school, who should have power to employ the teacher therefor. This act made no provision for the trustees holding school property, or for their incorporation or succession. It was continued by the acts 60 Geo. III. (or 1 Geo. IV.) cap. 7, and 4 Geo. IV. cap. 8 (1824).

1841.—4 & 5 Vic. cap. 18, repealed the foregoing, and provided (sec. 7, clause 1) for the election of common school commissioners in each township, who should, whenever funds were provided by the council, acquire a site for a common school-house in each school district where no such school-house existed; and also provided (sec. 9) that the common school-houses in each township now acquired, or hereafter to be acquired under this act, with the ground whereon they are situate, &c., should henceforward vest in and be held and possessed by the common school commissioners of the township and their successors in office forever as trustees for the purposes of the act.

1843.—7 Vic. cap. 29, repealed the preceding act, so far as it related to Upper Canada; abolished township school commissioners, and provided (sec. 43) for the annual election of three trustees for each school, and empowered them (sec. 44, clause 1) to have the custody and safe-keeping of the common school-house of their school district or section. This act further required (sec. 49) that any school-house to be thereafter erected, should be upon ground owned or to be acquired by the township, town or city for that purpose.

1846.—9 Vic. cap. 20, repealed the preceding act, except such portions of it as repealed former acts; and provided (sec. 10, proviso, and sec. 26) that the title to any common school-house, and the land and premises appurtenant thereto, now vested in trustees or other persons to and for the use of any common school, or hereafter to be purchased, acquired and conveyed for such use, shall be vested in the municipal council of the district (county) in which such school-houses and lands are situate, in trust for the use of such school, respectively; and expressly declared (sec. 25) that the trustee corporation should not at any time hold real property. But, notwithstanding this restriction, the trustees are authorized to take possession of all common school property, which may have been acquired or given for common school purposes in such section, and to hold personally property, &c.

1847.—10 & 11 Vic. cap. 19, relating to cities and towns, vested (sec. 4) all lands, houses and tenements acquired for common school purposes therein, in the corporation of the city or town, but authorized (sec. 5, clause 1) the boards of trustees to take possession of all such property so vested in said corporations.

1849.—12 Vic. c 83, repealed the two last preceding acts, continued the restriction (sec. 28) that the trustees should not at any time hold real property, and continued the authority to such trustees (sec. 30, clause 2) to take possession of all property acquired for common school purposes in their section. This act also provided (sec. 42) that all lands, houses, tenements and property of every description heretofore acquired for common school purposes, and vested in the district council, or in the hands of trustees in any township, town or city, should be vested in the municipal council of the township, town or city; and also that all such property to be hereafter acquired for common school purposes, should be so vested in such councils in trust for the sections to which they shall respectively belong.

1849.—12 Vic. cap. 81.—The Municipal Act (sec. 31, clause 3) authorizes the municipality of each township, village, town and city, t pass by-laws for the purchase and acquirement of such real property as may be required for common school purposes.

1850.—13 & 14 Vic. cap. 48.—The school act now in force, repeals 7 Vic. cap. 29, and 12 Vic. cap. 83, and repeats the provisions of two former acts in regard to common school property. Trustees are authorized (sec. 12, clause 3) "to take possession" (as in 9 Vic. cap. 20, sec. 27, cl. 3; 12 Vic. cap. 83, sec. 30, cl. 2) and "have the custody and safe-keeping" (as in 7 Vic. cap. 29, sec. 44, cl. 1) of all common school property which may have been acquired or given for common school purposes; and to acquire and hold as a corporation, by any title whatsoever, any "land" (the power given to councils by 9 Vic. cap. 20, and 12 Vic. cap. 83), moveable property, moneys or income (the power given to trustees by 9 Vic. cap. 20, and 12 Vic. cap. 83), for common school purposes, &c., and to apply the same according to the terms of acquiring or receiving them.

1853.—16 Vic. cap. 185, prescribes (sec. 6) how trustees shall acquire new school sites, or change old sites.

The case came on for argument in June 1855, and judgment was given in December of same year.

Hagarty, Q. C., for the plaintiffs.

Connor, Q. C., for the defendant Farrell; *Morphy* for the defendant Callaghan.

ESTEN, V. C., delivered the judgment of the court.

The mistake insisted upon by the bill is clearly established by the evidence, and also that the defendant had notice of it before he purchased. If, then, the plaintiffs were incontestably purchasers for value, they would have an equity to have this mistake rectified as against the person from whom they purchased; and the defendant having purchased with notice of this equity, could stand in no better position in this respect than the person from whom he purchased. It is, however, objected that the plaintiffs are mere volunteers, and that a mere volunteer cannot obtain the assistance of the court for the purpose of rectifying a mistake in the deed under which he claims. It is not necessary to express an opinion upon this point in the abstract, as it does not appear to us to apply under the circumstances of this case. It is in issue on the pleadings that the deed of the defendant conveyed the school site by mistake, that it was not bought by nor sold to him, which allegation is not met by the answer, but is proved by the evidence of Andrew Machell, and is not contradicted by the evidence of any other witness. It is therefore established. Now, without expressing any opinion whether the plaintiff would be entitled to the relief sought by this bill as against Andrew Machell, we think that at all events the defendant, who paid no value for the piece of land in question, cannot object that the plaintiffs are volunteers. It has already been decided in this court—in the case of *Houlding* v. *Poole* (1 Gr. Ch. 206)—that a prior volunteer is entitled to the aid of equity as against a subsequent volunteer, to have the voluntary deed under which he claims, to be delivered up to be cancelled, as forming a cloud upon the title. That case governs the present, we think, in this respect. Nor is Andrew Machell at all prejudiced by this determination; on the contrary, he is benefited by it, for whereas if the piece of land in question should remain vested in the defendant, a suit would be necessary on the part of Machell, in order to divest it. Now, if it is true, as supposed, that the plaintiffs are mere volunteers, as to which we express no opinion, a mere sale for valuable consideration by him will place it at his disposal. The plaintiffs are in fact fighting his battle as well as their own. We think the objection on the Mortmain Act cannot be sustained, the act having been virtually repealed as to these gifts and purchases by a long series of acts in *pari casu*. We think that this is the school-house of the school section named in the bill, and that the plaintiffs are the right parties to proceed for the purposes of this suit, but that the Municipality ought to join as co-plaintiffs. The result is, that the cause should stand over, with liberty to the plaintiffs to amend by joining the Municipal Council as co-plaintiffs, without costs, the objection not having been taken

by the answer; but if the parties be willing to accept this as the decision of the case, we think the plaintiffs should have their costs, except of the hearing, and they should convey to the defendant the parcel of ground conveyed by mistake by the elder Macbell to the original trustees.

After the foregoing judgment, the defendant Farrell, through his solicitors, intimated to the plaintiffs' solicitors that he was willing to accept the judgment of the court, and to execute conveyances to rectify the mistake, but insisted that the plaintiffs should prepare both deeds. The plaintiffs declined, as the defendant Farrell had been in the wrong by compelling them to come to court, but offered to prepare one of the deeds. The offer was refused, and the Township Municipality refusing to join as co-plaintiffs, as directed by the court, they were added as defendants; and on the bill being taken *pro confesso* against them, the cause was again set down for a hearing.

Hodgins, for the plaintiffs, contended that Farrell was the proper party to prepare the deeds. He had full notice of the plaintiffs' claim, and by his own wrong obtained a deed of land which neither he nor his grantor had any estate in. The plaintiffs had so far shown a willingness to settle that they prepared a draft deed, and submitted it to the defendant, but he refused to do his part. If it was to be held that both parties should have prepared deeds, then, according to *Jones v. Barclay* (2 Doug. 684), where there are mutual conditions to be performed at the same time, and one shows that he is ready to do his part, but the other stops him by an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act. That was a case similar to the present. Besides, the rule which governs in the preparation of deeds in specific performance may apply here. He referred to 9 Bythewood's Conveyancing, 518 (note); *Glazeburn v. Woodrow*, 8 T. R. 366; *Laird v. Pim*, 7 M. & W. 482.

Morphy, for defendant Callaghan.—His client had submitted to act as the court should direct, and must be held entitled to his costs. It was clearly the duty of the defendant Farrell, who had been condemned in costs by this court, to tender such a conveyance as would show that he had submitted to the judgment which had been pronounced.

