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DIARY FOR MARCH.

2. SUNDAY........ *Quinquagesima.*
3. Monday.......... Last day for notice of trial County Court.
4. Tuesday .... *Shrove Tuesday.* Ch. Ex. Term London and Belleville com. Last day for notice Brantford and Kingston.
6. Wednesday...... *Ash Wednesday.*
9. SUNDAY........ *1st Sunday in Lent.*
11. Tuesday.......... Quarter Sessions and Co. Ct. Sittings in each County. Last day for Notice of Chancery Examinations, Hamilton and Brockville.
16. SUNDAY........ *2nd Sunday in Lent.*
18. Tuesday .... Chancery Examination Term Brantford and Kingston commences. Last day for Notice for Barrie and Ottawa. Last day for Writ for York and Peel Assizes.
23. SUNDAY........ *3rd Sunday in Lent.*
25. Tuesday .... Chancery Examination Term Hamilton and Brockville com. Last day for Notice for Goderich and Cornwall.
28. Friday .... Declare for York and Peel Assizes.
30. SUNDAY........ *4th Sunday in Lent.*

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 Patton & Ardagh Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

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

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

The Upper Canada Law Journal.

MARCH, 1862.

PATENTS FOR INVENTIONS.

Our Legislature will soon be in session. It is to be expected that we shall have some useful laws, or amendments of existing laws. In our last issue we pointed out the necessity for some amendment in the law as to payment of Crown witnesses; in this issue we propose to direct attention to the law regulating letters patent for inventions.

In Canada we have a law which authorizes the issue of letters patent for inventions to certain persons, and under certain circumstances. Some, say that no such law should exist, while the many say that it is not sufficiently comprehensive. The good of the public is the aim of each of these classes of objectors, but each seeks to attain that good by means very different from that of the other.

Why should not *every* inventor or discoverer receive a patent for his invention or discovery? This is the question which we propose briefly to consider.

The man who builds a house or makes a pin is entitled to be paid for his labour. The reason is, that the product of his labour is useful, and it would be unjust for any member of society to deprive a fellow-man of the fruits of his labour without some compensation. So the man who by study has produced something useful to society, in the shape of labour-saving machinery or other invention, should not be deprived of the fruits of his study without compensation. He is under no obligation, even if the discovery be the result of accident, to disclose it to the public.

Matter is inert, and the laws of nature are fixed and unchangeable; but by new combinations of matter, great results are often produced. The man who either discovers or invents these new combinations, and proves them to be useful, is certainly entitled to some compensation from the public, before he ought in reason or in justice to be deprived of the fruits of his invention or discovery.

This is the foundation of a patent law, when correctly understood. Such a law is in the nature of a contract between the inventor and the public. The inventor makes known his invention to the public, under the protection of a patent. The exclusive use, and right to sell to others to use, is the consideration for the bargain. The Government, representing the public, says, "Explain to us the nature of your invention; and if it be useful, we shall guarantee to you the exclusive use of it for a term of years, at the end of which time the invention shall become the property of the public, whom we represent." In this bargain there is mutuality. The public grants the exclusive right to use for a term of years, and in consideration thereof, at the end of the term, the inventor foregoes all claim in favour of the public. The right to exclusive use for the term of years is a bonus in favor of the inventor—the inducement to make known to the public that which before was known only to himself.

This is a bargain by which the public lose nothing, and in the end may gain much. It is unlike a monopoly. The right exclusively to manufacture an article formerly well known to the public, is a monopoly; but the right, for a limited time, to do that of which the public before knew nothing, is no injury to the public, and in the end a positive gain. This is the distinction between a patent right and a monopoly. No man has the right, in justice, to make use of the fruits of another man's brains, any more than the fruits of his labour—without payment. The attempt so to do is a violation of the rules of honesty.

These principles have been fully acknowledged in modern times by all civilized powers. The result is, that each power has its own patent laws, more or less comprehensive. There is no difficulty in carrying out the principles of justice as between subjects of the same power, but the difficulty is in applying them as between subjects of different powers. Each Government may command and enjoin its own subjects, but has no authority over those of another Government. The consequence is, that when a subject makes public his invention to his own Government under the protection of a patent, the subjects of other Governments, in the absence of an international law, are at liberty to steal that invention.

The discovery, it may be, is of use, not merely to the people of one power, but to all mankind. Why, therefore,

should not the inventor be allowed to make known his invention to the people of every Government, and from every Government receive his reward? A contrary course is not merely unjust to the inventor himself, but unwise so far as the interests of mankind are concerned. It is to the interest of every nation and every people to encourage genius in the pursuit of that which is useful. Those who minister to the wants or convenience of mankind, are entitled to be paid for their services.

It may be said, so far as we in Canada are concerned, that if we were to throw open our market to American inventors, whose inventions of labour-saving machinery are prodigious, our infant manufactures would be crushed, and our operatives left without employment. There may be something in this argument, but we do not think that it should be pushed so far as to exclude the American inventor from the benefit of our Patent laws. We do not exclude either the British or foreign author; we acknowledge his rights—give him protection for a term of years, provided he print and publish in this Province. Why not allow the British or foreign inventor to claim a like protection, provided he manufactures in this Province? This at all events would be an improvement on the existing law —a step in the right direction.

The law as it stands is very narrow in scope, and in consequence we think very defective. None but subjects of Her Majesty resident in the Province are entitled to obtain letters patent from our Government for inventions or discoveries. The result is, that British subjects resident abroad, and all foreigners, are excluded from its operation. It is not possible for any such, upon any terms whatever, to obtain letters patent. Surely this is too restrictive. It challenges the attention of foreigners, and is only challenged to be condemned. In the United States any man. no matter of what creed or country, with one exception, can for a trifle obtain letters patent for an invention. That exception, we are sorry to say, is the Canadian. If *he* desires a patent, he must pay five hundred dollars before his application can be entertained. He may thank the Provincial Legislature for this invidious distinction. The distinction is evidently made with a view if possible to compel reciprocity. We do not see why compulsion should be necessary. We think reason and justice both demand a modification of our Patent law. Indeed we also believe that self-interest joins in the demand.

OUR COLONIAL COURTS.

We are glad to find that the courts in England, since the blunders made by the Queen's Bench in the Anderson case, are disposed to hold that Colonial Legislatures and Colonial Courts are not, in the mother country, to be deemed mere nonentities.

Not long since we had occasion to refer to the extraordinary conduct of the English Court of Queen's Bench, which apparently ashamed of its rashness in ordering the *habeas corpus* in the Anderson case, afterwards in *ex parte Massenger* was oblivious to the fact, and refused to acknowledge that they ever considered such a jurisdiction as existing.

Now we have the satisfaction of learning that the able and much respected Vice-Chancellor Wood has scouted the idea of the English Courts having jurisdiction in questions affecting realty situate in the Colonies.

It would (says the V. C.) be a great surprise to the various colonies if they were to be told, that by an Act passed in England, to which they were not consenting parties, the courts of this country were authorized to determine the rights of property in the colonies as against the Colonial Legislature.

We yield to none, in respect for the English courts one and all, but we hate that feeling of cockneyism which leads some men to think that London is the world and the colonies—beyond the pale of civilization.

The occasion of these remarks is a case of *Holmes* v. *The Queen*, reported in other columns. The facts were as follows: In 1801 certain lands in Upper Canada were granted by the Crown to a Mrs. McQueen. In 1827 the Rideau Canal Act was passed. It authorized, on given terms, the assumption by the Crown of lands through which the canal passed. It passed through the lands of Mrs. McQueen. In 1832 Colonel By purchased from the heir at law of Mrs. McQueen all the lands granted by the Crown to her, and of which she had made no disposition. In 1843 the 7 Vic. cap. 11 was passed, which, by sec. 29, provided that all lands taken under the authority of the Rideau Canal Act from private owners for the uses of the canal, and not used for that purpose, should be restored to the parties from whom taken. In 1856 the statute 19 Vic. cap. 45, was passed, for the purpose of vesting the canal and other ordnance property in Her Majesty for the use of the Province. Petitioners representing the estate of Colonel By in this Province filed a petition of right, claiming the restoration of so much of the land formerly belonging to Mrs. McQueen, taken for the use of the canal, as had not been used for that purpose. To this petition the Attorney General demurred for want of jurisdiction, and the demurrer was sustained.

It is difficult to conceive upon what ground the petitioners hoped to sustain their claim before an English tribunal. It was indeed contended by counsel *arguendo*, that the Court having jurisdiction *in personam*, and the Queen,

the trustee, being resident within the jurisdiction of the court, was subject to the authority of the court. But what an absurd doctrine, seriously, to broach to any court! It might have been well enough were the land vested in Her Majesty in her own right as an individual, but when it is by Act of the Colonial Legislature vested in her in right of the Crown, the argument entirely fails. Queen Victoria, the woman, is resident in Great Britain, but the body corporate, the Crown, of which Queen Victoria is the *locum tenens*, if resident anywhere is as much resident in Canada as in Great Britain, and for the purposes of the application on the facts laid before the court much more resident in Canada than in Great Britain.

The following is the language of V. C. Wood in disposing of this argument, "assuming that a trust existed, that the claim was not merely legal, and that Courts of Equity could exercise jurisdiction in matters relating to lands in a foreign country, still it is necessary that the trustee should be within the jurisdiction to give any operation in this court. The land was unquestionably vested in Her Majesty by the Act of 1856 for the benefit of the Province, and in that point of view Her Majesty was just as much present in Canada as in England. For the purposes of the Act and the doctrine of this court acting in *personam*, Her Majesty could not be taken to be within the jurisdiction of this court in respect of lands situate in Canada and held by her, not in virtue of her prerogative, but under the Act of the Colonial Legislature."

The decision in a colonial point of view is important. We apprehend there can be no doubt of its soundness. It squares with the dictates of reason. We are glad of it. It acknowledges the permanent authority of our Colonial Legislature in matters of local concern, and refers petitioners to our Colonial Courts, whose authority in such matters is also abundantly acknowledged.

JUDICIAL CHANGES.

We believe there is no doubt of the fact, that the Chief Justice of Upper Canada, Sir J. B. Robinson, Bart., has tendered his resignation to the government. The step was one which, after a long, most useful and brilliant career, was due to himself and his family, but one which will be learnt with regret by all who have had the good fortune to have had professional intercourse with him. Great was the responsibility of the step, and very great will be the responsibility of supplying the gap created by it. It will require a man of no ordinary ability to take the place of so distinguished a judge.

It is rumored that the present Chief Justice of the Common Pleas will be his successor. We hope the rumor is well founded. We know of no man in Upper Canada so fitted for the place.

It is also rumored that Mr. Justice McLean, after a long and faithful career, contemplates retirement at an early day. We should like to see him before the close of his judicial career, promoted to the office of Chief Justice of one or other of the courts. Such a step would be a proper tribute to the worth of that venerable and much respected judge.

Sir J. B. Robinson will no doubt be enabled to retain his seat in the Court of Error and Appeal. The country will in that, the highest court of Upper Canada, still continue to have the benefit of his great learning, only equalled by his extraordinary industry. We hope the divine dispenser of events will for many years yet to come be pleased to spare Sir J. B. Robinson to his family and to his country. Too often we fail to appreciate the services of a really great or good man till deprived of them.

WORK FOR PARLIAMENT.

In Upper Canada there are two common law courts of co-ordinate jurisdiction, the Queen's Bench and the Common Pleas. Both command great respect, and, as a general rule the proceedings of both are harmonious.

There are, however, at present at least three questions about which the two courts are at issue. The first is the effect of a bill of sale or chattel mortgage filed within the five days mentioned in the statute upon an execution placed in the hands of the sheriff during the five days. The second is the effect of either party calling his opponent as a witness in the cause, so far as regards the consequent right of cross-examination. The third is as to the right to try questions of boundary in actions of ejectment.

As to the first: The Queen's Bench hold that the filing of a bill of sale or chattel mortgage within the five days allowed by the statute has relation to the date of the instrument, so as to protect the chattels assigned from the effect of intermediate writs of execution. The Common Pleas hold the reverse.

As to the second: The Queen's Bench hold that if either party to a cause call his opponent as a witness, that the right of cross-examination is restricted to the subject matter of the examination in chief. The Common pleas hold the reverse.

As to the third: The Queen's Bench hold that a question of boundary may be properly tried in an action of ejectment. The Common Pleas hold the reverse.

It is really a matter of little consequence, so far as these questions are concerned, which side is supported as law, but it is a matter of great consequence that the law should be settled one way or the other, and that without delay.

The most expeditious mode of having the law on each point settled, is for the high court of Parliament at its coming session to declare in regard to each what the law is, and so set at rest the conflict between the courts.

Conflicts of decision between courts of co-ordinate jurisdiction are not peculiar to Upper Canada, or to any country or people. They arise from the imperfections of our common humanity. Often do the courts of Queen's Bench, Common Bench, and Exchequer in England, take different views of the law. The embarrassment resulting from such a state of things is very often removed by legislative interference.

CANADIAN LEGAL AND GENERAL AGENCY.

Mr. William Lapenotiere, formerly a well known solicitor in Woodstock, C. W., and Clerk of the Peace for the County of Oxford, has established a Canadian legal and general agency in London, England. His card will be found in other columns. Mr. Lapenotiere is not only a Canadian attorney but an English solicitor. The advantages of Canadians having business to transact in England employing such a person as Mr. Lapenotiere are too evident to need any recommendation from us. We are glad to learn that he has already charge of more than one appeal from Canada in the Privy Council. His knowledge of Canadian laws in a matter of that kind will give him an immense advantage over other solicitors in London. He does not, however, intend to confine his attention to appeals from Canada or other business of a strictly legal character. He will keep a book in which he will enter descriptions of lands in Canada entrusted to him for sale. When he has a sufficient number of farms for sale to make it worth while he promises to give publicity to them in the *Times* and other London newspapers. The description of each lot entrusted to him for sale must be accompanied by a post-office order for 5s. sterling, payable to him at the Bloomsbury Postal District Office, Holborn, W. C., London. Commission on sales and other charges to be learnt upon application to him by letter, post-paid. He is also prepared to negotiate the sale of Canadian securities. To enable him to do so he requires to be informed of the assessed value of the municipality, the municipal debt, and the current annual rate of assessment, together with the present population as compared with the population ten years previously.

SPRING ASSIZES.

The following table, compiled by Mr. Hallowell, a law student of the City of Toronro, showing last day for service of writ, declaration, and notice for trial for each assize, will, we think, be found most useful. We have been assured of its accuracy, but have not ourselves had sufficient time to test it. We trust that this will not be the last table of the kind compiled by Mr. Hallowell. Perhaps in course of time he may be induced to embark on some work of greater magnitude for the benefit of the profession. There is nothing like a beginning.

SPRING ASSIZE LIST 1862.

Circuits.	Serve Writ.	Declare.	Notice Trial.	Commission Day.
TORONTO & YORK, c. Peel.				
Hon. Mr. Justice Hagarty				
Toronto	14th Feb..	24th Feb..	4th Mar..	Wed., 12th Mar.
York and Peel	18th Mar..	28th Mar..	5th April	Mon., 14th April.
EASTERN.				
Hon. Mr. Justice Richards.				
Brockville	12th Mar..	22nd Mar..	31st Mar..	Tues., 8th April.
Perth	19th "	28th "	7th April	" 15th "
Cornwall	25th "	4th April	12th "	Mon., 21st "
Ottawa	2nd April	12th "	21st "	Tues., 29th "
L'Orignal	10th "	21st "	29th "	Wed., 7th May.
MIDLAND.				
Honble. Mr. Justice Burns.				
Whitby	25th Feb..	7th Mar..	15th Mar..	Mon., 24th Mar.
Peterborough	4th Mar..	14th "	22nd "	" 31st "
Cobourg	12th "	22nd "	31st "	Tues., 8th April.
Belleville	26th "	5th April	14th April	" 22nd "
Picton	9th April	19th "	28th "	" 6th May.
Kingston	13th "	23rd "	1st May..	Frid., 9th "
HOME.				
Hon. Chief Justice Draper.				
Milton	14th Feb..	24th Feb..	4th Mar..	Wed., 12th Mar.
Barrie	18th "	28th "	8th "	Mon., 17th "
Welland	26th "	8th Mar..	17th "	Tues., 25th "
Hamilton	4th Mar..	14th "	22nd "	Mon., 31st "
Niagara	8th April	18th April	26th April	" 5th May.
Owen Sound	16th "	26th "	5th May..	Tues., 13th "
OXFORD.				
Hon. Sir J. B. Robinson, C.J.				
Stratford	15th Feb..	25th Feb..	5th Mar..	Thurs. 13th Mar.
Guelph	19th "	1st Mar..	10th "	Tues., 18th "
Berlin	27th "	10th "	18th "	Wed., 26th "
Brantford	6th Mar..	17th "	26th "	" 2nd April.
Woodstock	25th "	4th April	12th April	Mon., 21st "
Simcoe	2nd April	12th "	21st "	Tues., 29th "
WESTERN.				
Hon. Mr. Justice McLean.				
Sarnia	15th Feb..	25th Feb..	6th Mar..	Thurs. 13th Mar.
London	20th "	3rd Mar..	11th "	Wed., 19th "
St. Thomas	5th Mar..	15th "	24th "	Tues., 1st April.
Chatham	14th "	22nd "	31st "	" 8th "
Sandwich	19th "	29th "	7th April	" 15th "
Goderich	26th "	5th April	14th "	" 22nd "

JUDGMENTS.

QUEEN'S BENCH.

Present: Robinson, C. J.; Burns, J.

5th February, 1862.

Brown v. *Erie and Ontario R. Co.*—Judgment for defendant on demurrer.

Campbell v. *Holmes*.—Judgment for defendant on demurrer.

Shire v. *Gates*.—Judgment for defendant on demurrer.

Regina v. *Ewing*.—Judgment arrested.

Mewburn v. *Street*.—Judgment for defendant on demurrer.

Regina v. *Roblin*.—Judgment for the Crown.

Commercial Bank v. *Merritt*.—Rule discharged.

Burnham v. *Burns*.—New trial without costs.

Present: Robinson, C. J.; Burns, J.

March 3, 1862.

Tinning v. *Hindson*.—Rule absolute for new trial without costs.

Corporation of Perth v. *McGregor*.—Rule nisi discharged.

Ranney qui tam. v. *Jones*.—Rule for nonsuit made absolute.

Boyd v. *Bartram*.—A defendant in custody in an action for seduction on a judgment for damages held to be "a judgment debtor" within meaning of Con. Stat. U. C., cap. 26, s. 7, and discharged from custody.

Row v. *Quinlan*.—Ejectment—confession given before trial and notice thereof served on plaintiff, but not on his attorney, before trial. Rule nisi to set aside verdict discharged.

In Re Thompson and United Townships of Bedford, Olden and Oso.—Bylaw quashed with costs.

Tanner v. *Bissell*.—Rule nisi for new trial discharged.

Bank of Upper Canada v. *Lynn*.—Rule absolute to add on equitable plea. Costs to be costs in the cause.

Small v. *The Corporation of Toronto*.—Rule nisi for new trial discharged.

Hurrell v. *Simpson*.—Rule for new trial without costs.

Nicholls v. *Golding*.—Action for seduction. Action within six months by Master, in his declaration averring loss of service. Plea not guilty. Loss of service proved. Verdict $425. Rule nisi for new trial or to arrest judgment on ground that it was not averred in the declaration nor proved at the trial that neither father nor mother living, so as to entitle Master within six months to sue. Rule nisi discharged.

The Attorney General v. *The Corporation of the County of Bruce*.—Rule absolute for mandamus nisi.

Harmer v. *Muma*.—Rule absolute.

In Re Smith and School Trustees of Dummer and Burleigh.—Rule discharged with costs.

Doe Dem Day v. *Bennett*.—Rule discharged with costs.

Van Every v. *Grant*.—Rule discharged.

Murphy v. *Case*.—Rule absolute for new trial. Costs to abide the event.

Shipman v. *Henderson*.—Rule absolute for entering verdict for defendant.

In the matter of the heirs of McLean.—Judgment for partition according to prayer of petitioners.

The Queen v. *Thomas Morris*.—Motion to quash conviction or order made under s. 86 of Con. Stat. U. C., cap. 55. Held, that no formal conviction is necessary under that section—a warrant in the first instance being all that is required. Rule nisi discharged without costs.

Girdlestone v. *O'Reilly*.—Stands for further consideration. If not again mentioned, rule absolute to reduce the verdict.

Hickey v. *G. T. R. Co.*—Rule discharged.

The Queen v. *John Craig*.—Rule absolute to quash conviction.

Evans v. *Morley*.—Rule discharged.

Dusenbury v. *Palmeter*.—Rule to enter verdict for plaintiff absolute.

