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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS—*Answers to queries by.*

For convenience sake, I have caused the common heading of particulars to be printed in the margin of summons and copy, thus: "——of ——, claims of —— the sum of ——, the amount of the account *hereunto annexed.*" As the accounts are handed in, I wafer them to the face of the summons and fill in the blanks. Now I am told by a "learned gentleman" that in point of fact the accounts are not *annexed* but *prefixed*, and that therefore the terms of the Statute are not complied with, and I am threatened with applications at my next court to dismiss the suits and make me pay the costs. Will you "advise me in the premises."—A. C.

The "learned gentleman" is no doubt learned in language, but he has yet to learn what is due to his honourable calling. His *quirk* is worth nothing. There is no Judge who would give effect to such a trifling and absurd objection. The object of particulars is sufficiently answered by the form adopted, for the plaintiff's account is brought to the defendant's notice, and this is all that is required.

"Is the Clerk bound to draw the plaintiff's particulars in a difficult action of Tort, and if he does draw it and it is wrong, is he liable to the plaintiff who loses his case in consequence?"—M.

The Clerk is not *bound* to prepare the particulars of the plaintiff's demand for him; it is not within the scope of his official duties. Should the Clerk draw particulars which are found to be incorrect, he incurs no legal responsibility for the imperfect performance of a *friendly office.* But M. appears to forget that the Rules provide for amendments and give ample powers to the Judge, and if an amendment be applied for at the right time, we do not see how a mistake in the particulars can affect the decision of the case on the merits. The plaintiff may be liable to some costs, but that is the worst that can come of mere mistakes in particulars of claim.

"A suit was entered under the 90th sec. of the Act on a note seized which was payable to one A. B., (the original defendant) but I omitted to add the note required by the 19th Rule. After the service of the summons the present defendant paid A.B. (the nominal plaintiff,) the amount of the note and costs and took his receipt. There is no mistake but what he knew that A. B. had no claim to the note, but that it was sued upon for his creditors—and I can prove it; but as I unfortunately omitted the proper "caution," I wish to know if the loss is to fall on me?"—*Clk.*

Certainly not. The object of the cautionary notice required by the 19th Rule of Practice is in this case to inform the party that the payee of the note had no power to discharge the suit or receive payment; according to your statement he was already informed of that fact. There was no absolute necessity therefore to put him on his guard. With his eyes open he has committed *a fraud*, and the payment in question will avail him nothing. You must be careful to have proof at the hearing of what you state you can prove.

BAILIFFS—*Answers to queries by.*

A. B.—It is the duty of a Bailiff to endorse on Executions the date when received by them from the Clerk, as well as the date of seizure, and if two Executions against the same person are given to a Bailiff, he should endorse the time of receiving each in such manner as may shew which Execution was first handed to him.

S.—The fees for service in Interpleader cases will be regulated by the value of the goods claimed: you can state the value of the goods in your written application to the Clerk to sue out interpleader summonses.

In another place will be found a further portion of the Bailiff's Manual. The next number will enter on the duties of the office.

SUITORS.

The Hearing or Trial, and the conduct of parties in reference thereto.—The causes entered for trial at a court are set down for hearing in the order in which they were in the first instance entered with the Clerk; if there be a jury case it is first disposed of, and unless the Judge should see cause for proceeding differently the other causes are then taken up in regular order and gone through with. The adjourned cases that stand over from the last court are usually put at the head of the list. It is not usual to strike out a cause when the parties do not appear at the first call; that is, if the Court has not been sitting for half an hour or longer after the hour appointed for the Court, they are commonly "put aside for the present" or placed at the foot of the list, but the practice in different Courts vary in this particular. It is always advisable that the plaintiff should be present at the opening of the Court, or immediately after, even though his case should stand low on the list, for all those previously entered may be put below his, or be otherwise disposed of. As to the defendant, it is essential that he should be present, for the case may be called on in his absence and judgment by default pass against him; punctuality is necessary to dispatch, and if parties suffer from their own negligence, they have no right to complain. The plaintiff may appear by attorney or by agent, if he finds it convenient to apply personally: any neighbour or member of the plaintiff's family may act as agent, but an appearance by some one must be made on the plaintiff's behalf.

If *the plaintiff does not appear personally* or by some one on his behalf, or appearing does not prove his demand to the satisfaction of the Judge, the Judge may award the defendant costs and such further sum of money by way of satisfaction for his trouble and attendance, as may appear right under the circumstances. If *the defendant does not appear* or sufficiently excuse his absence or neglects to answer when his name is called on proof of the service on him, the Judge proceeds to hear the evidence on the part of the plaintiff only, and to give judgment thereupon as if both parties attended. If the claim is on a promissory note or other written contract signed by the defendant for the payment of a certain sum, the judgment is given as a matter of course without any proof, except that of service; and in action upon "an account" when the particular items *are given in detail* in the "bill" sued on, it is not usual to require further proof than that the summons and account were *personally* served, for in such cases the Judge may in his discretion give judgment for the plaintiff without further proof.

In all other cases the plaintiff should have the requisite proofs ready when called for by the Court; but from what has been said, the advantage of handing in a detailed account will be very obvious.

The Law is very careful to prevent the plaintiff taking any undue advantage of the defendant by obtaining a judgment against him unawares; but where a defendant has been personally served with a summons to appear—informed of what the plaintiff claims—given full opportunity to answer it—and warned that failing to answer, judgment will be given against him—if, after all this, he fails to appear, or excuse his absence, it seems but reasonable to conclude that he admits the claim against him, that the claim is in fact just.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 44.)

APPREHENDING THE DEFENDANT.—(*Continued.*)

The 3rd section, already referred to, of the 16 Vic., c. 178, makes full provision for the backing of a Warrant where the defendant is residing in or suspected to be in another county,—and it is consequently necessary to execute the Warrant *out of the jurisdiction* of the Justice by whom it is granted. The process of *backing* the Warrant as already set forth, is upon proof of the hand-writing of the Justice who issued it, and authorizes the execution of the original Warrant within the jurisdiction of the Justice making the endorsement; it may be in the following form:—

Endorsement in backing a Warrant.

PROVINCE OF CANADA, County of ——— (*or*, as the case may be.) } Whereas proof upon oath hath this day been made before me, one of Her Majesty's Justices of the Peace in and for the said County (*or as the case may be*) of ———, that the name of ———, to the within Warrant subscribed, is of the hand-writing of the Justice of the Peace within mentioned; I do therefore hereby authorize ——— who bringeth to me this Warrant, and all other persons to whom this Warrant was originally directed, or by whom it may be lawfully executed, and also all constables and other peace officers of the said county (*or* United Counties, *as the case may be*) of ——— to execute the same within the said last mentioned county, (*or* United Counties, *as the case may be.*)

Given under my hand this——— day of———, in the year of our Lord one thousand eight hundred and fifty——, at——— in the county (*or* United Counties, *as the case may be*) of——.

———, J. P.