Roaf, for defendant Farrell, contended that the plaintiffs had never tendered a proper deed to the defendant; that being trustees for him of the piece they held by mistake, it was their duty to have prepared all proper deeds to rectify that mistake, according to the rule laid down in *Rowsell v. Hayden* (2 Grant, 557), which was, that where a trustee is required by his *cestui que trust* to convey to the latter the trust lands, where such a conveyance is proper, it is the duty of the *cestui que trust* to solve all reasonable doubts suggested by the trustee as to the course he is desired to pursue; and the *cestui que trust* must also pay all costs, charges and expenses properly incurred in relation to the trust.

Hodgins, in reply.—The rule in *Rowsell v. Hayden* does not strictly apply; if anything, it applies to both parties, as it might be considered there was here a double trusteeship.

ESTEN, V. C.—It must be supposed that the court thought Farrell in fault, by condemning him in costs, and that he ought to have rectified it. I see nothing to exonerate him from preparing the deeds. He should have prepared a description of the property he intended to convey to rectify the mistake, and let his solicitor draft a proper conveyance of what he wished the plaintiffs to convey to him; and if the parties disagreed, it should be referred to the Master to settle. The plaintiffs are entitled to a decree, as asked for. The defendant Callaghan, and the Municipality of the township, and all proper parties, should join in the conveyance. Callaghan is entitled to his costs, to be paid by the plaintiffs, who may have them over against Farrell.

FISKEN v. WRIDE.

Special Performance.

This was a bill by the vendor for the specific performance of an agreement for the purchase of land. In the agreement it was stated that the plaintiff would give the defendant a bond against a mortgage on the property to the Trust and Loan Company. The defendant resisted on the following grounds: first, that the plaintiff had no possession, and did not give the defendant possession when demanded; secondly, that the defendant had no professional adviser, while the plaintiff had, and that he was greatly imposed upon; and, thirdly, that the plaintiff and his co-partners had failed since the contract.

McDonald for plaintiff. *Turner* for defendant.

SPRAGGE, V. C., delivered the judgment of the court.

I do not think the defendant makes out his case. It is not shown that the plaintiff had not possession, but rather the contrary. As to the second, the plaintiff's evidence proves that he was a shrewd man, and one that well understood his bargain, and he shows nothing against this. I do not think that he was entrapped. As to the charge, that since the contract Fisken had failed in business, and that his bond is of no good, that is true, the contract having been made on the 27th May, 1857, and the failure having occurred in October of the same year. This is not that there was fraud or an unconscionable bargain, but that something has occurred since, which renders it inequitable to enforce the contract. Mr. Turner cited nothing in support of this argument, but there are several railway cases against it. I do not think that this is such a case as could be barred by such an event. The firm is still in business, and it is not shown that their payments to the Trust and Loan Company have failed; and in regard to such, this Trust and Loan Company have agreed to take the defendant's payments for the plaintiff's. Besides, the title was investigated before the failure by the solicitors of both parties.

As to the penalty, I do not think that it was the intention of the parties to pay it, and then rescind the contract. If so, it was the duty of the defendant to take occasion to claim it in his answer. If the Trust and Loan Company do not carry out the contract as to accepting the defendant in the payments yet to be paid on their mortgage, I do not think the plaintiff should have the aid of this court to enforce his contract. Each party will therefore have liberty to apply; and the decree will be for reference as to title, and for specific performance against the defendant.

CHAMBERS.

MITCHELL v. HAYES.

Foreclosure—Attendance to receive mortgage money.

This was an application for a final order of foreclosure; but the affidavit of the attorney appointed by the mortgagee showed an attendance of only a quarter of an hour at the appointed place, the solicitor's office. There was also an affidavit from the solicitor that no one attended during the two hours appointed by the Master's Report, to pay the mortgage money.

ESTEN, V. C., at first doubted whether he could make the order asked for, as the attendance was for such a small portion of the time; but after consideration, granted the order.

WHITEHEAD v. BUFFALO AND LAKE HURON R. R. CO.

Examination de bene esse.

This was an application by the plaintiff, on notice, supported by his own affidavit, to examine a witness *de bene esse*, who was about to go abroad. The cause had been heard, but no judgment pronounced. The plaintiff, presuming the decree would be in his favor, proposed to examine the witness with a view of using his evidence in the Master's Office in taking the accounts. The affidavit showed that the witness was going abroad; that the plaintiff could not prevent them; and that he was the only person within the jurisdiction who could give testimony in regard to the matters on which it was proposed to examine him; and also stated the grounds of the plaintiff's so considering him. The motion was unopposed.

ESTEN, V. C., made the order, on the ground that although such orders are only granted where it is shown that the evidence is to be used for some definite purpose, yet the court will make such an order where it considers that practice requires it.

COUNTY COURTS.

In the County Court of the County of Ontario, before His Honor Judge BURNHAM.

PERRY v. IRONS.

The defendant in this case, was arrested under a *capias* after action brought, issued on an order made by Burnham, J., under the 2nd section of 22nd Victoria, cap. 96.

The order to arrest was to the following effect, "Let a writ of *capias ad respondendum* issue, to hold the defendant to bail, for the sum of £58."

Macdonell applied to His Honor for a summons calling on the plaintiff (*inter alia*) to shew cause why the order directing the *capias* to issue, should not be set aside, (and subsequent proceedings) on the ground that a certain time should have been mentioned in the order to arrest, within which the writ was to issue, pursuant to the 2nd sec. of the above Act.

Macdonell contended that the word in the said section, "that it shall be lawful for such party or plaintiff, *within the time which shall be expressed in such order*, but not afterwards, to sue out a writ of *capias*," rendered it necessary that a time should be mentioned in the order, within which the writ should issue.

N. G. Ham, contra.

His Honor decided that from the language of the Act, it was not absolutely necessary to mention a certain time in the order, but was merely discretionary, and that when no time is mentioned in the order, the writ is to be issued within a reasonable time.

Summons discharged.

IN SUPREME COURT OF MISSOURI, U. S.

(*Held at St. Louis, October Term*, 1857.)

MARY CHARLOTTE v. GABRIEL S. CHOUTEAU, ET AL.

(*From the Lower Canada Jurist.*)

Opinion of Supreme Court, by RICHARDSON, Judge:—

The plaintiff asserts her right to freedom on the ground that her mother, a negress was born in Montreal, in Lower Canada, about the year 1768, and that her mother was not born a slave, because slavery did not exist in Canada at the time of her birth.

On the trial the plaintiff gave parol evidence tending to prove that her mother was born in Montreal about the year 1768, and that slavery did not actually exist and was not tolerated by law at that time in Canada.

The defendant, on his part gave parol evidence tending to prove the actual existence of slavery in Canada in the year 1768, that slaves were recognized as property, and that Rose, the plaintiff's mother, was held and sold as a slave in Canada.

The defendant* also gave the following documentary evidence.

First. The articles of capitulation of the surrender of Montreal by the French to the English forces, signed on the 8th September, 1760, by Lord Amherst, Commander-in-Chief of the British forces in North America, and the Marquis de Vaudreuil, Governor and Lieutenant General for the King of the French in Canada.

The 27th article secured to the Canadians the free exercise of the Roman Catholic religion.

The 47th article is as follows: "The negroes and panis of both sexes shall remain in their quality of slaves, in the possession of the French and Canadians to whom they belong: they shall be at liberty to keep them in their service in the colony or to sell them; and they may also continue to bring them up in the Roman religion."

"Granted, except those who shall be made prisoners."

Second. The definitive treaty of peace concluded between the Kings of Great Britain and France the 10th day of February, 1763, by which the French ceded and transferred to the Crown of Great Britain, Canada with all its dependencies. The King of Great Britain agreed to grant the liberty of the Catholic religion to the inhabitants of Canada, and that he would give the most effectual orders that his new Roman Catholic subjects might profess the worship of their religion according to the rites of the Romish Church, so far as the laws of Great Britain permitted; and that the French inhabitants or others who had been the subjects of France in Canada, might retire with all safety and freedom wherever they should think proper, and might sell their estates to British subjects, or take away their property without restraint. But the treaty is, in every respect, silent in reference to the persons or property of the Canadians.

