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DIARY FOR MAY.

1 SUNDAY... 1st *Sunday after Easter.*
8 SUNDAY... 2nd *Sunday after Easter.*
12 Thursday... University of Toronto Session of Senate begins.
15 SUNDAY... 3rd *Sunday after Easter.*
16 Monday .... EASTER Term begins.
18 Wednesday Trinity College EASTER Term ends.
20 Friday..... Paper Day, Q. B.
21 Saturday... Paper Day, C. P. Last day for serving Writ for County Courts.
22 SUNDAY... 4th *Sunday after Easter.*
23 Monday .... Paper Da., Q. B.
24 Tuesday .... Paper Day, C. P.
25 Wednesday Paper Day, Q. B.
26 Thursday .. Paper Day. C. P.
28 Saturday ... EASTER Term ends.
29 SUNDAY... 5th *Sunday after Easter.*
31 Tuesday ... { Last day for declaring for County Court. Last day for Court of Revision finally to revise Assessment Rolls.

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 & Armagh, 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.

MAY, 1859.

ENGLAND IN OUR WAKE.

Sir. R. Bethell's perseverance has triumphed, and the profession is indebted to him for the adoption by the Inns of Court of that which has been so long demanded, a compulsory examination into general acquirements before admission as a student; and an examination into the aspirant's legal qualifications before his call to the bar.

So says the Editor of the *Law Times* in a recent number:

Be it known to our respected co-laborer (the talented author of the *Advocate*), and all whom it may concern, that in this particular reform, as in many others, young Canada has taken the lead of old England."

Our first Parliament was assembled in 1792, and the Legislature at once declared that the laws of England should be the rule for the decision of all controversies relative to civil rights, &c. In 1797, a Law Society was incorporated by Act of Parliament, and since then no person is in general permitted to practice at the bar of any of Her Majesty's Courts in this country unless he has previously been admitted into the Society as a student of the Laws, been five years on the books, and conformed himself to the rules and regulations of the Society.

By the rules of the Society no person can be admitted as a student unless found on a full and strict examination to be by habits, character and education duly qualified for admission. The student must attend a prescribed course of lectures, and after remaining on all the books of the Society for five years, must again submit to an examination as to his legal and general attainments, and if found properly qualified for call he is admitted to the degree of Barrister-at-Law. The course prescribed by the Society was from the first respectable,—late rules have wisely enlarged the requirements.

The Law Society of Upper Canada was incorporated, in the words of the preamble, for the pu pose of securing to the Province a learned and honorable body to assist their fellow subjects and support and maintain the Constitution. It was well calculated to insure the respectability of the profession, and has most satisfactorily fulfilled its object.

The members of the Upper Canada bar were and are what they profess to be, having in very deed been students of the laws, and having been on examination found qualified for call, upon being called to the bar they come before the public duly accredited as lawyers in reality.

In England the same title, the same social position, the same honors are permitted to the ignorant as to the educated, and the whole class may well be said to be degraded by the uncertainty as to whether its members are what they profess to be. The required number of dinners *must* have been eaten, that is all. But as we said before many other law reforms were carried into practical operation here years before they were adopted in England,—two occur to us at this moment—the absconding debtors' law, which has been in force with us for more than 20 years; and the general system of local judicatories which was established in Upper Canada in 1847, just five years before the same system was introduced into England; for the Division Courts of Upper Canada and the County Courts of England are almost identical as systems of local jurisprudence, and very similar in all their details.

MUNICIPAL LAW REFORM.

It is provided by the Assessment Act of 1853, that the assessor or assessors for each township, village and ward shall prepare an assessment roll, in which after diligent enquiry shall be set down in different columns, and according to the best information in their power the names and surnames in full if the same can be ascertained of all taxable parties resident in the township, village or ward, and of all non-resident freeholders who shall either in person or in writing have required such assessor to enter their names and the land owned by them in the roll, together with the description and extent or amount of property assessable against each, and containing the particulars mentioned in the schedule appended to the Act, for each of the items whereof the assessment roll is to contain a separate column. (16 Vic., cap. 182, sec. 17.)

The assessment is to be completed in every year between

1st February and such day as the Municipal Council of the city, town, village or township shall appoint, not later than 15th April; and on or before the day so appointed the assessor or assessors or a majorty of them are required to complete the roll, and severally to attach thereto a certificate signed by each of them as to its correctness in a given form, and verified upon oath or affirmation. (*Ib.* sec. 24.)

Next it is the duty of the assessor or assessors to deliver the assessment roll completed and added up, with the certificates and affidavits attached to the Clerk of the Municipality. (*Ib.* sec. 25.)

Then it becomes the duty of the Clerk to make a copy of the roll arranged in the alphabetical order of the surnames, and to cause the copy so arranged to be put up in some convenient and public place within the municipality, and to be maintained there until after the meeting of the Court of Revision. (*Ib.*)

The Court of Revision is a Court established for the hearing of all complaints against the assessment. The roll as formally passed by the Court and certified by the Clerk as passed is made valid, and to bind all parties concerned notwithstanding any error or defect committed in or with regard to the roll, except as the same may be further amended on appeals allowed under certain restrictions to the County Judge. (*Ib.* sec. 26 & 28.)

It is the further duty of the Clerk of the Municipality, to transmit without delay to the County Clerk a certified copy of the assessment roll of his Municipality, after the same is formally revised and corrected. (*Ib.* sec. 25.)

The Council of every Municipal village, and of every township not divided into wards, is made to consist of five Councillors, one of whom is to be Reeve, and if the village or township had the names of five hundred resident freeholders and householders on the last revised assessment roll, then one other of the Councillors is to be Deputy Reeve. (22 Vic., cap. 99, sec. 66; sub-secs. 3 & 4.) Reeves and Deputy Reeves are members of the County Council. (*Ib.* sub-sec. 5.)

The Clergy Reserve moneys are equally apportioned by the Receiver General among the several city, town, incorporated village and township municipalities in Upper Canada, in proportion to the number of resident rate-payers that appear on the assessment roll of the Municipality for the year next before the time of the apportionment. (19 & 20 Vic., cap. 16, sec. 1; 20 Vic., cap. 71, sec. 1.)

It is the duty of the Clerks of the Municipalities on or before the 1st December in each year, to transmit to the Receiver General a true return of the number of resident rate-payers appearing yearly on their assessment rolls; and to make affidavits to be written on the returns, and sworn before a Justice of the Peace of the correctness of the returns. (19 & 20 Vic., cap. 16, sec. 2.)

It will thus be observed that the assessment rolls as formally revised and passed are subject to be used for different purposes, but are not made conclusive except as against individuals for any one purpose; were the law otherwise frauds the most gross might be perpetrated under the protection and by the sanction of the law. The safety of Municipal government and the security of the public alike render it necessary that the correctness of assessment rolls should be open to impeachment. Fraud will no doubt as much vitiate an assessment roll as any act or deed known to the law. It is a question whether the assessment rolls can be impeached on any other ground than that of fraud, —the point remains to be determined.

If, then, an assessment roll may be impeached, the question arises in what manner it shall be impeached. Take a single municipality. If it have only two hundred resident freeholders and householders, and yet show more than double that number on the last revised assessment roll, how is the fact to be ascertained? The law does not provide for scrutiny, nor in our opinion any other effectual mode of decision.

The defects of the law in this respect were lately made quite apparent. Proceedings were about to be taken to unseat the Deputy Reeve of the village of Brampton, elected for the year 1858, on the ground that there were not in fact in that year in the village of Brampton 500 resident freeholders and householders, though the roll as revised shows 639. It was found upon reference to sec. 127 of the Municipal Act of 1858 as to contested elections, that although the validity of the election or appointment of a Mayor, Warden, Reeve, Deputy Reeve, Alderman, Councillor, or Police Trustee may be questioned under that section, none can be relator except a candidate at the election, or any elector who gave or tendered his vote thereat. The Deputy Reeve of Brampton was elected by the Councillors, and as the Council desired to maintain him, none of them would consent to act as relator. It was in addition alleged that there is no such office as Deputy Reeve of Brampton, and as the Municipal Act applies only to the unseating of persons from admitted and existing offices, proceedings under that act could not be taken.

Under these circumstances, recourse was had to the English Statute of Anne, and under it an information was filed. It was averred in the information that there were not on the last revised assessment roll of the village the names of five hundred resident freeholders and householders nor were there at any time before or since the day of the election five hundred resident freeholders or householders in or belonging to the village.

These allegations were denied by the defendant—the Deputy Reeve elect and the relator having joined issue the parties proceeded to trial by jury in the ordinary manner.

On the trial the defendant produced the assessment roll, showing names of more than five hundred resident freeholders and householders, and so *prima facie* established his case. He however in the terms of his plea went further, and endeavoured to show that irrespective of the roll there were in fact when the assessment was made more than five hundred resident freeholders and householders in Brampton. Witnesses were called in to testify generally as to the population of Brampton in 1858, and testified particularly as to the names of many of the persons on the roll.

The witnesses for the prosecution testified generally that in 1858 there were not in their opinion five hundred resident freeholders and householders in Brampton, and particularly that many of the persons named on the roll were unknown.

In such a conflict of generalities it was discovered to be wholly impossible for a jury to agree at a conclusion either on one side or the other,—thus showing the inadequacy of existing machinery of trial by jury for such a case.

On a Parliamentary scrutiny each voter is looked upon as distinct case. One party affirms that he has a good vote, and the other denies, The evidence is heard *pro* and *con* and his right is determined. The case of the next voter is determined in like manner, and so name by name till the entire list of voters is disposed of. Some such machinery is required when the correctness of an assessment roll is in question, and without it proceedings cannot be ought than expensive and unsatisfactory. If trial by jury is to be the tribunal in such a case we think there ought to be a previous commission as now issued in Parliamentary election contests.

SCHOOL TRUSTEES AND TEACHERS.

Many persons are deterred from accepting offices of public trust, owing to a dread of personal liability for something that may be done by them in office. The office of school trustee is not exempt from this attendant dread.

The law will not intend anything in favor of the personal liability of school trustees or others who are by law clothed with corporate powers. The same anxiety which manifests itself in the protection extended to bailiffs and others, who in the discharge of public duties may do illegal acts, is found to exist in the case of school trustees.

It is enacted by 13 & 14 Vic cap. 48, sec. 10, that the trustees in each school section shall be a corporation, under the name of "the trustees of school section number ——, in the township of ——, in the county of ——." The effect of this legislative enactment is to give to the trustees, as a corporation, power to sue and be sued, contract and be contracted with, by their corporate name; to have a common seal; to vest in a majority of the trustees power to bind the others by their acts; and also to exempt the individual trustees from personal liability for debts, obligations, &c. (12 Vic. cap. 10, sec. 5, subsec. 24.)

School trustees of each section may, among other things, contract with and employ teachers for the section, and determine the amount of their salaries. (13 & 14 Vic. cap. 48, sec. 12, subsec. 5.) The agreement with a teacher should be not only in writing, but, it seems, under the corporate seal of the trustees. (*Quin v. School Trustees*, 7 U. C. Q. B. 130; *Kennedy v. Burness et al*, 15 *Ib.* 473.) A local superintendent who, together with the trustees, signs the agreement, will be considered as having signed the same only as approving of the appointment, and not otherwise. (*Campbell v. Elliott et al*, 3 U. C. Q. B. 241.)

It is the duty of the trustees, among other things, to give the teachers employed the necessary orders upon the local superintendent for the school fund apportioned and payable to the section, provided the teacher be at the time the holders of legal certificates of qualification. (13 & 14 Vic. cap. 48, sec. 12, subsec. 6.) Any teacher is entitled to be paid at the rate mentioned in his agreement with the trustees, even after the expiration of the period of his agreement, until the trustees pay him the whole of his salary as teacher of the school, according to their engagement with him. (*Ib.* sec. 17.)

It is the duty of the trustees to provide for the salaries of the teachers, and all other expenses of the school, in such manner as may be desired by a majority of the freeholders or householders at an annual school meeting, and to employ all lawful means to collect the sum or sums required. (*Ib.* sec. 12, subsecs. 7, 8, 9.)

If the trustees *wilfully* neglect or refuse to exercise the corporate powers vested in them by the School Acts, for the fulfilment of any contract or agreement made by them, they become personally responsible for the fulfilment of the contract or agreement. (*Ib.* sec. 12, subsec. 16.)

So the trustees of each school section are personally responsible for the amount of any school moneys forfeited and lost to the section, in consequence of their neglect of duty, during the period of their continuance in office. (16 Vic. cap. 185, sec. 9.)

In case of any difference between trustees and a teacher in regard to his salary, the sum due to him, or any other matter in dispute between them, it is lawful to submit the matter in dispute to arbitration. (13 & 14 Vic. cap. 58, sec. 17.)

The mode of proceeding is as follows:—Each party is to

choose one arbitrator. In case either party in the first instance neglect or refuse to name and appoint an arbitrator on his behalf, it is lawful for the party requiring the arbitration, by a notice in writing, to be served upon the party neglecting or refusing to make the appointment, to require the opposite party, within three days, inclusive of the day of service, to name and appoint an arbitrator on his behalf. The notice served must name the arbitrator of the party serving it. In case the party upon whom the notice is served do not, within the three days mentioned in the notice, name and appoint an arbitrator, then the party requiring the arbitration may nominate and appoint the second arbitrator. (*Ib.*)

The two arbitrators, in either way chosen, and the local superintendent, or any person chosen by him to act on his behalf in case he cannot attend, or any two of them, are empowered to make a final award between the parties—final of course only so far as the arbitrators have jurisdiction. (*Kennedy v. Burness et al*, 15 U. C. Q. B. 486.) The meaning is that the merits of the matter in dispute between the principal parties, when adjudicated upon by the tribunal authorized, shall be set at rest, and cannot be again opened or questioned; but it cannot extend to preclude an inquiry whether that tribunal has or has not acted according to law. The legislature never intended that arbitrators, when once appointed, should give themselves jurisdiction to say and do anything they pleased. (Per *Burns*, J., in *Kennedy v. Burness et al*, 15 U. C. Q. B. 491.) No power is given to review the decision of the arbitrators, and no authority is given to examine into their conduct and motives; and therefore, so long as they keep themselves to the law, they are free to form any judgment they please, and it is final. —(*Ib.*)

The arbitrators may administer oaths to, or require the attendance of all or any of the parties interested in the reference, and of their witnesses, with all such books, papers and writings as they may require them or either of them to produce. (16 Vic. cap. 185, sec. 15.)

So the arbitrators, or any two of them, may issue their warrant to any person to be named therein, to enforce the collection of any sum or sums of money by them awarded to be paid. The person named in the warrant is to have the same power and authority to enforce the collection of moneys mentioned in the warrant, with all reasonable costs, by seizure and sale of the property of the party or corporation against whom the same is rendered, as any bailiff in a division court has in enforcing a judgment and execution issued out of the court. (*Ib.*)

No action can be sustained by a school teacher against trustees for his salary. His only remedy is by arbitration. (*Tieman v. the Trustees of Napean*, 14 U. C. Q. B. 15.)

To warrant a proceeding against trustees as personally liable, it must be averred and proved that they have in some particular (which should be specified) wilfully neglected or refused to execute their corporate powers for the fulfilment of the contract. (Per *Robinson*. C. J., in *Kennedy v. Burness et al*, 15 U. C. Q. B. 485.)

Although under certain reservations an award may be bad in part, and yet supported as to the remainder, still, when a special jurisdiction is created, when goods are seized to make a sum directed to be levied under a warrant, and if, as to part of the sum directed to be made, the adjudication is illegal, the warrant, as regards the whole sum, will be held illegal, and the seizure under it not warrantable, even as to that part which is lawful. (*Ib.* p. 490.)

It is, however, a question, whether, under any circumstances, arbitrators can have jurisdiction to determine on the personal responsibility of school trustees. Nothing can be drawn from the expression of the 15th section of the act of 1853—that the person authorized to execute the warrant shall have the same powers, by the seizure and sale of the property of the party or corporation, as any bailiff of a division court has—which can militate against or be construed in favor of either view. If the award happened to be against the teacher, then he would be "the party" against whom the warrant would operate, if anything was awarded against him; or if the matter in dispute was clearly something personal with the trustees, and had nothing whatever to do with them in their corporate capacity, then they, or whichever of them it might be, would be "the party." (*Ib.* p. 494.)

In an action of replevin for goods of school trustees, distrained under an award for the salary of a school teacher, declaring the trustees individually liable, on the ground "that the trustees did not exercise all the corporate powers vested in them by the School Act for the due fulfilment of the contract" made by them with the teacher, it was held that the award did not support pleas which averred, as required by the 13 & 14 Vic. cap. 48, sec. 10, "a *wilful* neglect or refusal" by the trustees to exercise their corporate powers, as the ground of personal liability. It was also held that the trustees were not, under the circumstances of the case, personally liable. The award, which for the first time ascertained the exact amount due to the teacher declared the trustees personally liable, without giving them any opportunity to exercise their corporate powers to raise the funds to pay the amount of it. This was held to be unreasonable and bad. (*Kennedy v. Hall et al*, 7 U. C. C. P. 218.)