It may sometimes happen that the Justice, originally signing the Warrant, is also an acting Magistrate for the county in which the defendant is to be arrested. When that is the case he should, before he places the Warrant in the hands of a constable, endorse upon it an authority for its execution in the last mentioned county, varying for that purpose the above form.[1]

Under the 4 & 5 Vic., c. 25 and c. 26, and other Acts, any person found *actually* committing any offence punishable under these Acts, may be immediately apprehended *without a warrant* by any peace officer or the owner of the property, or by his servant or any person authorized by such owner. The person so apprehended must be forthwith taken before some neighbouring Justice to be dealt with according to law. It is not within the scope of these pages to treat at length of arrests *without warrant*, but it may be remarked that this power of apprehension should be confined to those cases of emergency where probably justice would be defeated if a Magistrate's warrant was first procured. Where an offender is a transitory person or unknown, and the injury be serious, it might be dangerous to delay; but where he is known as a resident in the place, a Magistrate's warrant should be procured for his apprehension; and it is absolutely necessary that the party apprehended without warrant to be *forthwith* taken before the nearest Magistrate, for should there be any unnecessary delay, the peace officer or person arresting loses the protection of the law.[2] When the party so arrested without warrant is brought before a Justice and the latter finds it necessary to remand the prisoner for further examination, it will be safer to have a statement on oath of the complainant, and at

[1] This matter should properly have appeared in a previous paragraph.
[2] *Reg. v. Curran*, 3 C. & P. 397.

all events to issue a Warrant empowering the officer to detain the prisoner, in which warrant the nature of the offence charged and the time and place at which the offender is again to be brought up should be stated. The form of *Warrant of Committal for safe custody during an adjournment of the Hearing*, which will be given below, may be varied for that purpose.

Of Compelling the Attendance of Witnesses.

Previously to the passing of the 16 Vic., c. 178, Magistrates possessed no general power to compel the attendance of witnesses before them; some few Acts certainly authorized them expressly to summon witnesses and proceed against them in default, but it was rarely this provision was contained; so the Justice might summon, but had no authority to enforce the witnesses attendance. The practice recommended in such cases was to sue out a "Criminal Subpœna" from the Crown Office, which, if disobeyed, might be followed by Attachment;[3] and in cases which do not come within the 16th Vic. as the same absence of general authority exists, the same practice should be resorted to, serving the witness with a criminal subpœna.

However now, as a general rule, if a party whose evidence is necessary in support of an information or complaint, is unwilling to attend before the Magistrate at the hearing, he can be served with a "Subpœna Summons," for by the 16 Vic., c. 173, ample powers are conferred upon Magistrates for enforcing the attendance of any one as a witness in all cases of summary proceedings before them when the witness is within their jurisdiction; by sec. 6 it is thus enacted:—

"That if it shall be made appear to any Justice of the Peace by the oath or affirmation of any credible person that any person within the jurisdiction of such Justice is likely to give material evidence on behalf of the prosecutor or complainant or defendant, and will not voluntarily be and appear as a witness at the time and place appointed for the hearing of such information, such Justice may and he is hereby required to issue his summons to such person under his hand and seal requiring him to be and appear at a time and place mentioned in such summons, before the said Justice or before such other Justice or Justices of the Peace for the same Territorial Division as shall be there to testify what he shall know concerning the said information or complaint."

Should the party summoned as a witness neglect or refuse to appear in obedience to the summons without offering any just excuse, the Justice before whom he was summoned to appear may issue a Warrant to compel his attendance to testify in the case; which warrant may be *backed* if necessary, in order to its being executed out of the jurisdiction of the Justice, in the same manner as a Warrant to compel the appearance of a person charged with an offence, as before described. Before issuing a Warrant to compel the attendance of a witness, however, there must be proof before the Justice upon oath or affirmation that such summons was served upon the witness either personally or by leaving the same for him with some person at his last or most usual place of abode; but it would seem that it is not absolutely necessary to make any tender of his expenses to the witness. In a subsequent part of the same section, power is given to the Justice to issue his Warrant, *in the first instance* without a previous summons, against a witness; in cases in which the Justice shall be satisfied by oath or affirmation that the witness is an unwilling one, and that it is probable he will not attend to give evidence without being compelled so to do, such warrant, if necessary may be also *backed* as before mentioned.

It will thus be seen that with a view either to obtaining a summons or warrant to compel the attendance of a witness, there must be a previous deposition on oath that the party is likely to give material evidence that he will not voluntarily appear for the purpose of being examined as a witness, and that he resides or is within the jurisdiction of the Justice; and in case of a warrant in the first instance, *in addition to the foregoing*, that it is probable that such person will not attend to give evidence without being compelled so to do, suitable forms are subjoined.

[3] Reg. v. Greenway, 7 Q. B. 196; R. Carney 7 Q. B. 126; Comer's Pra. c. D. 288.

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURT.

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 46.

APPOINTMENT—QUALIFICATION—SECURITIES.

The right of appointing to the office of Bailiff is vested in the Judge by the ninth section of the Division Courts Act, which enacts that for every Court there shall be "one or more Bailiffs, and the Judge of the County Court shall from time to time appoint, and at his pleasure remove the Bailiffs of the Courts holden by him."

No *qualification* for the office of Division Court Bailiff is prescribed by the Statute, but the section referred to provides that, "no person other than a subject of Her Majesty shall be so appointed." By implication of law also the right of the Judges is limited to their appointing only such persons as are qualified by Common Law. As a general rule, "all persons of sane mind are capable of holding office,"

and the only disqualifications by Common Law which need be referred to, are—the holding some office incompatible thereunto, and the want of skill and ability.

Where two offices interfere with each other, there is, of course, an objection to the same person holding both; and a Clerk or Deputy Clerk could not also hold the office of Bailiff (2 Inst., 100), for he would be subject in one of his capacities to his own correction in the other, and the office could not be carried on with impartiality and efficacy. So "where the multiplicity of business, and the time and place of its execution, would prevent two offices being duly administered by one person, there would, doubtless, be a bar to their being so held," and the same person acting as Bailiff of two different Division Courts would manifestly come within this rule.

Want of skill is either *implied by law* as in the case of minors, or is *apparent in fact*. Persons under twenty-one years of age are *deemed by law* incapable of the skill necessary in such an office; by the Division Courts' Acts, ministerial officers are required to give security by executing a covenant as well as a bond for the due performance of their duties; which instruments minors have no capacity to execute, and so they are clearly disqualified, and incapable of holding the office of Division Court Bailiff. *Skill and ability in fact* is matter of determination for the Judge: but any one not under the disqualifications before referred to, who has the necessary bodily ability, who can read and write, and has some knowledge of accounts, is capable of holding the office.

The Statute gives the Judge the power of appointing "*one or more*" Bailiffs, but there is nothing to show that they are to constitute *one officer*, so that if more than one Bailiff be appointed to a Court, each may do all legal acts required of a Bailiff by himself and in his own name alone (see Thompson *v.* Farden, Mame. & Geo. 535; Conegal *v.* London and Blackwall Railway Company, 5 Man. & Gr. 219.)