Patton v. *Cameron*.—Held, that under Stat. 24 Vic., cap. 53, plaintiff in ejectment may lay his venue either in the County of the City of Toronto or the United Counties of York and Peel. Rule nisi discharged.

Powell v. *Heron et al.*—New trial. Costs to abide the event.

Present: Robinson, C. J.; Burns, J.

March 8, 1862.

Corporation of Lambton v. *Poussett*.—Judgment as to fees to which Clerk of Peace entitled.

Middlebrook v. *Kernahan*.—Rule absolute for nonsuit.

Young v. *Daniell*.—Judgment for defendant on demurrer to declaration.

Moore v. *Sullivan*.—Judgment for plaintiff on demurrer.

Cotton v. *McCulley*.—Rule discharged.

Keenahan v. *Preston*.—Rule discharged without costs.

Agnew v. *Stewart*.—Judgment for defendant on demurrer.

Brown v. *Livingston et al.*—Judgment for defendants on demurrer.

Irvine v. *Sager*.—Rule absolute for new trial without costs. Held, under the circumstances, that a boundary question *may* be tried in ejectment.

Sexton v. *Paxton*.—Ejectment—rule absolute for new trial without costs.

Boules v. *Taughuly*.—Ejectment—rule absolute for new trial with costs.

Teer v. *Smith*.—Judgment for defendant.

Smith v. *Teer*.—Judgment for plaintiff.

Steen v. *Steen*.—Verdict for plaintiff to be reduced to £8 8s. 6d.

The Queen v. *Plunkett*.—Defendant improperly convicted.

In the matter of the Chief Superintendent of Schools and McLean.—Judgment reversed, without costs.

Shaw v. *Shaw*.—Appeal from County Court of Frontenac, Lennox and Addington. Judgment of Court below reversed.

Crawford v. *Fraser*.—Rule discharged.

Armour v. *Jeffrey*.—Plaintiff's rule for a new trial discharged—defendant's rule for nonsuit absolute.

Gildersleeve v. *O'Reilly*.—Verdict reduced by striking off excess of interest beyond six per cent.

Hartman v. *Snider*.—Defendant to secure verdict and costs to satisfaction of plaintiff's attorney or master within a month, and consent to evidence of plaintiff's witnesses being read if any absent, and pay of costs of this application within a month, then rule absolute, else discharged.

Wilson v. *McNab*.—Rule absolute for nonsuit.

Ruttan v. *Beamish*.—Rule absolute on payment of costs.

Clark v. *Hatch*.—Rule absolute without costs.

McKenzie v. *Scott*.—Rule absolute. Rule not to be issued till 10th April.

COMMON PLEAS.

Present: Draper, C. J.; Richards, J.; Hagarty, J.

3rd February, 1862.

Reed v. *Inglis*.—Held that 1st and 2nd pleas good—last plea bad. Leave to amend on terms.

Kent v. *Mercer*.—Judgment for plaintiff on special case.

Hamilton v. *Holcomb*.—Judgment for defendant as to third plea, and for plaintiff on demurrer to replication and other pleadings.

Ross v. *Massenburgh*.—New trial without costs.

Ryland v. *King*.—Rule absolute to enter judgment *non obstante*.

Present: Draper, C. J.; Richards, J.; Hagarty, J.

March 3, 1862.

Ward v. *Northumberland and Durham*.—Rule absolute to enter non-suit.

Farr v. *Robins*.—Rule absolute to enter non-suit.

Thayer v. *Street*.—Defendant to pay $1000 and costs within two weeks, in which case rule absolute. If this not done rule discharged.

Comstock v. *Tyrrell*.—Rule discharged.

Whiting v. *Kernahan*.—Rule discharged.

Brown v. *Drury*.—Rule absolute, without costs.

Barber v. *Daniel*.—Judgment for demurrer, with leave to apply within a fortnight to amend.

Scobell v. *Henson*.—A party not allowed to set up his own iniquity to avoid his deed. Judgment for plaintiff on demurrer.

Proudfoot v. *Bush*.—Rule discharged with costs.

Lawrason v. *Glass*.—Appeal allowed.

Stephens v. *Scott*.—Appeal dismissed with costs.

Preston v. *Johnston*.—Appeal dismissed with costs.

Clark et al. v. *McKellar*—Rule absolute for new trial without costs.

Hawley v. *Miller*.—Rule discharged.

Buchanan v. *The Corporation of the Town of Galt*.—Rule absolute for new trial without costs.

Barry v. *Halliday*.—Plaintiff non-suited. No judgment therefore on demurrer set down by him.

Jaggard v. *McInnes*.—Judgment for plaintiff on demurrer.

Low v. *Owen*.—Appeal allowed. New trial without costs.

Stephenson v. *Culbertson*.—Rule absolute to enter verdict for plaintiff.

Parker v. *Stevens*.—Rule absolute.

Curtis v. *The G. T. R. Co.*—Rule discharged.

Colby et al. v. *Smith.*—Rule absolute for new trial, with costs to abide the event.

Fortune v. *Boomer.*—New trial on payment of costs.

Fisken v. *McMillan.*—Rule discharged.

Burnham v. *The Town of Peterboro'.*—Appeal allowed—judgment for defendants on demurrer. Held, that an attorney, being a member of a Municipal corporation, cannot recover for services performed by him as an attorney for such corporation.

Present: Draper, C. J.; Richards, J.; Hagarty, J.

March 8, 1862.

The Queen v. *Bryant.*—Conviction affirmed—Hagarty, J., dissentiente.

Boulton v. *McKay.*—If plaintiff consents to reduce verdict to $466 02, rule discharged, otherwise rule absolute on payment of costs. Plaintiff at once consented to reduce verdict.

Brown v. *Beaty.*—Judgment for plaintiff on demurrer to first plea and for defendant on demurrer to second plea. Leave to defendant to apply to amend, leave to plaintiff to withdraw demurrer to last plea.

Sargeant v. *The City of Toronto.*—Judgment for plaintiff on special case.

Niagara District Fire Insurance Company v. *Lewis.*—Appeal allowed, new trial without costs in court below.

Osser v. *Provincial Insurance Company.*—Rule discharged.

Corporation of Essex v. *Park.*—Rule refused.

Dollery v. *Somerville.*—Writ of prohibition refused.

McInnes v. *Benedict.*—Appeal from decision of Judge of County Court of Elgin allowed. New trial ordered without any direction as to costs.

Toland v. *Adams.*—Appeal from County Court of Frontenac, Lennox and Addington dismissed with costs.

Hunter v. *Foot.*—Appeal from County Court of Middlesex. Judgment of Court below reversed, with leave to plaintiff to take issue on plea on payment of costs, otherwise judgmer to be entered for the defendant on the demurrer.

Johnson et al. v. *Parke et al.*—Rule discharged on plaintiffs reducing damages to nominal amount—otherwise rule absolute for new trial.

McMillan v. *McMillan.*—Rule absolute for new trial without costs.

Baskerville v. *Doan.*—Rule absolute for new trial on payment of costs.

Land v. *Savage.* — Rule discharged, but leave to defendant, upon payment of costs, to withdraw appearance and let plaintiff take judgment by default. Held, that an action of ejectment is not a fit action to try questions of boundary where plaintiff's title to the land described in the writ is admitted.

Lund v. *Nesbitt.*—Similar case—similar judgment.

UPPER CANADA LAW SOCIETY.

Trinity Term, 1861.

EXAMINATION FOR ADMISSION.

WILLIAMS ON REAL PROPERTY,

1. How are deeds divided?
2. Distinguish between a "use" and a "trust."
3. What changes have been effected by statute in the mode of conveying or assuring an estate?
4. Wherein does the law of Canada as to dower differ from that of England?
5. Explain the object and effect of the different covenants in an ordinary conveyance of an estate in fee simple.

STORY'S EQUITY JURISPRUDENCE.

1. What is meant by "accident" as one of the heads of equitable relief?
2. What is "auxiliary" equity?
3. When does equity relieve against the breach of a condition? and give instances.
4. How does our registry law affect the principle of "tacking?"
5. What relief does equity afford to sureties?

BLACKSTONE'S COMMENTARIES.

1. What private relations will justify a battery in defence of another?
2. What is the presumption, as regards the age, at which persons are criminally responsible for their acts?
3. In what light does the law of England regard Marriage?

SMITH'S MERCANTILE LAW.

1. Is a verbal acceptance of a bill of exchange binding on the acceptor? Does this depend upon common law or statute?
2. What are the rights of the debtor and creditor, respectively, with regard to the appropriation of payments made by the debtor?
3. To what extent is an auctioneer an agent of the purchaser, to bind him, where the Statute of Frauds requires a signed memorandum? Does this depend upon who is suing on the contract?
4. What is the effect upon a lien, of the debt for which it is held being barred by the Statute of Limitations?

STATUTES, PLEADINGS AND PRACTICE.

1. What was the effect of the registration of a judgment, and how has this been changed by a recent statute?
2. What are the different modes in equity of preferring a case and setting up a defence respectively?
3. In what cases is a guardian *ad litem* necessary, and how appointed?
4. When should a married woman answer separately from her husband, and what is the practice in this respect?
5. Within what time must a new trial be moved for in criminal cases?
6. What steps must be taken to enforce an award,—1st. Where a verdict is taken subject to an award; 2nd. Where no verdict is taken, but the submission is made a rule of court?
7. In what cases will judgment be arrested, or judgment *non obstante veredicto* be given?
8. What is the effect upon the plaintiff's costs of suing th several parties to a bill or note in distinct actions?
9. If a plaintiff, in an action of trespass or case, recover less than $8 in the Superior Court, what certificates are necessary to entitle him to full costs?

EXAMINATION FOR CALL.

WILLIAMS ON REAL PROPERTY.

1. What estate has a tenant for life?
2. How are springing or shifting uses created?
3. What acts of the vender will destroy his lien for the unpaid purchase money?
4. What was enacted by the statute *Quia Emptores?*
5. What is a tenant in special tail?

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between "legal" and "equitable" assets.
2. In what instances will equity decree specific performance in cases of chattels?

3. What is "apportionment" and "contribution?" and give instances.

4. When will an agreement to enter into a partnership be specifically performed? and when not?

5. What is "equitable set off?"

BYLES ON BILLS.

1. What is a qualified acceptance, and how may it be evidenced?
2. When is a renewal bill a satisfaction of the original bill?
3. When does the taking of a bill operate as a waiver of a lien?
4. What is presumptive evidence of payment of a bill or note?

TAYLOR ON EVIDENCE.

1. Give instances of conclusive presumptions.

2. What are *res gestæ*, and how do they effect the admissibility of evidence?

3. How far can a party impeach his own witness?

4. Explain the principles by which the evidence of "experts" is regulated.

STEPHENS ON PLEADING.

1. In what cases, in pleading a conveyance, should such conveyance be alleged to be in writing?

2. What is a new assignment, and what alteration has been made by the Common Law Procedure Act in new assigning, where several pleas are pleaded to the declaration?

3. Is a plaintiff entitled to judgment *non obstante veredicto* in every case in which the issue found for the defendant is no answer to the declaration; if not, in what cases is he entitled to such judgment, and what, if any, is his remedy in cases where such issue being found for the defendant he is not entitled to such judgment?

ADDISON ON CONTRACTS.

1. What is a sufficient consideration for a promise? Must it of necessity be an advantage to the person promising?

2. Is an infant liable on a bill of excha .ge given for necessaries? Give your reasons.

3. Is their any, and if so, what difference between the right of a principal to adopt a *contract* made by his agent, and an *act* ex gr. a demand to found an action of trover?

SMITH'S MERCANTILE LAW.

1. Can there be, and if so under what circumstances, a total loss of a vessel or goods while they retain their original form?

2. How will a lien be effected by the fact that the person upon whose goods such lien is claimed has a set off to an amount equal to the debt for which such lien is held? Give your reasons.

3. Is the right to bind the firm by negotiable instruments an incident of every partnership? if not, what is the limitation?

STATUTES, PLEADING AND PRACTICE.

1. What are the statutory limitations as to suits in equity?

2. Mention the different statutory enactments in relation to the rights of mortgagee and mortgagor, in respect of the mortgaged estate.

3. When should a demurrer, and not an answer be filed?

4. What is the doctrine of "representation" in equity pleading?

5. What is "publication," and the practice relating thereto?

6. In what cases can a reference to arbitration be made a rule of court?

7. In what cases will replevin lie in this Province; and in what cases is a judge's order necessary prior to issuing the writ?

8. Under what circumstances can the master of a female servant still maintain an action for the seduction of such servant?

9. What is the statutory rule with regard to speeches of counsel at *nisi prius*?

10. What is the effect of withdrawing a juror at the trial?

SELECTIONS.

THE MASON AND SLIDELL CASE.

From "The Jurist."

The answer of the Government of the United States of America to the demand of the British Government in the affair of The Trent mail packet has arrived, and proves of such a character as effectually to remove all causes of dispute between the two nations on that matter. In our recent article on this subject we expressed our conviction that such would be the result, if law and reason, not interest and passion, were listened to; and we are happy to find that our opinion has received such effectual confirmation.

But although the affair of The Trent is at an end, the important questions of international law involved in it are not; and indeed, from the ground taken by the American Government, it is extremely probable that they, or at least some of them, will present themselves on future occasions, and perhaps in disagreeable and dangerous forms. For this reason we now propose to examine the case of The Trent as it stands on the facts as admitted on both sides.

The published correspondence on this subject is too long for insertion in *The Jurist*. It consists chiefly of the following letters:—

1. A letter from the American Minister of State at Washington to the American Minister at London incidentally referring to the subject.

2. A letter from Earl Russell to Lord Lyons, the English Ambassador at Washington, containing the demand of satisfaction for the alleged aggression.

3 (And principally). A very long letter from the American Minister of State at Washington to Lord Lyons, stating the American view of the question, and giving the satisfaction desired.

4. A letter from Lord Lyons acknowledging the receipt of the preceding, &c.

5. A letter from the Prime Minister of France to the French Consul at Washington, directing him to move the American Government to accede to the demands of England.

6. A letter from the American Minister of State at Washington to the French Consul, informing him that before the receipt of his communication the matter had been arranged with the British Government.

The communication of the British Government was in substance:—"You, the Government of the United States, have offered an affront to the British flag, and committed a violation of international law, in this,—one of your frigates, The San Jacinto boarded our mail steamer Trent, when proceeding on a lawful and innocent voyage from the Havanna to England, and took from her by force (a constructive force, however, the Trent not offering, and being unable to offer, any resistance) four persons who were her passengers; and this act was aggravated by the manner of its performance—for, in order to induce The Trent to bring to, a round shot and a shell were discharged across her bows. We, therefore, demand the liberation of those four persons, in order that they may again be placed under our protection, and a suitable apology for the aggression."

The American answer is:—"It is true, we boarded your ship, and took from her, in the manner described, the four persons mentioned; but we did so for the following reasons —We were at the time attempting to repress an insurrection raised against our supreme authority by certain of our States which profess themselves independent, in which contest Great Britain had declared herself neutral. The four persons in question are citizens of the United States, and when they embarked on board The Trent one of them was proceeding to England in the affected character of a minister plenipotentiary to the British Court from the insurrectionary States; and another of them was going to Paris on a similar mission to the French Court; the other two persons being their respective secretaries: of all which the owner and agent and officers of The Trent had knowledge before the embarkation. It was presumed that these persons bore pretended credentials and instructions, which papers are in the law known as despatches; and we are informed that these documents, having escaped the search of The Trent, were conveyed and delivered to the emissaries of the insurrection in England. Under these circumstances those four persons were contraband of war, and The Trent, by carrying them, became liable to arrest and capture as a neutral vessel carrying contraband of war for the use of one of the belligerent parties." "With respect to the manner of proceeding, the American Government assert that the shot was fired intentionally, in a direction so obviously divergent from the course of The Trent that it should be regarded as a blank shot and a mere signal; and that when the shell was fired The Trent seemed to be moving under a full head of steam, as with a purpose to pass the frigate. For the above reasons the American Government say, that although they did not order the captain of the frigate to act as he did, still The Trent was a wrong-doer, and the captain of their frigate would have been justified in capturing and bringing her into port, to have the question decided by a competent tribunal; but they consider that he was not justified in taking persons out of her; and therefore deeming the act of their officer illegal in that respect, they consent to deliver up the prisoners to the British Government, and make the required apology."

The American Minister, in order to make out his view of the case, lays down five distinct and formal propositions. One of these—namely, the third—"Did Captain Wilkes" (*i. e.* the commander of The San Jacinto) "exercise his right of search in a lawful and proper manner?"—we do not propose to notice, as it involves questions of *fact* which cannot be looked on as admitted—viz. the mode in which the gun and shell were fired, and also the rate of speed at which The Trent was approaching the frigate. The other four propositions are as follows:—

1. Were the persons named, and their supposed despatches contraband of war?

2. Might Captain Wilkes lawfully stop and search The Trent for these contraband persons and despatches?

3. Having found the contraband persons on board, and in presumed possession of the contraband despatches, had he a right to capture the persons?

4. Did he exercise that right of capture in the manner allowed and recognised by the law of nations?

With respect to the first of these—"Were the persons named and their supposed despatches contraband of war?"—a question which the American Minister resolves in the affirmative—it may be doubted whether the expression "contraband of war" is here used with technical accuracy—whether that expression is strictly speaking, applicable to "persons," and not altogether confined to "things." But the context clearly shews the sense in which the word is used, namely, that The Trent was carrying a subject-matter—persons or things—which by the law of nations she was not allowed to carry. He says, "Persons as well as property may become contraband, since the word means, broadly, 'contrary to proclamation,' 'prohibited,' 'illegal,' 'unlawful.' All writers and judges pronounce naval or military persons in the service of the enemy contraband."

The latter position here laid down is fully borne out by authority. (See *The Hendrik and Alida*, Marr. Adm. Dec. 96; *The Friendship*, 6 Rob. Adm. 420; &c.) There is also some authority for the position that this rule is not confined to *military* persons, but may, in certain cases, extend to persons in the *civil* service. In *The Orozembo* (6 Rob. Adm. 434), Lord Stowell said, "In this instance the military persons are three, and there are besides two other persons, who were going to be employed in civil capacities in the government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that question has been agitated; but it appears to me, *on principle*, to be but reasonable, that whenever it is of sufficient importance to the enemy that such persons should be sent out on public service, at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations." It is certain that a belligerent party may intercept the ambassador of his enemy proceeding to a neutral power (Vattell, book 4, c. 7, s. 85; *The Caroline*, 6 Rob. Adm. 468); and if this holds in the case of a real ambassador, may it not also in that of a pseudo one?—the principle of all these cases being as we take it, that the carrying such persons or things is assisting one of the belligerent parties to the prejudice of the other, and consequently converting the neutral into a belligerent. (See the judgment of Lord Stowell in *The Atalanta* 6 Rob. Adm. 459, 460). The presence of an ambassador in a country may, under particular circumstances, be productive of the most important results, and prove the greatest possible good or evil to other countries; and in this very case the American Secretary of State, in the first letter in the correspondence in question, states as his conviction—"The life of this insurrection is sustained by its hopes of recognition in Great Britain and France. It would perish in ninety days if those hopes should cease."

And here it is essential to observe, once for all, that questions of international law are not determined by any written code. Like the common law of England, the immense bulk of the law of nations is a "lex non scripta," in which men must be guided by principles, and the reason of things, not by a determinate number of words set down by a legislator. The expression, therefore, which we so often hear, that some particular act does or does not come within the "*letter* of the law of nations," is in almost all cases improper, and not unfrequently arises from a total ignorance of the nature of that law in the persons by whom it is used.

It has, however, been urged that the rules of international law relative to the conveyance of contraband of war by neutral ships do not hold where the ship is conveying it from one neutral country to another. This view is expressly put forward by the French Minister in his letter already referred to, and has been insisted on by many persons in this country. Admitting at once that the conveyance of contraband of war under such circumstances is primâ facie an innocent act, the proposition must, we think, be guarded with the qualification that the transit is a bonâ fide one, and not in fraudem legis. Suppose countries A. and B. are at war, and countries C., D. and E. neutral. Is a vessel belonging to C. justified in *knowingly* carrying contraband of war, which she has received from an agent of A., from D. to E., and there delivering it to an agent of A. to be immediately shipped by him to his own country? Or to take a closer example, suppose several of the northern provinces of France were to declare themselves independent of the Imperial Government, and proceed to assert their independence by arms, would an English ship be justified in carrying contraband of war from London to the Channel Islands, to be there shipped to the northern coast of France? We think not; and if we are right in this, an important

question in The Trent case is—supposing the four persons seized by The San Jacinto were contraband of war, were the captain and owners of The Trent aware of the destination and objects of those persons when they became passengers in The Trent?