Third. The proclamation of George III., dated 7th October, 1763. It begins by reciting that extensive and valuable acquisitions in America had been secured to the Crown by the treaty concluded at Paris on the 10th February, 1763, and being desirous that his subjects, as well of *his* kingdoms, as of *his* colonies in America, might avail themselves of the great benefits which would accrue to them from their commerce, &c., he had thought fit to issue his proclamation and thereby, to publish and declare to his subjects that he had granted letters patent to erect within the countries and islands ceded and confirmed by said treaty four distinct governments called by the names of Quebec (Canada) East Florida, West Florida and Grenada.

It then designates the extent and boundaries of said Governments, and declares as follows: "And whereas, it will greatly contribute to the speedy settling our said new Governments, that our loving subjects should be informed of our paternal care for the security of the liberty and properties of those who are and shall become inhabitants; we have thought fit to publish and declare by this our Proclamation, that we have in the letters patent, under our great seal of Great Britain, by which the said governments are constituted, given express power and directions to our Governors of our said colonies, respectively, that so soon as the state and circumstances of our said colonies will admit thereof, they shall, with the advice and consent of the members of our Council, summon and call general assemblies within the said governments respectively, in such manner and form as is used and directed in those colonies and provinces in America which are under our immediate government; and we have also given power to the said Governors, with the consent of our said Councils, and the representatives of the people, so to be summoned as aforesaid, to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of our said colonies, and of the people and inhabitants thereof, as near as may be, agreeable to the laws of England, and under such regulations and restrictions as are used in other Colonies; and in the meantime, and until such assemblies can be called as aforesaid, all persons inhabiting or resorting to our said colonies may confide in our royal protection for the enjoyment of the benefits of the laws of our realm of England, for which purpose we have given power, under our great seal, to the Governors of the said colonies respectively, to erect and constitute with the advice of our said Councils, respectively, courts of judicature and public justice within our said colonies, for the hearing and determining of all causes as well criminal as civil, according to law and equity, and, as near as may be agreeable to the laws of England."

There is nothing else in the Proclamation that relates to this subject.

Fourth. The act of the British Parliament of 1774, 14 George III., chap. 83, entitled "An act for making more effectual provision for the government of the Province of Quebec in North America." (30 British Stat. at large, 549.) There is nothing in this act that bears on the subject but the two following sections:

"Sec. 4. And, whereas, the provisions made by the said proclamation in respect to the civil government of said province of Quebec, and the powers and authorities given to the Governor and other civil officers of the said Province, by the grants and commissions issued in consequence thereof, have been found upon experience to be inapplicable to the state and circumstances of the said Province, the inhabitants whereof amounted at the conquest to above sixty-five thousands persons professing the religion of the Church of Rome, and enjoying an established form of constitution and system of laws, by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the Province of Canada; be it thereof, further enacted by the authority aforesaid, that the said proclamation, so far as the same relates to the said Province of Quebec, and the commission under the authority whereof the government of the said Province is at present administered, and all and every the ordinance and ordinances, made by the Governor and Council of Quebec, for the time being, relative to the civil government and administration of justice in the said Province, and all commissions to Judges and other officers thereof, be and the same are hereby revoked, annulled and made void, from and after the first day of May, one thousand seven hundred and seventy-five."

* An error: the first three documents referred to were adduced by the plaintiff.

"Sec 8. And be it further enacted by the authority aforesaid, that all his Majesty's Canadian subjects, within the Province of Quebec, the religious orders and communities only excepted, may also hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other civil rights, in as large, ample and beneficial manner as if the said proclamation, commissions, ordinances, and other acts and instruments had not been made, and as may consist with their allegiance to his majesty, and subjection to the Crown and Parliament of Great Britain; and that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same, and all causes that shall hereafter be instituted in any of the courts of justice, to be appointed within and for the said province by his majesty, his heirs and successors, shall, with respect to such property and rights, be determined agreably to the said laws and customs of Canada, until they shall be varied or altered by any ordinance that shall from time to time be passed in said province," &c.

Fifth. The act of the British Parliament of 1790, 30 Geo. III, chap. 27, entitled, "An Act for encouraging new settlers in his Majesty's plantations in America," (37 British statutes at large 24,) as follows: "Whereas, it is expedient that encouragement should be given to persons who are disposed to come and settle in certain of his Majesty's colonies and plantations in America and the West Indies, be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same, that from and after the first day of August, one thousand seven hundred and ninety, if any person or persons, being a subject or subjects of the territories or countries belonging to the United States of America, shall come from thence, together with his or their family or families, to any of the Bahama or Bermuda or Somers Islands, or to any part of the Province of Quebec, or of Nova Scotia, or any of the territories belonging to his Majesty in North America, for the purpose of residing or settling there, it shall be lawful for any such person or persons, having first obtained a license for that purpose from the Governor, or in his absence the Lieutenant Governor of said Island, colonies or provinces respectively, to import into the same in British ships owned by his Majesty's subjects, and navigated according to law, any negroes, household furniture, utensils of husbandry and clothing free of duty; provided always, that such household furniture, utensils of husbandry and clothing shall not in the whole exceed the value of fifty pounds for every white person that shall belong to such family, and the value of forty shillings for every negro brought by such white person; and if any dispute shall arise as to the value of such household furniture, utensils of husbandry, or clothing, the same shall be heard and determined by the arbitration of three British merchants, at the port where the same shall be imported, one of such British merchants to be appointed by the Governor, or in his absence by the Lieutenant Governor of such Island or Province; or by the Collector of Customs at such port, and one by the person so coming with his family.

II. *And be it further enacted.* That all sales or bargains for the sale of any negro, household furniture, utensils of husbandry, or clothing so imported, which shall be made within twelve calendar months after the importation of the same, (except in cases of the bankruptcy of the owner thereof,) shall be null and void to all intents and purposes whatsoever."

The third and last section relates only to the oath of allegiance required to be taken by the imigrant.

Sixth. The act of the Provincial Parliament of Upper Canada, passed July 9th, 1793, (chap. VIII, 1 Rev. Stats. of Upper Canada 18.)

The first section of this act recites, that it is highly expedient to abolish slavery in the Province, so far as the same may gradually be done without violating private property. It then repeals so much of the act of 1790 as enables the Governor or Lieutenant Governor to grant license for the importation of negroes, and forbids any negro or other person subjected to the condition of a slave from coming or being brought into the Province after the passage of the act, to be subject to the condition of a slave.

The second section provides that nothing in the act should be construed to extend to liberate any negro subject to service, or to discharge him from the possession of his owner, who should have come or been brought into the Province in conformity to the conditions of the act of 1790, or should have otherwise come in possession of any person by gift, bequest or purchase.

The third section declares that, in order to prevent the continuation of slavery within the Province, every child thereafter born of a negro woman who was a slave, should remain with his or her mother or mistress until such child should arrive at the age of twenty-five years, and then be free.

At the request of the defendant the Court gave the following instruction:

1st. "If negro slavery existed by virtue of the laws and ordinances of the French Government in Canada, prior to the acquisition of that country by the English, and if the articles of capitulation, the treaty of cession, the acts of Parliament of 1774 and 1790, and the King's proclamation of 1763 be correct copies of the genuine documents, then negro slavery was sanctioned and permitted by law in the country called the Province of Canada, (which includes Montreal,) at all times from the year 1760 to the year 1790.

And afterwards at the plaintiff's instance gave this: "Whether Rose was lawfully a slave in Canada is a question for the jury to decide from the evidence on the trial."

These two instructions are imcompatible and both cannot stand. The first declared as a matter of law, the legality of the documents named in it, and the Court in giving it assumed, that it was its duty, and not the province of the jury, to pass on their meaning and operation. The second submitted every proposition of law in the case, to be determined by the jury. If it was a conclusion of law from the documents read in evidence, to be decided by the Court, that slavery was sanctioned in Canada, it was not proper to refer the question whether or not it was *lawful* to the jury. But if the last instruction was proper, though inconsistent with the first, the defendant cannot complain, and if the first was correct, the other was wrong, and was calculated to mislead the jury to the defendant's prejudice. The quality of these instructions must be determined by the question, whether it is the duty of the Court or the jury to construe a foreign law.