No form or manner is prescribed by the Division Courts Act for the appointment of Bailiffs, and it may be that as the Judge has a mere power of appointment by the Act, like other powers it may be exercised by parol (1 Ld. Raym. 166, Co. Litt. 616, 4 Rep. 30,) but on the other hand, as the power of nomination and appointment seems evidently to be delegated to the Judge *in his judicial capacity*, the appointment ought properly to be made under the official seal of the Judge, or by order of Court, (see 11 Co. Rep. 4), but even if the appointment be by invalid means, and the party acting is not really an officer but has only an apparent authority, yet are his acts as such valid, and what he does in possession and under colour of office, will be valid: (Bac. Abr. Court, pl. 22, Ld. Raymond 661.) In the whole view of the question the safest course is for the Judge to appoint, under his official seal, and when the necessary securities are given to pass the order of appointment.

The following are suggested as the form of appointment by the Judge, and the form of order thereupon:—

Judges Act appointing Bailiff.

I —— ——, Judge of the County Court of ——, by virtue of and in pursuance of the powers to me given and belonging by the Upper Canada Division Courts Acts, do hereby constitute and appoint *John Sharpman* of the Township of —— in the County of ——, *Yeoman*, the (*or* a) Bailiff of the *First* Division Court of the said County, to hold the said office during my pleasure.

Given under my hand and official seal at ——, this —— day of —— A.D. 185—.

—— ——, Judge.

Order for the Appointment of Bailiff.

In the *First* Division Court for the County of——

It is ordered upon the appointment of —— ——, Judge of the County Court of the said County that *John Sharpman* of the Township of——, in the County of ——, *Yeoman*, be and he is hereby constituted and declared the (*or* a) Bailiff of this Court.

Given under the Seal of the Court at the sittings thereof this —— day of ——, A.D. 185—.

By the Court.

—— ——, Clerk.

The Judge will of course, on appointing a Bailiff, prescribe the amount of security under the 22nd sec. of the Division Courts Act, which provides that every Bailiff appointed shall give security for such sum and with so many sureties as the Judge for the Division Court for which he acts, shall see reason to direct, by entering into a covenant according to the form given in the Schedule to the Act marked "C." or in words to the same effect, for

the security of and available to persons suffering damage by the default or misconduct of the officer.

It will be observed that by the section referred to (the 22nd) the amount of security and the number of sureties is to be settled "by the Judge of the *Division Court* for which they (the officers) act," and by the 7th and 30th sections the Judge of the County Court presides over the Division Courts within his county; it would seem therefore that as the County Judge only answers the description in 22nd section when sitting as Judge in the particular Court, that it is when acting in such Court and by an order of the Court, that the direction as to security should be given, and the approval thereof signed.

The covenant so given must be approved of by the Judge, and be filed in the office of the Clerk of the Peace for the County before the Bailiff can enter on the duties of his office, or can be said to be completely appointed; but even if he were to act before such an approval, and in case such approval were not afterwards obtained, his acts would be good for some purposes: (Ld. Raymond 661, Cro. Eliz. 669, pl. 13, 2 sec., 184, 2 Inst. 381.) In case any of the sureties in the covenant die, remove out of Upper Canada, or become insolvent, it is obviously the duty of the Bailiff to inform the Judge of the fact: and should the officer, after receiving a formal notice thereof from the Judge, neglect to renew his security within one month, he incurs a forfeiture of office.

In practice there are commonly two persons joined with the Bailiff in the covenant, but if the amount be large it is not unusual to have three or four sureties taken; the amount, of course, will be regulated according to the circumstances of such case in reference to amount of business done in the particular Court; the sum for the Bailiff ought to be at least equal in amount to that of all the sureties added together. As the Judge is required to approve the sureties and declare them sufficient for the sums for which they are bound, the power of making the necessary enquiry before approval is implied; and in cases where the Judge has not personal knowledge or is not otherwise satisfied of the fact, it seems proper that the sureties should justify by affidavit, showing what they are worth over and above their debts: [1] the covenant should be executed before the Clerk of the Court, a Magistrate or some person known to the Judge.

In order to make the Manual complete in itself the Form is subjoined:—

Form of Covenant by Bailiff.

Know all Men by these Presents, that we, *John Sharpman*, Bailiff of *First* Division Court for the County of ——, *James Friend*, of the Township of ——, in the said County, *yeoman*, and *Thomas Pledge*, of the Town of ——, in the said County, *carpenter*, do jointly and severally hereby for ourselves and for our heirs, executors, and administrators, covenant and promise that the said *John Sharpman*, Bailiff of the said *First* Division Court, shall duly pay over to such person or persons entitled to the same, all such monies as he shall receive by virtue of the said office of Bailiff, and shall and will well and faithfully do and perform the duties imposed upon him as such Bailiff by Law, and shall not misconduct himself in the said office to the damage of any person being a party to any legal proceeding; nevertheless it is hereby declared that no greater sum shall be recovered under this covenant against the several parties thereunto than as follows, that is to say:

Against the said *John Sharpman* in the whole *four hundred* pounds;
Against the said *James Friend* in the whole *one hundred* pounds;
Against the said *Thomas Pledge* in the whole *one hundred* pounds.

In Witness whereof, we have to these Presents set our Hands and Seals, this —— day of ——, in the year of our Lord one thousand eight hundred and fifty——

JOHN SHARPMAN, [L.S.]
JAMES FRIEND, X his mark [L.S.] & seal.
THOMAS PLEDGE. [L.S.]

Signed, Sealed and Delivered, (being first read and explained) in presence of
WILLIAM PENNAN,
Clerk of said Court.

The 12th sec. of the Division Courts Extension Act of 1853, enacts that every Bailiff shall give security "by entering into a Bond to Her Majesty, her heirs and successors, in such sums and with so many sureties and in such form as the Governor of this Province shall see reason to direct," for the due accounting for and payment of fees, &c., received, and the due performance of the duties of the office. It is usually referred to the Judge to settle the amount of security, but as very little in the

[1] This is the course taken in the only County we have knowledge of—the County of Simcoe.

shape of fees and fines pass through a Bailiff's hands, the security required in the Bond need not be as large as in the covenant.

We append the Draft of Bond sanctioned by the Governor in Council, as it may be found convenient to Officers to have the form:—

Know all Men by these Presents, that ——— ———, of the Town—— of ——— in the County of ———, Bailiff of the ——— Division Court of the said County, ——— ———, of the Town—— of ———, in the said County, yeoman, and ——— ———, of the Town—— of ———, in the said County, yeoman, are held and firmly bound unto Her Majesty Queen Victoria, Her Heirs and Successors, in manner and in the penal Sums following; that is to say, the said ——— ——— in the sum of ——— pounds of lawful money of the Province of Canada; the said ——— ——— in the sum of ——— pounds of like lawful money; and the said ——— ——— in the sum of ——— pounds of like lawful money, to be paid to our Sovereign Lady the Queen, Her Heirs and Successors; For which payments to be well and faithfully made, we severally, and not each for the other, bind ourselves, and each of us binds himself, our and each of our several Heirs, Executors and Administrators, firmly by these Presents, sealed with our Seals this ——— day of ——— in the year of our Lord one thousand eight hundred and fifty——

Whereas, the bounden ——— ———, as Bailiff of one of the Division Courts of the said County of ———, has been required, pursuant to the provisions of "The Upper Canada Division Courts Extension Act of 1853," to give security for the due performance of his office by entering into a Bond with two sufficient Sureties in the several sums herein before in that behalf expressed and set forth.