The case of *The Hendrik and Alida* (Marr. Adm. Dec. 96) is much relied on in support of the unqualified right of neutrals, as above stated; but it appears to us rather to negative it, as there the scienter was unproved, if not disproved. That case arose during the war of independence between England and the United States of America. A Dutch ship, bound from Holland to St. Eustatia, having on board gunpowder, &c., and military officers in the service of Congress, was seized by an English cruizer, and brought to England, with the view of condemning her as a prize. The judge of the Admiralty Court (Sir G. Hay), in delivering judgment says, "It would be too high for such a court of justice as this to assert that the Dutch may not carry on, in their own ships, to their own colonies and settlements, everything they please, whether arms, or ammunition, or other species of merchandise, provided they do it with the permission of their own law. . . . . . *The gunpowder cannot be proved to be going directly for the use of the rebels.* . . . . The master could not give much account of the owners of the ship and cargo, as he took the command but eight days before she sailed. . . . . But the condition of the ship, being armed, and having officers going to the provincial army, is a great point against the claimants for costs. . . . . *If it was clear that she was going to New England, touching at St. Eustatia, that would never do.* All ships trading thither are confiscable, and the act of Parliament is notice to all the world, and so was the former act in the case of naval stores. The declaration of Rousman, the former master and part owner, as to this illicit destination, is well proved; and the strong suspicion arising from that, and the armed state of the ship, and the character of the passengers, are all circumstances that concur fully to justify the seizure. . . . . I cannot direct any part of this cargo to be sold. I restore, therefore, the ship and cargo, and decree just cause of seizure, and expenses in favour of the captor."

In our previous notices on the affair of The Trent we considered the first four propositions in the despatch of the American Minister, with the intention of considering the remaining one on some future occasion. Since those notices, however, a most important document has appeared, namely, a despatch from the British Minister for Foreign Affairs to the British Ambassador at Washington, acknowledging the satisfaction given by the American Government in that affair, but strongly combatting several of the principles of international laid down by the American Minister. The contents of this document are of such importance, that even at the risk of repetition we are compelled to return to some of the ground already gone over by us.

In the fifth and last proposition of the American Minister, where he states his reasons for giving up the four persons taken out of The Trent, the British Minister apparently concurs, perhaps rather hastily, as it appears to amount to an admission likely to be productive of inconvenience hereafter. Moreover, the cause of complaint founded on the *manner* in which The Trent was compelled to bring to, and submit to be searched, which is the subject of the third proposition of the American Minister, is passed over by the British Minister sub silentio—either from a conviction that after the explanation given by the American Minister the charge was not borne out by the facts, or that, even deeming that explanation unsatisfactory, the charge was too trivial to be worth persisting in.

So with respect to the second question raised by the American Minister—whether the captain of the San Jacinto had a right to search The Trent for contraband of war—the British Minister declines to indorse the somewhat popular but absurd position, that a British ship, as such, is exempt from the right of search for contraband of war to which, by the well-known law of nations, every merchant vessel is subject; or the almost equally absurd position contended for by some modern jurists, and on which we commented in our last, that mail packets are exempt from such a search and privileged to violate the law of nations at pleasure—a privilege which would convert those vessels into a legalised international nuisance. He contents himself with claiming for them "peculiar favour and protection from all Governments in whose service they are engaged;" and adds, "To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly Governments. To this we fully subscribe, but take leave to suggest that, in return for this peculiar favour and protection, those vessels ought to exhibit an additional [illegible]nt of caution and circumspection, not only in carefully eschewing all acts in violation of international law, but in exhibiting an inclination towards either belligerent party to the prejudice of his adversary. Whether this degree of caution and circumspection was displayed by the authorities of The Trent on the present occasion is a matter which the facts disclosed render very questionable.

In our last we adverted to a difficulty of a singular character said to be raised by some persons, namely, that as England has not recognized the independence of the Confederate States, the rules of international law cannot be applied to the present or similar cases which may arise during the present conflict. This matter is thus summarily disposed of by the British Minister:—"This is, in fact, the nature of the question which has been, but happily is no longer, at issue. It concerned the respective rights of belligerents and of neutrals. We must, therefore, discard entirely from our minds the allegation that the captured persons were rebels, and we must consider them only as enemies of the United States at war with its Government, for that is the ground on which Mr. Seward ultimately places the discussion. It is the only ground upon which foreign Governments can treat it."

But on the chief question raised by the despatch of the American Minister, and on which, indeed, the rest virtually depend—"Were the persons named, and their supposed despatches, contraband of war?"—the British Minister declares that Her Majesty's Government entirely differ from him. This is certainly the strong part of the British Minister's case, and he puts his position very forcibly and fairly. He resolutely contends for the general right of a neutral nation to keep on terms of amity with both the contending parties, and carry on its communications and relations with each without molestation from the other. He cites, in support of this, the observations of Lord Stowell in *The Caroline* (6 Rob. Adm. 461), and Wheaton's Elements, part 4, c. 2, s. 22; and then proceeds:—

"That these principles must necessarily extend to every kind of diplomatic communication between Government and Government, whether by sending or receiving ambassadors or commissioners personally, or by sending or receiving despatches from or to such ambassadors or commissioners, or from or to the respective Governments, is too plain to need argument; and it seems no less clear that such communications must be as legitimate and innocent in their first commencement as afterwards, and that the rule cannot be restricted to the case in which diplomatic relations are already formally established by the residence of an accredited minister of the belligerent power in the neutral country. It is the neutrality of the one party to the communications, and not either the mode of the communication or the time when it first takes place, which furnishes the test of the true an-

plication of the principle. The only distinction arising out of the peculiar circumstances of the civil war, and of the non-recognition of the independence of the *de facto* government of *one* of the belligerents, either by the other belligerent power, or by the neutral power, is this—that 'for the purpose of avoiding the difficulties which *might* arise from a formal and positive solution of these questions, diplomatic agents are frequently substituted, who are clothed with the powers and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honours).' Wheaton's Elements, part 3, c. 1, s. 5.) Upon this footing Messrs. Mason and Slidell, who are expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the courts of St. James's and of Paris, must have been sent, and would have been, if at all, received; and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as an hostile or unfriendly act towards the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities, beyond those accorded to diplomatic agents not officially recognised.

"It appears to her Majesty's Government to be a necessary and certain deduction from these principles that the conveyance of public agents of this character from Ha'annah to St. Thomas's, on their way to Great Britain and France, and of their credentials or despatches (if any), on board The Trent, was not and could not be a violation of the duties of neutrality on the part of that vessel; and both for that reason, and because the destination of these persons and of their despatches was bonâ fide neutral, it is, in the judgment of her Majesty's Government, clear and certain that they were not contraband."

The British Minister then adverts to the authorities which are cited by the American Minister to shew that a belligerent may stop the ambassador of his adversary on his passage—namely, Vattel, book 4, c. 7, s. 85, and *The Caroline* (6 Rob. Adm. 468); and that civil functionaries, if sent out for a purpose intimately connected with hostile operations, may fall under the same rule with persons whose employment is directly military. (*The Orozembo*, 6 Rob. Adm. 434.) Those authorities, he contends, have been misunderstood, and must not be taken as referring to the conveyance of such parties in a neutral vessel bonâ fide proceeding to the neutral country to which they are sent. Without saying that this reasoning is erroneous, or denying that the law of nations is as here stated, we confess we are not quite satisfied on the subject. It is true, that in the cases cited the ship was not a neutral vessel proceeding with the alleged contraband to a neutral port; but the question remains, whether the *principle* of those decisions does not cover such a case. The principle we take to be, that the neutral vessel that acts in any of the ways described has *interfered* in the contest between the belligerents, has committed an act of *hostility* against one of them, and consequently has no cause to complain if she finds herself treated as a belligerent. Now, is this applicable to the case before us? Two nations are on terms of amity. A portion of one revolts against its own Government, declares its independence, and resorts to arms to enforce it. Pending the contest a ship of the other nation conveys to its own shores an alleged ambassador of the revolting portion, whose instructions are to endeavour to induce that State to recognise their independence—a recognition inconsistent with the amity existing between the two Governments, and which would most probably be followed by the rupture of diplomatic relations between them, if not by a declaration of war. The case is so unusual that it is not easy to [illegible] any express authority. But suppose (*De omen avertant*) that Ireland or Scotland was to declare itself independent of the British Government, and send in a French vessel a pretended ambassador to France, then at peace with England, to induce that country to recognise its independence, would the English cruisers be bound by the law of nations to allow that vessel, with such a freight, to cross the Channel? We doubt it.

The British Minister puts a case which he evidently deems an argumentum ad absurdum—"In the present war, according to Mr. Seward's doctrine, any packet ship carrying a confederate agent from Dover to Calais, or from Calais to Dover, might be captured and carried to New York." We would ask, suppose, instead of a confederate agent, the packet ship carried a body of confederate troops, with the knowledge and intent that on her arriving at Dover they should be transhipped to another vessel and forwarded to America without delay, would she *not* be liable to such capture? If she would, the question then comes round to the former one, does the carrying pseudo ambassadors, like those which were carried in The Trent, fall under the same rule as the carrying the troops, &c., of a belligerent?

Want of space compels us to abandon, for the present at least, our intention of discussing the fifth proposition of the American Minister.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office

All other Communications are as hitherto to be "The Editors of the Law Journal, Toronto."

SPLITTING THE PLAINTIFF'S DEMAND.

It has been suggested to us that a notice of some of the leading English cases on this point would be acceptable to our readers. The English Act 9 & 10 Vic., cap. 95, sec. 95, enacts, "*that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the said courts.*" The 59th section of the Division Courts Act is almost identical in terms. It provides that "*A cause of action shall not be divided into two or more suits, for the purpose of bringing the same within the jurisdiction of a Division Court.*"

The meaning of the term "cause of action," in the English act, was the subject of much discussion, and the principles which govern the construction are now pretty plainly laid down.

The old cases on the subject of splitting a demand have little weight in deciding the question on the enactment referred to, since the decision in *Grimbley* v. *Aykroid*, to which we shall presently advert at length. They would indeed go the length of establishing the position, that each item in an account ordered at different times is a distinct cause of action; but, as observed by a careful text writer, the practitioner must be careful not to apply the decision in *Grimbley* v. *Aykroid* too largely, as it is strictly applicable only to the case of a tradesman's accounts, and perhaps other running accounts of a similar nature. We shall therefore briefly direct attention to a few of the earlier decisions.

The 36 Geo. III., cap. 25 (Irish), provided that no cause

should be "split or divided" into two or more actions, to bring a case within the jurisdiction of the Civil Bill Courts. Under this act it was held, in *Hamblin* v. *Hamblin*, before Chief Justice Bush (Nap. C. B. 38), upon appeal, that when two gales of rent were due, which, taken together, exceeded the jurisdiction in amount, but taken separately were within it, that the plaintiff might split the two gales of rent and bring a separate action for each. And in *McCarter* v. *McConnell* (Nap. C. B. 39), it was decided, upon appeal, by Baron McClelland, that even where two actions were brought at the same sessions—one for one half year's rent, and the other for another half, due out of the same holding, both past due—it was not a splitting within the meaning of the act. Again, before Baron Pennefather (Nap. C. B. 38), it was held that when A. lent B. a sum of money, and about four months afterwards another sum of money in another county, A. might sue for each sum separately after both were due. In *Cairns* v. *Whelan* (1 Hud. & B. 552), it was held to be a splitting of the cause of action where a coal-meter, who claimed a fee of 6d. per ton for measuring each cargo of coals imported into the port of Dublin, made a rest whenever he had earned 30s., and demanded payment of that sum, and then sued for it in the Court of Conscience.

In the first three cases referred to, it will be seen that the division was in effect the result of mutual stipulation, and not an *ex parte* and arbitrary division of the plaintiff's claim; while in *Cairns* v. *Whelan* the cause of action was founded on the measurement of the entire cargo, and a rate per ton was only a mode of calculating the remuneration. Parties may also possibly by their own conduct unite various causes of action, so that it can be treated only as one cause of action. Thus, if "an account" be stated between them; though it is to be observed that although there is a new consideration arising from the accounting, the original one remained, and the old is not necessarily merged in the new.

The English decisions.—In *Kitchen* v. *Campbell* (3 In. Co. 308), it was said by DeGrey, C. J.: "What is meant by the same cause of action, is where the same evidence will support both the actions." In *Leddon* v. *Sutor* (6 T. R. 108), the plaintiff recovered in a second suit for a cause of action which might have been included in the first; and it was decided that the true enquiry was, "whether the same cause of action had been litigated and considered in the former action;" and the same principle was admitted in *Lord Bagot* v. *Williams* (3 B. & C. 235). The case of *R.* v. *Sheriff of Herefordshire* (1 B. & A. 672) is an early leading case on the point, but was declared in *Grimbley* v. *Aykroid* to be at variance with the other authorities.

The subject has been fully considered in *Ex parte Aykroid in re Grimbley* v. *Aykroid* (1 Ex. R. 479; 1 Cox & Mac., 77), and the meaning of the phrase "cause of action" defined. It is a leading case on the 95th sec. of the 9 & 10 Vic, cap. 95.

(*To be continued.*)

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

Dear Sirs—A. has a judgment against B., on which a return of "nulla bona" has been made in the cause. Some time afterwards B. removes to an adjoining Division in the same County. A. finds out that the Bailiff of another Division has been collecting from B. by virtue of executions. So A. orders me to forward a "transcript and certificate" to the Clerk of said Division (although not the Division where defendant B. resides) in order that an execution may be placed in the hands of the Bailiff, who *understands* B.'s affairs, and can make the money for A. Accordingly I sent a "transcript and certificate" to the Clerk of the Division where plaintiff desired it to be sent. The Clerk returned the said transcript to me, saying that "he could take no action upon it, and that every Bailiff must do the business of their own Divisions." It would appear, according to the 79th section of the Division Courts Act, that a Bailiff is not compelled to serve processes out of his respective Division. It is my impression that a plaintiff is allowed to transfer his judgment to *any* Division he chooses, and it is the duty of a Clerk, on receiving a "transcript and certificate" from any other Division, to enter the same in his book and, if required, issue an execution thereon, and leave the Bailiff to make whatever return he chooses in accordance with his duty. What is your opinion?

Yours, &c.,

Clerk 6th Division Court, Co. Norfolk.

Port Rowan, Feb. 17, 1862.

[Our correspondent's view is the correct one. A Clerk to whom a transcript of judgment is sent has no discretion, but must, on receipt, enter it as provided for by the Act and proceed in the ordinary way to issue execution to the Bailiff if required.

The officer who has a mere ministerial duty to perform, as in the instance mentioned, would best consult his own interests by following out the plain requirements of the law.—Eds. L. J.]

I am Clerk of a Division Court. A sues and gets judgment against B. on a note. I have an office some distance from my residence and keep a Clerk there to do business in my absence. B. the defendant comes to the office along with one H., a party who originally held the note against B., but who afterwards transferred it to A., from whom I received it for suit and in whose name the judgment is recorded; and as my Clerk was not there the defendant requested the wife of my Clerk to see what the amount of the judgment A. held against him, B., was, stating that H. and himself had agreed to settle the same. B. the defendant then paid over to my Clerk's wife the amount of the judgment and costs, which H. demanded and received. As he had no right to do so, what is the proper course for me to pursue. Can I take the ground that the Clerk's wife had no authority from me to transact the business, or would such a payment to her hold me liable, and if so, have I recourse against H. and what? E. R. K.

[In our opinion the judgment has not been duly satisfied and A. may sue out an execution. The payment to your

Clerk's wife cannot be considered a payment to the Clerk of the Court. If such a step be taken the question might come up on an application by B. to the Judge to set aside the execution and enter satisfaction.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen—Your opinion is respectfully requested in the next number of the *Law Journal* to the following queries, viz:—

1st. Has a Clerk of a Division Court the right to charge for a certificate given under the Seal of his Court of a return of Transcript of Judgment as to what has been done under said Transcript?

2nd. Has a Bailiff the right to charge his mileage more than once in travelling to serve a summons, viz: if he goes twice to serve said summons, fails each time to do so, but the third time succeeds in serving, is he (the Bailiff) entitled to charge mileage three times, viz: twice endeavouring to serve, and the third time for actual serving?

3rd. Has a Bailiff the right to charge mileage in endeavouring to levy under an execution, but in which levy he fails, and returns the execution to the Clerk, "no goods," or "nulla bona?"

4th. Has a Bailiff the right to charge for a schedule of property seized in execution, as in cases of attachment?

Yours respectfully, Scrutinium.

[We are in some doubt about the first question, and do not quite understand our correspondent's meaning. If the certificate is one required for use in the County Court it should of course be charged for—if not so required, we suppose no charge could be made, unless perhaps as for a search.

To the other questions we have no hesitation in answering that no such charges are allowable.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law.*

In re Higginbotham v. Moore.

Division court—Jurisdiction—Prohibition.

Plaintiff sued in the division court, stating his claim to be, for goods sold £26 14s., and four years' interest thereon, and for two promissory notes, £15 each, and interest, in all £73, and giving credit for cash payments of £46, abandoning the excess of the balance above £25. At the trial defendant objected to the jurisdiction, and judgment having been given against him, he afterwards obtained a new trial on affidavit of merits. In granting it the judge allowed the plaintiff to amend his claim, and the account then rendered claimed only the balance due on the notes, in all £49, gave credit for £23, and abandoned all but £25 of the balance. The defendant moved for a prohibition.

Held, that as amended the claim was clearly within the jurisdiction, and that if the amendment were improperly allowed, that would form no ground for prohibition.

(Q. B., M. T., 25 Vic.)

R. A. Harrison obtained a rule on the judge of the county court of the county of Wellington, being *ex officio* judge of the first division court of the county of Wellington, to show cause why a writ of prohibition should not issue to him against any further proceedings on the plaint between these parties.

Moore made affidavit that Higginbotham had sued him in the first division court of the county of Wellington for $100, which sum was the balance of an unsettled account, which exceeded in the whole $200, as the summons in the case shewed, the copy served being annexed to the affidavit: that he was advised by counsel that the case could not be entertained in the division court, on account of its being beyond the jurisdiction: that being so advised he did not attend the trial, but instructed counsel to attend and to object: that the objection was taken, but was overruled by the judge: that he afterwards applied for a new trial, on the ground, among others, that he did not expect the case would be tried; and that such an application was under consideration at the time of his making his affidavit: that no execution had yet issued, as he believed: that he had not paid the amount of the judgment, contending both against the jurisdiction of the court and against the demand; and that he did not owe the debt.

It was shewn in answer to the application for prohibition, that the plaintiff's claim, of which a copy was attached to the summons, was upon a running account, beginning on the 15th of April, 1855, and carried on to the 15th of September, 1857, for goods sold and delivered, amounting to £26 14s. Then four year's interest was added to that sum, and the defendant was in the same account charged with two promissory notes of £15 each, and interest, on one of which only a certain balance was due, the other due in full, making the debit side of the plaintiff's account in all £78 3s. 8d.

Credits were then given in the same account for various items of cash payments which with interest amounted in all to £46 15s., and reduced the plaintiff's demand to a balance of £26 8s. 8d.; and at the foot of his account it was noted that the plaintiff sued for £25, abandoning the excess, £1 8s. 8d. The plaintiff afterwards served an amended account, stating his demand to be £25, after abandoning an excess of £1 5s. 11d.

When the case came on it was defended by an agent of the defendant, only by objecting to the jurisdiction, without going into the merits, and the judge gave judgment in the plaintiff's favour for £25 and costs. A few days after, on the 30th of October, 1861, the defendant, Moore, moved for a new trial, upon an affidavit setting forth merits, giving an account of what he alleged to have been the dealings between them, asserting that he believed a small balance was really due to him, and giving as a reason for his not being able to defend himself at the trial, that he had been advised by counsel that the case was one which could not be entertained in the division court.

The plaintiff answered this by an affidavit, going also into the merits, and supporting his claim.

The judge granted a new trial; and stating that the manner in which the plaintiff's account was made out had misled the defendant, he gave leave to the plaintiff to amend his claim, so that it might not appear to be beyond the jurisdiction.

This order was made before the six days for moving had expired, namely, on the 2nd of November, 1861. The amended account stated the demand upon the current account for goods sold, and upon the notes and interest, in separate columns.

	£	s.	d.
The account thus rendered made the plaintiff's account for goods sold, &c.	£20	15	1
Interest	2	8	0
	£23	3	1
And the demand upon the two notes, on one of which there had been payments	26	5	1
	£49	8	2
And it gave credits in all	23	2	3
Balance	£26	5	11
Abandoning	1	5	11
Only claimed	£25	0	0

M. C. Cameron shewed cause, and cited *Turner* v. *Berry*, 5 Ex. 858; *Wallbridge* v. *Brown*, 18 U. C. Q. B., 158; *McMurtry* v. *Munro*, 14 U. C. Q. B., 165.