It is universally admitted that courts do not take judicial notice of the laws of a foreign country, but they must be proved as other facts in a trial. It will not be presumed that a foreign law is in writing, and if it does not appear that it is written, it may be proved by parol. (*Livingston* v. *Maryland Insurance Company*, 6 Cranch, 280.) But like the proof of every other fact, the best evidence of which the same is susceptible, must be produced; and as a witness may speak of the terms and nature of an unwritten contract, so he may testify of the existence of a foreign law, but, as when the contents of a written instrument are sought to be proved, the instrument itself must be produced. So foreign written laws must be proved by the laws themselves. 2 Starkie's Ev. 331; *Consequa* v. *Willing*, Pet. C. C. 229; *Robinson* v. *Clifford*, 2 Wash. C. C. L; *United States* v. *Ortegan*, 4 Wash. C. C. 533; *Doudherty* v. *Snyder*, 15 Lery & R. 87; *Kinney* v. *Clarkson*, 1 John 394; *Camparet* v. *Jernegan*, 5 Black. 375; *Gardiner* v. *Lewis*, 7 Gill 379; *McNeil* v. *Arnold*, 17 Ark. 155. The English cases are contradictory. In *Millar* v. *Hernwick*, (4 Cam. 155.) Gibbs, Ch. J. said: "Foreign laws, not written, are to be proved by the parol examination of witnesses of competent skill. But when they are in writing, a copy properly authenticated must be produced." Whilst Lord Denman, in Baron De Bode's case (8 Adol. and El. N. S. 250) permitted a witness to speak of the effect and state of the law in France, resulting from a decree, but Patterson, J. dissented. In this country the question is well settled; but the cases are not uniform on the point, whether the evidence of the existence of a foreign law is addressed in the first instance to the court or to the jury. In *Consequa* v. *Willing* it is said that whether the law or usage is sufficiently proven or not, is a question of fact for the jury, held that the "existence of a foreign law is a fact. The Court cannot judicially know it, and therefore it must be proved, and the proof, like all other, necessarily goes to the jury." And in *Moore* v. *Gergan*, (5 Ire. 190) where the question did not arise under statute, but under the common law of Virginia, and the testimony was conflicting, it was decided that it ought to be left

to the jury. But the decided weight of the American authorities goes to the length of establishing the doctrine, not only that it is the province and duty of the Court to instruct the jury as to the meaning and effect of a foreign law, when proved, whether the law is written or unwritten, but that the proof must be made to the court. Mr. Justice Story, in his Conflict of Laws, (sec. 638) says: "All matters of law are properly referable to the Court, and the object of the proof of foreign law is to enable the Court to instruct the jury what, in point of law, is the result of the foreign law to be applied to the matters in controversey before them. The court are therefore to decide what is the proper evidence of the laws of a foreign country; and when evidence is given of these laws, the Court are to judge of their applicability, when proved, to the case in hand." And Mr. Greenleaf, in his treatise on evidence, (1 Greenl. Ev. sec. 486,) quotes this section from Story, and incorporates it into the text of his work as containing the proper rule. Gibson, Chief Justice, observed, in *Sidwell* v. *Evans*. (1 Penn. 388) that "municipal law is a matter of compact, and as such, the construction of foreign statutes, as in the case of any other written compact, belongs to the Court. A plausible distinction might be taken in this respect between written and the unwritten law, which necessarily rests on parol, but it seems to have been disregarded."

Though the Supreme Court of North Carolina, in the case of the *State* v. *Jackson*, deciding that a foreign law was to be proved as a fact to the jury, *held*, that when it is established "its meaning, its conclusion and effect is the province of the Court. It is a matter of professional science, and as the terms of the law are taken to be ascertained by the jury, there is no necessity for imposing on them the burden of affixing a meaning on them more than on our own statutes. And in a late case (5 Iredell) the same Court decided, that where the question arises under a statute, it is the province of the Court to decide, both as to the existence of the statute and its proper construction. The case in *Inge* v. *Murphy* (10 Ala. 397) turned on the construction of a foreign statute, and the judge in delivering the opinion of the court observed: "It seem to us a self-evident proposition, that laws, whether written, statute, domestic or foreign, must be ascertained in the general, and always construed by the Court, and equally so, that it is manifestly not the province of the jury to place the construction upon it under any circumstances."

Again, in a very recent case in Pennsylvania (*Bock* v. *Lauman*, 24 State Rep. 447) the doctrine was re-asserted, and though the law of another State is a matter of fact, it is not necessary to be found by the jury, but by the Court, and that all the analogies of the law inclined the Court to regard the interpretation of foreign laws, whether written or unwritten, as falling within the province of the Court.

It may be doubted whether the rule ought to be applied, or can be practically enforced, when the foreign law offered in evidence is unwritten, or is the common law of the country where it prevails; for in many instances, as in the case in 5th Iredell, the evidence may be conflicting, and all the witnesses may state the law differently, in which case it would be extremely difficult for the Court to determine either the fact sought to be proved, or to declare the legal effect of the evidence. And whilst it may be the better rule to submit, as a question of fact, the existence of a foreign law to the jury, we think that when it is written and received in evidence, it is the duty of the Court to construe it, and to instruct the jury as to its meaning and effect. We do not mean by the written law the statements of text writers or the decisions of Courts; but these may be used, like the evidence of experts, to enlighten the court in expounding the foreign laws. For when a foreign law has received a local construction, judicial decisions and law writers may be consulted, and professional witnesses may be examined for the purpose of ascertaining the meaning.

The first instruction, then, given by the Court at the defendant's request, to the effect, that negro slavery was sanctioned and permitted by law in the Province of Quebec from 1760 to 1790, was proper, if the conclusion was legitimate from the facts stated in it; and it will therefore be necessary to recur to the evidence.

The plaintiff read the depositions of two learned and intelligent witnesses, Judges Reid and Gale, each of whom held high judicial positions for many years in Lower Canada. The former testified that slavery existed in Canada to a certain extent, while under the dominion of the French, although he could find no law by which it was introduced prior to the year 1709, when, by an ordinance of the Intendant of the colony, permission was given to the colonists to purchase negroes and Panis from the Indians, because they would be useful in the cultivation of the soil. That this ordinance would seem to have been made in order to confirm a practice which had previously existed, though there was no law of the French Government authorizing slavery in Canada. That it had been doubted whether the Intendant, or any Governor of a particular colony, could establish therein such a general principle of public law as slavery. But he says: "It is certain, however, that from the time of this ordinance and before, slavery of negroes and Panis, as therein stated, had been practised and still continued in the colony in 1736, as by an ordinance of Mr. Hocquart, the then Intendant, of the first of September of that year, a form for the emancipation of slaves was established, and directed to be observed. So far, the existence, if not the legality of slavery would appear." He also states that the ordinance of 1736 assumed the legal existence of slavery. Judge Gale, the other witness, in speaking of the ordinance of 1709, says, it declared that it would be useful to the colony to hold negroes, and Indians of a distant nation called Panis, as slaves, and, therefore, the negroes and Panis who had been or might be bought, should be held by the purchasers as their slaves; and that the ordinance of 1736 required masters who emancipated their slaves, to do so only by written documents, passed before public notaries, and declared other forms of emancipation void. In answer to the question, whether slavery of negroes or other persons was recognized and allowed by law in Canada while the country belonged to France, he replied, "I believe that a modified system of slavery respecting negroes, and some others, was *de facto* exercised in Canada, in various instances, while the country remained under the French dominion; but I cannot undertake to say that such *de facto* exercise of slavery was justifiable under sufficient legitimate enactment, and a correct interpretation of the laws as they then stood: my opinion is to the contrary."

Both of these gentlemen prove that slavery existed in Canada from a period at least as early as from 1709 to 1760; and though they say there was no act of the French Government legalizing it, we know that France permitted slavery in her West India colonies, and it cannot be supposed that she was ignorant of the state of things in Canada for so long a time. And it may be assumed that slavery existed in Canada under the French rule, not only *de facto* but *de jure*. Slavery existed in nearly all of the North American colonies, though no law or royal decree has been found introducing it; but it was permitted, and afterwards sanctioned by laws concerning it, passed by colonial Assemblies with the knowledge of the home government.