Now, the Condition of this obligation is such, that if the said ——— ——— shall well, truly and faithfully fulfil, perform, and discharge all and every the duties of his said office of Bailiff of a Division Court, and shall duly and regularly keep and render all Accounts which, pursuant to the Upper Canada Division Courts Acts, ought to be kept and rendered by him, and shall duly and punctually from time to time account for and pay over to the Clerk for the time being of the Division Court for which he is a Bailiff, all and every such sum or sums of money as he shall collect or receive, or as shall come into his hands by virtue of any Writ, Process, or Execution, or otherwise as such Bailiff, other than the lawful fees of him the said ——— ———, as such Bailiff, then his obligation to be null and void, otherwise to remain in full force, virtue, and effect.

——— ———, [L.S.]
——— ———, [L.S.]
Sealed and Delivered in the presence of ——— ———. ——— ———, [L.S.]

It only remains to observe that it is not at the Bailiff's own pleasure, but at the pleasure of the Judge that the office is held, and the Bailiff is under all its incidental responsibilities, and must continue to discharge the duties of the office until *removed* by order of the Judge. From what has been said, it will be seen, as the appointment as well as the removal may be considered judicial acts, that the Bailiff's hold of office depends entirely upon himself; it is sure, so long as he evinces the necessary skill and ability, and is sober, honest, and faithful in the performance of appointed duties.

U. C. REPORTS.

GENERAL LAW.

WHEELER v. MUNRO.

Sheriff—Duty of under 10 & 11 Vic., c. 15, sec. 5, and 16 Vic., ch. 175, sec. 7 & 8—Action against for non-committal of defendant when of bail, &c., being filed, not given—Relief against act—Time of recognizance entered obtained.

[In Chambers.]

The facts of the case are these:—In a suit of Wheeler v. Erskine and Bens, a writ of Capias ad satisfaciendum was delivered to the defendant, as Sheriff of the County of Elgin, after last Michaelmas Term, and on the 24th February, 1856, the defendant arrested Bens upon the writ, and he entered into a bond with Sureties under the Provisions of the Statute 16 Vic., ch. 175, sec. 7. The defendant Bens did not procure or deliver any certificate to the Sheriff within one month from the execution of the bond that special bail had been perfected and allowed according to the 5th sec. of 10 & 11 Vic., ch. 15, and on the 8th of March the plaintiff sued out against, and on the 15th March served the defendant with a writ of Summons treating the defendant Bens as having escaped from custody. The defendant, as Sheriff of Elgin, caused Bens on the 17th March to be arrested, and to be placed in close custody in the gaol of the County of Elgin, and now made application to be relieved against this action upon payment of costs.

M. B. Jackson for Sheriff. *F. G. Stanton* for plaintiff.

BURNS, J.—I am of opinion the defendant is entitled to have granted what he has asked. In the case of Calcutt v. Ruttan, 13 U.C. 220, the Sheriff treated the fact of his having procured the bond according to the 7th sec. of Vic., ch. 175, as a defence against an action for an escape. The Court decided against that view of the Statute, and held that under the 8th sec. of chap. 175, unless the debtor procured and delivered the certificate of bail having been allowed within one month, the plaintiff had a right to treat it as an escape. On considering this case, I am convinced that such view of the Statute was the correct view, though it does not appear to me the condition of the bond was broken by not procuring the certificate of bail being allowed within a month, and I think the present application is the correct application to make. It is opposed because it is said that an action once complete against the Sheriff for an escape cannot be stayed. This proposition depends upon the effect the Statute 16 Vic., ch. 175, has on the law as it stood previously. Whatever may have been the reason for the Legislature adopting the change from a bond to the Sheriff for the limits to that of a recognizance of bail—in which latter case the plaintiff might object or except to the bail—it is quite certain that the change was made,

and under the 10 & 11 Vic., ch. 15, defendants were obliged to remain in close custody until the allowance could be procured. The 7th sec. of ch. 175 recites this hardship, and for remedy thereof enacts that the debtor may with two or more sureties give a bond conditioned for remaining upon the limits upon the same terms and conditions as contained in the recognizance of bail. No time is limited for which the bond is to remain in force, and there is no provision for the forfeiture of the bond by not procuring the certificate of forfeiting and the allowance of bail, within the month. The Sheriff cannot, I apprehend, sue on the bond under the 9th sec., or assign it under the 10th sec. merely because the defendant did not comply with the provisions of the 8th sec. in procuring the certificate therein mentioned. The question then is, what effect the 8th sec. has upon the 7th sec., for without the 8th sec. the effect then would be to restore the law to its former footing before the 10 & 11 Vic., ch. 15 was passed. Now, it is quite clear to me that the Legislature did not intend to repeal the 10 & 11 Vic., ch. 15; and it is also clear to me that if a debtor offered good and sufficient sureties under the 7th sec. of ch. 175, the Sheriff is bound to accept, at the hazard of an action if he should refuse. The Legislature did not intend that both provisions should exist at the same time, leaving it optional with the debtor whether to give a bond to the Sheriff or a recognizance of bail; but it appears to me it was intended the bond should be an intermediate relief to debtors until the recognizance could be perfected, and when perfected, for which a month was sufficient, then it was to be substituted for the bond. If the certificate were not delivered within the month, then it should be lawful for the Sheriff to commit the defendant to close custody, there to remain as if no such bond had been given. Now the question is whether this latter provision is mandatory upon the Sheriff or whether it is optional with him to arrest the debtor after expiration of the month. No time is specified within which the Sheriff may commit, and I take it to be quite clear that until he does commit the debtor the bond remains in full force.

It is important to consider that the Legislature has in the proviso used the words *commit to close custody*, thus showing that the debtor was in custody upon the writ after having executed the requisite bond.