R. A. Harrison, contra, cited Consol. Stats. U. C., ch. 19, secs. 55, 59, 69, 74.

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

The 55th section of the Division Courts Act, (Consol. Stats. U. C., ch. 19,) gives jurisdiction to division courts in all cases of "claims and demands of debt, account, or breach of contract, or covenant, or money demand, whether payable in money or otherwise, *where the amount or balance claimed does not exceed* one hundred dollars."

The 59th section provides that "a cause of action shall not be divided into two or more suits for the purpose of bringing the same within the jurisdiction of a division court; and no greater sum than one hundred dollars shall be recovered in any action for the balance of an unsettled account; nor shall any action for any

such balance be sustained where the unsettled account in the whole exceeds two hundred dollars."

The 69th section enacts that "a judgment of the court upon a suit brought for the balance of an account, shall be a full discharge of all demands in respect of the account of which suit was for the balance, and the entry of judgment shall be made accordingly."

The 74th section also was cited by Mr. Harrison, on the part of the defendant, but we do not see that it has any material bearing, as no evidence appears to have been given of any cause of action not contained in the claim as entered, either in its original form or as amended; and this application cannot require us to go into any objection of that kind.

The plaintiff's claim, as first delivered, in stating an account of which the debit side exceeded £73, stated a case not within the jurisdiction of the court, according to the 59th section, although the balance claimed was only £25: that is, if the whole account is to be taken as an account unsettled, notwithstanding there were among the items two notes which in themselves were liquidated demands. With the moneys due on those notes, the account was much beyond £50, the sum mentioned in that clause: without them the account would be below it.

Admitting that this first statement, made out as it was, shewed an unsettled account above £50, it is to be considered that it does not stand so now in the account, for the learned judge, when he granted a new trial, allowed the statement to be so amended, adhering still to the facts, as to free the case from any possible objection in regard to jurisdiction. If there was an irregularity in allowing that amendment, still we should not award a prohibition on that account. In *Jolly* v. *Baines*, (12 A. & E. 209,) the court held that a matter of irregularity in practice only is no ground for interfering by prohibition.

The claim, as it now stands in the statement, is free from the objection we have been considering, for the whole of the plaintiff's account, including the notes, shews a sum of £49 8s. 2d. only, not so much as £50; and as there has been a new trial granted at the instance of the defendant himself, we shall allow the case to go on upon a demand, which, as it now stands, shews a case within the jurisdiction, and without perverting the facts.

Rule discharged.

MEWBURN V. STREET.

Lottery—Information to forfeit land sold—Practice.

Where an information was filed by a common informer, under 12 Geo. II, ch 28, to forfeit lands illegally sold by defendant by lottery, the court, the plaintiff not objecting, allowed the owner of a portion of the lands, who was not in possession and had not been served with the information, to come in and defend.

Semble, however, that the interest of such owner could not have been affected by a judgment obtained against defendant.

(Q. B., M. T., 25 Vic.)

Cooper obtained a rule on the plaintiff to shew cause why Ira Spaulding, who was interested in the lands mentioned in the information filed in this cause, should not have leave to appear to and defend the suit, and why he should not have two weeks' time to plead to the information, with leave to plead double and demur, and to plead such pleas as were set forth and attached to the affidavits and papers filed.

The information was by the plaintiff, as a common informer, suing in his own person. It set forth, in substance, that lots six and seven in the fourth concession of Barton, were on the 15th of July, 1853, by defendant Street unlawfully exposed to sale and sold in the city of Hamilton by lottery, to certain persons unknown to the informant, contrary to the statute 12 Geo. II., ch. 28, against "excessive and deceitful gaming," whereby the said lands became forfeited, under the provisions of that statute, to such person as should sue for the same, &c.; and the plaintiff prayed that the said lands might for the cause aforesaid be and remain forfeited to him.

This rule was moved on an affidavit of J. W. Kerr, that he was on the 26th of October, 1861, served with a notice, as a party in possession of the lands in the information: that Ira Spaulding was at that time and still is residing in Maryland, in the United States of America, was the person entitled to the fee simple in the portions of the said lands in possession of the deponent, Kerr, as trustee of his, Kerr's, wife: that he was instructed to defend this action on behalf of Spaulding, as regarded the portion of the lands so owned by Spaulding, and that the time mentioned in the notice for pleading had expired: that he had applied for further time to plead, and it had been refused: that Spaulding was not served with a copy of the notice, and that the same was not directed to Kerr as his agent: that he believed Spaulding had a good defence on the merits, as respected that part of the land which was claimed by Spaulding, and which was in possession of deponent, Kerr.

The notice served was addressed to Kerr and twelve other persons It informed them of the information being filed, stating its substance, and gave notice that a rule to plead to the information within eight days from service thereof was on the 18th of October, 1861, served on defendant, Street, and that this notice was served on them respectively, to the intent that if they claimed any interest in the premises, or any part of them, they might plead to the information, or procure themselves to be made defendants in this action, or take such other proceedings as they might be advised.

Another affidavit was filed by the attorney of Spaulding, in support of the application that he might be allowed to plead and demur giving his grounds for demurring, and copies of the pleas which he desired to file.

Burton appeared for the plaintiff, but did not object to the application in case the court should think it proper to be granted.

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

There is nothing in the Common Law Procedure Act to found this application upon. New defendants may be added after pleas in abatement, upon their written assent, and by way of amendment, but the provision for that is inapplicable to the circumstances of this case.

We can find nothing in the law and practice respecting penal actions to countenance such a proceeding as is desired here, nor to shew it to be necessary. What is done in actions of ejectment is analogous, where a party having an interest to defend, either as landlord or otherwise, is enabled to prevent his being prejudiced by collusion between his tenant or other party in possession and the plaintiff in the suit. Of course the ejectment clauses have no direct application to such an action as the present.

The defendant Spaulding is in this case desirous of being made a defendant and being allowed to plead, and it is to be considered that the plaintiff does not object, but so far as he may he assents to it. On that ground we think this court may sanction what is assented to, and permit the defendant to plead and demur as he desires; but upon the condition that the demurrer shall be argued before trial of any of the issues in fact, unless indeed the same legal points, and only those, shall be brought up by the demurrer put in by Street, which is now before us, and shall have been determined on that demurrer.

I will add that I do not apprehend at present that Spaulding, or any other occupant, would be affected in any interest, legal or equitable, by a judgment of forfeiture obtained against Street, for I assume that they would be at liberty to contest the ground of forfeiture, unless indeed they hold under certain circumstances; but this need not now be considered, if we grant the order prayed, which we think by the assent given we may.

Rule absolute.

COMSTOCK ET AL. V. GALBRAITH.

Commission to take evidence—Change of day appointed.

It is no ground at the trial for excluding evidence taken under a commission, that the day first named for the examination was changed by the plaintiff and another appointed. Such an objection, if available at all, must be taken by motion before the trial.

This was an action for a small demand on the common counts, about $31, for medicines sent by the plaintiffs from New York to defendant in this country upon defendant's order.

At the trial, at London, before Robinson, C. J., to prove that the medicines were enclosed and sent from New York properly addressed to the defendant evidence was taken of a clerk of the plaintiffs, who was examined in New York under a commission.

It was objected before the evidence was read, that the plaintiffs' attorney had given defendant's attorney notice of a day for executing the commission, and that afterwards there was another day

appointed of which defendant had notice, but it was contended that the first day named could not be departed from by giving notice of another.

Relying on that objection, or for other reasons not shewn, there was no cross-examination, and the learned Chief Justice allowed the evidence to be read, on which the Jury gave a verdict for the plaintiffs.

M. C. Cameron moved for a new trial, on the law and evidence, and for the reception of improper evidence.

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

The questions are, first, what evidence, if any, appeared in the papers themselves to make out the objection; and secondly, is there any thing in it, and ought not such an objection to be made the ground of a motion before the trial, to exclude the evidence under the commission.

The defendant shews by the notices served upon him that the day appointed for taking the evidence in New York had been in fact twice changed, and the place where it was to be taken in New York had been changed once: that notice of these changes had been given in sufficient time to allow the defendant or his attorney to cross-examine, and it is not shewn why he did not attend; nor does it appear that the defendant, who seems to rely now on the mere fact of the day first named being departed from as a fatal irregularity, took any steps by application before the trial to exclude the evidence on account of such change.

We are of opinion that the mere fact of such a change in the appointment could not be rightly held to be a good ground at the trial for excluding the evidence.

Rule refused.

CHAMBERS.

Reported by Robt. A. Harrison, Esq., Barrister-at-Law.

In re the Judge of the County Court of the County of Elgin.

Execution on rule of Court directing the payment of costs, &c.—From what office issued.

Rule *nisi* for a mandamus was discharged with costs. The rule discharging the rule nisi with costs, was issued, and costs thereupon taxed in the principal office in Toronto. Afterwards the party entitled to the costs filed the rule in the office of a Deputy Clerk of the Crown, and issued a writ of *fi. fa.* goods to sheriff from that office.

Held, that the writ was irregularly issued from the office of the Deputy Clerk of the Crown, and should have been issued from the principal office in Toronto.

(Chambers, January 6, 1862.)

This was an application to make absolute a summons to set aside an execution which had been issued against the goods and chattels of one Allworth, under the following circumstances:—

A rule had been granted by the Court of Queen's Bench, on the application of counsel for Allworth, calling on the judge of the county court for the County of Elgin, to shew cause why a mandamus should not issue, commanding him to grant a summons to Allworth, and to proceed thereon according to the 289th and following sections of the C. L. P. Act of 1856.

The court, after hearing both parties, discharged the rule with costs. The rule, discharging the rule to shew cause, was issued and the costs were taxed at the principal office in Toronto, and the agent or attorney in Toronto, for the judge, sent up the rule and an allocatur of the taxation, shewing the amount of the costs to St. Thomas, the county town of the County of Elgin.

The attorney by whom it was received, acting for the judge, filed the rule with the allocatur for costs, and a præcipe for *fi. fa.* in the office of the Deputy Clerk of the Crown, at St. Thomas, and sued out, and placed in the sheriff's hands a *fi. fa.* against the goods of Allworth.

This proceeding was taken under the assumed authority of the 22nd Vic. (1859), cap. 33, sec. 12.

The objection taken to this execution was, that it could not issue from the office of the Deputy Clerk of the Crown because there were not, and had not been any proceedings taken there, but that the only office from which, under the circumstances shewn, an execution could have issued, is the principal office in Toronto; and it was stated that at the very time, or nearly so, that the writ of execution was sued out at St. Thomas, the costs taxed were actually paid to the agent in Toronto.

Richards, Q. C., for the summons. *English*, contra.

Draper, C. J.—The statute referred to for the purpose of enforcing payment of costs (among other things,) payable by a rule of court, enables the person entitled to receive payment, to issue writs of *fi. fa.* against the property of the person to pay, "*in the same manner, and subject to the same rules as nearly as may be as in the case of a judgment at law in a civil action.*"

It is in vain to look for English authority on this question because there no such offices as those of the Deputy Clerk of the Crown and Pleas are known. These offices are the creation of our own statutes.

The Court of Queen's Bench was erected by the statute of U. C., 34 Geo. III., cap. 2. It is plain enough that there was but one office of the court under that act, the 4th and 7th sections of the act illustrate this remark.

By the 37th Geo. III., cap. 4, sec. 1, it was enacted that the Clerk of the Crown and Pleas should have in every district, an office in which actions might be instituted, and the parties might plead to issue, and it was made his duty to furnish his deputies with blank writs, signed and sealed, to be issued as occasion should require.

In the following year, 38 Geo. III., cap. 6, sec. 8, so much of the preceding act, as relates to pleading to issue, was repealed, but the outer offices were permitted to issue writs of *ca. sa.*

Then, the 41st Geo. III., cap. 9, made all the outer offices such that all the original process might issue therefrom, and in which actions might be instituted, and all necessary proceedings had before final judgment.

Next came the 2nd Geo. IV., cap. 1, the 32nd section of which re-enacted the previous provisions, requiring the clerks of the crown to have an office in each district, the duties of which were to be discharged by deputy, in which actions in the court might be instituted, and all necessary proceedings had before final judgment, and a writ of *ca. sa.* issued after final judgment.

And so the law continued substantially unchanged in this respect until 8 Vic., cap. 36, when the deputies of the clerks of the crown were authorized to issue original and *testatum* writs of mesne and final proces, excepting writs against lands and tenements, and to tax costs and enter final judgment in all suits commenced within such district where a cognovit should have been executed, and also cases of *non pros.*, and where judgment should be final in the first instance, and to issue an original or *testatum* writ of *fi. fa.* or *ca. sa.*, according to the practice, but all alias and subsequent writs of final process, and all writs against lands were still to issue out of the principal office.

These provisions were further extended by 12 Vic., cap. 68, sec. 1, authorising the deputy clerks of the crown at the election of the party entitled to judgment, to tax costs and enter final judgment *in all cases* in which the venue should be laid, the proceedings carried on, and the original pleadings filed within such district, whether the judgment were upon verdict computation, cognovit, warrant of attorney or otherwise, and whether such cognovit was given in the first instance, or after other proceedings taken, and to issue all original or teste writs, or alias or pluries writs of *fi. fa.* or *ca. sa.*

Upon this footing the law stood until the passing of the C. L. P. Act (1856), which repealed all the foregoing provisions as to offices of deputy clerks of the crown. This act is cap. 22 of the Consolidated Statutes of U. C. By section 7, in transitory actions, the writ for the commencement thereof might issue from the office of the clerk of either of the superior courts. In local actions (sec. 8,) the writ must be sued out in the proper county, and all proceedings to final judgment in actions transitory or local, must be carried on in the office from which the first process issued. (See also secs. 61, 84, 89, 128, 203, 228, 229, 236, as to entering judgment on cognovits; 243, 244, 245, since repealed; 249 as to writs of execution) Sec. 275 authorises deputy clerks of the crown to issue rules to return writs issued out of their respective offices. The writ of ejectment is to issue out of the office for the county in which the lands lie. (Consol. Stat. U. C., cap. 27, sec. 3).

In all the preceding clauses no reference is made to enforcing rules of court by process of execution. The statute 22 Vic. cap. 33, sec. 12, first introduced this practice, and it says nothing

about the office from which execution is under such circumstances to issue.

In order to determine this, it is important to remember that the first practice was to have but one office for this court, where its rolls were kept, whence its writs issued, where its rules were made out, costs taxed, and papers and proceedings filed. Such was our original practice founded on and derived from the practice in England, and step by step altered here, and even now though more clearly expressed in the earlier statutes, each deputy's office is a limited portion of the principal office in which certain specified things may be done because the legislature has permitted them to be done.

The enquiry seems limited therefore to this—is this one of the things authorised by the statutes? and in answering the question it appears to me that the maxim *expressio unius est exclusio alterius* must apply.

It cannot be supposed that the C. L. P. Act was intended to confer the power of issuing executions on the deputy clerks of the crown in this particular case, because when it was passed no such executions could be issued out of the court at all. And as the act which authorises their being issued, is silent on this subject, we must, in my opinion go back to the old practice by which the various proceedings in a cause were governed; and according to that I think it is too clear for question that the execution must in cases of this kind issue as under the English Statute, from the principal office. The proceedings were all in term at first. Then the costs were taxed in the principal office, and from that office and that office only, as appears to me, could the execution to enforce obedience to the rule go. The previous proceedings were neither instituted nor carried on in the outer office.

It is objected, however, that the summons is confined to setting aside the execution, and that it should go higher and apply to set aside the proceedings taken in the outer office, on which the execution was founded. But beyond filing the rule, the allocatur and the præcipe, nothing appears to have been done in the outer office. There is no step or proceeding actually rendered necessary to be taken, after the rule is made for the payment of costs, as a further preliminary to issuing the executions unless the filing a præcipe for the writ. The rule is the authority, and all the proceedings terminating with the rule are in the principal office. The filing of these papers in the outer office I look upon as a nullity.

On the whole I think the order should issue as asked.

Ordered accordingly.

McCollum v. Kerr et al.

Interpleader—Duty of Sheriff as to restoration of goods when issue determined in favor of claimant—Effect of interpleader order.

It is no part of the duty of a sheriff, under an ordinary interpleader issue, which has been determined in favor of the claimant, without tender of his costs for so doing, to restore the goods seized to the custody of the claimant in the same state as they were at the time of the seizure.

The proper mode, however, of raising such a question would be in an action against the sheriff for withholding the goods and not on an application to a judge for an order on him to restore them.

The interpleader order being for the sheriff's protection only, an action would be at the suit of the claimant to recover from the execution creditor the damages incident to, or arising out of the seizure.

(6th January, 1862.)

An interpleader order was sued out on 11th October, 1861, in a cause, Kerr et al v. Fullerton et al, the plaintiff, McCollum, being claimant.

It ordered that the sheriff of Kent, on payment of appraised value of goods seized into court by claimant, or as much as might be sufficient to satisfy the execution within seven days, or on claimant's giving security within seven days, for the payment of the same amount, the sheriff should withdraw from possession. That until such payment or security be should remain in possession, and the claimant should pay possession money for the time he should continue in possession from the date of the seizure, unless the claimant should desire the goods to be sold by the sheriff, in which case he was to sell the same and pay the proceeds into court, after deducting the expenses thereof and the possession money. If no payment were made, or security given by claimant within seven days, it was provided that the sheriff might sell and pay proceeds into court. Then the order provided for the trial of an issue, and reserved the question of costs and repayment of possession money, and all further questions.

From the affidavits filed, it appeared that the goods in question were seized in a store in the village of Morpeth, which store was in the occupation of the claimant. That claimant requested the sheriff's officer to take away the goods and allow her to carry on her business in the store, and said she thought it advisable, and desired him to take the goods to Chatham, as she thought in the event of a sale they could not be well sold in Morpeth, and she did not intend to bid. Her attornies also requested the sheriff to have the goods removed to Chatham, as they would, in the event of a sale, bring a better price there, and they threatened to bring an action against the sheriff on behalf the claimant, if he did not forthwith remove the goods out of the store. As there was no place in Morpeth to which the sheriff could remove them so as to be safe, or where they could be insured, the sheriff removed them to Chatham and got them insured. No payment into court or security was given by claimant, but on 14th October claimant's attornies gave the sheriff notice to sell the goods seized. The sheriff advertised for a sale on 31st October—could not sell, and adjourned to the following Saturday, but there were no bidders, and the sale was further adjourned till the 9th November.

On the 4th November the issue was tried and found in favour of the claimant, and the defendants on the interpleader order notified the sheriff not to sell, as they would deliver them up, and there was no sale.

It appeared that on the 7th November the defendants' attorney notified the claimant's attorney that they would give up all claim to the disposal of the goods and pay the costs. The claimant was willing to take back the goods, subject to her right for damages for the seizure and resulting therefrom, and thereupon claimant applied for and obtained a summons calling on the sheriff and on the defendants to shew cause why the sheriff should not forthwith return the goods and forthwith place them in claimant's shop whence they were taken in the same manner as he found them when he made the seizure.

The defendants appeared, but offered no opposition to the restoration of the goods.

The sheriff appeared, representing he had been put to great expense in keeping the goods, in removing them from Morpeth, in insuring them, advertising for sale, &c., &c., for all which he received nothing, and he resisted being required to take the goods back to Morpeth.

Draper, C. J.—The interpleader is meant for the protection of the sheriff, though the relief and indemnity he thereby acquires is deemed so beneficial that, generally speaking, the costs of making and attending the application will not be allowed him. As to poundage, I do not understand any claim is advanced. If it were I could not sustain it, but the expenses which occurred after the interpleader order was made is a different matter.

His continuing in possession was contemplated by the interpleader order, at least until the claimant had resolved whether she would entitle herself to have the goods at once restored.

Instead of this she directed their removal to Chatham, and their sale, and now she asks for their return.

I can see no reason or justice in compelling the sheriff, under these circumstances, to carry back the goods to Morpeth—and as to so much of the summons, I think clearly it should be discharged, and as I read it, the return asked for is really a return to the claimant's store at Morpeth, and in refusing to order that, I discharge the summons.

At the same time, I think that on tender of the costs of removal to Chatham, of the expense of insuring and safe keeping, the sheriff should at once restore the goods.

I was in some doubt whether I could not with propriety, order the insurance and expenses of keeping possession to be paid by the execution creditors, but if the claimant pays them I do not see why she may not claim these, or such portions of them as are attributable to the execution creditor's conduct, in an action against them. The interpleader order though it protects the sheriff against any action, extends its protection no further.

I think, therefore, the soundest conclusion is, that the claimant should pay them; but this, is an opinion, not an order. On

a review of all the circumstances I discharge this summons. If the sheriff improperly withholds the goods now, though an interpleader issue is directed, he will give a new cause of action against himself, after demand on him.

Summons discharged.

SMITH ET AL. v. FORBES.