The facts developed by the testimony of these witnesses in reference to the state of things in Canada before 1760, explains, if explanation was necessary, the purpose of the 47th article of the capitulation. It will be observed, by an examination of the articles of capitulation, that they make very few provisions affecting the inhabitants of Canada; and it is hardly probable that a besieged army, in the face of an enemy's guns, would stipulate in a separate article for the protection of an interest that had no real existence. No other allusion is made to the property of the inhabitants who intended to remain in the colony, and the 47th article is not only a clear recognition of the existence of slavery, but of the value of the interests connected with it. Only the most prominent objects seem to have engaged the attention of the retiring governor, for he secures nothing for his master's subjects but their religion and their slaves.

The national religion of England was Protestant, and the French king was therefore jealous of the religion of his Canadian subjects, and the reason is obvious why the treaty of 1763 secured to the Canadians the enjoyment of the Roman Catholic religion, and did not stipulate for any other rights of conscience or property. No argument can be drawn from the silence of the treaty on the subject of slavery or any other peculiar institution, for the inhabitants of Canada, without any special guaranties, were entitled to all their rights of property after the change of government, which they possessed under their former sovereign. The cession of a

territory only passes the sovereignty, and does not interfere with private property. This is an established rule of public law, and is acknowledged and respected by all civilized nations. The subjects or citizens of a conquered or ceded country, retain all rights of property, which are not taken away by the new sovereign, and remain under their former laws until they are changed. *Strother* v. *Lucas*, 12 Peter, 438; *Mitchell* v. *United States*, 9 Peters, 734; Black's Com. 107. In *The United States* v. *Percheman* (7 Pet. 87), Chief Justice Marshall, in speaking of the rights to property acquired in Florida before its cession to the United States, remarks: "The people change their allegiance; their relations to their ancient sovereign are dissolved; but their relations to each other, and their rights of property, remain undisturbed." If this be the modern rule in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulations respecting the property of individuals, the rights of property in all those who became subjects or citizens of the new government would have been unaffected by the change. This principle was recognized in England in reference to Jamaica as early as 1693, in *Blankard* v. *Coldy*, 4 Modern Rep. 222; also by Lord Mansfield, in *Rex* v. *Vaughan*, 4 Bur. 2500. Slavery now exists in Louisiana, Missouri and Florida, without any act of legislation introducing it; and none was necessary; for being in existence under the implied sanction at least of France and Spain in 1803 and 1819, it was continued, and was not dependent on any positive law for recognition.

It is insisted that the royal proclamation of October 7, 1763, had the effect of abolishing slavery in Canada. Admitting that the king's prerogative included the power of making laws for the English colonies, we have searched through every clause of the proclamation to find a word or sentence which, in terms or by implication, remotely touches the subject. We have been directed to the clause of the proclamation set out in the first part of this opinion, but on looking at it, it will be seen that no new law is decreed, but only the assurance is given that until provincial assemblies can be called, all persons inhabiting or resorting to the colonies of Quebec, East Florida, West Florida and Grenada, may confide in the royal proclamation for the enjoyment of the benefit of the laws of England, and that orders had been given to the governors of said colonies respectively, to erect courts of justice for the hearing and determining of all causes, as well criminal as civil, as near as may be agreeable to the laws of England. The judge's whole testimony, we have noticed, says that this proclamation introduced into all the colonies mentioned in it the "common law of England," and that the genius and spirit of the common law is so hostile to slavery, that whenever it is introduced or prevails, it operates *ipso facto* to abolish slavery.

In 1763 the English acquired, besides Canada, Florida, Dominico, St. Vincent and Tobago, in all which slavery existed; and though the proclamation expressly applied to all, it is well known, and these gentlemen admit, that it did not have the effect of abolishing slavery in Florida and the Grenadines. It is strange that it was potential for the purpose imputed to it in one place, and not in the others. The Supreme Court of Louisiana remarked, in *Seville* v. *Chretien* (5 Mar. 285), that they have not been able to find any trace of a legislative act of the European powers for the introduction of slavery into their American dominions.* Yet it is an undisputed historical fact, that slavery existed in nearly all the English colonies now included in the United States, and that in each of them the "common law" was claimed as their birth-right, and causes in their courts were determined agreeably to the laws of England. If the opinion of the Canadian judges is correct, it is evident that the common law was not uniform in its operation, for it did not perform the work in the thirteen colonies ascribed to it in Canada.

The common law of England was introduced in Missouri by an act of the Territorial Legislature, of the 19th January, 1816, and nobody ever supposed that it was equivalent to an act of emancipation.

In the case of *The Attorney-General* v. *Stewart* (2 Merwale, 156), the question arose, whether the proclamation we have been considering extended the laws of England to Grenada, and it was certainly doubted in that case whether they were carried by force of the proclamation to the province of Quebec. The Master of the Rolls, Sir William Grant, observes: "It seems to be supposed that this was done by the proclamation of 1763, which is set forth in the report. With regard to three of the four governments to which this proclamation related—viz., East Florida, West Florida and Grenada—I am not aware that any controversy as to the effect of it ever arose. Perhaps there may have been, with respect to them, other acts and instruments more directly expressive of his Majesty's intention to introduce the laws of England; but as to the fourth—viz., the government of Quebec, which was included in the same proclamation, and where it must have had the same legal effect as in the others—it became a matter of great and long-continued discussion whether the laws of England had thereby been generally introduced, in abrogation of the ancient municipal laws of the country. In a report made by the Attorney and Solicitor General in 1766, little other effect was ascribed to this proclamation than that of extending to the inhabitants of Canada the benefit of the criminal law of England." But no matter whether or not the proclamation introduced the laws of England into Canada, or whether they produced any change as to the rights of property, it is certain that the act of Parliament of 1774 repealed so much of the proclamation as related to the laws of England, and enacted that the Canadians within the province of Quebec might "hold and enjoy their property and possessions, together with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial a manner as if the said proclamation" had not been made; "and that in all matters of controversy relative to property and civil rights," resort "should be had to the laws of Canada as the rule for the decision of the same."

The act of 1790 is only consistent with itself on the idea that it assumed the existence of slavery in Canada. The mention of negroes is only in connection with other property which is exempted from the payment of an import duty; and the prohibition on the sale of negroes or furniture, imported under the act, within twelve months, was to prevent frauds on the revenue, and it implied that sales of negroes were lawful after the expiration of a year from the time they were imported. It is said that this act was for the benefit of British subjects, whose homes were uncomfortable to them in the United States, after our independence was achieved. This is doubtless true; but it is hardly probable that out of tenderness to them, parliament would have established in Canada, for their benefit alone, a system of slavery which had never before existed there, and which it is alleged is so repugnant to the genius of the common law.

The province of Quebec was divided into the provinces of Upper and Lower Canada, by an order in council, August 24, 1791, which took effect 26th December following.

The act of 1793, passed by the Parliament of Upper Canada, not only repealed the emigration act of 1790, but provided for the prospective and gradual emancipation of the slaves born thereafter. It assumed that there were other slaves in the province than such as had been imported under the license granted by the act of 1790, for the 2d section provided that the act should not apply to slaves then in being, who had been brought in under the act of 1790, or to such as had otherwise come to the possession of any person by gift, bequest, or purchase. And if there were no other slaves than such as had been imported under the act of 1790, there was no reason for mentioning them.

It is true this law was the act of Upper Canada, which does not include Montreal; but it was passed very soon after the Province of Quebec was divided, and if slaves were lawfully held in the upper part of the Province before the division it must be supposed that the law which permitted it, operated uniformly throughout the whole Province.

The Parliament of Upper Canada, at its first session in 1792, introduced the English law quite as effectually as the King's proclamation could have done it, as the rule of decision in all controversy relative to property and civil rights; and it could not have thought that the common law was effectual to abolish slavery, otherwise there would be no necessity for the subsequent act of 1793.

* Then the S. C. of L. must certainly have overlooked the French edict of March 1685, known as the *Code Noir*.—ED. JUR.