Considering the change made in the law by the 10 & 11 Vic., ch. 15, and the intention of the Legislature that such change should continue, and that the provisions of the 7th sec. of ch. 175 were to remedy the hardship of the debtor being compelled to go to prison until a rule or order for the allowance of the recognizance of bail shall have been made, I am of opinion that the provision is mandatory upon the Sheriff to commit to close custody after the expiration of the month. The expression, *there to remain as if no such bond had been given*, conveys to my mind the conclusion that the Legislature intended the parties after the expiration of the month should be placed in the same position as if there had been no bond; and that could not be the case unless the Sheriff did commit to close custody the person of the debtor. It is unfortunate the Legislature did not specify a time within which the Sheriff should commit to close custody, because a plaintiff may sue out process immediately against the Sheriff as he would formerly have had a right to do if the person of the debtor were arrested and the Sheriff allowed time to be at large without a bond for remaining upon the limits, but a reasonable time must be allowed. It is contended that the same rule prevails now as formerly, that the Sheriff being sued for the escape is fixed and can have no relief. I do not think such is the case. He cannot commit the debtor until after the expiration of the month, and even after the expiration of the month if the debtor remains upon the limits and obeys the condition of the bond, the Sheriff never can, as it appears to me, enforce the penalty; so that if the Sheriff is to be fixed with the debt as for an escape, he is without a remedy. If the Sheriff has committed the person of the debtor within a reasonable time after the expiration of the month, it may afford him a legal answer to the action for an escape. Whether it would or not afford a legal answer, it does afford an equitable answer to it. This certainly, I think, would be the case if the committal happened before action brought; and it only remains to say whether the Sheriff can relieve himself against the action by a commitment to close custody after an action has been commenced against him. I see no difference. The bond continues in force after the expiration of the month, and the Sheriff may not be urgent about committing so long as not urged by the plaintiff. The omission to commit, subjects the Sheriff to an action, as it appeared to me in Calcutt *v.* Ruttan, and consequently to costs and expenses in staying it; but when he has performed his duty by committing to close custody, he may then, I think, be relieved, because after the debtor has been committed to close custody, the parties are restored to the position as if no such bond had been given.

The action is ordered to be stayed upon payment of costs of the action and of this application.

CRAIG *v.* RUTTAN.

Sheriff—Neglect of to commit defendant on limits to close custody—Notice of Special bail, having been perfected, not being given within time prescribed by 16 Vic., *ch.* 175, *sec.* 8.—*Action against as for an escape—Stay of proceedings in.*

[In Chambers.]

This was an application for a stay of all further proceedings in the action on payment of costs "on the ground that bail to the limits in the cause of Joseph Craig, plaintiff, *v.* John E. Proctor, defendant, referred to in the declaration in this cause, was duly put in and filed and perfected, and an order for allowance thereof obtained before commencement of action, and on the ground that said bail hath been put in and perfected, and said order obtained, and the certificate of such order having been obtained, hath been delivered to the defendant in this cause," &c.

After cause shown—

MCLEAN, J.—The summons in this cause was issued, as appears by the declaration, on the 21st of January, 1856, for an escape of one John E. Proctor, who was in custody of the defendant on a Ca. Sa. issued about the 24th October, 1855, returnable on the 19th day of November following, being the first day of Michaelmas Term. That writ was returned *Cepi Corpus* on or about the 11th December, 1855, and on that day bail to the limits was duly entered, and on the 16th of January, 1855, a certificate given by the Clerk of the Crown that such bail had been entered and allowed. The recognizance was filed in the Deputy Clerk of the Crown's Office on the 17th December, 1855, and in the Clerk of the Crown's Office, Toronto, on the 2nd of January, 1856. On the 11th January, 1856, notice was given to plaintiff's Attorney according to the Statute that bail had been perfected being nearly a month and twenty days after the return day of the Ca. Sa.

The special bail had in fact been put in and allowed before this action was brought, but not within thirty days after the bond to the Sheriff for the Limits had been given, and though the plaintiff received notice of such bail having been entered, he has brought his action for an escape because the defendant as Sheriff did not arrest Proctor and commit him to close custody immediately on the expiration of thirty days.

It is shown that Proctor has been ever since his arrest within the limits of the gaol of Northumberland and Durham, and though the Court of Queen's Bench, in the absence of the Chief Justice, in the case of Calcutt *v.* Ruttan decided that a person who has given a bond to the Sheriff to entitle him to

the limits must be considered as having escaped if not arrested in default of special bail at the end of thirty days. The judgment of the Court of last Term, in the same case on the application to stay proceedings, seems to throw so much doubt on the former decision that I think proceedings should be stayed till next Term, in order that the question may receive more mature consideration.

The defendant Proctor was on the limits at the time this action was instituted; he had given ample security, and they were allowed on the 16th of January, being opposed by the agent of plaintiff's attorney. Plaintiff had notice of that allowance, and might have filed interrogatories in the suit against his debtor instead of seeking to make the Sheriff responsible on such doubtful grounds. According to the affidavit of Henry Hart, clerk of plaintiff's attorney, the whole delay of which he complains does not exceed twenty days—and he certainly under any circumstances could only recover nominal damages. It seems absurd, therefore, to allow such suit to proceed to recover a shilling damages at a cost to the defendant of perhaps £20 or £30, more especially when it seems very doubtful whether in fact there was any escape of which the plaintiff could complain. Having spoken to the Chief Justice (Sir J. B. Robinson) on this subject, he quite concurs in the propriety of staying proceedings.

Ross et al. v. Jones.

Issue of second fi. fa. goods, &c., the first having been returned "money made" by mistake.

[In Chambers.]

The summons obtained in this case called on the defendant to show cause "why he should not forthwith on return thereof pay to the plaintiff the balance of £132. 15s 5d. remaining due on the judgment of the plaintiffs against the defendant in this cause and interest thereon from the 6th December, 1855, together with the costs of this application; *or*, in the event of his neglecting to do so, why the plaintiffs should not be at liberty to issue a writ of execution against the goods and chattels of the defendant in this cause and to endorse the same to levy said balance and interest, together with Sheriff's fees, &c.

The plaintiffs' attorney "having been informed by the book-keeper of the plaintiffs that the claim in this cause was paid, gave to the said defendant personally an order on the Sheriff, directing him to discharge the defendant in this cause on receiving his own fees."

The Sheriff, on receipt of this order, returned the writ with an answer that he had made and paid over part of the amount ordered to be levied; and as to the residue that he had been "ordered by the said plaintiff not to make the said residue."

It was afterwards discovered "that an error had been made in the calculations in this cause, and that a balance was still owing from the defendant," &c.,—and the defendant refusing to pay said balance this application was made.

The summons was served personally on the defendant.

No cause was shown.

Draper, C. J., C.P., after reserving the question for consideration, allowed the application.

Brown et al. v. Stevens.

Debtor on limits—Application for recommittal of Interrogatories—Means of debtor, what may be considered available.

[In Chambers.]

The summons in this case was obtained by the plaintiffs to recommit the defendant who was upon the limits of the gaol of the County of Hastings, upon the ground that the defendant had the means at his disposal or within his control of satisfying the debt, or a considerable portion of it, and had not satisfactorily answered the interrogatories administered to him.