Verdict subject to a reference—Power to certify for costs—When to be exercised.

At Nisi Prius in an action for unliquidated damages a verdict was taken for $500, subject to a reference, with power to the referee to certify for costs in the same manner as a Judge at Nisi Prius. The referee reduced the damages to $38 50 and made his award without certifying for costs. It was held, that after award made and published the referee had no power to certify for costs.

Quære. Whether a referee under such a submission had power to certify for the costs of the county or intermediate court.

(7th January, 1862.)

The first count of the declaration was for selling grain seized on a distress warrant for rent before the same was cut; the second on a covenant for the price of certain fences put by by plaintiffs, and for cordwood. The third, the common counts for work, labor, money, and on account stated.

The plea to first count was, not guilty; to second, payment; and to third, never indebted, payment, and set off.

The case was entered for trial at the last Kingston Assizes, and a verdict rendered for plaintiff by consent for $500, subject to the award of the judge of the County Court, to be reduced, or vacated, or a verdict to be entered for defendant for any balance due defendant; award to be made by 1st January, submission to be made a rule of court, arbitrator to have the same power to certify for costs as the judge at Nisi Prius, costs of the cause, reference, and award, to abide the event.

On the 9th Dec., 1861, the arbitrator awarded that the verdict should stand for the plaintiff on all the issues and he assessed and awarded the damages which the plaintiffs were entitled to recover at $33.65, and that the verdict be reduced to that sum.

Afterwards on the 18th Dec. he signed a paper as follows: "In the Common Pleas, Thomas Smith and William George Smith, Plaintiffs, *v.* David Forbes, defendant, I, Kenneth McKenzie, referee in the cause, do certify, that application hath been duly made under the 325th section of the Common Law Procedure Act for a certificate that this cause is a fit cause to be brought in the Superior Court or County Court. I decline to certify, as I am not of opinion that it is a fit cause to be brought in the Superior Court, but in my opinion it is a fit cause to be withdrawn from the Division Court and tried in the County Court, and that the Division Court had not jurisdiction to try the cause, and would certify for County Court costs if I thought I had power under the Act to certify that the cause could be brought in an intermediate jurisdiction. I therefore leave the point for the decision of an superior court judge. Dated this 18th December, 1861."

Upon these facts, and an affidavit stating that the counsel for both parties appeared before the referee, and it was arranged that referee should make the above certificate, so that the directions for taxation might be decided by a judge of one of the Superior Courts, a summons was issued calling upon the defendants to show cause why the master should not "tax to the plaintiff Superior Court costs, or such other costs as the presiding judge should order."

It was opposed on an affidavit stating that the award was delivered on the 9th Dec., and that on delivering the award the arbitrator refused to certify for any costs, that the defendants counsel, at the request of plaintiffs counsel, went before the arbitrator on 18th Dec., and the arbitrator again refused to certify, but at the request of plaintiffs counsel signed the foregoing certificate; that it was not arranged the referee should make the certificate, that the Defendant's counsel was not an assenting party thereto; that on the 9th Dec. the referee did not reserve the matter for further consideration, but stated decidedly he would not certify; that on appearing before the arbitrators on the 18th Dec. the defendant's counsel waived no right, as he considered the arbitrator's authority at an end.

R. A. Harrison for the application. *M. B. Jackson* contra.

DRAPER, C. J.—Whether the arbitrator had power or not to certify for County Court costs under the circumstances, he made his award without certifying, and as to Superior Court costs refusing to certify.

If the verdict had been rendered at Nisi Prius then according to the Act, "the defendant shall be liable to County Court costs or to Division Court costs only (as the case may be), unless the judge who presides at the trial certifies in open court immediately after the verdict has been recorded," &c.

In an analagous case in England (*Spain* v. *Cadell*, 8 M. & W., 129,) Alderson, B. said, "No doubt the arbitrator who is invested with power by the consent of the parties must in all substantial matters follow the rules laid down in the statutes for the guidance of the judge, that is, he must give his opinion upon the matter immediately, he cannot make his award at one time and certify as to costs at a subsequent time. That is in substance the power possessed by the judge at Nisi Prius, which the arbitrator, although he cannot follow it literally, is bound to follow *cy pres*, the mode of doing which is by immediately inserting his certificate in the award." The case of *Greves* v. *Gorton*, 10 Jur. 272 is strong to the same effect.

I think the case stands precisely on the same footing as if the Judge at Nisi Prius had not certified.

No application could afterwards be made to another judge to supply the defect, in consequence of the express language of the Act, and therefore I think the summons must be discharged.

Summons discharged without costs.

HINOSTON ET AL. v. WHELAN.

Entry of Nisi Prius record—Con. Stat. U. C, cap. 22, s. 203, 204, 205, 23 Vic. cap. 42.

Where in a country cause the record was entered for trial before the commission day of the assizes, and afterwards before the commission day settled, the Master, upon consulting the Chief Justice of the Common Pleas, refused to allow the costs of entering the record or counsel fee.

The venue in this cause was laid in the County of Wellington, though all the proceedings were had in the principal office at Toronto.

On 8th November last the attorney for plaintiffs having made up the record sent it to his agent at Guelph, the County Town of Wellington, to be entered for trial and returned after verdict.

On 9th November the agent for defendant's attorney called upon the attorney for plaintiffs between three and four o'clock in the afternoon for the purpose of settling the suit. He was then informed that the record had on the day previous been sent to Guelph for trial. It was then agreed that the debt and costs, not including counsel fee or entry of record, should be received without prejudice, and that if plaintiffs were entitled to counsel fee and costs of entry of record on facts afterwards appearing such costs were to be paid. Immediately upon receipt of the money on this understanding a telegram was sent by the attorney for plaintiffs to his agent in Guelph that the suit was settled and not to enter the record. On same day an answer was received that the record had been previously entered.

It appeared that in the forenoon of 9th November, before any settlement had been effected, the record had been in good faith entered for trial at Guelph, though the assizes did not open till 11th November.

The question was whether the record, being in a county cause, had been properly entered before the commission day of the assize, and if so whether plaintiffs were entitled to the costs of entering the same and counsel fee.

The taxing officer refused to allow counsel fee or costs of entry of record.

R. A. Harrison appealed against his decision, contending that in country causes records may be properly entered before the commission day of the assize, and that if entered in good faith plaintiff is entitled to the costs of entering same together with counsel fee. He referred to Con. Stat. U. C., cap. 22, s. 203, 204 and 205, and 23 Vic., cap. 42.

M. B. Jackson contra.

BURNS, J.—It is for the Master to decide whether the costs in dispute are or are not to be allowed. I cannot interfere.

The parties afterwards went before the clerk of the court. He thought the record was properly entered and was inclined to allow

the costs of entering it but would not allow the counsel fee unless actually paid. He said, however, that he would consult the Chief Justice of the Common Pleas and be governed by his decision.

Having seen the Chief Justice he refused on a subsequent day to tax the costs either of entering the record or counsel fee, holding that the record could not be entered so as to entitle plaintiff to costs of entry or counsel fee before the commission day of the assize.

CHANCERY.

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

HAMILTON V. THORNHILL.

Master's office—Priority—Incumbrancers.

An incumbrancer has no right in the Master's office to impugn a prior judgment on the ground that it was irregularly obtained at law.

This was an appeal from the Master's report disallowing a claim offered on behalf of an infant petitioner, Sophia Thornhill, upon a judgment obtained by her Trustees against her father, the defendant, Richard Hall Thornhill.

The ground of the Master's judgment was that the judgment was irregular and void, inasmuch as it was obtained in an action in which the proceeding had been commenced by writ of summons specially endorsed, whereas the cause of action consisted a bond for £2000, with a condition to execute a mortgage on certain property mentioned in it for securing the sum of £1000 lent, as alleged by the trustees of Mrs. Thornhill's marriage settlement, to him, which sum of £1000 was settled on his marriage, after the death of himself and his wife, on his children absolutely, and the petitioner, Sophia Thornhill, being the sole surviving child, had become solely entitled to it after her father's death.

The Master was of opinion that the 15th section of the C. L. P. Act (19 Vic., ch. 43) did not apply to such a case, and therefore that the judgment was irregular and void. He rejected the proof on that account.

This was the sole ground of his decision.

Hurd for appellant.

Howell for the plaintiff.

Blake & Wood for incumbrancers, who had proved their claims in the Master's office.

SPRAGGE, V. C.—That the judgment was irregular cannot be doubted. It was, in fact, conceded by the learned counsel for the appellant in the course of the argument, but it did not follow because it was irregularly obtained that it was void. It was, I apprehend, a perfectly valid and binding judgment against Thornhill, and it should have been admitted therefore as a claim against his estate. What position it should occupy among the incumbrances affecting the estate was another question. Upon this question I may observe that it does not appear to me that an incumbrancer has any right to impugn a prior judgment in the Master's office on the ground that it was irregularly obtained. Either he has a right to move to set it aside on that ground in a court of law or he has not. If he has not such right he cannot impugn it on that ground in the Master's office. If he has such right he should exercise it. And the Master cannot, I apprehend, reject or postpone a claim founded on a judgment merely on the ground that it was irregularly obtained, so long as it remains undisturbed at law.

The subsequent incumbrancers can shew anything that would entitle them to priority at law, but not, I apprehend, that the judgment was irregularly obtained.

If at common law, all the writs being in the Sheriff's hands, the judgment in question must have priority, why should it not have priority in equity unless it is obnoxious to some equity which postpones it? I cannot suppose that the order in this case intended to give any unusual privileges to the incumbrancers. There was no reason for imposing any unusually stringent terms upon the petitioner. Her claim—betrayed as she was by her Trustees, and defrauded by her parent—was, if true in fact, as righteous as possible. The order, I think, would have been erroneous had it given liberty to question the regularity of the judgment on technical grounds, and I cannot put such a construction upon it.

I have no objection to order a stay of proceedings on the order, that the incumbrancers may make any application that they may be advised to make to a court of common law, and they will have the right, of course, to impeach the judgment in the Master's office on any ground that would postpone the execution upon it at law, or upon any ground peculiarly cognizable in equity.

In the petition which I have perused the petitioner claims an equitable lien on the lands in question, by reason of the bond to the Trustees, and the alienation of the lands mentioned in it, in exchange for the lands in question. Such a claim certainly has a great appearance of justice. It was afterwards, as I understand, that the mortgage of the plaintiff and the different judgments were created.

It seems to have been thought that the registration of these incumbrances gave them priority over the petitioner's equitable claim. But this claim was one not affected by the registry law, and it might deserve consideration whether, under such circumstances, the infant's claim would be postponed.

It is true that notice might be a material fact to be shewn, but to what extent and as to what persons it would be material to shew it, might also deserve serious consideration.

It must be referred to the Master to review his report, without costs.

I have thought it my duty to make these observations for the benefit of the infant, without intending in the slightest degree to prejudge any point not necessarily decided on this appeal.

TULLY V. BRADBURY.

Mortgage—Assignment—Set-off—Injunction.

Upon the sale of land which was subject to a mortgage, the vendor gave a bond to indemnify the purchaser against the incumbrance, and thereupon the transaction was completed, the purchaser giving a mortgage for £500, and paying residue of purchase money in cash. The mortgage given by the purchaser was transferred to a third party for value, but with notice of the existence of the prior incumbrancer, who subsequently took proceedings at law against the purchaser, to recover the amount of his mortgage, who thereupon filed a bill in this court, claiming a right to apply the amount due by him in discharge of the prior mortgage, which was then due and unpaid. A motion for an injunction to restrain the action at law was refused.

This was a bill by Kivas Tully against James R. Bradbury, Wm. Bradbury, and Archibald John McDonell, setting forth a purchase by the plaintiff, from the defendant, James R. Bradbury, in November, 1856, of certain lands at Owen Sound, which at the time of such sale were held by his father, the defendant, William Bradbury, as trustee for him, and were at the time subject to a mortgage made by the former owner thereof in the year 1853, for securing £500, which "was payable at a time long since expired," and which had been assigned to one George Alexander, who was entitled to receive the money secured thereby; that at the time of making such purchase, it was agreed between plaintiff and defendant, James R. Bradbury, that he (Bradbury) should pay off such mortgage, and should give to plaintiff a title free and clear of all incumbrances: that the conveyance therefor was executed to plaintiff, who paid a portion of the purchase money, and executed a mortgage in favour of the defendant, James R. Bradbury, securing the balance, (£500,) which had been transferred by James R. Bradbury in the latter part of the year 1857, and was then held by the defendant, McDonell.

The bill charged notice to McDonell of the agreement to pay off the mortgage held by Alexander, and claimed that plaintiff had a right to apply the £500 secured by his mortgage to Bradbury, to paying off the first mortgage so held by Alexander; and prayed, amongst other things, an injunction to stay proceedings at law by McDonell against plaintiff to recover the amount of the mortgage to Bradbury.

The defendant, McDonell, answered the bill, denying all notice of any agreement as to the discharge of the mortgage held by Alexander, or any notice with respect to it, other than appeared in the abstract of title furnished to him. The bill was taken *pro confesso* against the defendants, Bradbury.

An affidavit of the plaintiff was filed, reiterating the statements in the bill. The defendant, James R. Bradbury, was examined on behalf of the plaintiff, before a special examiner: his evidence, however, did not vary materially from the facts set out in McDonell's answer. Upon this state of facts, a motion

was made for an injunction to restrain the action at law, on the ground of plaintiff's right to apply the money due upon his mortgage to Bradbury.

Fitzgerald, in support of the application.

If the mortgage given by plaintiff had still been held by Bradbury, a clear right would exist for plaintiff to apply the amount due by him in reduction of the amount due upon the mortgage in the hands of Alexander; the position of the plaintiff is in fact that of surety for the debt due to him, and *Davis* v. *Hawke* (4 Grant, p. 408) is an authority in favour of plaintiff. The same rule must apply as to McDonell, who took the assignment subject to all the equitable rights of plaintiff as such surety. *Jones* v. *Mossop*, 3 Hare 568; *Moore* v. *Jervis*, 2 Col. 60; *DeMattos* v. *Gibson*, 5 Jur. N. S. 347.

The only point admitting of any question is the fact of notice to McDonell, but the notice conveyed by the abstract of title, and which is admitted by his answer, is sufficient for this purpose.

Strong contra. Although James R. Bradbury is bound to pay off the mortgage held by Alexander, still this affords no ground for plaintiff applying his debt in discharge of it. The pleadings and evidence shew that a bond was executed by Bradbury, for the purpose of indemnifying plaintiff against the mortgage of Alexander: this, it was contended, evinced an intention on the part of the plaintiff to rely upon that security, not upon any right of his to apply the amount secured by his own mortgage to discharge that held by Alexander. Besides, a person taking a bond of indemnity cannot refuse to pay his debt, because he has such bond before he has sustained any loss.

Here the most that can be claimed on behalf of plaintiff is a right of set-off, but this not having attached before the transfer of Tully's mortgage to McDonell, he must be treated as holding discharged of it.

Rigney v. *Vanzandt*, 5 Grant, p. 498; *Ex parte* v. *Hippins*, 2 Gl. & J. 98; *Barnet* v. *Sheffield*, 1 D. M. & G. 371; *Clark* v. *Cort*, Cr. & Ph. 154, were amongst other cases also cited by counsel.

ESTEN, V. C.—The material facts of this case, I understand, are these, the defendant, William Bradbury, purchased the lands in question, subject, with other lands, to a mortgage for £500 to one Alexander, which he covenanted to discharge. James Bradbury, another defendant, became entitled in equity to the lands in question, but received no conveyance of them from his father, William Bradbury. He contracts for the sale of them to the plaintiff for £645, of which £145 is paid, and £500 is secured by mortgage; and James Bradbury by bond agrees to discharge the mortgage to Alexander. The conveyance to the plaintiff is made by William Bradbury, as a trustee for James Bradbury, and he enters into covenants for the title limited to his own acts. James Bradbury transfers the mortgage for £500 to the other defendant, McDonell, who commences an action against the plaintiff on the covenant for payment of the mortgage money contained in it, and this suit is thereupon instituted by the plaintiff for an injunction to stay proceedings in that action, and to apply the mortgage held by McDonell to the exoneration of the lands in question from the mortgage of Alexander. The claim is based on several grounds; first, that the estate is a surety, and is entitled to apply its own debt to its exoneration as such surety; second, that both James and William Bradbury, the former by his bond, the latter by his covenant, have agreed to discharge the mortgage of Alexander, and that the plaintiff has a lien on his own purchase money or mortgage for securing all for which he bargained, namely, the estate free from incumbrances, and has therefore a right to apply his mortgage to the discharge of the incumbrance of the previous mortgage. Conceding the existence of these rights in the abstract, for the sake of argument, I think the circumstances of the case furnish an answer to them, inasmuch as they indicate an intention that the two mortgages shall be independent, and that one shall not be held as an indemnity or security against the other, and inasmuch as these rights cannot of course exist in opposition to the express intention. Had it been intended that the plaintiff should have a lien on his purcease money for the discharge of the incumbrance affecting the estate, he would have undertaken to discharge it, and purchased the equity of redemption merely, which would have been the prudent course. He would in this case probably have paid a little more for the estate. Aware of the incumbrance, and intending that it shall be discharged by the vendor, he nevertheless grants a mortgage and covenant, binding himself to pay the balance of the purchase money at stated times, and takes from the vendor a bond to discharge the incumbrance. This agreement indicates a clear intention to my mind that the balance of the purchase money should be paid irrespective of the prior incumbrance, and that no lien should exist upon it for the discharge of that incumbrance.

It is true, that if the mortgage remained in James Bradbury's hands, and the plaintiff had paid, or was required to pay the previous incumbrance, an off-set would be made of one against the other, in order to prevent any inconvenient circuity. But as I understand the law on this point, the right of set-off, when it is mere matter of arrangement, and does not arise from contract express or implied, accrues only when the necessity for making the arrangement occurs, and not before, and if one of the funds has been previously alienated, it does not arise at all.

In the present case, the circumstances, I think, exclude any implied contract that one mortgage should be a security against the other; and as a *bona fide* transfer was made by James Bradbury of the mortgage executed by the plaintiff before any right of set-off accrued, that is, before the necessity for it arose, I think it would be unjust to restrain McDonell from enforcing his legal rights; and therefore I think this application must be refused.

ANDREWS V. MAULSON.

Practice—Breach of injunction—Order to commit.

Where a party commits a breach of an injunction after service of the order upon his solicitor, but before personal service of the injunction upon the party enjoined, the court will commit him for contempt.

In this case an injunction had been granted against the defendant restraining him from collecting rents or otherwise interfering with the estate of the plaintiff. A copy of the order directing the injunction to issue was served on the defendant's solicitor on the 16th September, 1861. but the defendant was not served personally with the injunction until the 30th September, 1861. Between the times of the service of the order and of the injunction, the defendant collected rents belonging to the plaintiff's estate. Evidence having been taken,

Hodgins, for the plaintiff, moved in court for an order *nisi* to commit the defendant for breach of the injunction. He cited Drewry on Injunctions.

ESTEN, V. C., after hearing the cases referred to in Drewry, considered that notice to the solicitor that an injunction had been ordered was sufficient, and that the defendant, having violated the order, was guilty of contempt, and he therefore granted the order *nisi*. No cause having been shown on the return of the order, an attachment was issued against the defendant for breach of the injunction.

COUNTY COURT CASES.

In the County Court of the County of Elgin, before his Honor JUDGE HUGHES

METCALFE V. WIDDIFIELD.

Taverns—Election law—Con. Stat. of Canada, ch. 6, sec. 81—Action for penalties thereunder—Demurrer.

The General Election Law, section 81, enacts that "every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold shall be closed during the two days for polling, *in the same manner as it should be on Sunday during divine service*, and that no spirituous or fermented liquors shall be sold or given during the said period under a penalty of $100 for either offence."

In an action for penalties under this Act for both offences, claiming $100 for each in separate counts,

Held on demurrer that the prohibition is absolute, not restricted by any saving in other statutes.

Also, that a plea to the whole declaration that the liquors were supplied to travellers was bad, and no answer to the second count.

Also, that a plea that there was not when the Act was passed any law of the land requiring taverns or hotels to be closed on Sunday during divine service was bad.

Declaration.—First count. For that the defendant is indebted to the plaintiff in the sum of $200; for that heretofore, to wit,

on the 5th of July, 1861, a poll was opened and held in and for the municipality of the township of Yarmouth, in the county of Elgin, for the election of a member to represent the east riding of the said county in the Legislative Assembly of Canada. And for that the defendant, being keeper of an hotel or tavern wherein spirituous or fermented liquors or drinks are ordinarily sold in the said township of Yarmouth, did neglect to close and keep closed his said hotel or tavern on the said fifth day of July, in the manner directed by the Act, chapter six of the Consolidated Statutes of Canada, intitled "An Act respecting Elections of Members of the Legislature," and contrary to the provisions of the said Act, whereby the defendant forfeited for his said offence one hundred dollars.