If a controversy should arise in our courts as to whether slavery was authorized by law in Kentucky or Virginia, it is probable that no legislative act could be found in either State which in express terms legalized it; but the conclusion would force itself upon the mind of a judge, and he would feel himself compelled to decide that it was lawful, as a necessary inference from disconnected acts regulating the subject. And, in our opinion, if slavery existed in Canada under the French government, before the English acquired the country, it continued to exist and was lawful till it was abolished; and, after a careful examination of the documentary evidence in this cause, and for the reasons which are here hurriedly given, we have arrived at the conclusion which the Circuit Court announced in the first instruction for the defendant. The last instruction for the plaintiff is inconsistent with the first for the defendant, and was therefore improperly given. If the word *lawfully* had been omitted in the last instruction, it would have been unobjectionable, for though slavery was sanctioned by law in Canada, if in fact Rose was not a slave there, her children would not now be.

By omitting to notice the other instructions given for the defendant, our silence is not to be construed into an approval of them. The third instruction is very objectionable, for it implies that the plaintiff must make out her case by a higher degree of evidence, and that she must connect every link with more conclusive proof, than is ever required in civil cases of other persons. If a negro sues for his freedom, he must make out his case by proof like any other plaintiff; but the law does not couple the right to sue with ungenerous conditions, and he may prove such facts as are pertinent to the issue, and may invoke such presumtions as the law raises from particular acts. Our statute provides that in suits for freedom, "if the plaintiff be a negro or mulatto, he is required to prove his right to freedom," (Revised Statutes, 1845, Section 533,) but this is not a common law rule of evidence, and with this exception we are not aware of any other rule peculiarly applicable to such suits.

Judge Napton concurring, the judgment will be reversed and the cause remanded.

Scott, Judge, dissenting: What may be the province of the Court in the interpretation of foreign laws for the benefit of the jury, I do not deem necessary to determine, as I conceive no such question is involved in this record. The question for the jury was whether slavery existed in Canada. No statute was produced creating or establishing that institution which called for the interpretation of the Court. From the fact that there were laws and documents in which reference was made to slaves, or which contemplated a state of slavery, it was to be inferred that slavery lawfully existed in Canada. That inference was one of fact, to be made by the jury. As the jury have found the fact, whose exclusive province it was to do so, the practice of this Court, now established for a number of years, forbids that a judgment should be reversed, because a verdict is against the weight of evidence.

The State Missouri, ss:

I William S. Glanville, Clerk of the Supreme Court of said State, held at St. Louis, certify the foregoing to be a full, true and complete transcript of the opinion of said Court, and of the dissenting opinion aforesaid, delivered in the cause first before stated, at the October Term, A. D. 1857, on appeal from the St. Louis Circuit Court.

In testimony whereof, I hereto set my hand and the seal of said Court, at Office, in St. Louis, this 25th day of December, A. D. 1857.

Wm. S. Glanville,
(L. S.) *Clerk.*

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Elections — Towns — Wards — Joint Owners.

Gentlemen, — As a portion of your valuable *Journal* is devoted to the answers of questions relative to Municipal affairs, propounded by the officials of the municipalities, many of whom, no doubt, like myself, though acquainted somewhat with the English language, find it very difficult to arrive at the exact meaning of our Statutes, (It is indeed somewhat amusing at times to hear three or four opinions by as many persons, on the meaning of a clause or paragraph of a statute, and sometimes the opinions differ as widely as do the countenances of the parties giving them) I beg respectfully to submit for your answers two questions, which have agitated us somewhat, and more especially your humble correspondent, who is tremblingly alive to the consequences of an error made by him, these being nothing less than a two years servitude in the common gaol, if not in the penitentiary. The questions are as follows:

1. Are Towns not entitled to send a Member to Parliament to hold the election for Members to the Legislature in Wards or not?

2. If in Wards, must the Clerk omit the names of parties who are not assessed for £5 at least in each Ward *eg.*

A and B are a firm; they are assessed for £9 in the East Ward, and £3 in the North Ward. *Query*—Must the Clerk, in making out the list of voters, under 22 Vic. cap. 82, secs. 2 & 4, put down A and B on the list. If so, on which ward and how?

Your early answer to the above will confer a favor on possibly others beside your obedient servant,

A Town Clerk.

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1. In towns divided into wards, the election of representatives to serve in Parliament should, we think, be according to wards (see 12 Vic. cap. 27, sec. 13, and 22 Vic. cap. 82, sec. 4), and each voter to vote in that ward in which his property is situate (12 Vic. cap. 27, sec. 13).

2. Two or more persons, jointly interested in property, in respect of which a right to vote exists, are entitled to be entered on the list of voters in respect to such property only when the value of the share of each is sufficient to entitle him to vote as if the property were assessed in his individual name (22 Vic. cap. 82, sec. 2, subs. 3), and ought, as before mentioned, to vote in the ward in which the property is situate (12 Vic. cap. 27, sec. 13). If, therefore, the property assessed in the name of two persons be of the value of £9 only in one ward, and £3 in another, when the law would require an assessment of £10 in one ward to entitle two persons to vote, it would seem that the two persons supposed would not have a right to be entered on the list of voters as regards any particular ward, and so not entitled to vote as joint tenants. The case is in principle the same as that of a man having property in several wards of a town, in no one ward sufficient to entitle him to vote, but in the aggregate more than sufficient.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C.C.R. Regina v. Alexander Richmond. *April* 30.

Acting under false colour and pretence of process of a County Court

B. being indebted to A., A. obtained a blank form for plaintiff's instructions to issue County Court summons. This he filled up

with particulars of the names and addresses of himself and B. as plaintiff and defendant, and of the nature and amount of the claim, and without any authority signed it with the name of the Registrar, indorsing also a notice signed also by A., in the name of the Registrar and without his authority, that unless the amount claimed were paid by B on a certain day, an execution warrant would issue against him. This paper he delivered to B. with intent thereby to obtain payment of his debt.

Held, affirming *Regina* v. *Evans* 26 L. J. M. C. 92; 5 W. R. 652, that this was an "acting or professing to act under false colour and pretence of process of the County Court" within the meaning of 9 & 10 Vic., ch. 95 s. 57 (from which sec. 85 of U. C. Division Courts Act 13 & 14 Vic. ch. 53 is copied. Eds. L. J.).

EX. THE MARQUIS OF SALISBURY v. GLADSTONE. *Nov.* 18.

Practice—Bill of exceptions and motion for new trial—When motion may be made without waiving exceptions.

The plaintiff at the trial, tendered a bill of exceptions to the ruling of the judge, that a certain custom might by law exist, and the jury by their verdict affirmed the existence of the custom.

Held, that he might move for a new trial, on the ground of there being no sufficient evidence of the custom, without abandoning the bill of exceptions.

Q.B. *April* 21.

TOWN COUNCIL OF KIDDERMINSTER (Appellants) v. COURT, (Respondent.)

5 & 6 Wm. 4, c. 76, ss. 69 and 75—*Exercise of powers of trustees by Town Council.*

When the powers of trustees under a local Act have been transferred to the body corporate of a borough under 6 & 7 Wm. 4, c. 76, s. 75, the procedure is to be in conformity with that pointed out in sec. 69 of that Act, and not that pointed out in the local Act; and a notice of meeting, such as is thereby directed for the ordinary meetings of the Town Council, is sufficient to enable them to exercise the powers of the local act.

Q.B. BOTT v. ACKROYD ET AL. *April* 19.

Action against justices—Excess of jurisdiction.

In an action against justices for false imprisonment, it was proved that the plaintiff was convicted in £2 penalty and costs, no sum for costs being mentioned. A conviction and warrant of commitment were afterwards drawn up in which blanks were left for the amount of costs to be inserted. These blanks were filled up by the Magistrate's Clerk. The plaintiff was then arrested.

Held, that there had been no excess, but only an erroneous exercise of jurisdiction, and that the action would not lie.

C.P. HODDESDON GAS AND COKE COMPANY (Appellants) v. WILLIAM HASLEWOOD (Respondent.) *April* 29.

Contract—Implied by circumstances.

Where the appellants (a gas company) had supplied the respondent with gas for ten years receiving payments for the same quarterly, and let him have a meter at a yearly rental, and the respondent had altered his stoves in order to use the gas, and in consequence of a dispute between the parties the appellants cut off the gas.