Burns, J.—The Statute upon which this application is made is the 4 Wm. IV. ch. 10, sec. 4, and this enacts that if it shall appear upon the return of a summons to the satisfaction of a Judge, that the debtor has the means at his disposal or within his control, of satisfying the debt or a considerable portion thereof, or that he had such means at the time of the service upon him of any notice by the plaintiff of an intended application under the Act, it shall be competent for the Judge upon a consideration of the facts disclosed, and upon any other matters he may require, to order the Sheriff to apprehend the defendant. Under this Statute two things must be kept in view, that the defendant has the means—that is, has them at the time the Judge is investigating the matter, or that he had them at the time a notice was served of intended application. If it should appear that a defendant has parted with his property, making himself an Insolvent for the purpose of applying for a discharge, the Court will refuse him a discharge under such circumstances, or if it appear upon an application for his discharge that the debtor has not answered the interrogatories administered to him satisfactorily, he will be refused his discharge. In the present case the plaintiffs have the body of the debtor in satisfaction admitted to the limits of the gaol, and believes that the debtor has means within his control from which he can satisfy a portion of the debt. No doubt the object of the Legislature was to reach the means of the debtor which could not be effectually reached by execution, which may issue, notwithstanding the debtor is upon the limits; or though such means could not be reached by execution, yet they might be reached by means of compulsory power over the debtor.

I have carefully examined all the answers to the interrogatories, with the affidavits put in and the points made by the plaintiffs' attorney, and it appears to me in this light:

1st. It is urged that the defendant at one time had some goods which might have been appropriated in satisfaction of part of the demand from which originated the judgment now being enforced by the plaintiffs, and that the defendant did not appropriate these goods. These goods are those which Mr. *Reynolds* relinquished and were afterwards seized upon an Execution from the Division Court. That relinquishment took place in January, 1855, and the defendant was not arrested upon the Ca. Sa. issued at the plaintiffs' suit. Why the Sheriff allowed a Division Court Execution to take precedence of one he had in hands issued before it, I do not know; but for the purposes of this application, it appears the goods were disposed of, that is, some of them to pay the debt of another creditor; and if there be any doubt whether the defendant be possessed of any of those goods so surrendered by Mr. *Reynolds*, the plaintiff may issue an execution against them. It does not appear that the defendant therefore has the means now or had the means since he was notified of this application of satisfying any part of the plaintiffs' demand.

2nd. It is urged that because some years since Mr. *Reynolds* intended to give the defendant's wife, (who was his daughter) and after his death to the defendant's children, his grandchildren, a lot of land upon which the defendant expended some money in building, and which buildings being insured, the defendant received the insurance money, and again expended some money in attempting to restore the buildings; therefore it is a kind of equitable demand which may be made available to pay the plaintiffs' debt. The land certainly is the property of Mr. *Reynolds*, and it is quite clear the defendant has not even an equitable title to it. The defendant says he has expended no more money in renewing the buildings than those standing upon the land when he took possession. Other persons swear the expenditure to be

much more, and on the other hand others again swear that the value of those so far as gone do not exceed that of those on the land. Be that as it may, I do not see how I can trust the expenditure of that money on Mr. *Reynold's* property as means available in any way to satisfy the plaintiffs' debt. It does not appear that the expenditure of money took place with a view of depriving the plaintiff, or any one of means they could reach or attach in any way. It is matter of inference that the expenditure of money upon another property was a fraud upon creditors. It may be a fraud according to circumstances. I do not see enough on these documents to adjudge that it was a fraud on the plaintiffs.

3rd. It is urged that the defendant retains an interest in a mill property which might be available. The affidavits in reply completely answer the point made against the defendant. If the defendant's statement be untrue it is very easy for the plaintiffs to take steps at law which would sift the matter before a jury. The answers might be insufficient, and upon an application for the defendant's discharge I might not discharge him, but that is a different question from committing to custody because the defendant has the means of paying the debt or a portion of it.

The summons must be discharged.

In re the Board of School Trustees of the Incorporated Village of Galt and the Municipality of the Village of Galt.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

Duty of municipality to raise money on request of trustees—Mode of proceeding by trustees—13 & 14 Vic., ch. 48, secs. 24, 25, 26—16 Vic., ch. 185, sec. 1.

The school trustees of an incorporated village applied to the village municipality to levy a sum of money required to pay for a school site which they had contracted to purchase. The municipality refused to do so, and the trustees applied for a mandamus. It did not appear that the trustees had appointed a secretary-treasurer, if they are empowered to do so by the 16 Vic., ch. 185, secs. 1, 6.

Held, that the trustees should first have given an order to the person from whom they had agreed to purchase upon the treasurer of the municipality, and on this ground the application was refused.

Quære, however, whether a mandamus would have gone, independently of this objection.

[13 U. C. Q. B. R. 511.]

In Trinity Term last *D. B. Read* obtained a rule calling on the Municipality of Galt to shew cause why a writ of mandamus should not be issued against them, commanding them to levy or cause to be levied £750, required by the said Board of School Trustees for the purchase of, or to pay for, a school site and premises in the incorporated village of Galt, or for the payment of the school site and premises already purchased by the said Board of School Trustees in the said village from J. Harris.

From the affidavits and papers filed in support of the rule, it appeared that on the 17th of August, 1855, a notice was served on J. Davidson, Esq., reeve of the municipality, by the solicitor for the Board of Trustees, that he was retained to institute proceedings to enforce the raising of money or other means to fulfil the engagement entered into by the Board of Trustees and Mr. James Harris for the purchase of a lot as a school site; and "you will please take notice and govern yourselves with respect to your assessments and actions accordingly." No direct answer was given to this notice; but the reeve, on the 27th of August, informed the solicitor verbally that the Municipality would take no steps towards raising the money unless compelled so to do.

On the 29th of March, 1855, P. Cook, the secretary of the Board of School Trustees, addressed a letter to the reeve and council of the Municipality, stating that the Trustees had bargained with Mr. James Harris for a lot of land containing two acres and five perches, for £750, payable as follows: cash to be paid on the execution of the deed £225, less £25, which Mr. Harris gave for school prizes; the balance £525, payable in four equal annual instalments, with interest, giving to Mr. Harris at the same time ample security for the payment of the balance and interest; and according to the School Act of 1850, sec. 24, sub-sec. 6, confirmed by the Act of 1853, laying before the Municipality the foregoing statement, and requesting the Municipality to make provision for carrying out the arrangement.

On the 26th of April, 1855, Mr. Cook, pursuant to a resolution of the Trustees, requested a reply to the letter of the 29th of March, inquiring whether it was the intention of the council to make provision for the payment of the school site purchased from Mr. Harris.

On the 9th of May, 1855, the clerk of the Municipality transmitted a copy of a resolution as follows: "That the council do make such provision as may be necessary to enable the Trustees to redeem their engagements with Mr. Harris, but are opposed to the idea of central schools in this village at present; would therefore recommend that the said lot be placed at the disposal of the council, and purchase a lot on the west side of the river for additional school-house accommodation, which, with an outlay of £500 or £600 along with the present school-house, would be accommodation for a number of years."