Second count.—And for that the defendant, on the said fifth day of July, at his hotel or tavern aforesaid, in the township of Yarmouth aforesaid, did sell or give certain spirituous or fermented liquors or drinks to divers persons in his hotel or tavern aforesaid, contrary to the provisions of the said Act, whereby the defendant forfeited for his said offence the further sum of one hundred dollars.

Pleas.—1. The defendant says that he does not owe the said debt as alleged.

2. That the time when, &c., the liquors sold or given to the said persons was by way of refreshment to travellers lodging at defendant's tavern, but not otherwise.

3. To so much of the plaintiff's declaration as alleges that the said defendant, at the said time when, &c , neglected to close his said hotel or tavern in the manner directed by the Act therein referred to, the defendant says that there was not at the time of passing the said Act, or before the passing thereof, any law of the land requiring taverns or hotels to be closed on Sunday during divine service.

Demurrer to both pleas.

Joinder in demurrer, and notice of exception to the declaration that there is no manner pointed out by law in which hotels or taverns shall be closed during elections, as in said declaration mentioned.

Paul, Plaintiff's Attorney for the demurrer.

Ellis, Defendant's Attorney in support of the pleas.

Hughes, Co. J.—1st. The object of the demurrers in this case is to test the meaning of the 81st section of Con. Stat. of Can., cap. 6. I think that according to the rules of construction of penal statutes, such as this is, there is no difficulty in reaching the intention of the Legislature, and that it is not all obscurely expressed, however strict a construction may be placed upon its wording.

2nd. *The intention* is no doubt to promote complete freedom to every one in the use of his own unbiassed judgment in the exercise of the elective franchise, and to remove from him the baneful influence of intoxicating drinks and the importunities of those who assemble in taverns and drinking places to tempt the unwary in order to make them vote under the influence of intoxication, in a manner they would not do in their sober moments.

3rd. Every hotel, tavern and shop in which spirituous or fermented liquors or drinks are ordinarily sold is to be closed during the two polling days of an election.

4th. I take the words in "*wards or municipalities in which the polls are held*," to mean a ward as applicable to a city or town election and a municipality to apply to a county or riding election.

5th. And I take from the words "*in the same manner as it should be on Sunday during divine service*" this meaning, *i. e.*, by the laws of Upper and Lower as well as of United Canada there is a public r cognition of the Christian Sabbath, and protection given to those professing christians who meet for purposes of public worship on the Lord's Day called Sunday, and at other times. I refer to the Statutes of Lower Canada, 7 Geo. 4, cap. 3 (1827); 1 Geo. 4, cap. 2; 4 Geo 4, cap. 35; 45 Geo. 3, cap. 10 (1805); also to the Statutes of Canada, 14 & 15 Vic., cap. 100, sec. 12; 7 Vic., cap. 14 (1843); 12 Vic., cap. 58, sec. 90; 14 & 15 Vic., cap. 96, sec. 3; 22 Vic., cap. 102, sec. 7; and cap. 54, sec. 282; also of Upper Canada, 8 Vic., cap. 45, sec. 1, 2, 3, &c.; 22 Vic., cap. 104, and others: and although the recognition of legal equality among all religious denominations is now an admitted principle in Colonial Legislation and has been recognized by our Parliament as a fundamental principle of our civil policy and the free exercise and enjoyment of religious profession and worship without discrimination or preference is allowed under proper restrictions to all Her Majesty's subjects, the Christian profession is the religion of the inhabitants and the Christian Sabbath is the day of rest and worship recognized by law. I take those words therefore to point to the necessity of keeping closed every hotel, tavern, &c., during the two days of polling in an election contest with as much strictness and scrupulosity and in the same manner and as it ought to be on a Sunday during divine service.

6th. Supposing the Legislature had not used the words "*on Sunday during divine service*," and suppose this country were to consist of a large majority of those who profess the Roman Catholic system and the words in this Statute were "*in the same manner as it should be during the passing of a public religious procession*," I think there would be no difficulty in saying that the intention of the Legislature was to pay respect to those whose religious profession might lead them to believe and to follow or join in such a procession; so here I think the duty enjoined by the Legislature is to keep taverns closed with as much strictness as a point of obedience to the necessity of insuring purity of election and the mischief that that clause of the Statute was intended to cure, as the deference which the community generally ought to pay to the feelings and views of those who engage in Christian worship on the Sabbath and the requirements of morality and public decency.

7th. I cannot understand that the Legislature, when passing the Election law (Con. Stat. of Can., cap. 6, sec. 81), had any intention to refer or to make allusion to the provisions of 22 Vic., cap. 6, which restrains the sale of intoxicating liquors from Saturday night until Monday morning, because that Act merely applies to Upper and not to Lower Canada, and it surely could not be intended to make the people of Lower Canada understand that they were bound to read a Statute exclusively applicable to this part of the Province in order to make them have proper apprehension of what is enjoined or forbidden by the 81st section of the General Election law—that it stands as an independent enactment like several others purely local in so far as Upper Canada is concerned.

8th. By keeping open an hotel, &c , during the two days of an election, *i. e.*, not closing it in the manner intended by the Legislature, is a penal offence, subjecting the offender to the penalty of $100, and the selling liquors during the same period is another distinct offence subjecting the transgressor of the law to another penalty of $100.

9th. In this view I think the declaration upon the objections raised against its sufficiency is good, and there must be judgment for the plaintiff upon it.

10th. For the reasons before stated, *i. e.*, that the provisions of Statute of U. C., 22 Vic., cap. 6, has no bearing upon the question, I think the second plea is no answer to the plaintiff's action.

11th. And as to the last plea, I think it insufficient, because it neither traverses nor confesses and avoids what is alleged in the declaration, and, in my opinion, it was not at all necessary that the Legislature should pass an Act of Parliament enjoining that a tavern shall be closed on Sunday during divine service in order to give effect to their Statute requiring that taverns shall be kept closed during an election and pointing out that the manner of its being so kept closed should be the same as it should be on a Sunday during divine service.

12th. If the 81st section had expressed its intention in these words, "*in the same manner as by law it is bound to be on Sunday during divine service*," then in the absence of such a law the 81st section would have been inoperative as it is. I think the last plea is no answer and offers no issue, at all events it is no answer to the second count.

Judgment for plaintiff.*

* This judgment has since been affirmed on appeal. (See 21 U. C. Q. B. 247.)

COUNTY COURT CHAMBERS.

In Chambers, before the County Judge of the County of Elgin.

Regina v. Brynes.

Bail—Grounds for admitting criminal prisoners to bail—Probability of the prisoner appearing to take his trial—Arson.

The guilt or innocence of prisoner not the question to decide on application for bail on a criminal charge.

The seriousness of the charge, the nature of punishment and evidence, and probability of prisoner's appearing to take his trial are the important questions to be considered.

Held, when it is shown prisoner attempted to bribe the constable to allow him to escape, the probability of his appearing to take his trial was too slight for the Judge to order bail. Bail refused, although it was some months before a criminal court competent to try the case would sit.

The charge in this case was for feloniously causing one Florence Stumpff to set fire to prisoner's dwelling house in order that he might recover from the Equitable Insurance Company a large amount assured to the prisoner by that Company in the event of its being destroyed by fire. Stumpff was the only witness to prove the fact examined before the committing Magistrate.

Paul, for prisoner, applied for bail upon copies of the depositions taken before the committing Magistrate and upon affidavits, and cited Taylor on Evidence, 177 and 179; Arch. Crim. Plead., 225, and urged that the only evidence against the prisoner was that of an accomplice and produced affidavits impeaching that witness's character.

Stanton, County Attorney, contra, produced the affidavit of the constable who executed the warrant to apprehend, which set forth that prisoner attempted to bribe him to let prisoner escape by offering him a deed of some land and money.

The alleged arson took place about the time of the Spring Assizes and prisoner was not arrested until they were over.

Hughes, Co. J.—Acting upon the authority of *Regina* v. *Scaife and wife*, 9 Dowl. P. C., 553, which was also acted upon in *Regina* v. *Gallaher*, by the Irish Court of Queen's Bench, reported in 30 L. T. Reports, page 221, and also upon the authority of *Barronet's Case*, 1 Ell. & Bl. 1, I must refuse to bail the prisoner for the following reasons:—

I conceive that the reason why parties are committed to prison by Magistrates before trial is for the purpose of ensuring or making certain their appearance to take their trial, and the same principle is to be adopted on an application for bailing a person committed to take his trial; and it is not a question as to the guilt or innocence of the prisoner—it is on that account necessary to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy.

In this case the accusation is a very serious one, *i. e.*, procuring and hiring another person to set his house on fire and to burn it in order to recover from an Insurence Company a large sum of money which had been assured to him in the event of its being accidentally burned; the punishment is very considerable, imprisonment in the Penitentiary from two years upwards to the end of life; the evidence is strongly presumptive of guilt, and besides that, the prisoner appears to have endeavoured to purchase his escape from the custody of the constable who arrested him and had him in charge, which does away with any hope that he would, if ordered to be bailed, come forward to take his trial. I think therefore I would not be exercising my discretion properly by granting the order asked for.

Order for bail refused.

ELECTION CASE.

Before Kenneth McKenzie, Esq., Judge of the County Court of the United Counties of Frontenac, Lennox and Addington.

Qualification of voters—Effect of assessment rolls—Admissibility of parol evidence to contradict or vary same.

1. In the case of a municipality divided into wards, where a voter is entitled to vote in the ward in which he resides, he is not entitled to vote in any other ward.
2. In the case of a householder, residence for one month next before the election is an essential to qualification as a voter.
3. Where there was great noise and confusion at the polling place, but no personal violence offered to the voter, the allegation of intimidation failed in the proof.
4. It is necessary that a voter, whether freeholder or householder, should not only be rated as such, but at the time of the election hold the property in respect of which he is rated.
5. Parol evidence cannot be received by a returning officer or Judge sitting as a scrutineer, to contradict or vary the contents of the assessment roll.

A writ of summons, in the nature of a *quo warranto*, was issued upon the fiat of Judge McKenzie, calling upon the defendant to show by what authority he used, enjoyed and exercised the office of municipal councilman for Rideau ward, in the city of Kingston, the relator claiming an interest in the election as a candidate.

The relator complained that six illegal votes had been recorded at the election for the defendant, and that he (relator) had a clear legal majority of three votes over the defendant, and should have been returned elected. The relator claimed the seat for himself.

The relator objected to the vote of one Thomas Campbell, on the ground that he was residing in Victoria ward at the time of the election, and entitled then to vote therein; to the vote of one Wm. McKee, on the ground that he was residing in Frontenac ward at the time of the election, and entitled then to vote therein; to the vote of one John Mills, on the ground that he was not rated for any property in Rideau ward, and that he voted on real property assessed against his father; to the vote of one Jacob Wilson, on the ground that one David Moore falsely personated Wilson at the election, and voted in his name; to the vote of one David Sewell, on the ground of non-residence, he being assessed as a householder; and to the vote of one John Hickey, on the ground that he was, through threats, violence and intimidation, induced to vote for the defendant.

The defendant, in his answer, denied the allegations of the relator generally, and objected to several votes recorded for the relator. The defendant objected to the vote of one John Waters, on the ground that he was not sufficiently assessed; to the votes of one John Redpath and one Benjamin Redpath, on the same ground; to the vote of one William Aubin, on the ground of non-residence. He claimed also the vote of one James Ovens, as having been recorded in a mistake by the returning officer for the relator, whereas the vote was intended for the defendant. Exceptions taken by the defendant to several other votes of the relator were of a clerical character, and unnecessary to be here noticed.

J. O'Reilly for the relator. *J. Agnew* for the defendant.

McKenzie, Co. J.—According to the poll-book returned to me, 118 votes had been polled at the election for the defendant, and 116 votes for the relator, so that the defendant was returned as elected by an apparent majority of two votes over the relator.

I am of opinion that the votes of Thomas Campbell, William McKee, John Mills, David Sewell and Jacob Wilson, were not legal votes, and must be struck out of the poll-book; and that the vote of John Hickey should not be disturbed.

The evidence showed conclusively that Thomas Campbell was residing at the time of the election, and a long time before it, in Victoria ward, and entitled to vote in that ward. William McKee was, at the time of the election, and for a long time before it, residing in Frontenac ward, and entitled to vote in that ward at the time of the election. It is clear that, under the 78th section of the Municipal Institutions Act, Campbell and McKee could not vote in Rideau ward. John Mills had no right whatever to vote. The real property in respect of which he voted, was not his property, or assessed against him. It was the property of his father, and assessed against his father. David Sewell had not been residing in the city of Kingston for one month before the election within the meaning of the act of Parliament; on the contrary, he had been residing in the township of Kingston for several months before the election. One David Moore falsely personated Jacob Wilson at the election, and voted for the defendant as Jacob Wilson. This was an unblushing piece of effrontery, involving a criminal violation of the law. As to the vote of John Hickey, I think it should not be disturbed. It is true that there was great noise and confusion at the polling place when Hickey went up to vote, and violent language passed, but no personal violence was offered to Hickey. I think Hickey, if he had a mind to, might have withheld his vote from the defendant. From the evidence, I am inclined to think that the persuasion of Loan had more influence over the mind of Hickey than the turbulence of the crowd.

The five illegal votes recorded at the election for the defendant—namely, the votes of Campbell, McKee, Mills, Sewell and Wilson, must be deducted from the 118 votes recorded in his favor in the poll-book. This will reduce the aggregate of legal votes received by the defendant to 113 votes, giving the relator an apparent majority of three votes over the defendant.

It is admitted on all sides that the vote of James Ovens was intended for the defendant, and entered, by a mistake, in the poll-book for the relator. The evidence admits of no other conclusion, consequently the vote of James Ovens must be deducted from the gross votes received by the relator, and added to the 113 legal votes entered for the defendant. This will reduce the number of aggregate votes received by the relator, according to the poll-book, to 115 votes, and increase the number received by the defendant to 114 votes.

I am clearly of opinion, under the law, that William Aubin was not entitled to vote in Rideau ward at the election. He left the city in the spring, in company with a young woman, leaving his wife and family behind him. Before he left, he sold his interest in the premises upon which he voted for $100 to one Elmer, and has been out of the possession of them ever since. It is true that he returned to the city a few weeks before the election, but there was nothing to shew that he had resumed possession of the assessed premises, or that any one held the possession of them for him. On the contray, it was shown that Elmer had the possession of them through his tenant. The statute requires that the voter should be a freeholder or a householder, at the time of the election, within the municipality. It cannot be said on the evidence that William Aubin was the one or the other at the time of the election; it is very clear he was not. Several of the adjudicated cases show that when a person sells or disposes of the premises assessed against him, between the time of the assessment and the election, that he cannot vote on such premises, as he cannot be said in respect of them to be a freeholder or a householder at the time of the election.

The vote of John Waters requires to be considered carefully. The entries in the assessment rolls must be examined in connection with the law. By the 163rd section of the Municipal Institutions Act, it is enacted "that the assessors shall state in their assessment rolls whether the persons therein named are freeholders or householders, or both, and shall in separate columns for this purpose use the initial letters F. and H. to signify the same respectively," and the 23rd section of the assessment law that when land is assessed against the owner and occupant, the assessors shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant;" and by the 19th section, the assessors are required "to set down the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality, who have taxable property therein." The 75th section of the Municipal Institution Act defines who shall be municipal electors as follows:—"The electors of every municipality for which there is an assessment roll shall be the male freeholders thereof, and such of the householders thereof as have been resident therein for one month next before the election, who were severally rated on the last revised assessment roll for real property in the municipality, held in their own rights or that of their wives as proprietors or tenants;" and by the 79th section it is enacted that "in case both the owner and occupant of real property are rated therefor, both shall be deemed rated within this Act;" and by the 80th section, "that when any real property is owned or occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided among them, to give a qualification to each, then each shall be deemed rated within the act, otherwise none of them shall be deemed so rated;" and by the 97th section it is enacted "that the clerk of the municipality shall deliver to the Returning Officer, who is to preside at the election, a correct copy of so much of the last revised assessment roll for the municipality, ward, &c., as contains the names of all male freeholders and householders rated upon the roll in respect of real property lying therein, with the assessed value of the real property for which every such person is so rated."

On reading over those several enactments carefully, with the adjudicated cases, and in connection with the common sense of the of the thing, I am unable to arrive at any other conclusion than that the right of municipal electors to vote rests upon the last revised assessment roll, and every Returning officer is bound in the reception or rejection of votes by what appears on such roll, and has no right to resort to extrinsic evidence to explain, vary, or contradict what appears on such roll. The law requires great care in preparing those rolls. The assessors make them up under the solemnity of an oath, in the first instance; then the Court of Revision reviews the proceedings of the assessors, and an appeal lies to the County Judge from the Court of Revision. And the statute declares that the roll as finally passed by the Court of Revision and County Judge shall be valid, and binding on all parties concerned. The assessment rolls, it appears, are records of great importance, and should be prepared with great care and intelligence. They fix the basis of taxation, and regulate and limit the right of voting at elections. The roll settles the value of the property assessed, and the character in which a party is assessed, whether as owner, occupant, or jointly with other persons. The returning officer is bound to receive or reject a vote, according to what appears on the roll or the copy sent to him. When a party appears on the roll as an owner, the returning officer cannot receive extrinsic evidence to show that he is an occupant only. Or when two parties appear on the roll as householders the returning officer cannot receive such evidence to show that the one is a freeholder and the other a householder. And that is what the learned counsel for the relator proposed in reference to the vote of John Waters. In a scrutiny of votes the Judge is bound by the same law, the same rules, and the same restrictions as the returning officer at the election. In the assessment roll produced at the hearing of this cause, I find the following entry in respect of John Waters:—"John Waters or Garrett Fitzgerald, with a figure 1 in the column headed Householders yearly value of real property, 42 dollars."—Now if this entry means anything at all, it means that John Waters and Garrett Fitzgerald some way or other are householders in respect of the assessed property. Mr. O'Reily at the hearing, offered parol evidence to show that John Waters was the occupant, and Garret Fitzgerald the owner of the assessed premises. I refused to receive this evidence, and justly so. The returning officer could not receive such evidence at the election, and I could not receive it at the scrutiny, as it would be admitting evidence to explain and contradict a written record made evidence in the matter by Act of Parliament. John Waters could not vote as a householder, as the roll shows that Garret Fitzgerald has as much a right to vote as he has, and I cannot decide which of them has the right to vote, and both could not vote. He cannot vote under the 80thth section as a joint occupant with Fitzgerald, as the rate is too low for that purpose, and if he could vote at all on the present assessment roll, it would be under that section. I think that the 78th and 80th section of the Act cut out the right of John Waters to vote on the real property, as rated and assessed on the last revised assessment roll. His vote is an illegal vote, and must be struck out. It would be a waste of time to discuss the fact that a John Waters appears rated on the roll together with Jane Webster, as it is not the same man; and if he were the same man it would do no good, as the rate is too low.

The names of Benjamin Redpath and John Redpath are entered on the roll in the same manner as the names of John Waters and Garrett Fitzgerald are, and the principles of law which are applicable to the vote of John Waters are applicable to the votes of Benjamin Redpath and John Redpath, consequently their votes must be disallowed.

Upon this view of the case, the votes of William Aubin, John Waters, Benjamin Redpath and John Redpath, four in all, must be deducted from the 115 votes standing in favor of the relator, which will reduce the actual number of legal votes received by him to 111 votes, which being deducted from the 114 legal votes adjudged to the defendant, will give to the defendant a clear legal majority of 3 votes over the relator, consequently the defendant is entitled to hold the office of councilman, to which he has been elected.

As the defendant is entitled to hold the seat, it becomes unnecessaay to discuss the question raised at the hearing about the qualification of the relator.

A considerable portion of the difficulties I had to encounter in deciding this case, has been caused by the defective manner in

which the assessment rolls produced had been made up. The assessors seem to have repudiated the plain and intelligent directions of the statutes and have introduced a novel mode of their own, not sanctioned by any statute whatever. To the directions contained in the 163rd section of the Municipal Institutions Act, and in the 18th and 24th sections of the Assessment Act they have paid no regard whatever in the assessment rolls produced before me, at the hearing of this cause. I am, however, bound by law to act on the rolls as they are, and not on rolls as they ought to be.

For the reasons already stated, I am of opinion that the defendant is entitled to hold the office and to judgment on the present writ of summons in the nature of a *quo warranto* issued against him. Therefore I consider and adjudge that the said office of Municipal Councilman for Rideau ward, in the City of Kingston, be allowed and adjudged to him the defendant Thomas Flynn, and that he be dismissed and discharged from the premises charged upon him; and also that he do recover against the said relator his proper costs and charges laid out and expended in defending himself.