Where a school teacher, after an award had been made in his favor, on a dispute as to salary afterwards made a claim, on a second arbitration, for the amount payable under

the first award, together with his salary for the further period that had elapsed since the award, and sought under an award obtained *ex parte*, and a warrant thereon to recover the amount by a seizure of the trustee's own goods, such a course was held to be illegal, and not contemplated by the School Acts. (*Kennedy v. Burness et al*, 7 U. C. C. P. 227.)

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

(Continued from p. 78.)

The Quebec Act—Constitution abolished—Courts abolished—Conservators of the Peace appointed—Attempt at restoration of English Law—Reasons of failure—Invasion by Montgomery—Confusion consequent thereon—Proclamation Courts abused.

The Quebec Act, though remarkable for the abrogation of the old constitution of the Province and other sweeping changes accomplished, is also remarkable owing to the fact that it abolished all the courts in the Province, on 1st May, 1778, and did not establish any other courts of justice in the room of those abolished.

It will be observed that it only recognized a power in the Crown to establish courts; which power might or might not be exercised, and certainly was not exercised in time to leave the country without a single tribunal of justice. Some instrument ought to have been prepared and passed under the great seal of Great Britain as soon as possible after the passing of the Act, which was on 13th January, 1774, to erect other courts of justice in the Province, to take effect on 1st May of the same year, when the old courts ceased. No such instrument was prepared.

When the first day of May arrived, the Province must have fallen into a state of positive anarchy if Governor Carleton had not endeavoured to prevent it by appointing three magistrates, whom he called Conservators of the Peace for the District of Quebec, and as many more for the District of Montreal. Those appointed for the District of Quebec were, Mr. Adam Mabane, Mr. Thomas Dunn, and Monsieur Claude Panet. The two former had been the Judges of the Court of Common Pleas for that district before the suppression of the court, on 1st May, 1775. The latter was a French lawyer and notary at Quebec. Those appointed for the District of Montreal were, Captain John Fraser, Mr. John Marteil, he and Monsieur Réné Ovide Hestel de Rouville. As in the case of the Quebec District, the two first named gentlemen had been the Judges of the Court of Common Pleas for the District of Montreal, before its suppression. The last named gentleman was a resident of Montreal, who had been a Judge at Three Rivers, in the time of the French government.

The reasonableness of restoring the English law on some important subjects appears to have been felt and acknowledged by his Majesty's ministers soon after the passing of the Quebec Act. Though the English ministry, when the act was before the House of Commons, voted against clauses offered by Mr. Dempster for preserving to the inhabitants the English laws relating to habeas corpus and trial by jury, these subjects seem afterwards to have met with approval. Soon after the act was passed, Chief Justice Hey, acting under the direction of the Earl of Dartmouth, Secretary of State, prepared a draft ordinance re-establishing the writ of habeas corpus and trial by jury. This draft was proposed to the Legislative Council of the Province in the month of September, 1775, and would probably have passed, had not the invasion of Montgomery caused a speedy termination of the session.

In this year, in consequence of the irruption of Montgomery and other revolutionary forces of the neighbouring colonies, martial law was proclaimed throughout Canada. The proclamation recited that a rebellion prevailed in many of his Majesty's colonies in America, and particularly in some of the neighbouring ones, and that many of the rebels had with an armed force made incursions in the Province, attacking and carrying away a part of his Majesty's troops, together with a parcel of stores and a vessel belonging to his Majesty; and had actually invaded the Province in a traitorous and hostile manner, to the great terror of his Majesty's subjects and in open defiance of his laws and government, falsely and maliciously giving out, by themselves and their abettors, that the motives for so doing were to prevent the inhabitants of the Province from being taxed and oppressed by the government, together with divers other false and seditious reports, tending to inflame the minds of the people and to alienate them from his Majesty. To the end therefore that so treasonable an invasion might soon be defeated, that all such traitors with their said abettors might speedily be brought to justice, and the public peace and tranquillity of the Province restored, which the ordinary course of civil law was unable to effect, the proclamation was issued. It declared that "until the aforesaid good purposes could be attained," the Governor General would, in virtue of the powers and authority to him given by his Majesty, execute martial law, and cause the same to be executed throughout the Province. To that end he ordered the Militia to be raised forthwith. All subjects and others whom it might concern were enjoined to be aiding and assisting the commissioned officers and others who had been or might be commissioned for carrying on his Majesty's service. The consequence was, the law courts were abandoned, and that lawyers and lawyers' clerks, as well as all other of his Majesty's subjects, abandoned their occupations for the protection and preservation of the Pro-

vince. For several years, the Courts and the Law Society were closed, and neither students were admitted, attorneys enrolled, nor barristers called.

DIVISION COURTS.

Liddal v. Gibson et al.

Although it does not appear in the report of this case (published in our last number), we understand as a matter of fact, that the Judge offered to allow the objection, if the defendant would give him any reason to suppose that he had sustained any loss from want of notice; and as he did not pretend he had, but appeared merely to wish to get off paying his just liability, the Judge thought he was in equity bound to pay.

We are not aware of any case in which the power of deciding according to equity and good conscience has been so employed, but we have heard that other county judges as well as Judge Robinson have decided in that way. We should be glad to hear from any correspondent on the subject;—in the mean time we subjoin some observations which have been communicated to us respecting the case:

17 Q. B. R. 98, 99.—The judge may have determined it on that ground; *i. e.*, that the defendant, as endorser, was in *conscience* liable on the note. But is not the defence set up by the defendant a statutory one (4 Anne, cap. 9, sec. 7), as well as by the implication raised by our own statutes regulating the time of presentment, sending notice and evidence of the same, and protest, which, by the Division Court Act of 1850 (sec. 43), requires six days' notice before trial?

It does not appear in this case that such a notice was given, but merely that the defendant appeared and raised the objection of no proof of presentment of notice of non-payment.

It is as fair that the defendant should give this notice of such a defence, in order that the plaintiff may be prepared with his retort as presumptive evidence of the sending the notice of dishonor, or more conclusive evidence if that is *effectually* disputed, as it is for the defendant to be entitled to notice of dishonor, to save the expense of extra witnesses; and the defendant should not be allowed to lay by, and raise this defence at the last moment, which otherwise must lead to one of two bad results—either that the plaintiff must be defeated, or that the case must be postponed till next court, to enable him to prove notice given, by which the defendant gains two months more time.

Then, as to statutory defences, is not any plea now required by the rules of superior courts under the late statutes to let in any defence, a statutory defence? And if intended in a minor case to be relied on in the Division Courts as a defence, is not six days' notice of it necessary as both fair and legal? And if there is a doubt as to defences under the New Rules, the 10th section of the Extension Act of Division Court should be adopted.

Then, are not all defences which are available by reason of the enactments of any statute, either by special plea, general issue, or by statute, or simply such, which requires no special plea in the superior courts, but which requires that something shall be done before an action can be brought, such as giving a written notice, or where a writing shall be the only evidence, and such as require six days' notice under the Division Court Act, and in the superior courts, some of them could be taken advantage of without any special plea or general issue per statute, particularly pointing out the statute for the defence relied on.

It would seem that the Division Court Acts intended that all *others* than the ordinary defences, which the plaintiff would be prepared for, and notice of which he received in writing, should, if they arose by the effect of any statute, should have six days' notice given of them, as these cases are generally not undertaken by lawyers, and in fairness the party should be apprised in time of their true nature, so that he could prepare to meet it, or abandon the suit if the defence was well founded.

The other defences of an ordinary nature do not even require a written appearance or plea. But upon the defendent or his agent appears and defends. It is *quasi* general issue.

We have received the April number of the *Lower Canada Jurist*, edited by a committee of Advocates, and published by John Lovell, Montreal; also the *Solicitor's Journal*, London, England; Nos. 1 and 2 of the *Lower Canada Reports*, published in Quebec; and the Tables of the Trade and Navigation of the Province of Canada for 1858, compiled from official returns, by Hon. A. T. Galt, Inspector-General.

Messrs. Stephens & Norton are, we are informed, about to publish a twelfth edition of Selwyn's Abridgment of the Law of Nisi Prius, brought down to the present time, by David Power, Esq., Q.C., Recorder of Ipswich. The edition is much required, and will, we are sure, be in all respects worthy of the publishers, whose Agent in this city is J. C. Geikie.

We delayed this issue of the *Law Journal* in order at the earliest moment to publish some of the most important Acts of the Legislature, recently sanctioned and now in force. They will be found in other columns.

LAW SOCIETY, U. C.—MICHAELMAS TERM, 1858.

EXAMINATION FOR CALL.

SMITH'S MERCANTILE LAW.

1. In what respects does life insurance differ from other contracts of insurance?
2. Mention some cases in which one partner has, and some in which he has not, a right to bind the partnership.
3. What is a bill of lading, and to what extent is it a negotiable instrument.
4. How may a partnership be created, and how dissolved?

ADDISON ON CONTRACTS.

1. What is a *nudum partum?*
2. Is a delivery of goods above the value of ten pounds sufficient to satisfy the Statute of Frauds, where there is no written contract, or part payment? If not, what more is requisite?
3. To what extent must a contract be in restraint of trade to render it void on that account?
4. What amounts to a sufficient giving of time to a principal, to discharge a surety?
5. What contracts of infants are absolutely binding? and what

is requisite to render a voidable contract by an infant binding on him when of full age?

TAYLOR ON EVIDENCE.

1. Is there any and what distinction between secondary and second-hand evidence?
2. Are there any cases in which defendant is an admissible witness for his co-defendant?
3. In what cases prior to the Common Law Procedure Act was a comparison of hand-writing admissible?
4. Does the fact that the issue is on the defendant in all cases entitle him to begin? If not, state any exception.
5. Where a fact in issue in the cause requires to be decided during the progress of the trial, for the purpose of rendering evidence admissible, is it a question for the court or for the jury, and is such decision final?
6. If a witness gives evidence which may tend to criminate himself without claiming the protection of the court, is such admission admissible evidence against him? Does it make any difference if he claim the protection of the court, and is compelled to answer?
7. How many kinds of presumptions are, and what are their effects respectively?

BYLES ON BILLS.

1. In what cases would the drawer of a bill accepted for his accommodation be entitled to notice of dishonour?
2. Give an instance of a restrictive indorsement, what is its effect?
3. What is the effect of a blank left in a bill or note, for the name of the payee?
4. Is the forgery of the drawer's name a good defence in an action against the acceptor of a bill.
5. What is the effect of taking a bill or note after it becomes due?
6. Within what time must the several parties to a note or bill give notice of dishonour, to enable them to charge the parties liable to them?

STATUTES AND PRACTICE OF COURTS.

1. What is the practice of the Court of Chancery as to the re-hearing of causes? How is the application for a re-hearing made, and how often may a cause be re-heard?
2. What time has a defendant to demur to a bill?
3. What is the practice substituted by the general orders for the old practice of examining parties *pro interisse suo?*
4. In what cases can the Court of Chancery, by its order or decree, vest property without a conveyance? Is this jurisdiction given by any, and what statute?
5. How many years arrears of interest on a legacy is a legatee entitled to?
6. What are the proceedings in replevin, and in what cases can the action be brought in this province?
7. When is judgment *non obstante veridicto;* and when is a re-pleader granted? Has the Common Law Procedure Act made any change with regard to costs on judgment *non obstante?*
8. What is the effect of a defendant in ejectment not appearing at the trial?
9. What changes have taken place during the last session with regard to the law of arrest?
10. Within what time after the date of the first writ of attachment against an absconding debtor must a creditor place his attachment in the hands of the sheriff to entitle him to share, if the property of the debtor is insufficient to satisfy all demands?
11. How many peremptory challenges is a prisoner entitled to; and what is the right of the Crown in objecting to jurors?

WILLIAMS ON REAL PROPERTY.

1. In what respect does a contingent remain under the present law differ from an executory devise? Has there been any, and what change in the law on this subject?
2. State the rule of law against perpetuities.
3. What are the requisites of a legal jointure sufficient to bar a widow of dower?
4. Upon the death of a tenant *pour autre vie* living *cestui que vie*, where no special occupant has been named, who takes the residue of the estate? On what statutes does the law in such cases depend?
5. In whom does the property in timber unlawfully cut down by a tenant for life, vest upon its recoverance?

STORY'S EQUITY JURISPRUDENCE.

1. Give some illustrations of the doctrine of relief in equity, on the ground of accident.
2. What is it essential that a purchaser seeking to rescind the contract of sale on the ground of the vender's misrepresentations, should shew?
3. Is inadequacy of price in any, and what cases, a good ground of defence to a bill by a purchaser for specific performance?
4. What are the rules of court of equity, as to setting aside sales of reversion, and reversionary interests?
5. What precaution should the assignee of a chose in action take to guard against priority being obtained by a subsequent assignee?
6. In what cases will courts of equity deem a trust created by recommendatory words in a will? Give an instance in which words of recommendation will be held to raise a trust, and an instance in which such a construction will not be applied.

BLACKSTONE'S COMMENTARIES.

1. Where a colony is won by conquest or cession, does it still remain subject to its ancient laws; or do the laws of England apply to it?
2. How are statutes classed by Blackstone?
3. Mention some of the rules given by Blackstone for the construction of statutes.

An Act respecting the Consolidated Statutes of Canada.

[Assented to 4th May, 1859]

WHEREAS it has been found expedient to revise, classify and consolidate the Public General Statutes which apply to the whole Province of Canada;—And whereas such revision, classification and consolidation have been made accordingly; And whereas it is expedient to provide for the incorporation therewith of the Public General Statutes passed during the present Session in so far as the same affect the whole Province, and for giving the force of law to the body of Consolidated Statutes to result from such incorporation: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The printed Roll attested as that of the said Statutes so revised, classified and consolidated as aforesaid, under the signature of His Excellency the Governor-General, that of the Clerk of the Legislative Council, and that of the Clerk of the Legislative Assembly, and deposited in the office of the Clerk of the Legislative Council, shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as to be repealed in the Schedule A thereto annexed; but the marginal notes thereon, and the references to former enactments at the foot of the several sections thereof form no part of the said Statutes and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected, and any mis-print or clerical error in the said Roll may also be corrected,—in the Roll hereinafter mentioned.

2.—The Governor may select such Acts and parts of Acts passed during the present Session, as he may deem it advisable to incorporate with the said Statutes contained in the said first mentioned Roll, and may cause them to be so incorporated therewith, adapting their form and language to those of the said Statutes (but without changing their effect), inserting

them in their proper places in the said Statutes, striking out of the latter any enactments repealed by or inconsistent with those so incorporated, altering the numbering of the chapters and sections, if need be, and adding to the said Schedule A a list of the Acts and parts of Acts of the present Session so incorporated as aforesaid; and the Governor may direct that all sums of money stated in the said Roll in Halifax currency, be converted into dollars and cents, in all cases where it can be conveniently done.

3.—So soon as the said incorporation of such Acts and parts of Acts with the said Statutes, and the said addition to the said Schedule A shall have been completed, the Governor may cause a correct printed Roll thereof attested under his signature and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as repealed in the amended Schedule A thereto annexed; any marginal notes however, and references to former enactments which may appear thereon being held to form no part of the said Statutes, but to be inserted for convenience of reference only.

4.—The Governor in Council, after such deposit of the said last mentioned Roll, may by Proclamation, declare the day on, from and after which the same shall come into force and have effect as law by the designation of "The Consolidated Statutes of Canada."

5.—On, from, and after such day, the same shall accordingly come into force and effect as and by the designation of "The Consolidated Statutes of Canada," to all intents as though the same were expressly embodied in and enacted by this Act, to come into force and effect on, from and after such day; and on, from and after the same day, all the enactments in the several Acts and parts of Acts in such amended Schedule A mentioned as repealed shall stand and be repealed,—save only as hereinafter is provided.

6.—The repeal of the said Acts and parts of Acts shall not revive any Act or provision of law repealed by them: nor shall the said repeal prevent the effect of any saving clause in the said Acts and parts of Acts, or the application of any of the said Acts or parts of Acts or of any Act or provision of law formerly in force,—to any transaction, matter or thing anterior to the said repeal, to which they would otherwise apply.