By memorandum of agreement, under the seal of the corporation of the School Trustees and of James Harris, dated the 21st of June, 1855, Harris agreed to sell, and the trustees agreed to purchase, a piece of ground in Galt (described) containing two acres and six perches, for £750, payable as follows: £25 to be appropriated as prizes to the pupils attending the common schools for the school to be built on the property; the balance, £725, with interest from the 26th of March, 1855, to be paid on the signature of the deed, barring right of dower, subject to a discount of £7.10s. on payment as aforesaid; the payment and the completion of the transfer to be made on or before the 31st of October, 1855.

On the 9th of August, 1855, Mr. Cook, by direction of the Board of Trustees, addressed a letter to the Municipality to ask whether, "in view of the rejection by the rate-payers on the 4th instant of the by-law for issuing debentures to the amount of £750 to pay for the school lot purchased from Mr. Harris, and for which the Board is under sealed engagements, it is still the intention of the Council to raise that sum by assessment this year in the ordinary way and within the ordinary time of collecting the assessments, or to raise it by some other means."

On the 11th of August, 1855, the Municipality clerk, by way of reply, sent to Mr. Cook a copy of the resolution following, passed the preceding evening: "Resolved, that the council refuse to raise the sum of £750 to pay Mr. Harris for the lot of ground purchased by the School Trustees for erecting thereon a central school-house, in consequence of the qualified electors of this Municipality objecting by a majority of votes to sanction the Council passing a by-law to raise the said amount by debentures for that purpose."

The affidavit of Peter Cook, secretary of the Board of Trustees, verified all the foregoing papers, and stated that a verbal agreement between the Trustees and Harris was entered into before the 29th of March, containing the same terms as were afterwards reduced to writing by the agreement of the 21st of June, 1855.

In this term *M. C. Cameron* shewed cause. He filed the affidavit of John Davidson, reeve of the Municipality of Galt, setting forth that no common school meeting had been called by the Board of School Trustees to consider the steps to be taken by said Trustees for procuring a school site on which to erect a new school-house. He referred especially to the letter of the 29th of March last, containg the terms of the original agreement, and stated that on the 13th of April last a conference took place between the Trustees and the Village Council, when the Trustees intimated that they should require over £1000 to build a school-house: that in consequence of these

proceedings a large meeting of the rate-payers of the Municipality was holden on the 23rd of April, at which a resolution was passed by a large majority, "That it is unwise, unnecessary, and inexpedient to expend a large sum of money in buying a school site and building new schools this year, and that this meeting do recommend to the Council that they do not assess this year for either or any of the purposes requested by the School Trustees in their late letter to the council." That the Village Council, assuming that the School Trustees were liable to Harris for the completion of the agreement, proposed a by-law, whereby the said sum of £750 might be raised by debentures, and be payable over a period of years; but when this by-law was submitted to the rate-payers (about the 9th of August last) they demanded a poll, and on taking the poll the by-law was lost, and the Municipality was unable to raise the sum by loan; and in consequence of this expression by the rate-payers, the Council felt bound to decline inserting in the annual by-law a sum to cover the purchase money of the school site: that the agreement of the 21st of June, 1855, was entered into after the resolution of the rate-payers at the meeting held on the 23rd of April: that the Municipality have passed a by-law for the payment of the teachers' salaries and the incidental expenses of the Board of Trustees for the current year, ending the 31st of December, 1855.

D. B. Read tendered further affidavits by way of reply to those filed on showing cause, which the court refused to receive.

DRAPER, J.—Incorporated villages were erected, and provision was made for the erection of others, by 12 Vic., chap. 81, sec. 52. They appear to have been overlooked in the school act of the same session (ch. 83) which makes provisions as to several townships, towns, and cities in each county.

The Act 13 & 14 Vic., chap. 48, sec. 25, provides that the municipality of every incorporated village shall possess and exercise all the powers, and be subject to all the obligations, with regard to the levying and raising of monies for common school purposes, and for the establishment and maintenance of school libraries, which are conferred and imposed by the Act upon the municipal corporations of cities; and it provides for the election of six school trustees, at a meeting of the taxable inhabitants of the village—the trustees to be resident householders. Sec. 26 provides that the trustees shall be a corporation, and shall possess all the powers and be subject to all the obligations, within the limits of such incorporated village, which are conferred and imposed by the 24th section on the trustees of cities or towns. These powers, so far as they apply to the present case, are: to do whatever they may judge expedient with regard to purchasing or renting school sites and premises; building, repairing, furnishing, warming, or keeping in order the school-house or school-houses. To determine the number, sites, kind, and description of schools which shall be established and maintained in such city or town. To prepare from time to time, and lay before the municipal council of such city or town, an estimate of the sum which they shall judge expedient for paying teachers' salaries—for purchasing or renting school premises—for building, renting, repairing, warming, furnishing, and keeping in order the school-houses and their appendages and grounds—for procuring suitable apparatus and text books for the schools—for the establishment and maintenance of school libraries, and for all the necessary expenses of the schools under their charge; and it shall be the duty of the council to provide such sums in manner as shall be desired by the board of trustees. To levy at their discretion any rates upon the parents or guardians of children attending any of the schools under their charge, and to employ the same means for collecting such rates as trustees of common schools may do under the 12th section: provided that all monies thus collected shall be paid into the hands of the chamberlain or treasurer of such city or town, for the common school purposes of the same, and shall be subject to the order of such trustees; to give orders to teachers and other school officers and creditors, upon the chamberlain or treasurer, for the sums which shall be due them.

There is a difference to be noted between the powers of the trustees of school sections in townships and in cities, towns and incorporated villages. In townships, the school trustees are to apply to the municipality of the township, or to employ their own lawful authority, as they may judge expedient, for the raising and collecting of all sums authorized. And they are to appoint a secretary and treasurer, who is to receive all school moneys and to disburse such moneys as directed by a majority of the trustees. In this respect, the city, town, or village trustees, have not the same power as the trustees in township school sections, to raise and collect money by their own lawful authority. In another respect their own power is greater—viz: as to purchasing school sites or premises, a power vested in the township council, by the 18th section, firstly. Then again in cities, towns and villages, the school trustees have no treasurer. There is another remarkable difference between the powers of the two boards of trustees. In cities, towns and incorporated villages, such boards are not restricted in the exercise of their powers by the necessity of reference to a majority of the freeholders or householders.—See sec. 12, seventhly.

The powers of the municipal council of the incorporated village, and its obligations, are the same as those conferred upon the township and the county councils; both are united; but it must be borne in mind, that in townships the councils are directed to levy for the purchase of a school site, the erection, &c., of a school-house, &c., such sum as shall be desired by the trustees of the school section on behalf of the majority of the freeholders or householders at a public meeting called for such purpose as provided by the 12th section: provided that such municipality may grant to the trustees of any school section authority to borrow any sum which may be necessary in respect to school sites, &c., and cause to be levied upon the taxable property in such section such sum in each year as shall be necessary to pay the interest, and to pay off the principal in ten years.