Held that there was no contract binding the Company to supply gas for any certain period and that the surrounding circumstances were not sufficient to establish an implied contract to do so.

EX. WHITE v. HALLETT. *April*, 19.

Practice—Commission to examine witnesses—Notice of holding—Effect of want of notice.

A commission issued to examine witnesses in New York. The order did not provide for the day of holding or returning the commission. The opposite party, after the commission was executed, and before it was returned, consented to waive any irregularity in the order. He had no notice of the holding of the commission, but he had notice of its coming back to England. Eight months after the return of the Commission the opposite party objected at the trial to the admissibility of the evidence taken under the commission for the want of notice.

Held, that if there was any irregularity in this respect it had been waived by his silence.

Semble that there was no irregularity, the order not providing for the giving of notice.

EX. SAMUEL v. BATE. *May* 11.

Costs—County Courts Acts—Indorsement of bill for purpose of moving in Superior Courts—Certificate—Statute 15 *&* 16 *Vic., ch.* 54, *sec.* 4.

A bill of exchange for less than £20, was indorsed to a nominal plaintiff for the purpose of suing in the Superior Courts, the party really interested dwelling within twenty miles of the defendant. The under-sheriff, before whom the action was tried, having certified for costs, the Court refused to interfere.

EX. BAXENDALE v. HARDINGHAM. *April* 19.

Insurance—Fire insurance—Condition as to description of premises—Increase of risk—Machinery.

Goods in a warehouse were insured, and in the policy it was mentioned that there was a steam engine of twelve horse power on the premises, used for the purpose of hoisting goods. The steam engine, in addition to the purposes so specified, was applied to the grinding and cutting of food for the horses of the insured, who was a carrier, being for this purpose connected with machinery by a shaft runing through the building.

Held, that there had been no concealment or misdescription within the meaning of a condition in the policy, that it should be void unless the nature and material structure of all buildings which contained any part of the property insured, should be fully and accurately described, and unless the trades carried on in such buildings should be correctly shown.

Q. B. *May* 3.

BROWN AND OTHERS v. THE ROYAL INSURANCE SOCIETY.

Policy of insurance against fire—Election—Impossible contract.

An insurance company, in a policy against fire, reserved the right of electing, whether they should pay the amount of the loss and damage in case of fire, or should reinstate the insured premises; a fire having occurred, they elected to reinstate.

Held, in an action against the company for not reinstating, that it was no answer that the parts of the insured premises not destroyed by the fire, were in a dangerous condition from causes unconnected with the fire, and were ordered to be pulled down by the Commissioners of Sewers, and that, if they had not been so pulled down, they would have been reinstated by the company; for that the company were bound by their election, to reinstate the premises, and that not having done so, they were liable in th i action, to pay damages for not doing so.

ERLE, J., *dissentiente.*

Q. B. *April* 19, 30

BROWN v. THE METROPOLITAN COUNTIES LIFE ASSURANCE SOCIETY.

Mortgagor and Mortgagee—Power of distress—License—Creation of tenancy.

A. and B., were first and second mortgagees respectively. A. transferred his mortgage to B., together with all interest in arrears and all his rights under the mortgage deed, and gave him a power of attorney to sue and recover in his (A's.) name. A's. mortgage deed contained a proviso, whereby the mortgagor, for more easy recovery of the interest, gave to the mortgagees the same power of distress, as by law landlords have for the recovery of rent, and attorned and became tenant from year to year, to the mortgagee of the mortgaged premises, at a rent of the same amount as the interest.

Held, that this was not a mere license to seize and sell, but that a tenancy was thereby created, and that, the mortgagee having assigned away his interest, the power of distress was gone.

Held, also, that, even if this could be construed as a mere license, it would last no longer than a tenancy would have done, and that it was therefore equally at an end.

Semble, also, that if the license were not at an end, it is one which could be exercised by A. personally only, and that the transaction between A. and B., amounted to transfer of the license, and was therefore void.

CHANCERY.

L. J. MACLEAN v. DAWSON. *May* 3.

Practice—Service of defendant out of jurisdiction.

When plaintiff applies for leave to serve a copy of the bill on a defendant out of the jurisdiction, it is a matter of discretion with the judge whether leave should be given. Although it is not necessary to support such an application with evidence of the truth of the plaintiff's case, yet the court ought to look into the bill to ascertain whether the plaintiff's case is a reasonable one.

L. J. LYDDON v. MOSS. *April* 29.

Agreement between solicitor and client—Agreement for compromise—Agreement to pay interest on bills of costs—Acquiescence.

M., a solicitor acting for the plaintiff in a suit, entered, (without consulting his client) into an agreement for a compromise, whereby the defendant was to pay a sum of money to the plaintiff, which was to be handed to M., in satisfaction of his bill of costs with compound interest; and the conduct of the suit was to be given up to another solicitor. M., prevailed on his client the plaintiff, to execute a deed carrying into effect this compromise. In the following year the plaintiff obtained independent professional advice on the subject of the compromise, but remained in friendly terms with M., and had divers negotiations and dealings with him, in relation to the deed of compromise but did not attempt to set it aside till eight years afterwards, when she filed a bill for that purpose.

Held, that neither the agreement for compromise nor the deed carrying it into effect was originally binding upon the plaintiff; but that under the circumstances, she had precluded herself by her conduct and the lapse of time from now setting the transaction aside, and the bill was dismissed without costs.

Per TURNER, L. J.—A solicitor's bill of costs does not carry interest: and if a solicitor makes an agreement with his client for interest, he is bound to let him know that it is a special bargain beyond what is sanctioned by law, or by the ordinary course of the profession.

V. C. K. GOMPERTZ v. POOLEY. *Feb.* 9.

Injunction—Guarantee—Common Law Procedure Act—Equitable defence.

Where a defendant in an action at law has an equitable defence only, he is not compellable under the Common Law Procedure Act to plead such equitable defence, but may at once come into equity for an injunction to restrain the action. If however such defendant has pleaded and exercised his option, he cannot have relief in equity.

V. C. K. VERITY v. WYLD. *Feb.* 11.

Solicitors lien—Compromise—Costs.

A solicitor has no lien for costs, as against other persons, on the property of his client, but only on whatever such client recovers by the litigation.

A solicitor's right of lien does not preclude a fair compromise but where a party is about to receive money to the exclusion of the solicitor, the solicitor may apply to the Court to provide for his costs.

L. C. WYTHES v. LABOUCHERE. *Jan.* 31.

Surety—Rights and obligations of—Concealment by creditor.

If a creditor takes a security, knowing that it is intended by way of suretyship, that is an acceptance of the surety as such, within the principle of *Hollier* v. *Eyre*, 9 Cl. & Fin. 1.

A creditor who accepts a surety is not bound to volunteer information of previous transactions with the principal (*quære*), even though there were such, as it would be fraudulent to conceal if enquiries directed to them were made by the surety.

REVIEW.

SELWYN'S ABRIDGMENT OF THE LAW OF NISI PRIUS. Twelfth Edition, with considerable alterations and additions. By DAVID POWER, of the Middle Temple, Esquire, one of Her Majesty's Counsel, Recorder of Ipswich. 2 vols. London: V. & R. Stevens and G. S. Norton, 26 Bell Yard, Lincoln's Inn. Toronto: J. C. Geikie, King-street.

It is unnecessary, in this year of our Lord, to point out the utility and necessity to the legal profession, of the class of works of which the above is one. From the day that Buller's Nisi Prius first appeared as an anonymous publication, to the present time, there has been a demand for Nisi Prius works.

The Nisi Prius advocate cannot carry on circuit, either in his bag or on his back, all the works to which, in the course even of a very limited practice, he may require to consult. If practising on the civil side of the courts, he may have occasion to refer to many if not all works appertaining to civil rights. So, as to criminal law. For these and similar reasons, an epitome of the laws, in the shape of a circuit companion or work on Nisi Prius, is an indispensable requisite. Hence we have Buller, Espinasse, Stephens, Archbold and other works on Nisi Prius, to which no further reference is needed. Each and all of these we have mentioned have gone through repeated editions. The work now under review has reached no less than its twelfth edition. From this we learn not only the general utility of such works, but the particular value placed upon the work now before us.