7.—The repeal of the said Acts and parts of Acts shall not affect:

1.—Any penalty, forfeiture or liability, civil or criminal, incurred before the time of such repeal, or any proceedings for enforcing the same, had, done, completed or pending at the time of such repeal;

2.—Nor any indictment, information, conviction, sentence or prosecution had, done, completed or pending at the time of such repeal;

3.—Nor any action, suit, judgment, decree, certificate, execution, process, order, rule or any proceeding, matter or thing whatever respecting the same, had, done, made, entered, granted, completed, pending, existing, or in force at the time of such repeal;

4.—Nor any act, deed, right, title, interest, grant, assurance, descent, will, registry, contract, lien, charge, matter or thing, had, done, made, established or existing at the time of such repeal;

5.—Nor any office, appointment, commission, salary, allowance, security, duty, or any matter or thing appertaining thereto, at the time of such repeal;

6.—Nor any marriage, certificate or registry thereof, lawfully had, made, granted or existing before or at the time of such repeal;

7.—Nor shall such repeal defeat, disturb, invalidate or prejudicially affect any other matter or thing whatsoever, had, done, completed, existing or pending at the time of such repeal;

8.—But every

Such penalty, forfeiture and liability, and every such

Indictment, information, conviction, sentence and prosecution, and every such

Action, suit, judgment, decree, certificate, execution, process, order, rule, proceeding, matter or thing, and every such

Act, deed, right, title, interest, grant, assurance, descent, will, registry, contract, lien, charge, matter or thing, and every such

Office, appointment, commission, salary, allowance, security and duty, and every such

Marriage, certificate and registry, and every such other matter, and thing, and the force and effect thereof, respectively,

May and shall, both at law and in equity, remain and continue as if no such repeal had taken place, and, so far as necessary, may and shall be continued, prosecuted, enforced and proceeded with under the said Consolidated Statutes and other the Statutes and Laws having force in this Province, so far as applicable thereto, and subject to the provisions of the said several Statutes and Laws.

8.—The said Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Consolidated Statutes are substituted.

9.—But if upon any point the provisions of the said Consolidated Satutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Consolidated Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

10.—Any reference in any former Act remaining in force, or in any instrument or document, to any Act or enactment so repealed, shall after the Consolidated Statutes take effect, be held, as regards any subsequent transaction, matter or thing, to be a reference to the enactments in the Consolidated Statutes having the same effect as such repealed Act or enactment.

11.—The insertion of any Act in the said Schedule A shall not be construed as a declaration that such Act or any part of it was or was not in force immediately before the coming into force of the said Consolidated Statutes.

12.—Copies of the said Consolidated Statutes printed by the Queen's Printer from the amended roll so deposited, shall be received as evidence of the said Consolidated Statutes in all Courts and places whatsoever.

13.—The Interpretation Act contained in the said Consolidated Statutes, shall apply to them and to this Act;—and in construing this Act or any Act forming part of the said Statutes, unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning or calling for a different construction:

1.—The enactments in such Act apply to the whole Province of Canada;

2.—The Law is to be considered as always speaking, and whenever any matter or thing is expressed in the present tense, the same is to be applied to the circumstances as they arise, so that effect may be given to each Act and every part thereof according to its spirit, true intent and meaning;

3.—The word "shall" is to be construed as imperative, and the word "may" as permissive;

4.—Whenever the word "herein" is used in any section of an Act, it is to be understood to relate to the whole Act and not to that section only;

5.—When any Act or thing is required to be done by more than two persons, a majority of them may do it;

6.—The word "Proclamation" means a Proclamation under the Great Seal, and the expression "Great Seal" means the Great Seal of the Province of Canada;

7.—When the Governor is authorized to do any act by Proclamation, such Proclamation is to be understood to be a Proclamation issued under an order of the Governor in Council, but it shall not be necessary that it be mentioned in the Proclamation that it is issued under such order,

8.—The word "County" includes two or more Counties united for purposes to which the enactment relates.

14.—If upon any point there be a difference between the English and the French versions of the said Statutes, that version which is most consistent with the Acts consolidated in the said Statutes shall prevail.

15.—The laws relating to the distribution of the printed copies of the Statutes shall not apply to the said Consolidated Statutes, but the same shall be distributed in such numbers and to such persons only, as the Governor in Council may direct.

16.—This Act shall be printed with the said Consolidated Statutes and shall be subject to the same rules of construction as the said Consolidated Statutes;—And any Chapter of the said Statutes may be cited and referred to in any Act and proceeding whatever, Civil and Criminal, either by its title as an Act,—or by its number as a Chapter in the copies printed by the Queen's Printer,—or by its short title.

17.—The Governor may direct that any Acts or parts of Acts of the Imperial Parliament, Proclamations, Treaties or other Public documents which he may select as of general interest to the people of this Province, be printed and annexed to and distributed with the printed copies of the said Consolidated Statutes.

An Act respecting the Consolidated Statutes for Upper Canada.

[Assented to 4th May, 1859.]

WHEREAS it has been found expedient to revise, classify and consolidate the Public General Statutes which apply exclusively to Upper Canada, including both those passed by the Legislature of the late Province of Upper Canada, and those passed by the Parliament of Canada;—And whereas such revision, classification and consolidation have been made accordingly; And whereas it is expedient to provide for the incorporation therewith of the Public General Statutes passed during the present Session in so far as the same affects Upper Canada exclusively, and for giving the force of law to the body of Consolidated Statutes to result from such incorporation: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The printed Roll attested as that of the said Statutes so revised, classified and consolidated as aforesaid, under the signature of His Excellency the Governor General, that of the Clerk of the Legislative Council and that of the Clerk of the Legislative Assembly, and deposited in the office of Clerk of the Legislative Council, shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as to be repealed in Schedule A thereto annexed; but the marginal notes thereon, and the references to former enactments at the foot of the several sections thereof form no part of the said Statutes, and shall be held to have been inserted for convenience of reference only, and may be omitted or corrected, and any mis-print or clerical error in the said Roll may also be corrected,—in the Roll hereinafter mentioned.

2.—The Governor may select such Acts and parts of Acts passed during the present Session, as he may deem it advisable to incorporate with the said Statutes contained in the said first mentioned Roll, and may cause them to be so incorporated therewith, adapting their form and language to those of the said Statutes (but without changing their effect), inserting them in their proper places in the said Statutes, striking out of the latter any enactments repealed by or inconsistent with those so incorporated, altering the numbering of the chapters and sections, if need be, and adding to the said Schedule A a list of the Acts and parts of Acts of the present Session so incorporated as aforesaid; and the Governor may direct that all sums of money stated in the said Roll in Halifax currency, be converted into dollars and cents, in all cases where it can be conveniently done.

3.—So soon as the said incorporation of such Acts and parts of Acts with the said Statutes, and the said addition to the said Schedule A shall have been completed, the Governor may *cause a correct printed Roll thereof attested under his signature* and countersigned by the Provincial Secretary, to be deposited in the office of the Clerk of the Legislative Council, which Roll shall be held to be the original thereof, and to embody the several Acts and parts of Acts mentioned as repealed in the amended Schedule A thereto annexed; any marginal notes however, and references to former enactments which may appear thereon being held to form no part of the said Statutes but to be inserted for convenience of reference only.

4.—The Governor in Council, after such deposit of the said last mentioned Roll, may, by Proclamation, declare the day on, from and after which the same shall come into force and have effect as law by the designation of "The Consolidated Statutes for Upper Canada."

5.—On, from and after such day, the same shall accordingly come into force and affect as and by the designation of "The Consolidated Statutes for Upper Canada," to all intents as though the same were expressly embodied in and enacted by this Act, *to come into force and effect on, from and after such* day; and on, from and after the same day, all the enactments in the several Acts and parts of Acts in such amended Schedule A mentioned as repealed, shall stand and be repealed, save only as hereinafter is provided.

6.—The repeal of the said Acts and parts of Acts shall not revive any Act or provision of law repealed by them; nor shall the said repeal prevent the effect of any saving clause in the said Acts and parts of Acts, or the application of any of the said Acts or parts of Acts or of any Act or provision of laws formerly in force,—to any transaction, matter or thing anterior to the said repeal, to which they would otherwise apply.

7.—The repeal of the said Acts and parts of Acts shall not affect—

1.—Any penalty, forfeiture or liability, civil or criminal, incurred before the time of such repeal, or any proceedings for enforcing the same, had, done, completed or pending at the time of such repeal,—

2.—Nor any indictment, information, conviction, sentence or prosecution had, done, completed or pending at the time of such repeal,—

3.—Nor any action, suit, judgment, decree, certificate, execution, process, order, rule or any proceeding, matter or thing whatever respecting the same, had, done, made, entered, granted, completed, pending, existing, or in force at the time of such repeal,—

4.—Nor any act, deed, right, title, interest, grant, assurance, descent, will, registry, contract, lien, charge, matter or thing, had, done made, acquired, established or existing at the time of such repeal,—

5.—Nor any office, appointment, commission, salary, allowance, security, duty, or any matter or thing appertaining thereto, at the time of such repeal,—

6.—Nor any marriage, certificate or registry thereof, lawfully had, made, granted or existing before or at the time of such repeal,—

7.—Nor shall such repeal defeat, disturb, invalidate or prejudicially affect any other matter or thing whatsoever, had, done, completed, existing or pending at the time of such repeal,—

8.—But every

Such penalty, forfeiture and liability, and every such

Indictment, information, conviction, sentence and prosecution, and every such

Action, suit, judgment, decree, certificate, execution, process, order, rule, proceeding, matter or thing, and every such

Act, deed, right, title, interest, grant, assurance, descent, will, registry, contract, lien, charge, matter or thing, and every such

Office, appointment, commission, salary, allowance, security and duty, and every such

Marriage, certificate and registry, and every such other matter and thing, and the force and effect thereof, respectively,

May and shall, both at law and in equity, remain and continue as if no such repeal had taken place, and, so far as necessary, may and shall be continued, prosecuted, enforced and proceeded with under the said Consolidated Statutes and other the Statutes and Laws having force in Upper Canada, so far as applicable thereto, and subject to the provisions of the said several Statutes and Laws.

8.—The said Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Consolidated Statutes are substituted.

9.—But if upon any point the provisions of the said Consolidated Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Consolidated Statutes take effect, the provisions contained in them shall prevail, but as respects all transactions, matters and things anterior to the said time, the provisions of the said repealed Acts and parts of Acts shall prevail.

10.—Any reference in any former Act remaining in force, or in any instrument or document, to any Act or enactment so repealed, shall after the Consolidated Statutes take effect, be held, as regards any subsequent transaction, matter or thing, to be a reference to the enactments in the Consolidated Statutes having the same effect as such repealed Act or enactment.

11.—The insertion of any Act in the said Schedule A shall not be construed as a declaration that such Act or any part of it was or was not in force immediately before the coming into force of the said Consolidated Statutes.

12.—Copies of the said Consolidated Statutes printed by the Queen's Printer from the amended Roll so deposited, shall be received as evidence of the said Consolidated Statutes in all Courts and places whatsoever.

13.—It shall not be necessary that the said Consolidated Statutes for Upper Canada be translated into French: but the Governor may, in his discretion, cause a translation to be made and printed at any time hereafter.

14.—The laws relating to the distribution of the printed copies of the Statutes shall not apply to the said Consolidated Statutes, but the same shall be distributed in such numbers and to such persons only, as the Governor in Council may direct.

15.—This Act shall be printed with and shall form the first Chapter of the said Consolidated Statutes, and shall be subject to the rules of construction prescribed in the second Chapter thereof;—And any Chapter of the said Statutes may be cited and referred to in any Act and proceeding whatever, Civil and Criminal, either by its title as an Act,—or by its number as a Chapter in the copies printed by the Queen's Printer,—or by its short title.

An Act to amend and explain An Act to define the Elective Franchise, to provide for the Registration of Voters, and for other purposes therein mentioned.

[Assented to 4th May, 1859.]

WHEREAS it is in and by the fourth section of the Act passed in the twenty-second year of Her Majesty's Reign, and intituled, *An Act to define the Elective Franchise, to provide for the Registration of Voters, and for other purposes therein mentioned*, amongst other things enacted, that the Clerk of each Municipality in Upper Canada shall, after the final revision and correction of the Assessment Roll, forthwith make a correct alphabetical list of all persons entitled to vote at the election of a Member of the Legislative Council and Assembly within such Municipality, according to the provisions of the said Act; and that all such lists shall be completed and delivered as thereinbefore mentioned on or before the first day of October in each year; And whereas doubts have arisen as to the effect of the enactment requiring that the said lists should be completed and delivered on or before the first day of October in each year: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, declares and enacts as follows:

1.—It was and is the meaning and intention of the said Act and of the clause hereinbefore recited, that the period therein mentioned within which the lists should be completed and delivered, that is to say, the first day of October, in each year, shall be directory, only to the Clerk of each Municipality in Upper Canada, and that nothing therein contained is intended to render null, void or inoperative the said lists, in the event of their not being completed and delivered as in the said Act mentioned on or before the period aforesaid, but that the said lists shall be valid and effectual for the purposes of the said Act, even though not so completed, and delivered by the said period of time.

2.—If any Clerk of a Municipality in Upper Canada shall omit, neglect or refuse to complete or deliver the said lists on or before the first day of October in each year, according to the directions of the fourth section of the said Act, or to perform any of the obligations or formalities therein required of him, such Clerk for each such omission, neglect or refusal, shall incur a penalty of two hundred dollars.

And, for avoiding doubts under those provisions of the said Act which relate to Lower Canada, it is declared and enacted by the following sections of this Act which apply only to Lower Canada, as follows:

Notwithstanding any thing contained in *The Lower Canada Municipal and Road Act of* 1855, in the Acts amending the same or in any Act incorporating any City or Town in Lower Canada, every Assessor, Valuator or other person employed to make the Valuation or Assessment Roll of property in any City, Town, Village, or other local Municipality in Lower Canada, shall insert in such roll, in separate columns and in addition to the information now required by law to be inserted, the actual value of every real property, the annual value of, or income derived or derivable from every such property, and the names of the owners, tenants or occupants (each in separate columns) of every such property:

2.—And whenever the rent, or any part of the rent of any real property is made payable in produce, or otherwise than in money, or any premium is paid, or any improvements are to be made by the tenant, or any other consideration is stipulated in favor of the owner, in reduction of the rent,—the Assessor or Valuator shall take into consideration and allow for such produce, premium, improvement or consideration in establishing the annual rent or value of such property.

4.—Every Valuation or Assessment Roll, every revised Valuation or Assessment Roll, and every List of Voters, made under the provisions of this Act, of the Acts hereby amended, or of any other Act, shall be subscribed or attested by the person or persons making the same, and by any person employed

under the authority of the second sub-section of the sixty-fifth section of *The Lower Canada Municipal and Road Act of* 1855, if any such person be so employed, and attested by his or their oath or affirmation, in the following form:

"I,——(*or*, we severally and each for himself,) do swear (*or* solemly declare) that to the best of my (*or* our) knowledge and belief, the above (*here insert title of document as* Valuation or Assessment Roll, revised Valuation or Assessment Roll, *or* list of Voters, *as the case may be*,) is correct, and that nothing has been improperly and fraudulently inserted therein, or omitted therefrom."

And such oath or affirmation shall be made before a Justice of the Peace who shall attest the same;—and the wilful making of any false statement in any such oath or affirmation, shall be wilful and corrupt perjury, and punishable as such, as provided by the Interpretation Act, which shall apply to this Act.

5.—If at the time of any election, no list of voters for the current year shall have been made or shall exist, the Returning Officer and Deputy Returning Officers for such election shall be furnished with the list of Voters last made or existing and shall govern themselves thereby, and such list shall have the same effect as if it were the list for the current year.

6.—Whenever the name of any voter entitled to have his name entered on the Valuation or Assessment Roll, or on the revised Valuation or Assessment Roll, is omitted from the list of Voters, in consequence of its having been omitted from any such Roll or revised Roll, it was and is the intention of the Act herein first above cited and amended, that such person should have the same right of complaint and of appeal in order to have his name placed on the said list of Voters, as if it had been omitted from the said list after having been inserted in such Roll or revised Roll.

7.—If the Clerk or Secretary Treasurer of any City or Municipality in Lower Canada does not furnish to every Deputy Returning Officer acting in such City or Municipality, or in any Ward or Division thereof, a true copy or copies of the proper list of voters, or of so much thereof as relates to the locality for which such Deputy Returning Officer is to act, or as required by the eighth sub-section of the fifth section of the said first cited Act, the Returning Officer shall procure from the Registrar of the County or Registration division, or if he be himself such Registrar shall furnish a copy certified by him to be correct, of the then last list of voters for such Municipality, part of a Municipality or Ward, filed in his office, and shall cause the same to be delivered to the Deputy Returning Officer; and the cost of such copy shall be paid by the Clerk or Secretary Treasurer, in default, and may be recovered from him or from the Municipality of which he is such Officer, by the Returning Officer or Registrar who shall have procured or furnished such copy.

8.—The word "Occupant" in the said first cited Act shall, in Lower Canada, signify a person occupying property, otherwise than as owner, tenant, or usufructuary, either in his own right, or in the right of his wife, but being in possession of such property and enjoying the revenues and profits arising therefrom,—and the word "Tenant" shall include any person who instead of paying rent in money is bound to render to the owner any portion of the produce of such property.