Judgment for the defendant with costs.

ENGLISH CASES.

V. C. WOOD'S COURT.

(*From the Law Times.*)

HOLMES ET AL V. THE QUEEN.

Petition of right—Jurisdiction—Lands in a colony—Petition of Right Act 1860, 23 & 24 *Vict. c.* 34.

This court will not entertain a petition of right to adjudicate upon a claim to lands vested in the Crown, situated in one of the colonies, nor will it make a decree *in personam* as against the Sovereign of this country in the character of Trustee here of lands in a British colony.

(*Nov.* 15 *and* 19)

Demurrer.

This was a demurrer filed by the Crown to a petition of right, presented under the Petition of Right Act 1860, to obtain restoration from the Crown of certain lands within the city of Ottawa, in Upper Canada, taken by the Ordnance Department under the authority of the Rideau Canal Act, and not actually used for the purposes of the canal. It appeared that in 1801 a concession of lands in Upper Canada was made by the Crown to a Mrs. M'Queen. In 1827 the Rideau Canal Act, authorising the construction of a canal for connecting Lake Ontario with the river Ottawa, and containing certain provisions for vesting in the Crown the lands required for the purposes of the canal, was passed by the Upper Canada Parliament. The canal, which was completed in May 1832 passed through the lands conceded to Mrs. M'Queen, but left on both sides of the canal a tract of surplus land, which formed the subject-matter of the present claim. The present petitioners claimed under the late Colonel By, who had purchased in 1832 from the heir-at-law of Mrs. M'Queen all the lands conceded to that lady. In 1843 an Act was passed by the Provincial Parliament of Canada, for vesting in the Ordnance Department the Rideau Canal, and the lands and works belonging to it for the service of the Department. This Act contained a provision (sect. 29), that all lands taken from private owners, under the authority of the Rideau Canal Act, for the uses of the canal, which had not been used for that purpose, should be restored to the parties from whom the same were taken. In 1856 an Act was passed by the Canadian Legislature for vesting the Ordnance estate and property in her Majesty, for the benefit, use and purposes of the provinces. The petitioners, as the persons interested in Colonel By's Canada estate had filed this petition of right, claiming the restoration of so much of the land taken for the use of the Rideau Canal as had not been used for that purpose. To this petition of right the Attorney-General had demurred.

The Solicitor-General (Sir R. Palmer), *Sir H. Cairns, Q. C.* and *Wickens*, for the Crown, in support of the demurrer, contended that a court of equity in England had no jurisdiction to entertain questions of right to lands in a British colony; that the courts of the colony in which the lands were situated had ample jurisdiction to entertain such questions. No case was here raised upon which a court of equity could adjudicate. The Petition of Right Act, 23 & 24 Vict. c 34, expressly declared that a legal right was given to parties who might claim an interest in lands situated as the present were. They cited *Penn* v. *Lord Baltimore*, 1 Ves. sen. 444; *Clayton* v. *Attorney-General*, 1 C. P. Coop. 97; and referred to Story's Conflict of Laws.

Giffard Q. C., *W. W. Cooper* and *Hanson*, in support of the petition, contended that the court had ample jurisdiction to make a decree *in personam*, assuming her Majesty to be the trustee dwelling here, in whom the lands in question were vested as trustee. By such decree a conveyance could be directed, and an enumeration of the lands with their respective boundaries obtained. No petition of right could be presented in Canada, where the lands were. The remedy was that pointed out by the Petition of Right Act, 1860; and it was only under that Act that a petition similar to the present could be presented, and justice obtained. Unless the present petition could be entertained, the petitioners would be wholly without a remedy. They cited *Earl Kildare* v. *Eustace*, 1 Vern. 418; *Innes* v. *Mitchell*, 4 Drew. 57 and 151; S. C. on appeal, 2 De G. and Jo. 453; *Cranston* v. *Johnstone*, 3 Ves. 17; *Tulloch*, v. *Hardy*, 1 Yo. C. C. C. 115.

THE VICE-CHANCELLOR, after stating the case, said that the demurrer must be allowed, on the broad ground that this court could not take upon itself to adjudicate the claims to land in one of the colonies, and that there was nothing in the Petition of Right Act 1860 which could have the effect of withdrawing land from the jurisdiction of the country in which it was situated, and giving the English courts jurisdiction over it. It had been conceded on behalf of the petitioners that no direct remedy *in rem* could be given by this court as to lands out of the jurisdiction; but it was argued that, according to a series of cases beginning with that cited from Vernon and *Penn* v. *Lord Baltimore*, where the question did not arise so as to involve the action of the court *in rem*, but a decree could be made *in personam*, then that the Court of Chancery had authority to act, and order a conveyance to be made as directed by the colonial legislature in 1843 (according to the allegations in the petition). That really was the main question, but it appeared to him that it must clearly be decided against the petitioners. It was argued that the Crown was a trustee for these petitioners of the land in Canada, and was bound to restore it to them; that if it had been a case between subjects, and the trustees were found to be in this country, those trustees would be bound by the decree of this court, and that the Queen must be taken to be a trustee in respect of those lands present in this country. But this was a singular doctrine, and it would be a great surprise to the various colonies enjoying a separate legislature, if they were to be told that by an Act passed in England, to which they were not consenting parties, the courts of this country were authorized to determine the rights to property in the colonies as against the colonial legislature. It had been contended that the Crown, on the theory of being present everywhere within its dominions, must be taken to be in the position of a trustee present in this country, so as to bring the land in question under the jurisdiction of the English Court of Chancery. But even assuming that a trust existed, that the claim was not merely legal, and that courts of equity could exercise jurisdiction in matters relating to land in a foreign country, still it was necessary that the trustee should be within the jurisdiction to give any operation to this court. The land was unquestionably vested in her Majesty by the Act of 1856, for the benefit of the province, and in that point of view her Majesty was just as much present in Canada as in England. For the purposes of the Act, and the doctrine of this court acting *in personam*, her Majesty could not be taken to be within the jurisdiction of this court in respect of lands situate in Canada, and held by her not in virtue of her prerogative, but under the Act of the colonial legislature. On the highest ground, therefore, that it was not within the scope of the Act of 1860, or intended thereby, to transfer to this country the jurisdiction over lands in the various colonies upon the mere supposition that the Crown was present as a trustee in England, the demurrer must be allowed. This rendered it unnecessary for him (the V. C.) to enter into a consideration of the other arguments urged in support of the demurrer. He considered this ground sufficient to oblige him to allow the demurrer of the Crown, and with costs.

Order accordingly.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PHILADELPHIA.

Pottsdown Gas Company v. Murphy.

Nuisance—Liability of Incorporated Gas Company.

1. A corporation is exempt from consequential damages only where, being clothed with the state right of eminent domain, it takes private property for public use, on making proper compensation, and where such damages are not part of the compensation required.
2. A gas company is answerable for consequential damages, such as the corruption of the plaintiffs' ground and well, by the fluids percolating from the works; and is not exempted, as a corporation authorized by statute to carry on the business of making gas, and to purchase in fee simple the real estate necessary therefor.
3. In an action against a gas company for a nuisance, the court defined it as "wantonly, unnecessarily, or oppressively, causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others, in the immediate vicinity." *Held*, that the definition was not perfect, but, that when taken in connection with the instruction to the jury, "that a certain degree of offensive odor is unavoidably incident to the business, and must be endured by the public," it was as favourable to the defendant as a more perfect one would have been, and was not a cause for reversing the verdict of the jury.

Error to the Common Pleas of Montgomery County.

This was an action on the case brought September 14th, 1858, by John Murphy against the Pottsdown Gas Company.

The defendants were incorporated by the Legislature of the State on the 7th of March, 1856, in the usual form, with authority to supply with gas-light the borough of Pottsdown, and such individuals and corporations as might desire to produce, sell, and distribute gas for the production of artificial light; to make and erect the necessary apparatus for manufacturing and introducing the same; construct the requisite buildings and machinery; purchase and prepare the necessary materials; with the right to enter upon any public street, lane, or highway, for the purpose of laying down, repairing, altering, and inspecting the pipes necessary for conducting said gas, doing as little damage, &c.

Soon after the passage of this act, the company purchased in fee simple such real estate as was necessary for carrying on the business of the corporation, and commenced their works in June, 1856, which were completed on the 16th of September of that year.

The site selected by the company for their main works, lies between the Reading railroad and the Schuylkill river, on the verge of the borough of Pottsdown, convenient to the canal and railroad from which they were to receive their supplies of coal, &c., and is the most available and central point from which to supply the town with gas.

The house of the plaintiff, which is a hotel, is also between the railroad and the river, and near it the gas works were erected, the main tank and gas meter being about sixty feet from plaintiff's line. The soil in that locality is sandy. In sinking the pit for the tank, veins of water were discovered, and after the flooring of the tank had been put in, it leaked in several places. The ammonia well into which the water from the gas-washer is discharged, is lined with rough stone without cement, and has no artificial outlet, the water being allowed to soak into the earth. There were other houses in the neighbourhood of the works. Soon after the works were commenced, to wit, June 13th, 1856, Murphy caused the following notice to be served on the company:

"To the President and Managers of the Pottsdown Gas Company.

"You are hereby notified that I will hold you liable for any damage my property may sustain in consequence of the erection of your works, and the manufacture of gas.

"John Murphy.

"June 12th, 1856."

And also another notice, served in the same way, on the 8th of December, 1856, of which the following is a copy:

"To the President and Managers of the Pottsdown Gas Company.

"You are hereby notified that on the 13th day of June last past, I gave you lawful notice that I would hold you liable for all damages my property might sustain in consequence of the erection of your works and the manufacture of gas. I now give you due and timely notice that the erection of your works and the manufacture of gas, has injured the water in my well, so that it is wholly unfit for use, and if you do not prevent injuring my water, I will proceed against you by due course of law.

"John Murphy.

"Pottsdown, December 8th, 1856."

About a year after this he sunk another well, which cost about sixty dollars.

On the 14th of September, 1858, this suit was brought, as above stated.

The declaration contained six counts, laying the cause of the action as a nuisance, to which the defendants pleaded not guilty, with leave, &c.

On the trial, the following agreement between the parties was signed by the counsel, and filed in the cause:

"1859, October 26. It is agreed, that if the plaintiff is entitled to recover at all in this case, and does recover, the jury shall assess the damages on the basis of entire compensation, prospectively, as well as up to the present time, for the entire alleged injury, if any has been suffered for which compensation ought legally to be made, and in consideration thereof, plaintiff releases, remits, and for ever discharges all or any right or rights of action, claim, or demand which he might (independently of this agreement) have in the future, on account of any continuance or maintenance of the alleged injury and nuisance complained of, after and beyond the day of the institution of the present action, unless defendants, by some new erection or material change in the location or construction of their works should inflict some new and substantial injury, or supposed injury on the plaintiff, or to his property, not embraced within the true intent, meaning, and spirit of this agreement.

"This agreement to be filed of record in this case, and to be for ever binding on both parties."

The plaintiff requested the court to charge the jury:

1. Even if the jury believe that the defendants have constructed their works with the usual skill and precaution, they are notwithstanding answerable in damages for any injury which the jury may find has been done to the property of the plaintiff by means of the construction of the works of the defendants, or as a consequence of their use in the manufacture of gas.

The defendants requested the court to charge:

1. If the jury find that the defendants have not been guilty of negligence in the erection and in the carrying on of said works, the plaintiff cannot recover.

2. That the defendants were authorized by law to erect said works, and to have the right to carry them on for the purpose of manufacturing gas for the public, and are not responsible in damages for the ordinary and usual smells that usually proceed from such works, nor are they liable to pay damages for injuring the plaintiff's water, unless done by their negligence.

3. That in no sense can the gas works be considered a nuisance, if conducted and carried on in the usual and customary way that similar works are conducted and carried on.

The Court below (Smyser J.) answered these points as follows:—"The points of plaintiff are correct, subject to the qualifications contained in our answer to defendants' second point." As to the points presented by the defendants, the court said:

"1. We cannot so instruct the jury. The question is not one of negligence or no negligence, but of nuisance or no nuisance. If the defendants have either so constructed, or carried on and conducted their works, or both, as to create an abiding nuisance to the particular injury of plaintiff's property, they are liable in reasonable damages therefor, whether there was negligence or not; subject, however, to the qualifications contained in our answer to the second point.

"2. The business of manufacturing and distributing gas is lawful and beneficial to the public; and the defendants were specially authorized by their charter to engage in it. A certain degree of offensive odour is unavoidably incident to the business, and must

be endured by the public, or the business must stop. We, therefore, say that the law is as stated in the first part of the proposition (that relating to smells), unless the defendants, by something done in the construction, location, or conduct of their works, have wantonly, unnecessarily, or oppressively caused such smells and odours to annoy plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity; and such annoyance shall, in the opinion of the jury, amount to such a nuisance as is referred to in the answer to the first point.

"The latter branch of this proposition, that relative to the water, is answered by the reply to the first point, to which we refer the jury.

"3. We cannot affirm this proposition. If so carried on and conducted as to create and amount to such a nuisance as we have described, there is an injury for which plaintiff would be entitled to reasonable and proper, which means mere compensatory, damages, no matter whether the works were managed in the usual manner of others or not. This company could not plead the example and practice of others in excuse or justification of a nuisance."

There was a verdict and judgment in favor of the plaintiff for $1400 damages and six cents costs; whereupon the defendant sued out this writ, and assigned for error the following matters, viz:

1. The court erred in refusing to affirm the first point of the defendants below, and erred in charging that the question was nuisance or no nuisance, when there was no evidence of a nuisance beyond what pertains to all gas works.

2. The court erred in refusing to affirm the defendants' second point.

3. The court erred in refusing to affirm the defendants' third point.

J. H. Hobart and *James Boyd*, with whom was *St. George Tucker Campbell*, for plaintiff in error.—In answer to our point, which raised the question of negligence in erecting and carrying on the works, the court below replied that the case was one which raised the question of nuisance or no nuisance, and refused the instruction prayed for. As there was no evidence in the cause tending to establish a nuisance, except in so far as all gas works are nuisances, *per se*, the question is, whether these works, properly constructed and worked, are *per se* nuisances, and whether the owners are responsible in damages for the consequence arising from the ordinary and usual smells incident to such works. If so, the result will be ruinous to most, if not all the gas companies in the state. We argue, therefore, that under the ruling in *Wheatly* v. *Baugh*, 1 *Casey* 536, the court below should have told the jury that the plaintiff had no cause of action. Analogous cases sustain this view: Am. Railway Cases, vol. 2, p. 292.

This argument meets the second and third assignments of error, because, taking the whole charge together, the jury were told that the company was liable for damages, although guilty of nothing beyond the proper use of the works. The slight qualification as to the manufacturing and distributing of gas being legal and beneficial, did not change the general tenor and effect of the charge.

B. M. Boyer, for defendant in error. The plaintiff below has cause to complain of the charge of the Court below, for by it he was deprived of damages, on account of the noisome smells proceeding from the works, unless he could show that the company "by something done in the construction of their works, had wantonly, unnecessarily, or oppressively caused such smells to annoy the plaintiff in a special and peculiar manner and degree beyond others in the immediate vicinity;" while, with regard to the injury done to the well of plaintiff, the jury were told "that for such an injury, if it amounted to a nuisance, he was entitled to reasonable and proper, which means mere compensatory, damages."

The law is not as is contended for, that a gas company may pollute the air which a man breathes, and the water which he uses, provided it be done skilfully, and from no worse motives than selfishness. The offer to the public of a cheap, safe light, is no proper substitute for pure air and water. The principle *sic utere tuo*, &c., applies to this as to other offensive occupations.

The fact that the defendants are incorporated is no justification or excuse. It is a private corporation, which sells what it manufactures for private profit. It is a public accommodation, but so is he hotel of Mr. Murphy.

The court instructed the jury that the question was not of negligence, but nuisance, and that if the works were constructed, or carried on, or either, so as to create an abiding nuisance, to the particular injury of plaintiff's property, the company were liable to reasonable damages, whether there was negligence or not. This instruction was correct: 3 Bl. Com. c. 13; *Shuter* v. *The City Leg Int.*, October 15th, 1858; *Greer* v. *The Borough of Reading*, 9 Watts 382; *The Mayor* v. *Randolph*, 4 W. & S. 514, are not like this: but the cases of *Howell* v. *McCoy*, 3 Rawle, 269; *Barclay* v. *The Commonwealth*, 1 Casey, 503; Angell on Watercourses 136; Co. Litt. 200; *Morton* v. *Scholefield*, 9 M. & W. 565; *Mason* v. *Chadwick*. 11 A. & El. Rep. 371; *Wright* v. *Williams*, 1 M. & W. 77; *Storey* v. *Hammond*, 4 Ohio Rep. 833; *People* v. *Townsend*, 3 Hill (N. Y. Rep.) 479; *Mayo* v. *Turner*, 1 Muf. (Va. Rep) 405; *Wood* v. *Sutcliffe*, 16 Jurist 75; 8 E. C. L. & Eq. Rep. 217, are in point, and sustain the view taken by defendant in error.

The opinion of the Court was delivered, at Harrisburg, May 6th, 1861, by

Lowrie, C. J.—The Court was right in saying that this is not a question of negligence, but of nuisance, for so is the declaration. How, then, did they define nuisance? First, of smells, wantonly, unnecessarily, or oppressively causing such smells as to annoy the plaintiff below in a special and peculiar degree beyond others in the immediate vicinity, and to create an abiding nuisance, to the particular injury of the plaintiff's property.

We cannot call this a perfect definition; but, taken in connection with the instruction that "a certain degree of offensive odour is unavoidably incident to the business, and must be endured by the public," it seems to us that it must have been understood by the jury as well and as favourably to the defendants as the most perfect one could have been.

Then, as to the corruption of the plaintiff's ground and well, by the fluids percolating from the defendants' works. This was disposed of in a similar way. But the defendants think that as a corporation, authorized by statute to carry on this business, and to purchase in fee simple such real estate as may be necessary for it, they are not answerable for such consequential damages as are complained of here. We cannot adopt this view. No such exemption is involved in the fact of incorporation, nor in the privilege of buying land. The principle they invoke applies only where an incorporation, clothed with a portion of the state's right of eminent domain, takes private property for public use on making proper compensation, and where such damages are not part of the compensation required.

Judgment affirmed.

Strong, J., dissentiente.

GENERAL CORRESPONDENCE.

Non-payment of Crown Witnesses.

To the Editors of the Law Journal.

Gentlemen,—I have just rea. your excellent editorial in the February number of the *Law Journal*, about "Payment of Crown Witnesses." Permit me to illustrate your position by an incident in my own experience.

Three or four years ago, I sent a letter containing money to Streetsville. It never came to hand. In two or three weeks I was written to about the money. I replied, giving a particular description of the bills—bank, letters and numbers—which I had kept, according to an invariable custom of mine, in a book for the purpose. A party was arrested on suspicion, and a five-dollar bill corresponding to one in my list found in his trunk. I knew nothing of this for some weeks, till I was served with a subpœna to attend the assizes at Toronto. I had to engage a person at a dollar a day to supply my place in the Division Court office till my return, and start at a few hours' notice. By the good offices of the prosecuting attorney,

the case, which had been put off till my arrival, was brought on the second day of my stay in Toronto, and I got home in the wonderfully short space of four days from the time of leaving Owen Sound. The accused party was found guilty.

Thinking that the County Auditors had a larger discretion than I have since learned they possess, I made application by affidavit for reimbursement of necessary expenses, amounting to sixteen dollars, exclusive of the loss of time. Of course the application was refused.

Now, if I had been careless about sending money, and, instead of keeping a list of the bills, &c., sent at the request of the plaintiffs, had merely enclosed and posted the money in presence of a witness, my evidence would have been of no value, and I would not have been troubled. I could not help looking upon it as a *fine for being correct*. My first impulse was to throw my memoranda of "cash mailed" into the fire, and keep no more such; but I did not, and have since found the memoranda useful on several occasions;—though I still live in the dread of being hauled off some morning to Toronto, London or Ottawa, at an hour's notice, on a similar errand.

I am, &c., WILLIAM W. SMITH,
Clerk 1st D. C., G.

Owen Sound, Feb. 10, 1862.

[The above is one of several letters of the same kind which we have received on the subject to which it refers. We give it as a specimen. The evils arising from non-payment of Crown witnesses are wide-spread. Something ought to be done towards amendment of the law in the matter.—EDS. L. J.]

Fines, Penalties, Forfeitures—How Appropriated.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN—Would you oblige me and my brother magistrates by answering the following questions through your valuable periodical, the *Law Journal*:—

1st. What shall be done with moneys collected in payment of fines or penalties for assault? The Consolidated Statute of Canada, page 960, chap. 91, sec. 39, says that the amount is to be paid to the Treasurer of the Municipality in which the offence was committed. Query: Is it the County or the minor Municipalities within the County?