The Editor of the twelfth edition of Selwyn's Nisi Prius informs us that he has omitted the chapters on "Consequential Damages," "Tithes," and "Wages," and has added those on "Amendment" and "Costs." So he has done away with the two sets of notes, the one numbered and the other lettered. These are either incorporated with the text, or else are placed with the other notes.

Considering the contents of the work, we find it wonderfully convenient. In two moderately sized volumes is contained the law evolved from no less than nine thousand decided cases. The process of condensation is really surprising, and the arrangement of title is all that can be either expected or desired. The following are the chief titles: Action of Account, Adultery, Assault and Battery, Assumpsit, Attorney, Auction, Bankrupt, Baron and Feme, Bills of Exchange and Promissory Notes, Coroners, Common, Covenant, Debt, Deceit, Detenue, Distress, Ejectment, Executors and Administrators, Factor, Fishery, Frauds, Statute of Game, Imprisonment, Insurance, Libel, Malicious Prosecution, Mandamus, Master and Servant, Nuisance, Partners, Quo Warranto, Replevin, Rescous, Shipping, Slander, Stoppage in Transitu, Trespass, Trover, Use and Occupation, Amendment under the C. L. P. Acts, Certificate for Costs.

Numerous as these titles are, each is a treatise in itself. Some of course are short, but others—such as Assumpsit, Bankrupt, Bills of Exchange, and Statute of Frauds—are very elaborate; and whenever a title is elaborate, that is full and extensive, it is carefully subdivided. Thus, upon reference to "Bills of Exchange and Promissory Notes," the following subdivisions present themselves: 1. Of the Nature of a Bill of Exchange. 2. Of the capacity of the contracting parties. 3. Of the Requisites of a Bill of Exchange. 4. Presentment for acceptance. 5. Of the Transfer of Bills of Exchange. 6. Of Presentment for payment. 7. Of the acts of the holder, whereby the parties may be discharged. 9. Of the action on a Bill

of Exchange. 10. Of the Nature of a Promissory Note. 11. Of the time when a Note ought to be presented for payment. 12. Of the Declaration.

Others of the titles embrace branches of the law either entirely new or new in great part. Such are "Amendments under the C. L. P. Acts," and "Certificate for Costs." Nothing can be of greater utility to a Nisi Prius man, than the summary of the law on these two subjects. Scarce a case is tried wherein it is not necessary to make some reference to one or other of these branches of practice. In the volumes before us the summary as to each is both complete and reliable.

The work itself having now attained its twelfth edition, nothing more need be said to show in what manner it is received by the profession. After all, the profession is not slow to appreciate a work of the kind, and in proportion to the patronage bestowed may we rate the real value of the work patronised. It is not our practice to praise indescriminately books sent to us for review; but the work now under consideration is one which merits all that we have said in its favor. It is of a nature useful, and of a size convenient. It is compendious in matter, and compact in form. It is all that it purposes to be, and more than it appears to be. It is, in a word, a ready and reliable circuit companion—as useful in the office as it is on circuit. It is of its kind the most recent work published, and upon this account, if no other, as a law book, is to be prized—the more so when it is a new edition, with considerable alterations and additions, of a well known and thoroughly established work.

In mechanical execution the volumes are in all respects worthy of the contents. Messrs. Stevens & Norton, the eminent publishers, of Bell Yard, Lincoln's Inn, London, are the publishers. The type is clear, the paper good, and the binding unsurpassed for beauty and utility. Let all who can, procure copies of this work; and none who do so, and make a proper use of them, will regret the purchase.

THE LOWER CANADA REPORTS. Edited by Messrs. Labeare & Augers, and published by Augustin Caté, Quebec.

We have received No. 9 of Vol. IX. of the above. It contains reports of four very interesting decisions of the Lower Canada Courts—two of mercantile importance, one of local interest in Montreal, and the fourth on the construction of particular words creating a legacy. Upper Canadian lawyers, who, in quest of information, avail themselves even of reports of the United States courts, will find that a perusal of the Lower Canada Reports will repay the cost of subscription.

THE LOWER CANADA JURIST. Montreal: John Lovell.

The October number of this useful publication is received. It contains seven cases, of which one, viz., *Charlotte* v. *Cateau*, is of considerable interest, bearing as it does on the subject of Slavery in Canada; and another—*Huston* v. *The Grand Trunk Railway Company*—is a leading case in Lower Canada on the law of carriers. The former case is elsewhere copied at length.

THE BRITISH QUARTERLIES AND BLACKWOOD.

Leonard Scott & Co. continue to send us the reprints of these valuable Reviews. Differing as they do in politics and religious opinion, they are interesting and instructive to all classes. They are without doubt *the* Magazines of the age.

No man alive to the world of literature, should be without these exponents of the opinions of some of the first minds of his time. In England the expense of subscription may be an obstacle to some, but in America the facilities offered by Leonard Scott & Co. are such as to bring the Magazines within the reach of all not absolutely poverty-stricken.

Any one of the four Reviews—*North British*, *Edinburgh*, *Westminster* or *London Quarterly*—can be had for $3 a year. Blackwood is also the same price. Blackwood and any one of the four Reviews, only $5; or the four Reviews and Blackwood only $10. All the principal Booksellers of Toronto are authorized to act as Agents.

THE GREAT REPUBLIC MONTHLY, for October, 1859. Oaksmith & Co., 112 & 114 William street, New York.

This large and well conducted Magazine does not lose in interest as it progresses in years. Its conception was of the most extensive description, and its execution equals its conception. The number before us is the fourth of the second volume, and is fully equal to any number that has yet appeared. So far as we can understand the articles which from time to time appear, their aim seems to be less to instruct than to amuse and delight. Productions of a high order, in prose and poetry, are contained in its pages; and while there are some things of which we do not quite approve, there are many which we greatly admire. The October number opens with a poem called "Sir Agilthorn," having no less than seven well executed illustrations. Then follows a short biography, with four illustrations, of John Bunyan, author of the Pilgrim's Progress. A short paper on Clairvoyance and Imagination, by Prof. Gregory, of Edinburgh, is also to be found in this number, together with other contributions in poetry and prose, of which we have not space even to give the names.

THE WEEKLY LAW GAZETTE. Edited by R. B. & W. W. Warden, Cincinnati.

We have to thank the publishers for a great many numbers of the above publication, and shall be glad to exchange regularly with it.

One of the Editors was at one time President Judge of the Court of Common Pleas in Cincinnati, and recently a member of the Supreme Court of Ohio. His views on the Elective Judiciary coincide with our own. Under the heading, "A Judgship gone a-begging," he deplores the low state to which judicial excellence in the United States is reduced. Speaking of a judgship of the Court of Appeal in New York, he says that "nobody who is very worthy of honors considers it any honor at all to have it conferred upon him; and the mass of the citizens, so far from looking after its disposition with the most anxious attention, leave it to a class of the community notoriously *the most unscrupulous, knavish, and time-serving of any.*" Again, he says, "It is not in human nature to relinquish a first-rate professional practice, for a berth from which the occupant, without any fault of his own, every two years runs the risk of being kicked out, and in which the more conscientiously he discharges his duty the more likely he is to offend *the most influential portion of his employers.*"

The *Weekly Gazette* is, for the purpose of binding, published in neat pamphlet form. Each number contains, besides an editorial miscellany, the reports of many decided cases, not only in Ohio, but in the States of New York, Massachusetts, Pennsylvania, Kentucky, Indiana, Illinois, Missouri, &c.

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TO CORRESPONDENTS.

INQUIRER—under "Division Courts" by mistake, but there answered.

A SUBSCRIBER—JOHN ALLCHIN—W. S.—J. T.—under "Division Courts."

A TOWN CLERK—under "General Correspondence."

ONE OF YOUR SUBSCRIBERS—will receive attention in our next.

J. E., SOUTHAMPTON—We are obliged by your communication, but we do not think it advisable to publish the report you enclose. It is not of sufficient importance to warrant any notice at our hands, and we could not well insert it unaccompanied by some remarks. It is, as you say, an absurd production. If we undertook to answer all the crude suggestions for legal reform which come under our notice, we would have but little time to devote to matters of more importance.—EDS. L. J.