An Act to extend the provisions of the Act for the abolition of Imprisonment for Debt.

[Assented to 4th May, 1859.]

WHEREAS it is just to extend to decrees and orders in Chancery, and rules and orders of the Common Law Courts for the payment of money, the relief granted to parties in actions at law under the Act for the abolition of Imprisonment for Debt; and to abolish imprisonment for debt in the Division Courts; and to make further provision for the relief of parties and the punishment of frauds, in respect as well of debts affected by the said Act, as of the other debts embraced in this Act: Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

CHANCERY.

1.—No order shall be granted for a writ of *Ne exeat Provinciâ*, (to be hereafter called a Writ of Arrest,) unless the party applying for the writ has a cause of suit to at least such an amount, and shows by affidavit such facts and circumstances as the Act for the abolition of imprisonment for debt requires in the case of a special order for holding a party to bail under that Act.

2.—In case an order is made for a Writ of Arrest in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the Court.

3.—The bail or security required to be taken under a Writ of Arrest shall not be that the person arrested will not go or attempt to go out of Upper Canada, but shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will, in case he becomes liable by law to be committed to close custody, render himself (if so ordered) into the custody of any Sheriff the Court may from time to time direct.

GENERAL PROVISIONS.

4.—Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges, or expenses, payable by any decree or order of the Court of Chancery, or of a Judge thereof, or by any rule or order of the Court of Queen's Bench or Common Pleas, or of a Judge thereof, or by any decree, order, or rule of a County Court, or of a Judge thereof, is hereby abolished; and no person shall be detained, arrested, or held to bail for non-payment of money, unless a special order for the purpose is made on an affidavit or affidavits, establishing the same facts and circumstances as are necessary for an order for a writ of *capias ad satisfaciendum*, under the Act for the abolition of imprisonment for debt; and in such case the arrest when allowed shall be made by means of a writ of attachment, corresponding as nearly as may be to a writ of *capias ad satisfaciendum*.

5.—But in case a party is arrested under a Writ of Arrest, issued after the passing of this Act, it shall not be necessary before suing out a writ under the preceding section of this Act to obtain a Judge's order therefor, or to file any further affidavit than those on which the order for the Writ of Arrest was obtained.

6.—Persons who may hereafter give bail under a writ of *capias ad satisfaciendum*, or under a writ of attachment under the fourth section of this Act, shall not be bound to remain or abide within the gaol limits, but may depart therefrom at their discretion; and when a person desires to give bail under such a writ, the bond to the Sheriff shall not contain that part of the usual condition which provides that the debtor shall remain and abide within the limits of the gaol, or shall not depart therefrom, unless discharged from custody by due course of law; but the condition shall provide that the person arrested shall observe and obey all notices, orders, and rules of the Court touching or concerning the debtor or person ordered to pay, or his answering interrogatories, or his appearing to be examined *vivâ voce*, or otherwise, or his returning and being remanded into close custody; and the party or his bail shall not be entitled to claim longer time for so observing or obeying them he would have been entitled to if the party had remained on the limits as heretofore, but the Court may, notwithstanding, grant further time if the Court is of opinion that the same may be done without substantial injury to the interests of the party to receive the money.

7.—Persons who have heretofore given bail or security under a writ of *ne exeat* or *capias ad satisfaciendum*, may surrender themselves into custody, or may substitute for their bonds or other security heretofore given under the writ, a bond or other security to the effect and amount mentioned in the preceding sections of this Act; and thereupon in either case the existing bail or security shall be discharged or released.

8.—A person arrested under a writ of *capias ad satisfaciendum*, or under a writ of attachment, though he is not confined to close custody, but has given bail, may apply for and obtain his discharge, in the same manner and subject to the same terms and conditions, as nearly as may be, as an execution debtor who is confined to close custody.

9.—In case a person has been heretofore or may be hereafter arrested and committed to gaol in any other County than that in which he resided or carried on business at the time, or in case a person is surrendered by his bail to the Sheriffs of any County, other than that in which he resided or carried on business at the time, such person shall be entitled to be transferred to the gaol of his own County, on pre-paying the expense of his removal: and the Sheriff in whose County he was arrested may, if he is satisfied of the facts, transfer him accordingly; but if the Sheriff declines to act without an order of the Court or a Judge, such an order shall be made on the application of the prisoner, and notice to the opposite party.

10.—Every person who is now in custody, or on bail under a process of contempt for non-payment of costs, shall be entitled to be discharged therefrom; and no person shall hereafter be liable to arrest for non-payment of costs.

11.—Every person who is now in custody or on bail under a writ of *ne exeat* or who is now in custody or on bail, whether to the limits of any gaol or otherwise, under process of contempt for non-payment of money under any award, order, decree, or other proceeding whatever other than costs, charges, and expenses, shall be entitled to be discharged, but shall be liable to be detained, after such discharge to be again arrested, by virtue of any such special order, as mentioned in the first or fourth section of this Act.

12.—For the purpose of enforcing payment of any money, or of any costs, charges, or expenses payable by any decree or order of the Court of Chancery, or any rule or order of the Court of Queen's Bench or Common Pleas, or any decree, order, or rule of a County Court, the person to receive payment shall be entitled to writs of *fieri facias* and *rendition exponas* respectively, against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively and subject to the same rules as nearly as may be, as in the case of a judgment at law in a civil action; and such writs shall have the like effect as nearly as may be, and the Courts and Judges shall have the same powers and duties in respect to the same and in respect to the proceedings under the same, and the parties and sheriff respectively shall have the same rights and remedies in respect thereof, and the writs shall be executed in the same manner and subject to the same conditions, as nearly as may be, as in the case of like writs in other cases; but subject to such general orders and rules varying or otherwise affecting the practice in regard to the said matters, as the Courts respectively may from time to time make under their authority in that behalf.

13.—As to the Court of Chancery, that Court may also issue writs of sequestration as hitherto or in such cases as by general or other orders of the Court may think expedient: and nothing in this Act shall be construed to take away the jurisdiction of the Court under or by means of such writs; and no writ shall issue from Chancery against the lands of the person to pay, but if the decree or order is registered, the Court may enforce the charge thereby created upon real estate, according to the practice of the Court in the case of a charge on real estate created by other means.

14.—Every decree or order of the Court of Chancery, and every rule or order of the Court of Queen's Bench or Common Pleas, and every decree, order or rule of a County Court, directing payment of money or of costs, charges or expenses, shall, so far as it relates to such money, costs, charges or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of the Act for the abolition of imprisonment for debt; and the said persons shall respectively have the same remedies, and the Courts and Judges and the officers of Justice shall in cases under this Act have the same powers and duties, as in corresponding cases under the said Act.

15.—In case a decree or order in Chancery, or of a County Court in the exercise of the equitable jurisdiction of such County Court, directs the payment of money into Court or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the plaintiff within the meaning of the said Act.

16.—If any person being a Trustee of any money or other property for the benefit either wholly or partially of some other person, or for any public or charitable purpose, converts or appropriates the same or any part thereof to or for his own use or purposes, or otherwise wilfully disposes of the same contrary to his duty, so that such money or other property is not forthcoming and paid or delivered when such person is ordered or decreed by the Court of Chancery or other Court having jurisdiction in the matter to pay the same, he shall be deemed to have converted or disposed of the same with intent to defraud within the meaning of the Act twenty-second Victoria, chapter twenty-two.

17.—Every rule or order of the Court of Queen's Bench or Common Pleas, or of a Judge thereof, directing payment of money other than costs, and every rule or order of a County Court directing such payment, may be registered in the Registry Office of any County, and such registration shall be on the certificate of the same officer and shall have the same effect as the registration of a judgment of the same Court.

18.—For the purpose of carrying out the provisions of this Act, so far as relates to the Courts of Queen's Bench and Common Pleas, and to the County Courts as Courts of Law, the three hundred and thirteenth, three hundred and fourteenth, and three hundred and fifteenth sections of the Common Law Procedure Act, 1856, and the ninth section of the County Courts' Amendment Act, 1857, shall be deemed incorporated herewith, as if the provisions therein contained had been repeated in this Act and expressly made to apply thereto, and it shall not be necessary to lay before Parliament any rules, orders or regulations made for the purpose of this Act.

19.—The Court of Chancery shall, with reference to the proceedings in the Court of Chancery under this Act, and to proceedings under this Act in the County Courts in the exercise of their equitable jurisdiction, have all the powers which the next preceding section of this Act gives to the Common Law Courts, in respect to the cases to which that section refers.

DIVISION COURTS.

20.—The Summons issued under the ninety-first section of the Division Courts' Act may be served either personally or by leaving a copy of the summons at the house of the party to be served, or at his usual or last place of abode, or with some grown person there dwelling.

21.—A party failing to attend according to the requirements of any such summons, shall not be liable to be committed to Gaol for the default, unless the Judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being twice so summoned, and if at the hearing it appears to the Judge, upon the examination of the party or otherwise, that he ought not to have been so summoned, or if at such hearing the judgment creditor does not appear, the Judge shall

award the party summoned, a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the Court.

22.—The examination shall be held in the Judge's chamber, unless the Judge shall otherwise direct.

23.—In case a party has, after his examination, been discharged by the Judge, no further summons shall issue out of the same Division Court at the suit of the same or any other creditor, without an affidavit satisfying the Judge upon facts not before the Court upon such examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the Judge that since such examination the party has acquired the means of paying.

PENALTIES.

24.—No person shall be arrested or imprisoned on any claim or on any judgment recovered against him as a debtor at the suit of any person for any penalty or sum of money in the nature of a penalty or forfeiture, whether such claim or suit be in the name of such person alone, or in the form of proceeding known as *qui tam*, &c., (notwithstanding any thing to the contrary in any statute providing for the recovery of such penalties or sums by action at law) except in cases and under circumstances where on claims or judgments for ordinary debts, parties can hereafter be arrested or imprisoned, and any person now under arrest or imprisonment or order for arrest or imprisonment on any such claim or judgment first in this section referred to, shall be forthwith discharged from such arrest or imprisonment or order therefor, subject to be arrested hereafter, as in the cases of judgments for ordinary debts as hereinbefore provided.

25.—This Act shall apply to Upper Canada only.

An Act to secure to Married Women certain Separate Rights of Property.

[Assented to 4th May, 1859.]

WHEREAS the law of Upper Canada relating to the property of married women is frequently productive of great injustice, and it is highly desirable that amendments should be made therein for the better protection of their rights; therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Every woman who shall marry after the passing of this Act without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her personal property, whether belonging to her before marriage, or acquired by her after marriage, and also all her personal earnings and any acquisitions therefrom, free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; provided, that this clause shall not extend to any property received by a married woman from her husband during coverture.

2.—Every woman already married without any marriage contract or settlement, shall and may, from and after the passing of this Act, notwithstanding her coverture, have, hold and enjoy all her personal property not already reduced into the possession of her husband, whether belonging to her before marriage or acquired by her after marriage, and also all her personal earnings and any acquisitions therefrom not already reduced into the possession of her husband, free from his debts and obligations contracted after the passing of this Act, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law, usage or custom to the contrary notwithstanding.

3.—Provided always that nothing herein contained shall be construed to protect the property of a married woman from seizure and sale on any execution against her husband for her torts; and in such case, execution shall first be levied on her separate property.

4.—The interest acquired by marriage of a man in the real estate of his wife shall not, during her life, be subject to execution on any judgment against him.

5.—Every married woman having separate property, whether real or personal, not settled by any ante-nuptial contract, shall be liable upon any separate contract made or debt incurred by her before marriage, to the extent and value of such separate property, in the same manner as if she were sole and unmarried.

6.—Every husband who takes any interest in the separate real or personal property of his wife, under any contract or settlement on marriage, shall be liable upon the contracts made or debts incurred by her before marriage, to the extent or value of such interest only, and no more.

7.—Every married woman may make any devise or bequest of her separate property, real or personal, or of any rights therein, whether such property be acquired before or after marriage, to or among her child or children issue of any marriage, and failing there be any issue, then to her husband, or as she may see fit, in the same manner as if she were sole and unmarried; Provided that such devise or bequest be executed in the presence of two or more witnesses, neither of whom shall be her husband, and that her husband shall not be deprived by such devise or bequest of any right he may have acquired as tenant by the curtesy.

8.—A married woman shall not be liable to arrest either on mesne or final process.

9.—The separate personal property of a married woman dying intestate shall be distributed in the same proportions between her husband and children as the personal property of a husband dying intestate is or shall be distributed between his wife and children; and if there be no child or children living at the death of the wife so dying intestate, then such property shall pass or be distributed as if this Act had not been passed.

10.—In any action or proceeding at law or in equity, by or against a married woman, upon any contract made or debt incurred by her before marriage, her husband shall be made a party if residing within the Province, but if absent therefrom, the action or proceeding may go on for or against her alone; and in the declaration, bill or statement of the cause of action, it shall be alleged that such cause of action accrued before marriage, and also that such married woman has separate estate; and the judgment or decree therein, if against such married woman, shall be to recover of her separate estate only, unless in any action or proceeding against her, in which her husband has been joined as a party, any false plea or answer has been pleaded or put in, when the judgment or decree shall be, in addition, to recover against him the costs occasioned by such false plea or answer, as in ordinary cases.

11.—Nothing in this Act contained shall be construed to prevent any ante-nuptial settlement or contract being made in the same manner and with the same effect as such contract or settlement might be made if this Act had not been passed; but notwithstanding any such contract or settlement, any separate, real or personal property of a married woman acquired either before or after marriage, and not coming under or being affected by such contract or settlement, shall be subject to the provisions of this Act, in the same manner as if no such contract or settlement had been made; and as to such property, and her personal earnings and any acquisitions therefrom, such woman shall be considered as having married without any marriage contract or settlement.

12.—This Act shall apply only to Upper Canada.

An Act to amend the law enabling Married Women to convey their Real Estate within Upper Canada.

[Assented to 4th May, 1859.]

WHEREAS it is expedient to amend the law enabling married women to convey their real estate within Upper Canada, by providing for cases in which informal or erroneous certificates have been indorsed upon Deeds conveying real estate executed by married women jointly with their husbands, as well as for cases in which such Deeds have been executed in presence of and certificates indorsed thereon by non-resident Justices of the Peace, or in which certificates have been indorsed on such Deeds subsequent to the execution thereof: therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Whenever any certificate on the back of any Deed heretofore executed by any married woman, pursuant to the Act of the said Parliament of Upper Canada, passed in the first year of the reign of his late Majesty King William the Fourth, chapter two, or pursuant to the Act of the said Parliament of Upper Canada, passed in the second year of Her Majesty's reign, chapter six, has been signed by two Justices of the Peace, such certificate shall be held and is hereby declared to be valid and effectual for all the purposes contemplated by said Acts, although the said Justices were not at the time residents of the District or County in which such married woman resided; and every Deed heretofore executed in the presence of such Justices, and every such certificates so signed shall have the same force, validity and effect as if the said Deed had been executed in the presence of, and such certificate had been signed by two Justices of the Peace of the District or County in which such married woman at the time of the execution thereof resided.

2.—When any certificate on the back of any Deed executed by any married woman, pursuant to the said first mentioned Act, shall have been heretofore given on any day subsequent to the execution of the said Deed, such certificate shall be deemed and be taken to have been given on the day on which the said Deed was executed; and such Deed shall be as good and valid in law as if such certificate had been in fact signed on the day of the execution of the deed to which it relates, as required by the said Act.

3.—In case any married woman seized of or entitled to real estate in Upper Canada, and being of the age of twenty-one years, has heretofore executed, jointly with her husband, a Deed for the conveyance of the same, such Deed shall be taken and considered as a valid conveyance of the land therein mentioned, and the execution thereof shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the said land, although a certificate of her consent to be barred of her right of Dower of and in such land, instead of a certificate of her consent to convey her estate in the same, have been indorsed thereon.

4.—Whenever the requirements of the Acts of the Parliament of the late Province of Upper Canada, or of the Parliament of this Province of Canada, respecting the conveyance of real estate in Upper Canada by married women, while respectively in force, have been complied with on the execution by any married women of a Deed of conveyance of real estate in Upper Canada then belonging to such married woman, such execution shall be deemed and taken to be valid and effectual to pass the estate of such married woman in the land intended to be conveyed, although the certificate indorsed on such Deed be not in strict conformity with the forms prescribed by the said Acts, or any or either of them.

An Act to amend the Law of False Pretences.

[Assented to 4th May, 1859.]

WHEREAS it is expedient to amend the law relating to false pretences: therefore, her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—If any person by any false pretence obtains the signature of any other person to any bill of exchange, promissory note, or any valuable security, with intent to cheat or defraud, every such offender shall be guilty of a misdemeanor, and shall be liable to fine or imprisonment, or both, at the discretion of the Court; such imprisonment to be for a period less than two years.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

ANCASTER, 19th March, 1859.