2nd. On page 1008 C., chap. 98, sec. 3, says, "One moiety is to be paid to the prosecutor, and the other to Her Majesty." Where or to whom shall Her Majesty's moiety be paid?

3rd. Again on page 968, C., chap. 92, sec. 33, in reference to dog stealing, what shall be done with the fine imposed for such offence?

4th. Under chap. 96, sec. 13, page 1003 C., fines imposed for cruelty to animals are to be spent in improvement of roads, &c. Must the money be applied to improving streets and roads, or can it be applied to the general fund of the town out of which the money is taken to improve the streets?

5th. In sections 122 and 123, chap. 99, page 1036 C., concerning the appropriation of fines imposed by a Justice of the Peace. Suppose, for example, six persons are taken up and fined, say two dollars each, for damage to property. The prosecutor, of course, gets two dollars, the amount of the damage. The question is, to whom is the remaining $10 to be paid?

6th. Do sections 77, 78, 79, 80 and 86 of chap. 103, page 1100 of C., concerning summary convictions, apply to both Provinces, or to Lower Canada only?

7th. It is the impression of some Magistrates that according to 124th chapter of U. C., all moneys must be sent to the Clerk of the Peace with the statement of the returns of convictions. Is this so?

A reply to the above questions in the next issue of your valuable journal, and any suggestions you may make, will be much appreciated by magistrates generally in this quarter.

Yours truly, M. C. L.

Galt, Feb. 24, 1862.

[1st. Reading the section without reference to others, we should say that the Municipality meant is the local and not the County Municipality; but upon reference to the old Act, 4 & 5 Vic., cap. 27, sec. 27, and to the present Con. Stat. U. C., cap. 118, we greatly doubt if the Legislature so intended.

2nd. The moiety of Her Majesty is to be paid into some branch of the Bank of Upper Canada to the credit of the Receiver General.

3rd. Where no provision is made for the appropriation of a penalty or forfeiture, one half belongs to the Crown and the other half to the private prosecutor, if any there be, and if none, then the whole to the Crown. (Con. Stat. Can., cap 5, s. 6, sub s. 17.)

4th. Penalties levied under Con. Stat. Can., cap. 96, must be applied exclusively in repairing streets or roads, and ought not to be paid into any general fund applicable to miscellaneous purposes, though including repairs of streets and roads.

5th. The expression "shall be applied in the same manner as other penalties imposed by Justices of the Peace are directed to be applied," is, we think, very unsatisfactory, for the reason that we can find no *general* Act declaring in *what* particular manner penalties imposed by Justices of the Peace are to be applied. So far as Lower Canada is concerned, reference may be made to Con. Stat. Can., cap. 105, s. 77, 78, 79 and 80. And so far as Upper Canada is concerned, we can do more than refer to Con. Stat. Can., cap. 5, s. 6, sub-s. 17.

6th. To Lower Canada only, we think. The original Act, 14 & 15 Vic., cap. 95, was in terms so restricted.

7th. Such impression, so far as Upper Canada is concerned, is erroneous. The convicting Justice is by Con. Stat. U. C., cap. 124, required to make to the Quarter Sessions a return of the convictions and "of the receipt and *application* by him of the moneys received," &c., (sec. 1.) The form of return has a column with this heading, "To whom paid over by such Justice."

The questions put by our correspondent, and the difficulties in the way of answering some of them satisfactorily, convinces us that the many provisions regulating the appropriation of fines, penalties and forfeitures, ought by some general Act to be consolidated so that Justices of the Peace might at a glance, in the absence of a special provision in the

Act creating the offence or providing for its punishment, know to whom to pay the fine, penalty or money forfeited. We are satisfied that the want of such an Act is the cause of serious loss to the Revenue as well as of much embarrassment to Justices of the Peace.—Eds. L. J.]

Menonists—Exemption from municipal duties.

To the Editors of the Law Journal.

Gentlemen,—An answer to the following will much oblige the Township Clerk of Rainham. Are the people called Mononists exempt by law from doing the duty of overseers of highways, or holding the office of school trustees? We have a class of people in this township who refuse to serve, and the Council scarcely know how to proceed in the matter. The question is one of public interest, especially in those townships where the population is of German origin. A.

Selkirk, Feb. 19, 1862.

[Persons bearing certificates from the Society of Quakers Menonists and Tunkers, are exempt from attending militia muster in time of peace, but are not, so far as we can find, exempt from the discharge of duties appertaining to municipal offices.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. Valentine v. Dickson. *May 7.*

Vendor and purchaser—Specific performance—Conflict of evidence—Parties left to their remedy at law—Costs.

In a suit against the heir-at-law of the vendor for specific performance of a contract entered into by his ancestor, the evidence as to the circumstances under which the contract was signed by the vendor being unsatisfactory, the bill was dismissed without costs and the parties left to their remedy at law.

M. R. Boulton v. Pilcher. *May 8.*

Will—Construction—Application of whole income to maintenance of children—Direction to sell on all children attaining twenty-one—Gift of proceeds to children—Survivorship—Vesting.

Bequest of leaseholds to trustees upon trust to pay the rents and profits to the testator's wife for life, and after her death apply them during the minorities of all the children of the testator living at her death for their maintenance, and after the said children shall have attained twenty-one, upon trust to sell such leasehold property, and divide the proceeds equally among all and every the said children, and if but one surviving child then the whole to such child.

Held that all the children who survived the testator took vested interests in the property bequeathed, and that the construction was not varied by the interposition of the life interest to the widow.

V. C. K.

In re Plaskett's Estate. Bryant v. Kuyvett.

Bond—Consideration—Cohabitation—Illegitimate children.

P. binds himself in a penal sum to pay an annuity of £200 a year to trustees, for the benefit of E K., a single woman, by whom he has had five children, in consideration of her having ceded to him the custody, education and support of such children. And such bond is conditioned to be void on due payment of the annuity during such time as E. K. shall not require the custody of the children.

Held that such bond was for a valuable consideration, and constituted a specialty debt.

S. C. In re Ward. Gordon v. Duff.

Will—Construction—Bequest of a sum of long annuities—Specific or demonstrative legacy.

The will of a testatrix, made in 1846, contained the following bequests: "I bequeath to M. the sum of £2000 long annuities, standing in my name in the books of the Governor and Company of the Bank of England. I bequeath to A. the sum of £2000 of the said long annuities, standing in my name," &c. At the date of her will and of her death, the testatrix was possessed of £300 long annuities, and no more, but left personal estate to a considerable amount.

Held that the said legacies were specific and not demonstrative, and that the legatees were not entitled to have the deficiency in their legacies made good out of the testator's general estate.

V. C. K. Mawe v. Heaviside.

Practice—Married woman—Separate receipt—Consent in court.

Where there is a fund in Court to part of which a married woman is entitled, but not for her separate use, the Court will not dispense with her being examined in Court; although it was proposed with the consent of her husband, that the money should be paid to her on her separate estate.

V. C. S. Fowle v. N. G. Assurance Society and others.

Assurance—Guarantee policy—Misrepresentation—Notice—Principal and agent.

R. effected a policy of guarantee, the basis of which was his answer to certain questions. These answers were substantially correct when made; but a practice of checking accounts, &c., to which they referred, was subsequently abandoned.

Held that the policy was not invalidated by his neglecting to give notice of the change.

Endorsed on a life policy effected by the same Society was a memorandum that it was issued in connection with the guarantee policy. The Society transferred its life business to the Assurance Company, who accepted the said life policy.

Held that the Company were liable under the guarantee policy.

No private arrangement between agent and principal as to the peculiar form of a receipt in writing can be binding on a person who has no notice of such arrangement, nor does it constitute any part of the extent or nature of the authority which a person dealing with the agent is bound to know.

V. C. W. Harding v. Wickham.

Arbitration—Jurisdiction.

By an order of the Court of Exchequer, all matters in difference between A. & B., who had each brought an action against the other, were referred to arbitration; the award to be delivered by a certain day to the parties or their personal representatives, in case either of them should die before award made; the arbitrator to proceed *ex parte* if either of the parties should without reasonable excuse fail to attend, with power to enlarge the time for making the award. Within two days of the time fixed for proceeding with the reference, A., one of the parties, died. The arbitrator refused to postpone the reference until the presence of A.'s personal representative could be obtained, and made his award *ex parte.*

To a bill by A.'s personal representatives to set aside the award and all proceedings thereunder—

Demurrer allowed, on the ground that the matter was already before a court of jurisdiction competent to re-consider the matter and correct any error, the bill itself alleging that an application to set aside the award could be sustained in the Court of Exchequer.

COMMON LAW.

Q. B. SCHLIMBERGER v. LISTER. Nov. 9.

Demurrer—Equitable replication—Contemporaneous deeds—same parties—one instrument.

Declaration for infringement of a patent.

Plea that the administrator of the patentee granted a license to use the patent to S. & A. who assigned the same to the defendant.

Replication on equitable grounds that the deed of license was contemporaneous with another deed made between the administrator of the patentee of the first part, the plaintiff and others of the second part, and S. & A. of the third part, and by the latter deed it was witnessed that S. & A. should not manufacture or sell machines under the license out of Great Britain and Ireland; and that by another deed between S. & A. of the one part and the defendant of the other part, the defendant covenanted that he would perform all the covenants in the first deed contained to be performed on the part of S. & A. The replication then alleged breeches of the covenant by the defendant in making and selling machines out of Great Britain and Ireland.

Replication held bad on demurrer

C. P. TODD v. FLIGHT. Nov. 20.

Reversioner, action against—Demising premises, knowing them to be in a dangerous condition.

An action lies against a reversioner who has demised his premises with the chimneys in a ruinous condition, and in danger of falling, they being known to be so by him at the time of the demise, and in consequence of their condition falling during the demise and injuring the building of another person.

C. P. SMITH v. VIRTUE ET AL. Nov. 24

Bill of Exchange—Acceptance.

If a bill is accepted conditionally on a bill of lading being given up, and the bill of exchange is not presented for payment, and the bill of lading is not given up on the day on which the bill of exchange falls due, the acceptor is not released from his liability.

C. P.
WILSON v. LANCASTER AND YORKSHIRE RAILWAY COMPANY.

Carriers—Goods not delivered in time—Loss of season—Loss of profits.

The defendants a railway company delivered cloth entrusted to them for conveyance to the plaintiff, the consignee, so long after the time when it was due that the exchangeable value was materially diminished—the judge told the jury to consider what the plaintiff had suffered by "the loss of the season."—the jury gave a verdict for the plaintiff with £80 damages.

Held, that the jury were right in giving substantial damages for the loss in exchangeable value, but that as from the words of the judge "loss of the season" and the circumstances of the case there was ground for supposing that the jury might have included in the amount awarded a sum for the loss of profits, contrary to the rule laid down in *Hadley* v. *Baxendale*, 9 Ex. 341; there must be a new trial unless the plaintiff consented to the damages being reduced.

Ex. DURRELL v. EVANS. April, 30.

Statute of frauds—Sale of goods—Bought and sold Notes made out by factor of seller.

The factor of a hop merchant negotiated with the defendant for the sale to him of a quantity of hops, the defendant agreed verbally to purchase a certain quantity at an agreed price, and the factor made out a note of the transaction at the time in the form of bought and sold notes, altering the date from the day of the transaction to the day following at the request of the defendant.

In an action for not receiving the hops—*Held*, that there was no memorandum of the contract signed by or on behalf of the defendant to satisfy the statute of frauds

C. P. CAHILL v. THE L. & N. W. RAILWAY CO. April, 20.

Railway Company—Passengers luggage—Merchandise.

If a passenger by railway, without any other contract with the Company than that arising from taking a ticket to travel as one of their passengers, so conducts him as that his conduct amounts to a representation that a package which he brings with him to be carried as part of his personal luggage is only his personal luggage, whereas the package contains merchandise only (the regulations requiring merchandise to be paid for) the Company are not responsible for the loss of such package and its contents. It makes no difference if "glass" be written outside the package.

Per EARLE, C. J.—That where a Company is crea-d by act of parliament with liabilities and duties cast upon it and privileges and rights granted to the persons dealing with it the party imposing duties on the Company must be taken to know the provisions of the statute although it be a private act.

C. P.
THE MIDLAND RAILWAY CO. APPELLANTS, v. PYE RESPONDENTS.

Feme covert—Order of protection—Right to sue—Retro-activity.

A married women deserted by her husband entered a plaint in the County Court—afterwards and before the hearing she obtained an order of protection.

Held, that the order has not such a retro-active effect as to entitle her to a right to sue in such plaint, which right she had not at the time of the entry of the plaint by reason of her coverture.

B. C. THE EASTERN COUNTIES RAILWAY CO., RESPONDENTS v. WOODARD, APPELLANT.

Railway passenger—Holder of annual ticket liable to penalty for not producing his ticket when required—By-laws—Regulations—Special control—Cumulation Remedy.

A By-law of the E. C. R. Co. provides that each passenger not producing or delivering up his ticket when required shall be subject to a penalty. The appellant whilst travelling on the line, was required by a collector, who knew that the appellant was the holder of an annual ticket, to produce his ticket. He refused, and, upon an information framed upon the by-law was convicted for refusing. Upon a case stated by the justices it appeared that it was printed upon the ticket itself, that it was to be exhibited when required, and that the holder was subjected to the regulations in regard to passengers. The appellant also when he took the ticket agreed in writing to abide by the by-laws of the Company, and to produce the ticket when required, or, in default thereof to pay the ordinary fare.

Held, that the conviction was right; that the appellant was a passenger subject to the by-laws; that the by-laws were regulations within the meaning of the terms upon the ticket; and that as the appellant had absolutely refused to produce his ticket, and had not paid the ordinary fare the penalty under the by-law could be enforced notwithstanding that by his special agreement he had agreed to produce the ticket or, in default, to pay the ordinary fare.

REVIEWS.

THE LAW MAGAZINE AND LAW REVIEW for February, 1862, London: Butterworths, 7 Fleet Street.

We welcome this number of a valued legal quarterly. The contents are as usual both able and interesting. The *first* is a biographical sketch of Sir John Patterson, for many years an ornament to the English Bench. The sketch, which is written in an easy style, is full of interest. Lawyers are delighted to read of the habits, vicissitudes and successes of those who have attained eminence in the profession. Sir John Patterson was born on 11th February, 1790, and died on 28th June, 1861. He was first appointed to a seat on the Bench on 12th November, 1830. On 19th January, 1852, he resigned that appointment. From that time till the day of

his death he was a member of the Privy Council. The *second* is a paper on international general average, the object of which is to shew the injurious results to commerce from the want of some international system of general average, and at the same time to point out the best means of accomplishing that object. The writer displays much learning in the treatment of his subject. The *third*, headed Ancient Irish Conveyancing, is the substance of a paper read by Mr. J. Huband Smith, M.A., at the meeting of the National Association for the promotion of Social Science held at Dublin in August last. The writer starts with the proposition that a system of jurisprudence of a comprehensive nature existed in Ireland long anterior to the arrival of the Anglo-Norman invaders in the twelfth century. The remainder of his paper is devoted to the proof of that proposition. The *fourth* is a short and curious paper on the rights, disabilities and usages of the Ancient English Peasantry. The *fifth* is a paper on the disbarment of Edwin James by the Benchers of the Inner Temple, and is evidently written with the knowledge if not under the instructions of the Benchers. It gives to the public the facts which rendered necessary that proceeding, and these facts appear to be an ample justification for what was done by the Benchers. The *sixth* is a review of the eighth edition of Sugden on Powers, just issued from the pen of Lord St. Leonards. The *seventh* is an investigation of the several vexed questions which were raised out of the affair of the Trent. The *eighth* is a short paper on the practice of the Divorce Court, in which the writer dwells chiefly on the fact that the wife whose husband commits adultery is without redress, although the most complete redress is afforded to the husband whose wife is unfaithful to marriage vows. The *ninth* is a paper on the Disunion of the United States and the right of Secession. The conclusion at which the author arrives is that "there is much to be said on both sides."

The Edinburgh for January, 1862—New York: Leonard, Scott & Co., also received.

Contents. 1. Life and Writings of William Paterson; 2. Sewell's Ordeal of Free Labour; 3. Max Müller on the Science of Language; 4. Felix Mendelssohn's Letters; 6. Wrecks, Life Boats and Light Houses; 7. Barton's City of the Saints; 8. May's Constitutional History of England; 9. The Lady of Garaye; 10. Belligerents and Neutrals.

The Westminster for January, 1862—New York: Leonard, Scott & Co., also received.

Contents: 1. Law in and for India; 2. The Dramatic Poetry of Ochlenschläger; 3. The Religious Heresies of the Working Classes; 4. Income Tax Reform; 5. Admiral Sir Charles Napier; 6. On Translating Homer; 7. Popular Education in Russia; 8. The American Belligerents; 9. The late Prince Consort.

Blackwood for February, 1862—New York: Leonard, Scott & Co., is also received.

1. Caxtonians, a series of Essays on Life, Literature and Manners. These essays promise to be well worth reading. They are by the author of "The Caxton Family." The first essay is "On the increased attention to outward nature in the decline of life." 2. The conclusion of Wassail, a Christmas story; 3. Physicians and Quacks; 4. Conclusion of Captain Clutterbuck's Champagne; 5. Chronicles of Carlingford; 6. The Origin of Language—a Song; 7. The Defence of Canada—a long and, at the present time, deeply interesting paper. The writer thinks that a war between England and the United States, since the affair of the Trent, is only deferred, and that if not imminent, is pretty sure to come sooner or later. In order, therefore, that Great Britain may be prepared for the contingency he throws out a number of suggestions for the Defence of Canada. The writer is evidently a military man of experience, and his suggestions well worthy of consideration.

The Eclectic Magazine for March, 1862—New York: W. H. Bidwell, is received.

It opens with a portrait of the King of Prussia. In the next we are promised a portrait of Her Majesty the Queen. The contents of the Letter Press are as usual copious and well selected. 1. The Italian Clergy and the Pope; 2. Elizabeth Barrett Browning; 3. The Poetry of Age; 4. Concerning the World's Opinion; 5. Are the Planets Inhabited? 6. Comets and their Phenomena; 7. The Constable of the Tower; 8. Life and Times of Edmund Burke; 9. Ancient Forests and Modern Fuel; 10. Story of the Winter Light; 11. Discoveries, New and Old; 12. The Struggle in America; 13. The Coronation at Königsberg; 13. Martyrs to Adventure; 15. Possible Future of Russia and Poland; 16. King Frederick William Louis; 17. Passages in the Last War; 18. The Abbot Female Collegiate Institute; 19. The Last of the Condes.

Lady's Book for March—Philadelphia: Louis A. Godey, also received.

This number contains no less than sixty-eight engravings, and nearly all of them illustrative of the proper costume for Spring. The letter press is entertaining and instructive. The Magazine is now so well known to that class of readers for whom it is designed that nothing we can say will enhance its value. We wish the magazine the continued success which the enterprise of its publisher so richly deserves.

Lloyd's Military Map and Gazetteer of the Southern States.

This at the present time will be found a most useful compilation. The Map, unlike many others that are palmed off on the public, is drawn from actual surveys made by Southern surveyors. We believe it to be not only the most reliable but by far the most complete Map of the Southern States now offered for sale. The statistical information furnished on the back of the Map is of great importance. It appears to have been compiled with great care and to be very complete and well condensed. The whole undertaking is entitled to a liberal support from those interested in the struggle that unhappily is still pending in the Southern States.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JAMES HENDERSON, of the City of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted February 8, 1862.)

CORONERS.

BENJAMIN HEATON LEMON, Esquire, M.D., Associate Coroner, County of Lincoln.—(Gazetted February 8, 1862.)

BENJAMIN HEATON LEMON, Esquire, M.D., Associate Coroner, County of Welland.—(Gazetted February 8, 1662.)

JOHN GILCHRIST, Esquire, Associate Coroner, United Counties Huron and Bruce.—(Gazetted February 8, 1862.)

PETER C. DAVIS, Esquire, Associate Coroner, United Counties of Frontenac, Lennox and Addington.—(Gazetted February 22, 1862.)

REVENUE INSPECTORS.

THOMAS WHITE, of Peterborough, Esquire, Revenue Inspector, United Counties of Peterborough and Victoria.—(Gazetted February 8, 1862.)

HENRY GODSON, of the City of Toronto, Esquire, Revenue Inspector, Revenue District No 3, Counties of York and Ontario.—(Gazetted February 8, 1862.)

TO CORRESPONDENTS.

"Clerk 6th D. C. Co."—"E. B. K."—"Scrutinium."—Under "Division Courts."

"William W. Smith"—"M. C. L."—"A."—Under "General Correspondence."

"X. Y. Z." Your letter accidentally omitted. In answer, we think both first and last days must be excluded.