GENTLEMEN.—As uniformity of Practice is very desirable not only in the several divisions of a County, but in the various Counties also, I beg leave to submit the following, on which I am aware there is a great difference of opinion, and consequently of practice; hoping that you will favour your readers with your opinion on the subject, and also that some of those Clerks, whose experience qualifies them to give an authoritive opinion, would give us their views on the subject. The subject is the interpretation of scale of fees "For every order or judgment."

I believe it is the opinion of many that the terms Order and Judgment are to be taken together, and one fee charged for the direction of the Court, however many Orders may have accompanied the Judgment in the cause. This part of the question was decided, as far as this county is concerned, by an order from the Attorney General's office dated 14th September 1858, in which, he gave his opinion that "Clerks should collect a fee on every order in addition to the Judgment fee," and the communication (addressed to Judge Logie) concludes thus "Such is the practice of the County of Simcoe, and some other counties, and the Attorney General thinks it desirable, that your Court should adopt this as an uniform procedure." Such being the case, the difficulty that occurs to me is, what is to be considered an order, and charged for as such? We will take an example to show what I mean. In a certain suit, there is Judgment given for plaintiff.

Order, that defendant pay the amount in so many days.

Order, that expenses of one witness be allowed.

Order, that 10s. be charged for Hearing Fee.

And it may be, some individual is brought up for disturbing the Court, and ordered to pay $10 forthwith or to be committed for contempt. Should a fee be charged for each of these orders? And in the case of a judgment summons where the judgment debtor is ordered to pay by certain instalments, the Orders might be multiplied indefinitely.

Another subject I should like to have your opinion upon, is: When are the Fee Fund returns due, and, the money accounted for therein, payable to the County Attorney? When I came into this office I followed the instructions contained in a printed circular "furnished for the information of Clerks of County and Division Courts," from the Inspector General's office; by which Clerks are required to furnish returns to the Fee Fund, up to certain dates, "and having had them compared with their books by the County Judge, at the County or Division Court sessions next following, to forward them, &c." Taking it for granted that the same practice would be followed in this County, as in the County of Wellington, where I first learned something of the business, I was waiting for next court day to have my returns examined by the Judge, but before that day arrived I received a letter from the County Crown Attorney, to the effect, that, as my returns were long

past due he would report me as a defaulter, unless said returns were forwarded to him by a certain day. I then wrote to the County Attorney, that I had been following the printed circular, and that my returns would be forwarded to him, as soon as they should be examined by the Judge. I must not omit to mention that I had, upon my coming into office received a letter from the County Attorney, to the effect that he had received instructions from the Inspector General's office, to report the names of all Clerks who failed to make their returns within ten days after the end of each quarter. After some conversation with the County Attorney, I agreed to give in, and since that time I have made my returns at the end of each quarter, without however, being at all convinced, that I was in the wrong. If the County Attorney is right, I conceive that a great hardship is imposed on Division Court Clerks, particularly on those who live at a distance from the county town. By the Tarriff of Fees, Clerks are allowed $4 for each quarter's returns, and when you consider, the amount of time, and labour, required to make up these returns, (and they must be in duplicate too,) especially in an office where there is a large amount of business to be done: and also the time and trouble required, in finding a Justice of the Peace, that the Clerk may swear to the correctness of his returns; in all which the Clerk has not the smallest interest: I am sure you will admit that he is not over paid. But if, in addition to all this, instead of waiting till the judge comes round, in his usual circuit, to have the returns examined by him; the Clerk is obliged to lose a day (and in many cases one day would not be sufficient) and to incur expense in travelling to the county town, (and perhaps he may not find the Judge in town that day) I think you will admit that it is a hard case.

Your's respectfully,

A S. CADENHEAD.

Clerk 6th D. C., Wentworth.

[The direction as to the allowance of witness fees is not properly an order, but given it may be presumed to relieve the Clerk of the responsibility in taxation or to prevent the necessity of an after appeal to the Judge to revise the taxation. Neither can the direction to charge an increased hearing fee of 10s. or less be viewed as an order. In neither of these cases should it be charged.

The order to commit spoken of should be charged, but if not recovered at the time of making return, the Clerk notes it merely in his return, accounting for it afterwards if received.

The Clerk's returns should be made within ten days after each quarter day. From previous inspection of the books and from his own notes if properly kept, the Judge has all the information necessary to enable him to certify without the Clerk's personal attendance at the county town, and we do not see any occasion for his doing so, unless specially requested by the County Judge.—EDS. L. J.]

To the Editors of the Law Journal.

Office of the Third Division Court, Co of Perth,
St. Mary's, March 22, 1859.

GENTLEMEN,—I observe that a Clerk hailing from London C. W. inquires of you if a fee of three pence can be claimed for returning foreign summons in addition to fees for receiving service and affidavit? now I am confident, that no Clerk has claimed such a fee, your querist has mistaken the ground of the claim of three pence when a foreign summons is returned, he should have worded his query thus:—Is the Clerk receiving a foreign summons entitled to the fee of three pence in the Clerk's schedule of fees for entering bailiff's returns, to summons to defendant as well as the Clerk issuing such summons? I aver that he is, inasmuch that he is under the necessity of entering the bailiff's returns in Foreign Summons Books equally with the issuing Clerk in his Proceedure Book; if the same duty be compulsory upon him why should not the fee be the same! The question lies in a very small compass; if it *is* the duty of this receiving Clerk to enter in his Foreign Summons Book, the bailiff's returns to summons to defendant, he *is* entitled to the fee for entering such returns, if it is *not* his duty to make such entry, he is *not* entitled to the fee. I cannot perceive how the receiving Clerk can keep a correct account either with his bailiff or the issuing clerk, or justify himself, if any question should arise relative to the legality of the service, unless he makes an entry of the bailiff's return of the service in his Foreign Summons Book. The following question has been much agitated of late by the Clerks and Bailiffs of the Division Courts, viz.: whether a bailiff is entitled to a fee of 1s. for attending to swear to the service of a summons when such service is made out of the Division from the Court of which such summons has been issued, or not, the claim therefor being founded on the 4th item in the bailiff's schedule of fees, such item being worded thus "drawing and attending to swear to every affidavit of service of summons, when served out of the Division. The solution of this question appears to me to be easy. The tariff of bailiff's fees is part of the act of 1850, the Division Courts Act, which this act superseded, authorized the trial of a cause only in the Division in which the debtor resided, the framers of the act of 1850, perceived that this limitation was a great inconvenience and a great injustice to the creditor, and therefore in that they inserted clause 25th, which enables a creditor to have his cause tried not only where the debtor resides, but also where the debt has been contracted, and to make this clause effectual, they added clause 87, which empowers the bailiff of the Division in which the debtor resides, to serve the summons, we must now remember that the said framers of the act of 1850, did not think it necessary that a bailiff should make affidavit of the service of a summons served by him on his own Division, they no doubt considered that the presiding judge at the sittings of the Court, could swear him as to that if he should think it requisite to do so, but they saw that the judge could not swear an absent bailiff, and therefore they added clause 88. Now to satisfy the requirements of this clause every bailiff, who has served a foreign summons is compelled to make a special return of such service and to attend either at the office of the Court of which he is bailiff or at that of a Commissioner in the Court of Queen's Bench, to make the affidavit of service (occasionally it happens that he is called upon to make a separate visit to the Clerk's office, to swear or each of several summonses he has served) now it is very evident that item 4th, in the bailiff's table of fees was inserted for the purpose of remunerating the bailiff for this special attendance. The supplementary acts do not remove this item from the bailiff's fees he is therefore clearly entitled to 1s. for *attending* to swear to the service of a summons issued in a foreign Division. But is he entitled to a shilling for attending to swear to service of a summons issued in his own Division, when he has served it out of such Division? I think not, he returns it to the Clerk with the other summonses of the Court which have been delivered to him for service, and makes affidavit of the service of it, at the same time, that he makes affidavit of the services of them, he has therefore no special trouble in making the affidavit; besides, I do not think the said 88th clause requires such affidavit, the framers of it evidently had in their eye the service only of such summonses as would be served by the bailiff of a Court other than that out of which they would be issued. There is another circumstance to which I desire to call your attention; some Clerks are in the practice of entering imaginary costs on the summons to appear; one Clerk from whom I receive numerous summonses always makes the costs $2.00, let the amount claimed be small or great, now what can be the utility of placing costs on the summons but either to inform the defendant what he should pay the bailiff at the time he served the summons or to enable him to bring the Clerk the exact amount

of the debt and costs if he should choose to settle with him previously to the sittings of the Court it the entry of the amount of costs on the summons does not effect either of these ends it is useless, it is therefore evident that the real amount of costs due by the defendant should be on the summons. It is evident that the judges, who framed the general rules were of this opinion, for in each of the three forms which they have given for the entry of the proceedings of the Court in the Procedure Book, they have inserted the exact costs that would be due by the defendant previously to the sittings of the Court, if you will take the first table of fees and compare it with the forms of entry given by the judges at the end of the general rules, you will find this to be the case. A difference of opinion also exists between Clerks as to the amount a Clerk should certify on a transcript to be due on the judgment at the date of the issue of the transcript; some certify only to the amount of the debt and the costs incurred to and at the entry of the judgment, giving the sense of the preposition of to the word upon in the following section of the clause 3, in the extension act of 1855, viz: "stating the amount upaid *upon* such judgment," I and others take the said word *upon* in it's exact literal sense and include in the certificate of the amount due, the fees for the transcript itself and the forwarding of it, the postage upon the forwarding and the interest that has accrued on the debt and costs from the entry of the judgment, you I hope will be so good as to judge between us and declare which party in your opinion is correct in it's views. I would too very much like to have your opinion on clause 30, of the extension act of 1853, as to whether it is operative only in the County in which the judgment has been given, or through the whole of the Upper Province also, the words of the clause are quite general, yet some of the judges limit the application of them to the County in which the judgment was obtained; I have made my letter rather too long, but my anxiety to be correct in the transaction of my Court business must be my excuse.

I am, Gentlemen,
Your obedient Servant,
JAMES COLEMAN,
Clerk 3rd D. C., C. of Perth.

[The true and exact amount of costs should be stated in each case. It is clearly necessary—the object is to inform the defendant, not to deceive him, which the insertion of 10s. as costs in every case irrespective of the amount claimed, undoubtedly would do.

We have before now expressed a similar opinion, and we think the practice of stating an arbitrary amount for costs highly censurable.

The certificate should show the whole amount due upon (or by virtue of) the judgment.

There is no authority under section 30 of the extension act or under any other clause in the Division Court Acts to issue a judgment summons out of the County and at law on such process served on a defendant resident out of the particular County would be void.

The other parts of our correspondent's letter we leave on the strength of his own arguments. In future communications our correspondent will be good enough to write only on one side of the paper.—EDS. L. J.]

To the Editors of the Law Journal,

PRESTON, March 23d, 1859.

GENTLEMEN,—Upon the subject of charging a "*hearing fee*" I beg to submit another question:

In a certain suit, His Honour the Judge lately ruled that the same was out of the jurisdiction of the Division Court, he endorsed on the summons "*dismissed, no jurisdiction,*" and signed it by his initials, which endorsement was entered by me in the Procedure Book. On taking the costs of said suit I charged a fee for "*hearing*" and for "*order*" according to the tariff to which the counsel for the plaintiff objected, stating that since the suit was out of the jurisdiction of the Division Court, that court had no right to charge a hearing fee.

On the other hand I maintained that since both parties had in open Court, been called and appeared before the judge, who had heard the defence put up against the claim of the plaintiff and thereupon inquired into the nature of the claim, which enquiry led the judge to the conclusion that the claim was out of the jurisdiction of the Division Court; this in my opinion constituted a "*hearing,*" and since these proceedings require the judge's time and skill, for which the Government pays him his salary, the Government is entitled to receive from all and every person who thus engages the judge's time, such fees as are stipulated by Act of Parliament. And for this reason I have charged the "*hearing fee.*" The authority for charging an "*order*" fee, I draw from the decision of the judge spoken, or from his endorsement on the summons. The word "*dismissed*" in my opinion, implies an order, the judge *orders* that the suit be dismissed, and in condensing that sentence says, "*dismissed;*" in compliance with this *order*, the Clerk makes the entry in the Procedure Book, which entry he could not make without being *ordered* by the judge to do so, though such order may be either directly or impliedly, and it is not imperative that a sum of money be mentioned which is ordered to be paid, a judgment of nonsuit or a commitment both imply an order and so I think doth a dismissal.

In the meantime the matter remains in *statu quo*, until your opinion is heard.

It may here not be out of place to state the cause of action on which the judge ruled, that it was out of the jurisdiction of the Division Court.

The claim of the plaintiff was on a balance of promissory note and book account, viz:

Amount of Promissory Note	$315 29
Amount of Book Account	74 75
	$390 04
By sundry payments made	317 88
Balance	72 16
Interest	15 50
Claim	$87 66

I only remember of one similar case reported in your *Law Journal*, viz., in Volume II, for 1856, page 39, in which however the ruling was different.

Respectfully yours,
OTTO KLOTZ.

[The hearing fee was clearly chargeable; but not the fee for order. If the judge had no jurisdiction, he had no power to make any order in the suit.

The Clerk needs no express direction from the judge to make entry in the Procedure Book; he records as a matter of course every decision of the judge as is done in other courts. Endorsements by the judge have no legal value—the entries in the Procedure Book alone are evidence.

The cause of action as stated is in our judgment within the jurisdiction of the Division Courts. The claim being originally *liquidated* by the signature of the defendant, and reduced *by payments* to a sum under £25.—EDS. L. J.]

To the Editors of the Law Journal.

Middlesex, C. W., March 23, 1859.

GENTLEMEN,—Will you be good enough to favour me with your opinion on the following points:

1. What constitutes a servant or laborer, as the term is used in the Masters and Servants Acts 10 & 11 Vic., cap. 23, and 18 Vic., cap. 136. The case in point is as follows:

A. B. hires a team of horses of C. D. at a daily rate of hire. A. B. is a Railway Contractor, and attempts to leave his work without paying his debts. C. D. applies to a Justice of the Peace, who issues a summons to A. B., who appears and settles the case. Is this such a "hiring" as is contemplated by the act; or ought it not rather to have been tried in a Division Court.

2. Is not section 97 of the Division Courts' Act (1850) repealed by sections 1 and 3 of the Extension Act of 1855, in so far as relates to the transmission of an execution by a Bailiff of one county, to the Bailiff or Clerk of a division in another county? It appears to me that the only legal mode of transmission is by Transcript and Certificate of Judgment.

By a reply in your next issue you will oblige,

Your obedient servant,

———, Clerk.

[The first question involves a point of general law which we do not profess to answer. However in the case put, we think the Magistrate ought not to have acted if A. B. *objected to his doing so.*

The 97th section of the Division Court Act is superseded by sections 1 and 3 of 18 Vic., cap 125, so far as regards the subject matter referred to by our correspondent.

Referring to the private note of our correspondent, we think that he is needlessly diffident. There are occasionally cases in which a querist may find it prudent to withhold his name, but as a general rule it is better the name of the querist should appear.

But we do not wish to be understood as desiring to impose our views on correspondents.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen:—I give Bailiff an execution against A. B. in favor of C. D., Bailiff returns his execution at the end of 30 days, "no goods." E. F. has also a judgment against A. B., who obtains an execution which is put into the same Bailiff's hands, and tells him where he can find property belonging to the defendant; is the Bailiff justified in applying the proceeds of the property seized on E. F.'s execution.

Please answer the above, and oblige

Your obedient Servant,

April 27th, 1859 W. J.

[If the first execution had not been returned when the second one was placed in the Bailiff's hands, his duty would have been to seize under the first and apply the proceeds of the sale, if any, to it. But if the first execution had been returned when the goods were pointed out to the Bailiff, he would have to apply the proceeds of the property on E. F.'s execution, as there was no other then in force.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1859.

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

In re Brooke, an Attorney.

Attorney and Client—Bill—Taxation—One sixth deducted—Costs.

If a bill as between attorney and client be referred to the Master for taxation, and more than a sixth be deducted, the attorney must pay the costs of the reference, which means the costs of the application as well as the taxation.

(March 9, 1859.)

On 17th January last the usual order was obtained that the bill of costs of Daniel Brooke delivered to James M. Acred and Edward Jordan be referred to the Master to be taxed.

By the order, the Master was in the usual terms directed to tax the costs of the reference and to certify what upon such reference should be found due to or from either party in respect of the bill,—the costs of the reference to be paid according to the event pursuant to the statute.

It is provided by 16 Vic., cap. 175, sec. 20, that the costs of such a reference shall, except as thereafter provided, be paid according to the event of the taxation, that is if the bill when taxed be less by a sixth part than the bill delivered, sent or left, then the attorney, or solicitor, or executor, or administrator of the attorney or solicitor as the case may be, shall pay such costs, and if such bill when taxed shall not be less by a sixth part than the bill delivered, &c., then the party chargeable with such bill making such application, or so attending, shall pay such costs.

The bill in this case after taxation was less than a sixth part of the bill delivered, and the Master taxed against the attorney, the costs of the taxation. The party who obtained the reference contended that the attorney should pay more, viz: the costs of the application to refer in addition to the costs of the taxation.

Harrison for the applicant argued,—

1. That it was the fault of the attorney to deliver an excessive case.

2. That in consequence of that fault, the application for a reference became necessary.

3. That the result showed the bill to be excessive, and that as the reference was rendered necessary by the misconduct of the attorney he should be made to pay the costs.

He also contended that costs of the "reference" meant more than costs of the "taxation," and made a comparison of English statutes. 2 Geo. II. cap 23, sec. 23; 6 & 7 Vic., cap. 73, sec. 37, and our own statutes 16 Vic., cap. 175, sec. 20, and C. L. P. Act, 1856, sec. 26, to establish his position.

He cited *Huggins* v. *Woolcott*, 5 B. & C., 760. *Woolcott* in re 12 M. & W., 504, and Har. C. L. P. Act, p. 62.

Burns, contra, submitted that the English cases shew that costs of reference means only costs of taxation, and referred to the practice as to costs in cases of awards in support of his argument.

Burns, J., having taken time to consider, on the day following decided that costs of reference include costs of the application, and so ordered.

COMMON PLEAS.

HILARY TERM, 1859.

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

Adair v. Wallace.

Garnishee.

Where an attaching order issued against the assignee of a judgment debtor, ordering a sum of money in his hands to be appropriated to a debt due by the judgment creditor.

The garnishee obtains a rule nisi to set the order aside; but after obtaining the rule, the garnishee pays over the money as ordered.

The rule discharged with costs.

In this action, the defendant, on his plea of set off, obtained a verdict against the plaintiff, upon which judgment was entered for £98 18s. 4d. debt and £43 12s. 9d. costs.

One Thomas Kydd was indebted to the plaintiff, Adair, in a sum exceeding £67, as well as to other parties, and made an assignment (under seal) to one John Macdonald, in trust for his, Kydd's, creditors, of a claim which Kydd had, on which a verdict was obtained in favour of Kidd for above £230, and judgment therefor has been entered in the Court of Queen's Bench; out of which it was sworn, in support of the present application, that John Macdonald, as such assignee, would receive about £119.

The assignment had annexed to it a schedule of Kidd's debts, amounting to £119 10s., among which the debt to the plaintiff Adair, £57 10s, was contained; and the trusts declared were to pay to the parties named in the schedule the sums set opposite their names, *pari passu* and without priority; and if there should

not be enough to pay all in full, then to pay in proportion to the several sums due.

Upon these facts, Sir John Robinson, C. J., issued an attaching order on the debt so assigned, and due to Adair under the assignment, against John Macdonald, as garnishee, bearing date the 21st January, 1859.

In Hilary Term (on 8th February, 1859), *Robertson* obtained a rule *nisi* on behalf of the garnishee, calling on the defendant Wallace to show cause why the order of the 21st January, 1859, should not be rescinded with costs, on the grounds—

1. That the order did not attach any debts due or accruing from the garnishee to Adair, but only the debts due from the garnishee as assignee of Kydd.

2. That the garnishee is not indebted to Adair within the meaning of the 194th section of the C. L. P. Act of 1856, for he is merely a trustee for Adair, in whose favour no action for money had and received would lie against Macdonald as such trustee.

This rule was granted upon the foregoing facts and on a further affidavit of Macdonald. That on the 22nd January, 1859, he received from Mr. Malcolm C. Cameron (attorney for Wallace), a check, bearing date on that day, on the agent of the Bank U. C. at Goderich, for $230, payable to the assignee of Thomas Kidd, being for the balance due to Thomas Kydd, upon the debt assigned by him. That Cameron at the same time told him (Macdonald) that he wished to garnishee the debt in his hands for Wallace. That Macdonald accepted the check strictly under the terms of the deed of assignment. That he has not got the check cashed, and has not received any other sum under the assignment.

S Richards, Q. C., shewed cause. He filed an affidavit from the garnishee, annexing a copy of the order of Sir J. B. Robinson of 21st January last, and a copy of an order made by Burns, J., on 3rd February last, in a cause of Thomas Kydd, plaintiff, and John Macdonald (not the garnishee) and others, defendants, ordering that the *fi fa* in the cause in which the order was made should be discharged and returned satisfied by the Coroner in whose hands it was, on payment of the amount due thereon, less £57 10s., paid by defendant to John Macdonald (the present garnishee) by a check; as to which £57 10s. all proceedings are by the order stayed. He swore that before the 21st January, 1859, he had received the sum of £57 10s, and that on the 10th February he paid Wallace's attorney the sum of £57, attached by the first order of Sir J. B. Robinson. He filed also an affidavit from Wallace, stating his recovery against Adair, and that except as to £57 10s. it is still wholly unsatisfied. He refers to the deed of assignment, Adair to Macdonald the garnishee, and to his obtaining the order to attach it. That by virtue of such attachment, and to save further costs, the garnishee paid him the sum of £57 10s., for which he (Wallace) has given Adair credit on the judgment. That Thomas Kydd and David Adair are both in insolvent circumstances.

Richards cited *Johnson* v. *Diamond*, 11 Exch. 73; *Westoby* v. *Day*, 2 E & B. 605; *Randoll* v. *Bell*, 1 M. & S. 714; *Roper* v. *Holland*, 3 A. & E. 99; *Turner* v. *Jones*, 1 H. & N. 878.

Robertson, in reply, referred to *Bartlett* v. *Dimond*, 14 M. & W. 49; *Pardoe* v. *Price*, 16 M. & W. 451; *Edwards* v. *Lowender*, 1 E. & B. 81; *Harris* v. *Bunten*, 16 U. C. Q. B. 59.

DRAPER, C. J.—On the 8th February, 1859, Macdonald, the garnishee, obtains a rule *nisi* from this court to set aside the order of Sir J. B. Robinson, C. J., ordering a sum of money, in his hands as assignee of one Thomas Kydd, part of which was to be appropriated to pay a debt due by Kydd to Adair, the judgment debtor in this matter, to be attached as money belonging to Adair, to satisfy Wallace, the judgment creditor.

On the 10th of February, he pays over the very sum to Wallace, in satisfaction of so much of his claim against Adair.

It is unnecessary to say whether the attaching order could be supported, while there was no specific appropriation of any portion of the monies in Macdonald's hands as the monies of Adair, payable to him on account of Kydd's debts. If Adair could not have maintained an action for money had and received, against Macdonald, I do not at present perceive that the attaching order could have been effectual. That question would probably have been disposed of, on application for an order on Macdonald to pay over the money to the judgment creditor. But before any such order is made or even asked for, so far as we see, he pays the money to the judgment creditor, thereby appropriating it, as far as he is concerned, very unequivocally to Adair. His rule must be discharged under these circumstances, and I think with costs. I do not understand why he moved it, unless indeed it was at the instance of Adair, or of some other creditor of his, and after wards was prevailed upon by Wallace to pay him. We have, however, nothing to do with any other consideration than the disposing of this rule, which must be discharged with costs.

CHANCERY.

Reported by A. GRANT, ESQ., *Barrister-at-Law.*

CHAPIN v. CLARKE.

Reforming deed—Assignment for benefit of creditors.

A trader having become involved made an assignment of his estate and effects to trustees, for the benefit of his creditors, some of whom were declared to have preferred claims and to be paid in full. The claim of one of them was stated by the debtor to be "£3,500, or thereabouts," no account having been settled between the debtor and that creditor for a long time, and the sum so mentioned by the debtor was stated in the schedule as the amount, and the several creditors executed the deed of assignment. The creditor, afterwards, on balancing his account with the debtor, ascertained that his claim amounted to £5,062, and demanded the sum from the trustees, which they refused to pay: whereupon the creditor filed a bill to reform the deed, by introducing the latter sum as his claim, on the ground that the words "or thereabouts," were sufficient to include the excess of that amount over and above the £3,500. The court refused the relief prayed, and dismissed the bill with costs.

The bill in this cause was filed by Royal Chapin, against William A. Clarke, William McMaster, Robert James the younger, James Mitchell, and about thirty others, creditors of Clarke, praying, under the circumstances set forth in the judgment, a correction of the deed of assignment executed by the defendant Clarke, to the defendants McMaster, James and Mitchell, in trust for his creditors; and a motion was now made for a decree in the terms of the prayer of the bill, by

Mr. Eccles, Q. C., for the plaintiff. The words "more or less," in deeds of conveyance of lands would cover 100, although the deed might convey 80 acres. *Leeming* v. *Smith*, 16 Q. B. 275; *Brown* v. *Ware*, 5 Sarg. & R. 401. If any creditor has been deceived by the statement of the plaintiff's claim, the execution of the deed by him goes for nothing, and he is at liberty to sue for his whole debt.

Mr. Connor, Q. C., for another preferred creditor. The plaintiff does not depend upon the words "or thereabouts," as he now seeks to correct the deed, and include this enlarged demand.

Mr. Strong, for McMaster and Mitchell. The words "or thereabouts," or "more or less," are wholly insufficient to cover so large an advance as is sought to be embraced in these words; and although plaintiff says it was a mistake inserting £3,500, that is no ground for altering the deed to the prejudice of the other creditors who joined in that conveyance upon seeing what the debtor's liabilities were stated at. The mistake, if such it were, must be the mistake of all parties. *Winch* v. *Winchester*, 1 V. & B. 376, *Purefoy* v. *Purefoy*, 1 Ver. 28, *Sewell* v. *Musson*, Ib. 240, were referred to.

Mr. A. Crooks for James; and

Mr. Doyle for Clarke, submitted to such decree as the court might pronounce, and asked for their costs.

The judgment of the court was delivered by

THE CHANCELLOR.—This suit is instituted by one of the creditors of Clarke, an insolvent debtor, for the purpose of having a deed executed by the insolvent, for the benefit of his creditors, on the 19th of June, 1854, reformed, by striking out the words and figures "£3100 or thereabouts," the amount of the plaintiff's debt as stated in the deed, and inserting in lieu thereof £5062, which is now said to be the true amount of his claim.

The facts of this case are few, and I have no doubt as to the conclusions to be deduced from the evidence before us.

Clarke being in difficulty, being indeed, as it now seems, quite insolvent, proposed to assign his property to trustees, for the benefit of his creditors, and several meetings were held in the month of May, 1854, for the purpose of taking his proposal into consideration. The proposition was, that Clarke should be released on assigning his property to trustees, for the benefit of his creditors;

that out of the proceeds, if sufficient the plaintiff and James should be paid their debts in full; that out of the residue of the estate the other creditors shall accept a composition of 10s. in the pound upon their debts payable in four years; but if the estate should fail to realize that amount, then that the remainder, whatever might be its amount, should be divided between them *pari passu*. James appears to have been an accommodation indorser, and to have been preferred on that account; but I have not been able to discover any ground upon which the plaintiff should have been placed in a more favourable position than the other creditors. However that may be, Heacock, who was by far the largest creditor, objected, naturally enough, to the proposed arrangement. He claimed to be paid *pari passu* with the plaintiff, and he insisted that the amount of the plaintiff's debt should be ascertained and stated in the deed. It was a matter of the utmost importance to Clarke, and indeed to the plaintiff also, to obtain Heacock's assent, his debt being upwards of six thousand pounds. So important was it, indeed, that without it Clarke would not have executed the assignment. And to meet Heacock's views, it was agreed that his debt to the extent of £1025 should be paid in full, and *pari passu* with the plaintiff, and that the plaintiff's debt should be stated in the deed to amount to "£3500 or thereabouts." It was alleged that the amount of the plaintiff's debt could not be precisely ascertained, as the account had not been made out, and for that reason it was agreed that it should be stated in the deed as amounting to "£3500, or thereabouts" To that proposal Heacock agreed, and the deed was prepared and signed by all parties, on or after the 19th of June, 1854.

I have no difficulty in arriving at the conclusion that Heacock insisted upon having the amount of the plaintiff's debt ascertained before he would assent to the arrangement, and that the deed was drawn in its present shape to meet his views. The statement is highly probable in itself. The proposition was, that Heacock, who was a creditor for six thousand pounds and upwards, should release his debtor altogether, and look to the estate alone, after deducting thereout the large debts due to the plaintiff and to James, for payment of the proposed composition of 10s. in the pound. Now, on such a proposal as that being made, it was natural and highly reasonable that Heacock should insist on knowing the amount of the plaintiff's demand. Until that had been ascertained, no rational opinion could have been formed by any creditor as to the prudence or imprudence of acceding to the proposed arrangement. And, on the other hand, seeing how important it was both to the plaintiff and Clarke to obtain Heacock's assent, it was natural and reasonable that they should agree to limit the plaintiff's demand in such a way as to enable the creditors to form some rational estimate of this proposal. Now, the evidence appears to me to lead very clearly to the conclusion that what we would have expected *a priori*, did in fact take place. The Heacocks swear that when they executed the deed, they believed that the plaintiff's demand was limited for all practical purposes to £3500, and that if they had known that he claimed £5000, or any sum materially different from the amount specified in the deed, they would not have been parties to the assignment. Dr. Connor, who attended several, if not all the meetings of the creditors, on behalf of the Heacocks, swears that there were several discussions before the terms could be agreed upon; that Heacock was unwilling to come into the assignment while the plaintiff, was so largely preferred, and then the affidavit proceeds in these words: "I remember there was some discussion that Chapin's claim should not be fixed, but should be paid in full, whatever it might be, but Mr. Heacock and I absolutely refused this, and I am certain Heacock insisted upon having a sum named as Chapin's claim, otherwise he would not have signed." Now, that statement, which is perfectly clear and consistent, is quite unopposed. Nay, it is materially coroborated. Chapin, who might have contradicted the statement, if untrue, has not filed any affidavit in reply. Clarke being examined upon the point says: "I *don't think* that Heacock, at any of the meetings, required the amount of Chapin's claim to be ascertained before signing the assignment." But James, who had a very material interest in attending to what passed at these meetings, who is said to have acted for the plaintiff, at some of them, and who must be allowed to manifest some bias in his behalf, contradicts Clarke, and goes far to affirm the truth of Dr. Connor's statement. In his examination in chief he says: "I think Dr. Connor asked at the time what the amount of the indebtedness of Clarke to Chapin was, Clarke said it was about £3500, he could not tell exactly;" and on cross-examination he says: "There was a good deal of questioning by Dr. Connor and Heacock at the meeting, as to the amount of Chapin's claim. Heacock was not willing to sign until he knew the amount of Chapin's claim."

I have no doubt, whatever, therefore, as to the perfect accuracy of Dr. Connor's statement.

It is said, however, to have been agreed on all hands that the plaintiff's debt should be preferred to the full amount, and that if the amount, when ascertained, should exceed the amount specified in the deed, it was to be increased; if it fell short, diminished. Clarke is the material, perhaps I may say, the only witness upon that point. Now, if Clarke only meant that £3500 was stated as being for all practical purposes the true debt, but that as the amount had not been precisely ascertained, the words, "or thereabouts," were added to cover any inconsiderable difference which might be found to exist—if that be his meaning, and the words are capable of that construction, then it agrees both with the language of the deed, and with the witnesses for the defence. But if he meant to say that Heacock agreed to pay the plaintiff's debt, whatever might be its amount, then his statement is not only improbable and inconsistent with established facts, but it is moreover in direct conflict with the answer of Heacock and the evidence of Dr. Connor. For if it be true that Heacock insisted on having the amount of the plaintiff's debt ascertained, and refused to execute the deed until that had been done, and I think that established, it cannot be also true that he agreed to pay the plaintiff's debt in full, whatever might be its amount. I think it clear therefore, that Heacock did not enter into that agreement, but positively refused to execute the assignment upon any such terms.

This deed then, which was executed under the circumstances to which I have already adverted, provides that the trustees are "to pay and discharge in full, a certain debt due and owing by the said party of the first part to Royal Chapin and Son, such debt being hereby declared to be a preferred claim, and to amount to three thousand five hundred pounds or thereabouts, of lawful money of Canada."

Now, unless I have wholly mistaken the effect of the evidence, it must be perfectly obvious that to alter this deed by striking out the words: "*three thousand five hundred pounds or thereabouts*," and substituting in their room, the words: "*five thousand and sixty-two pounds*," would be to alter it not in accordance with, but directly contrary to the clear intent of all parties Indeed, such an alteration would be wholly unjustifiable even upon plaintiff's evidence. It was never hinted to the creditors, by anybody, so far as I can discover, that there was a possibility of the plaintiff's debt amounting to £5,000, or any thing like that amount. On the contrary Clarke stated to the creditors himself, that the debt, according to his calculation, amounted to £3,500; and there is no evidence that the plaintiff ever informed them that the true amount would be in his opinion materially different. It is clear, I think, even upon the plaintiff's evidence, that the words "£3,500, or thereabouts," were inserted in accordance with the clear and expressed intention of all parties.

It was argued, however, that upon the deed as it stands the plaintiff is entitled to be paid the debt in full. I cannot accede to that proposition. Assuming the plaintiff to have known that his debt did, or would greatly exceed the amount specified, and to have represented it at that amount for the purpose of misleading the creditors, and of inducing them to come into the assignment, upon that hypothesis the case is one of gross fraud, and it would be a monstrous perversion of justice to permit the plaintiff to recover any thing beyond the amount at which, for the purpose of fraud, he had chosen to represent his debt.

I am inclined to think that this case has been brought within the principle to which I have adverted. It is difficult to believe that the plaintiff came to this country for the express purpose of obtaining a settlement of this debt without having first satisfied himself as to its amount. But, assuming him to have done so, still three weeks intervened between the negociation and the execution of the assignment. The plaintiff had, therefore, an ample opportunity for ascertaining the true amount of his debt; and in

the absence of all explanation must be taken to have done so; and having allowed the other creditors to execute the deed of assignment without declaring the truth, he cannot be heard now to say that his debt exceeds the amount specified, for that would be to allow him to take advantage of his own fraud.

But assuming the matter to have happened otherwise, assuming the plaintiff to have honestly believed, and therefore, to have innocently stated, that his debt amounted to £3,500, or thereabouts, then I have no doubt that the plaintiff is bound to make that representation good, on the foot of contract, as conclusively as he would have been on the ground of fraud, if he had chosen to misrepresent the true amount of his debt. The creditors had a most material interest in knowing the true state of the account. They had no means of ascertaining that fact except by enquiring from the plaintiff himself. And by this deed it is declared that his debt amounts to £3,500, or thereabouts. Now that amounts, as I understand it, to a declaration that £3,500 may be taken for all practical purposes as the true amount of the plaintiff's debt, and as against the creditors who acted on the faith of that representation, the plaintiff can have no right to recover any sum materially greater than that stated in the deed, *Gregory* v. *Williams*, 3 Mer 581.

Suppose a mortgagor to sell the equity of redemption subject to the mortgage, and to covenant that the amount due upon the mortgage was "£3,500, or thereabouts," can it be argued that there would not be a breach of covenant if the debt should turn out to be £5,000 instead of £3,500? Again, suppose a mortgagee to assign his security, with a covenant that the amount due on foot of the mortgage was £5,000 or thereabouts, would it, or would it not, be a breach of that covenant if the amount due should turn out to be £3,500, instead of £5,000? I cannot doubt that there would be, in each instance, a plain breach of covenant; and the present case appears to me to be substantially the same.

For these reasons I have come to the conclusion that the bill must be dismissed with costs.

Gillam v. Cleghorn.

Road Company—Arbitration.

In proceedings taken under the statute, 16 Victoria, chapter 190. for the purpose of ascertaining the amount to be paid by a road company for materials necessary for the construction of the road, the arbitrators cannot confer upon the company a prospective right to carry away the material, by awarding an amount as compensation for the materials to be taken at a future time

Arbitrators appointed under this act, awarded damages for materials taken generally.

Held, that the award was *ultra vires*, they having power to award damages in respect of materials taken for the purpose of the road only.

Quære—Whether the act gives the power to such companies to enter upon land distant two miles from the line of the company's road, for the purpose of obtaining materials for the construction thereof.

This was a bill filed by Alfred Gillam, against Allen Cleghorn, Thomas Botham, Phillip Kelly, James Barr, and Garry V. Delong, setting forth that the plaintiff was owner in fee of a parcel of land in North Norwichville, and that the defendants, who were trustees of the Norwichville, Burford, and Brantford Plank Road Company, (the Road Company being also defendants,) had by themselves, their agents and workmen, from the 10th of October, 1856, continued to trespass thereon, by quarrying and removing therefrom, and applying to their own use (as such trustees) large quantities of stone, gravel, sand, and other material, which were on, and formed part of the soil, and that they continued, and intended to continue, to do so; that the plaintiff's land is situate at a distance of about two miles from the works of the defendants, and not adjoining or neighbouring thereto, and that there are quarries of such material on lands adjoining the defendants' works.

The bill further alleged that the defendants claimed a right to carry away such soil and gravel under an award alleged to have been made by certain arbitrators, but which the plaintiff objected was not a valid or binding award, notice never having been served on the plaintiff, according to the provisions of the statute, 16 Victoria, ch. 90. The prayer was for an injunction to restrain the defendants from removing the gravel, &c, and that the award might be set aside, and for further relief.

The defendants answered the bill, alleging several grounds of defence; amongst others, that before going upon the land, the defendant Delong had agreed with John Gillam, the father of the plaintiff, for the right to remove the gravel, and paid the consideration therefor: but the amount was afterwards returned by John Gillam, who expressed a desire to rescind the bargain, and leave the question of value to arbitration in consequence of the arrangement he had effected having been disapproved of by his family; that notice under the act was served upon John Gillam, and he having failed to name an arbitrator, one was appointed by the judge of the county court, and notice thereof and of the names of the other arbitrators and umpire was served on John Gillam, and an award had been made according to the provisions of the act; but no notice was shewn to have been served on the plaintiff. It was alleged that the defendants had been induced by the representations of John Gillam, to believe that he owned the property: but the evidence established that before any proceedings were taken by the arbitrators, the defendants were aware to whom the property belonged.

Mr. Strong for the plaintiff.

Mr. Morphy for the defendants. The bill states no case for the interposition of this court, for all that appears the plaintiff can obtain an ample remedy at law—the act, if illegal, is merely trespass, and no irreparable damage is alleged as likely to arise. The conveyance to plaintiff is dated in July, 1856; the award was made on the 28th of August, 1856, and although the defendants began to remove the gravel in October following, no step was taken by the plaintiff to prevent them until September, 1857. The conveyance from the father to the son looks very much like a contrivance to prevent the defendants obtaining the material wherewith to construct their road. The act does not require the company to take the ground from a place nearest to the road.

The judgment of the court was delivered by

The Chancellor.—I think the plaintiff entitled to succeed on several grounds.

The right of the defendants to interfere with the plaintiff's property in the way they have done depends entirely upon the act of parliament under which they exist. 16 Vic ch. 190. To have entitled themselves to the privileges which that act secures to such companies, they must have shown a strict, or at all events, a substantial compliance with the provisions of the statute; but the defendants have failed to comply with either the letter or the spirit of the statute, and for that reason the parliamentary title on which they rely cannot, I think, be allowed to prevail

If this award is to bind the plaintiff, it must be because the arbitrator was appointed by the plaintiff himself, or by some person authorised to appoint for him under the statute. Now there are several cases in which the judge of the county court of the county in which the property lies is empowered to appoint an arbitrator *who has authority under the statute to bind the rights of the contesting parties*. That is a most important power, and to be exercised safely, it must be exercised with caution. The legislature cannot have intended to authorise the exercise of that sort of power behind the back of the party interested. The legislature intended, I apprehend, that the judge should proceed upon proper evidence—upon evidence sufficient to satisfy him of his jurisdiction in the given case, and calculated to guide his mind to a proper choice. The judge had authority, in other words, to bind the plaintiff by an appointment made in presence of the contesting parties, or after due notice; but that step was taken in the present case upon the *ex parte* application of the defendants, and for that reason it was, in my opinion, wholly nugatory and void.

Again, the proceedings subsequent to the notice to arbitrate were not served upon the plaintiff, but upon John Gilam, his father. But the property was at that time the property of the plaintiff. The evidence shows that it was so, and that the defendants knew it. They knew it before the arbitrators met to consider the matter, perhaps at an earlier period. Now the notice to arbitrate served upon John Gillam may have bound the property as a parliamentry contract, and the defendants may have had a right to enforce it against the plaintiff. But that right, assuming it to exist, cannot make proceedings taken against John Gillam, after his interest in the property had ceased, binding against the plaintiff. The arbitrators proceeded, therefore, without giving the plaintiff, the real owner of the property, notice, and their award, for that reason, cannot bind him.

But this award is bad in substance, as it seems to me, being unauthorised by the act of parliament. What has been done is this, the defendants are ordered to pay a certain sum as a compensation for the materials to be taken by them at any future period from the premises in question. There is nothing in the act to authorise that. The defendants requiring gravel to construct their road, had a compulsory right to take it for that purpose from adjoining lands, at a price to be fixed by arbitration. See sec. 6. And upon gravel becoming necessary for *repairs*, they would have had a right to acquire it, for that purpose, upon the same terms. See sec. 21. But there is nothing in the act which entitles the defendants to acquire, in this way, that sort of prospective right which this award affects to confer—not a right to take plaintiff's property, at the time of the award, and in some given quantity, because then necessary for a public purpose, but a right unlimited as to time and quantity—a perpetual right to take the plaintiff's property against his will and at all times, and upon every contingency. Upon what data are the damages to be estimated? Can the arbitrators calculate the value of an unknown quantity of material to be taken, not then, but it may be a hundred years thereafter? The defendants had no power to acquire the property in fee simple, under the compulsory powers of the act. They might have purchased it, perhaps, in the ordinary way, but they had no right to take it. And as they had no power to acquire the fee, so neither have they any power, in my opinion, to acquire the perpetual prospective right to take materials.

The award appears to me to be *ultra vires* in another particular. The damages are not for materials taken *for the purpose of the road*, but for materials taken for any purpose whatever, which would be clearly illegal. But that, perhaps, was not intended.

I may add, that I doubt very much whether the defendants have any power at all to enter upon the plaintiff's land under the act. Companies are only authorised to take material from "adjoining or neighbouring lands." Now these expressions "adjoining or neighbouring," were intended, I presume, to impose some limit on the powers intended to be conferred. The legislature, clearly, did not intend to allow materials to be taken from land wherever situate. Now, according to Johnson, to adjoin means "to lie next so as to have nothing between," and according to the same learned author, to neighbour means "to confine on." But the land in question certainly is not land adjoining or neighbouring on the road, according to Johnson's definition; and to hold that the powers of the act embrace it, would seem to reduce the words to which I have referred to silence, for if the defendants can enter upon lands distant two miles from their road, I know of no principle upon which any lands can be excluded, however distant.

For these reasons I think the plaintiff entitled to a decree. The master must be directed to ascertain the value of the material taken by the defendants, and that amount with the costs of this suit must be paid to the plaintiff.

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

(IN BANC.)

TRIPP v. GRIFFIN.

Vendor and Purchaser—Specific Performance—Covenant for further assurance—Jurisdiction.

A purchaser having paid all his purchase money, filed a bill under the covenant for further assurance to compel his vendors to pay off a mortgage disclosed at the time of sale.

Held, that the bill was properly filed, although the purchase money had been paid and there was no concealment of the incumbrance.

Held, also, that under a covenant for further assurance a purchaser has a right to require the removal of incumberances created by his vendor.

(29th January, 1859.)

The bill stated that the defendants, representing themselves to be entitled to the hereditaments thereinafter mentioned, free from incumbrances, save as therein stated, sold the same to the plaintiff for £650, the full value thereof: that at the time of sale the defendants mentioned that the premises were subject to a mortgage to the Brant Mechanics' Building Society, but that they would procure a discharge thereof: that plaintiff relying on such promise (which was merely verbal) completed the purchase and paid the purchase money, and that a deed was executed by the defendants with absolute covenants for title. That the defendants had not procured the said mortgage, to be discharged; and it was prayed that they might be decreed to do so. The bill was taken *pro confesso* against the defendants.

G. Morphy, for the plaintiff, moved for the decree on the ground that a plaintiff under a covenant for further assurance, had a right to come to this court to compel the defendants to discharge the mortgage. He cited Rawle on Covenants, 206; 2 Sugden, V. and P. 542; Dart, V. and P., 412.

The CHANCELLOR delivered the judgment of the court.

This is a bill by a purchaser of property to compel his vendor to pay off a mortgage covenanted by such vendor to be paid off In regard to the question of relief, it is laid down that when a deed is executed in the absence of fraud, the purchaser must rest on his covenants—as it was his duty to have investigated title.

We have gone further however, and have decreed the payment of an incumbrance out of unpaid purchase money. In the present case the mortgage is disclosed and agreed to be paid off. If the purchaser brought an action for damages at law, the verdict would be for the amount required to pay off the incumbrance—and thus the law seems to afford an adequate protection. But under a covenant for "further assurance," it also seems that a purchaser may of course require a removal of the incumbrances found upon the estate. These words imply a right,—as laid down in *King* v. *Jones*, 5 Taunt, 427,—to file a bill and seek relief in this court. The words, however, in that case were used at common law. A bill has never before been filed on this ground; and at the hearing, I doubted whether such a bill could be filed; but having considered the matter and reviewed the authorities laid down in the text-books of Sugden, Dart, and Rawle, it appears to me that this Court has jurisdiction to enforce the specific performance of such covenants, and that the purchaser is entitled to relief. My brother ESTEN, who has given great attention to the subject, is of opinion that the bill is properly filed, and the decree will therefore be as prayed.

MACHELL v. CAMPBELL.

Deposit on decree for sale.—Trustee.

The Trustee of a mortgaged estate asking a sale in a suit for foreclosure, is not relieved from the payment of the usual deposit required on such a decree.

In this cause there had been the decree for foreclosure and reference to the Master to inquire as to incumberances—reserving further directions,—under which the Master reported that the estate had been conveyed to a Trustee under a marriage settlement of the mortgagor; and the case now coming up on further directions,—the bill having been *pro confesso* against the motgagor,

Hodgins, for the plaintiff, asked for the usual decree of foreclosure,—giving the defendants the usual time to redeem.

E. Fitzgerald, for the Trustee asked for a sale; but without the payment of the usual deposit—as the trustee had nothing but the bare estate.

SPRAGGE, V. C., delivered the judgment of the court. The application for a sale can only be on the usual terms. If on a sale of the estate there be any surplus after paying the mortgagee, such surplus should be paid into Court. If the deposit for sale be not made in the usual time, then the decree for foreclosure will go—giving the one day for redemption to the mortgagor and trustee. If the parties redeem, then there should be a re-conveyance upon the trusts of the marriage settlement.

[*Note by Reporter.*—See also the case of *Whitfield* v. *Roberts*, 5 Jur. N. S. 113, as to a decree for sale on payment of the deposit, or the usual decree for foreclosure in default of such payment.]

THIBODO v. SCOBELL.

Injunction.—Partner applying funds to other contracts.

Where a partner in a special contract applies the funds derived from such contract to other contracts, not belonging to such special partnership, an injunction will be granted against him until the partnership be wound up, although such injunction may not have been prayed for in the original bill.

(11th March, 1859)

In this case, the defendants had obtained a contract through the plaintiff for building the Court House at Kingston, and afterwards refused to allow the plaintiff any share; a decree had been pronounced declaring the plaintiff a partner in the contract. The

contract had been completed and the balance of the amount due, £1250, was about to be drawn by the defendants and applied to other contracts; whereupon

Roaf, for the plaintiff, applied for injunction and a receiver, on the grounds set out in the affidavits. The plaintiff had been excluded from seeing the books, until the decree had been pronounced, and though declared a partner in regard to this contract, could not find out from the books how much had been expended.

Brough, Q. C., contra. No such injunction is asked for by the bill; the plaintiff should have filed a supplemental bill. In foreclosure suits, after the decree for foreclosure, if the mortgagor abuses the property, the Court will interfere and preserve the property in the same state In the case of a partnership, a receiver will be granted if there is exclusion or gross misconduct. [SPRAGGE, V. C.—Or if the funds are in danger of being misapplied.] Yes, but only in certain cases. Here, after the decree, plaintiff was treated as a partner and had access to the books, but he lies by for more than a year. He says that the defendants will do so and so—why? because they must have done so before; that they had gone beyond the partnership articles, and he acquiesced. Besides, the plaintiff had not contributed funds at the commencement of this contract, and the defendants had to withdraw their means from other contracts, and had a right to use the money now coming to them from this contract in the same way. They had never refused to account but would allow the plaintiff his share when the partnership was wound up.

Roaf, in reply. The decree in this case is equal to an administration decree; and as between parties an injunction is often granted to restrain wrongful acts In this case the business of the partnership is completed, and all we ask is that the balance due on it may not be allowed to go to other contracts. If the defendants allege they are entitled to the amount, they should show it to the Court. The rule that a partner should know the accounts does not apply here because the books were of the general account of all contracts of the defendants, but they never informed him what belonged to his contract, and because of his exclusion. The affidavits show the money will be misapplied, and the plaintiff ought not to be forced to rely upon the mere personal responsibility of the defendants.

SPRAGGE., V. C. delivered the judgment of the Court. I am of opinion that the plaintiff has made out a strong case of danger to the fund. The most convenient way is to appoint a receiver; but perhaps the most simple way is to pay the money into Court, and then take the account. It is clear that if it goes into the defendants' hands, they may apply it to other accounts, and leave the plaintiff to look to their personal liability. The plaintiff shows that £1250 belong to the partnership, and that there will be danger if it goes to these parties; that he has been excluded from the partnership; and that moneys of the partnership have gone into other contracts, and that he did not assent to them;—but the defendants show nothing against these facts. The injunction therefore will issue, giving the defendants leave to show cause against it.

(IN CHAMBERS.)

ALLAN v. PYPER.

Substitutional service—Partners—Agents.

Where some or all of the parties to be served are out of the jurisdiction, substitutional service of a bill may be effected on partners or agents where there is clear proof of agency with reference to the *subject matter* of the suit.

(1st April, 1859.)

Cattanach moved for leave to serve the partner of a firm here, the other members of which resided in England, on the ground that he had signed the name of the firm to the deed of assignment in regard to which the suit was brought;—also to serve the agent in Toronto of an English firm, who had signed the name of the firm to such deed of assignment.

THE CHANCELLOR.—If there is clear proof of agency with reference to the subject matter of the suit, and the defendant sought to be served is out of the jurisdiction, the partner or agent may be served. It is not necessary, though some of the cases incline to this, that the agent should have special authority with reference to the suit: it is sufficient if, as in this case, there is clear proof of agency with reference to the *subject matter* of the suit. But the Court will not infer agency from the mere execution, there must be evidence to show the circumstance of the agency. The order for substitutional service *should, however, state that the* supposed agent can, within a limited time, move to discharge the order.

(MASTER'S OFFICE)

RUSSELL v. ROBERTSON.

Practice—Parties—Orders of 1853.

A mortgagee who has been in possession and who has assigned his interests to his co mortgagee is not a necessary party in a suit for foreclosure.

The Master was directed to take an account of what was due to plaintiff on security of the premises in the pleadings mentioned, and to charge plaintiff with rents and profits in case he found that plaintiff had been in possession.

It appeared that in 1846, defendant Robertson in effect mortgaged the premises to Hector and Colin Russell, and that they went into possession immediately. In 1852, Hector Russell released all his interest to Colin Russell, and the plaintiff became entitled by divise from Colin Russell, her husband, in 1855.

Davis for defendant Robertson, (the mortgagor) contended that Hector Russell should be made a party, so that Robertson could have the benefit of his conscience, as H. Russell had been in receipt of the rents and profits and might have been paid in full.

Crooks, contra. The Master has power to add parties in his office only in those cases in which, according to the general orders of 1853, it is unnecesary to make them parties by bill. He cited *Gooderham* v. *DeGrassi*, 2 Grant, 135, in which it was held that although the mortgagee was in the possession, and the mortgagor swore that he had been paid off by the rents and profits, he (the mortgagee) was not a necessary party to a bill for foreclosure filed by the assignee of the mortgagee against the mortgagor. This was in 1850, before the publication of the general orders of 1853; and if it was unnecessary then to make the mortgagee a party *a fortiori* it is not so now. He also cited *Wiard* v. *Gabel*, Grant's Rep.; *Trulock* v. *Rolery*, 15 Sim. 277.

Upon which it was held that Hector Russell was not a necessary party in the Master's office.

COUNTY COURTS, U. C.

(In the County Court of Lincoln, before His Honor JUDGE CAMPBELL.)

ST. JOHN v. HISERTT ET AL.

Action against maker and endorser of a Note—Admissibility of maker as a witness for indorser.

This was an action brought by the plaintiff as the indorsee of a promissory note made by one of the defendants and endorsed by the other defendant. The defendant pleaded that the maker paid the note before action, on which issue was joined.

The defendants' counsel called the maker to give evidence on behalf of the indorsers. The plaintiff's counsel objected to his evidence being allowed, and founded his objection on the Evidence Acts of 1849, 1851 and 1862, particularly the proviso in the first section of the last mentioned Act, which provides that any party to every suit individually named in the record cannot be examined except at the instance of the opposite party.

The counsel for the defendants contended that under the Act 5 Wm. IV., cap. 1, sec. 9, the maker was a competent witness for the endorsers.

The learned judge noted the objection taken by the plaintiff's counsel, but allowed the witness to give evidence, when upon the statement of the maker, being the only witness called, the jury found a verdict against the endorsers for only £6, and against the maker for £27 10s. 3d., being the full amount of the plaintiff's claim.

The plaintiff's counsel then applied for a certificate for County Court costs, which on consideration the learned judge granted.

Currie for plaintiff.

Miller and *Lawder* for defendants.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

April 11, 1859.

Gentlemen,—Can a Homœpathic Physician not qualified to practice under our Canadian statutes collect his charges for medicines prescribed by him in the course of his calling? If you consider the question one of sufficient general interest I shall feel obliged by an answer through the medium of your excellent Journal.

I am, your obedient Servant,

An Enquirer.

[It is not lawful for any person not being a member of the Medical Board of Upper Canada, or not being licensed by the Governor General, or not being actually employed as a Physician or Surgeon in the Naval or Military Service, to practise Physic, Surgery or Midwifery in Upper Canada *for hire, gain, or hope of reward.* (8 George IV, cap. 3, sec. 6.) Homœopathics are not in general within the provisions of this enactment; and when not so, have no legal right to fees for services rendered or performed by them as physicians, and to practice medicine without being duly authorized so to do, is a misdemeanor punishable as such. (*Ib.* sec. 7.)—Eds. L. J.]

To the Editors of the Law Journal.

19th April, 1859.

Gentlemen,—Knowing that you are incessantly annoyed with numerous letters, upon the contents of which you are requested to give your opinion. I assure you it is with much reluctance that I now submit the following for your advice thereupon.

Suppose A. mortgages a farm or town lot to B. for £500, payable in one or two years, or as the case may be, and in this mortgage the former for himself, his heirs, executors, &c., covenants to pay the latter or his heirs, &c., the said sum of money with interest, without any deduction or abatement on the day on which it will accrue due. There is a power of sale also contained in the mortgage. A makes default in payment of the amount, and B. causes the lands comprised in the mortgage to be advertised, having first demanded payment of the principal money with interest and having waited the time agreed on in the power of sale. The land is sold to C. whether as a *bona fide* purchaser or on account of B., I cannot say, for £400, and B. gives him a quit claim of the fee simple which he held by virtue of the mortgage. Has B. by giving this quit claim forfeited the remaining £100 due upon the mortgage even in the event of C. re-conveying to him for the same consideration at which the mortgage was sold?

Some of the gentlemen of "Coke upon Littleton" in this town, contend that the heirs or creditors of A. would by filing a bill in Chancery be entitled to the land on payment of £400, on the ground that B. having released and relinquished all his claim, title and interest thereto in consideration of that amount would not be permitted on again becoming seized to attach the remaining £100 to it.

Williams on real property says, that the mortgagee "is at *liberty to retain to himself his principal, interest* and costs, and having done this the surplus, if any, must be paid over to the morgagor," these are the words in the mortgage. Could B. quit claim in favour of C., reserving his right to prosecute the heirs or executors of A. for the balance upon the covenant to pay, A. being dead, we will suppose, at the time of the sale.

As lawyers, like doctors, sometimes differ in their opinion, and as some in this case contend one way and some another, I have made bold enough to submit the matter for your opinion.

Lex.

[We think on general principles that a mortgagee of real estate having a covenant for the payment of the mortgage money and a power of sale, may exercise the power of sale, and if the property sell for less than the mortgage debt, may, notwithstanding his conveyance of the equity of redemption, still sue the mortgagor for the remainder of the debt. But if the sale of the equity be only colorable so as to enable the mortgagee to acquire the ownership of the property, and the mortgagee to obtain a conveyance from his vendee, the mortgagor would still we apprehend have the right to redeem upon payment of the mortgage debt.—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

Ex. Furber *v.* Strumey. *January* 15.

Execution—Goods pawned—Lien of Pawnee.

The evidence in an interpleader issue was that the goods taken in execution originally belonged to the execution debtor and had been pawned, but it did not appear by whom; that after the writ of execution was issued the pawnbroker's tickets were handed over to the claimant by one L that he might redeem them and hold the goods as a security for the money paid to redeem them. The case was tried at the County Court, and the Judge inferred as matter of fact that L had possession of the tickets, and deposited them with the claimant as the agent of the execution debtor, and that the execution debtor had at the time notice of the writ having issued.

Held, that the claimant was entitled to succeed on the issue.

At the trial no evidence was given as to how L became possessed of the tickets, and the Judge inferred as a matter of fact that he was merely the agent of the execution debtor; that the said L had notice that a writ of execution against the execution debtor was in the bailiff's hands. The plaintiff paid money to the bailiff under the said execution and sought to recover it, in which he failed. Cause was shown that the plaintiff stood in the same position as the pawnbroker from whom he redeemed the goods, and that whatever lien he had now vested in the plaintiff.

Watson, B. The learned Judge appears to have thought that because possession obtained after the fi fa. was lodged that therefore the goods were bound by it. But it is of no consequence that the transfer of the tickets and the redeeming of the goods was after that event since the pawning was previous to it.

Judgment reversed.

Q. B. Regina *v.* Cumberland. *January* 15.

11 & 12 *Vic. c.* 49—*Conviction for unlawfully opening of house on Sunday—Evidence in support of.*

Upon an information under 11 & 12 Vic., c. 49, s. 1, for unlawfully opening a house for the sale of beer after 12 o'clock on Saturday night.

Held, that proof of the house being closed at 12 o'clock, and that at 2 o'clock a person was seen drinking in the house, who was afterwards let out, was not evidence to support the conviction.

In an appeal from the decision of two Justices, it was argued that there was no evidence that the house was opened for the sale of beer, and that the person who was seen drinking was not shown not to be a traveller. Also, the Act enacts two offences, the sale of beer and the opening the house after 12 o'clock on Saturday night.

The Court held the *onus probandi* that the person was a traveller lay upon the defendant, since 11 & 12 Vic. c. 43, and that there was no evidence that the house had been opened after hours. It was opened to let the person out, but that was not the offence charged.

Q. B. REGINA *v.* CUDHAM. *January* 15.

Poor—Settlement—9 & 10 Vic. c. 66, s. 1—Irremovability of a widow after her husband's death.

A widow, not having resided five years in a parish at her husband's death, is not irremovable, although her husband had resided continuously in the parish for more than twenty years previously and up to the date of his death.

An appeal was made against the order of justices for the removal of a pauper from one parish to another, and it was contended that as the husband was irremovable at the time of his death and therefore the wife was so too, and as she had done nothing to loose that status she was not liable to be removed after his death.

COMPTON, J., said the proviso in the section merely enacts, that whilst the husband cannot be removed the wife and children shall be irremovable, in order that families may not be separated, but this cannot apply when there is no husband.

CHANCERY.

M. R. MILLAR *v.* ELWIN. *July* 1.

Practice—Pro confesso—Notice.

Under the 79th order of May, 1845, four notices in successive weeks held sufficient compliance with the order, though the day for which notice was given was five weeks after the first insertion.

B. C. IN THE MATTER OF ——, ATTORNEY AND HIS ARTICLED CLERK. *Nov.* 25.

Attorney—Articled clerk—Opposition to swearing in—disclosure of information obtained as clerk.

Where upon the opposition by the master of an articled clerk to the clerk being sworn in as an attorney, upon the ground that he had disclosed information as clerk, the charge was indistinctly stated in the affidavit, the clerk was at once allowed to be sworn.

There was nothing distinctly stated against the clerk, but the court said the attorney might object within a year.

W. R. COLLINS *v.* COLLINS. *Dec* 11, 13.

Arbitration—Vendor and Purchaser—Common Law Procedure Act 1854, *s.* 12.

Where vendor and purchaser entered into a contract for sale at a price to be determined by two valuers named in the agreement and as to matters in difference between the valuers by an umpire whom the valuers were directed to appoint before entering upon the valuation.

Held, that this was not an arbitration within the 12th section of the Common Law Procedure Act 1854, and that on failure of the valuers to appoint an umpire, and on the other steps provided in the Act having been taken, the Court had no jurisdiction to appoint an umpire.

Semble, that if in course of a treaty for sale disputes and discussions arise between vendor and purchaser as to the price to be fixed and they thereupon agree to refer the price to the valuation of certain persons, this would be an arbitration within the meaning of the 12th section of this said Act.

V. C. K. LINCOLN *v.* WRIGHT. *Dec* 14.

Mortgage by parol—Statute of Frauds—Constructive trust—Costs.

L makes a parol agreement with W for the sale of his life interest on certain property on the terms as L alleges of W. repaying himself interest and principal out of the rents, L paying the premiums on a policy of insurance on his life and being allowed to reside in his house and lands, there being at the same time a simple conveyance to the defendant of W's direction. W writes letters stating that the conditions were mistaken, and leaving out the condition of repayment and dies and his devisee brings an action of ejectment against L. L files a bill to restrain the action setting up the agreement and asks for a declaration that the defendant is a trustee for him and for an account. L and one witness swear to the agreement and two witnesses of the defendant swear that W denied that there was such an agreement.

The defendant objects that the suit is informal as a redemption suit, the representative of W not being a party, and as a suit for specific performance untenable under the statute of Frauds.

Held, that the statute of Frauds does not apply that the evidence is in the plaintiff's favor and a decree for redemption is made on bringing the representative of W before the court. No costs up to the hearing, and thence redemption costs.

APPOINTMENTS TO OFFICE &c.

COUNTY CROWN ATTORNEYS.

IRA LEWIS, of Osgoode Hall, Esquire, Barrister-at-Law, to be County Attorney in and for the United Counties of Huron and Bruce, in the room and stead of Alexander Wood Strachan, Esquire, deceased.—(Gazetted 2nd April, 1859.)

CORONERS.

WILLIAM N. HUTT, Associate Coroner, County of Lincoln.

EMANUEL B. SPARHAM, Esquire, M.D., and DANIEL BROWN, Esquire, M.D., Associate Coroners, United Counties of Leeds and Grenville.

WILLIAM FRANCIS LEWIS, Esquire, Associate Coroner, County of Carleton.—(Gazetted 9th April, 1859.)

GEORGE HOLMES, Esquire, M.D., Associate Coroner County of Middlesex.

NATHANIEL HILL, Esquire, M.D., Associate Coroner, County of Oxford.

JAMES POWER, Esquire, M.D., Associate Coroner, County of Hastings.—(Gazetted, 16th April, 1859.)

REUBEN IRA HICKEY, Esquire, M.D., and DAVID ALEXANDER BREAKENRIDGE, Esquire, Associate Coroners, in and for the United Counties of Stormont, Dundas, and Glengarry.

JAMES B. TRONSDALE, Esquire, M.D., Associate Coroner, in and for the United Counties of Leeds and Grenville.—(Gazetted, 23rd April, 1859.)

CHARLES EBERT, Esquire, Surgeon, Associate Coroner for the County of Waterloo.

WILLIAM DEEN, Esquire, Surgeon, Associate Coroner for the County of Carleton.—(Gazetted, 30th April, 1859.)

NOTARIES PUBLIC.

WILLIAM A. HUSBAND, of Preston, Esquire, to be a Notary Public in Upper Canada.

CONRAD NAHRGANG of Hespeler, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, 2nd April, 1859.)

WILLIAM COLLINS, of the Village of Walkerton, Esquire, to be a Notary Public in Upper Canada.

GEORGE DORMER, of the Town of Lindsay, Esquire, to be a Notary Public in Upper Canada.

GEORGE JAMES GALE, of the Town of Owen Sound, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, 9th April, 1859.)

HENRY JOSEPH, of the City of Toronto, Gentleman, to be a Notary Public in Upper Canada.—(Gazetted, 16th April, 1859.)

WILLIAM RATHBUN, of Ayr, Esquire, to be a Notary Public in Upper Canada.

WILLIAM FRANCIS LIGHTHALL, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada.

ISAAC SAMUEL FARRELL, of Simcoe, Esquire, to be a Notary Public in Upper Canada.

JOHN BREAKENRIDGE READ, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.

DAVID TISDALE, of Simcoe, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.

JOHN . MURPHY, of the City of Hamilton, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, 30th April, 1859.)

TO CORRESPONDENTS.

A. C.—Thanks for matter. It does not seem advisable to present it in connection with the case referred to, which may have been decided (originally) apart from the grounds suggested. We purpose keeping it till the point can be appropriately introduced unencumbered *and on its own merits.*