The 16 Vic., ch. 185, sec. 6, enacts that the trustees of each school section shall have the same authority to assess and collect school rates for the purpose of purchasing school sites and the erection of school-houses, as they are now or may be invested with by law to assess and collect rates for other school purposes: provided they shall take no steps to procure a school site, or change the site of a school-house, without calling a special meeting of the freeholders and householders; and provided that such trustees shall, whenever they impose any rate for school purposes, make a return to the clerk of the municipality of the amount of the rate so imposed by them.

Upon the best consideration I can give this section, I am of opinion that it applies only to the trustees of school sections in townships. *Firstly*, because the board of trustees in cities, towns and incorporated villages, had already power to purchase school sites and build school-houses.—13 & 14 Vic., ch. 48, section 24, 3rdly. *Secondly*, that the proviso would (unless for section 1,) apply only to township school section trustees; observe distinction of corporate name—one is, "The trustees of school section No. ——, in the township of ———, in the county of ———," 13 & 14 Vic., chap. 48, sec. 10: the other is "The Board of School Trustees of the city (or town) of———, in the county of———," *Ib.* sec. 24. The Legislature keeps up this distinction. In section 1 of 16 Vic., ch. 185, they speak of "The Board of School Trustees," and of "The trustees of each school section"; in sec. 6 the latter phrase is used.

The first section of this act, however, declares that the board of school trustees in each city, town and incorporated village, shall, in addition to the powers with which they are now legally vested, possess and exercise, as far as they shall judge expedient, in regard to such city, &c., *all the powers*

with which the trustees of such school section are or may be invested by law in regard to each such school section.

This provision may give rise to much question. Can such board, if "they shall judge expedient," appoint a secretary and treasurer, to be clothed with the powers given to that officer by 13 & 14 Vic., ch. 48, *sec.* 12, and thereby virtually abrogate sub-sections 7 & 8 of *sec.* 21, of the same act? as to this, see also section 26. Again, if they take such powers as were possessed by the trustees of school sections, are they subjected to such limitations as were the trustees of school sections? *Ex gr.* sub-section 7, to section 12 of 13 & 14 Vic., chap. 48.

It may perhaps be successfully contended, that it was in the opinion of the Legislature desirable that the local government of all common schools in townships should be vested in a board of trustees, as in cities, &c., (*See* 13 & 14 Vic., ch. 48, sec. 20); and that such boards should be more independent of the freeholders and householders or taxable inhabitants than the trustees of school sections were.

Again: considering the extended power of boards of school trustees, and of trustees of school sections, and reading them in connection with section 17 of the 16 Vic., ch. 185, are all the municipalities not prevented from levying for the purchase of a school site unless the application is made to them before the 1st of August in each year, or does that restriction apply only to the township councils, and to applications by trustees of school sections.

The 21st section of the 16 Vic. puts both bodies of trustees on the same footing as to the appointment of one of themselves collector of school rates.

It does not appear that the board of school trustees have appointed a secretary or treasurer, if under the 1st section of 16 Vic., ch. 185. they are empowered so to do; in which case the school moneys must still be paid into the hands of the municipal treasurer, and the board must give orders on him in favor of their creditors, for the sums which shall be due such creditors. Assuming all that has been done by the board of school trustees to have been rightly done, they have, by the agreement of the 21st of June, made Mr. Harris their creditor. They should, therefore, give him an order on the treasurer of the Municipality of Galt for such sum as they are liable to pay him. The duty cast upon the municipality is to provide such sums in such manner as shall be desired by the board of trustees. I do not construe this to mean that this gives the board the power to determine whether the Municipality shall raise the money by assessment or by loan, or by the appropriation of any fund at their command. "In such manner," I rather think, means at such times, and for such particular purposes, as the trustees in their estimate point out; and I think the Municipality might lawfully pay such orders out of their general fund, instead of either raising a loan or levying an assessment. If so, then until an order or orders have been given, and payment of them has been refused, we are not, I think, called upon to issue a mandamus, although the Municipality have in distinct terms refused to raise the required sum of £750 to pay Mr. Harris for the lot of ground purchased by the Board of School Trustees. If they refuse to make the payment when thus demanded, I do not say a mandamus may not go to order them to provide the necessary sums, if they excuse the payment for want of having them in hand; if they admit they are in funds, but refuse on some other grounds, it may be that a mandamus will not be the proper remedy to compel them.

BURNS, J.—I do not see the way clear to grant the application. The 1st section 16 Vic., chap. 185, in addition to the powers which the trustees of a city, town, or incorporated village have, gives the corporation all the powers with which the trustees of school sections were or may be invested, as far as the board of trustees of the city, town or village, shall judge expedient. Now the trustees of school sections have power to appoint a secretary and treasurer to the corporation, and a collector.—See 13 & 14 Vic., chap. 48. sec. 12; sub-sections 1 & 2. and 16 Vic., ch. 185, sec. 21. No. 9 of the same section gives authority to the trustees, either to apply to the municipal council to raise and collect money, or employ their own lawful authority. The 6th section of ch. 185, 16 Vic., expressly gives power to trustees of school sections to assess and collect rates for purchasing school sites, and this provision by operation of the 1st section of the same act, applies to the Board of School Trustees in this case. This course is open to the applicants in this case, if they choose to adopt these provisions. It is not shewn to us whether the Board of Trustees have or not appointed a secretary, treasurer, or collector. If they have done so, a question then might be made whether they should not employ their own power to raise and collect what might be required, as being the more expeditious remedy, rather than take the course of applying for a mandamus to compel the Municipal Council to do so; that is, supposing the application, as in this case, to be a correct mode of applying to compel the Council to meet the engagements of the trustees.—*See* the *Queen* v. *Gamble* (11 A. & E. 69.) If we take it in this case that the Board of Trustees have not availed themselves of the provisions extended to them, then the question is, whether they are the persons or body to make the application. The duty of the council, if that body be applied to, is under No. 1 of sec. 18, and under sec. 21, of the act of 1850, to levy such sum as desired by the trustees: and in such case the money levied would be paid into the hands of the chamberlain or treasurer of the city, town or village. The board of school trustees discharge their duty, so far as the municipal council is concerned, by making the application to that body to levy the money required. No. 8 of section 21, imposes the duty on the Board of School Trustees to give orders on the chamberlain or treasurer, he being the proper custodier of the monies, for such sum or sums as shall be due to creditors. The question therefore in this case is two-fold, whether the Board of School Trustees should not, after having requested the Municipal Council to levy the sum required, have proceeded to fulfil their duty and give an order to the person from whom they purchased the school site, and then it would follow that he should apply for a mandamus to compel payment of the order if it were refused; or whether the Board of Trustees can come to this court before giving such order, and ask us to compel the Municipal Council to levy a rate to meet the orders they may afterwards give. I think they should fulfil their duty, presuming that other bodies will do theirs, and that an order should have been given to the person for payment of the purchase money of the school site. It does not follow as a matter of course, though the Trustees do ask and require the Municipal Council to levy a rate, that it is necessary to provide the funds by that means. It may be that the Council has surplus funds in hand to meet orders without levying any rate, and that it is unnecessary to levy any rate. The Board of Trustees discharge their duty by requiring the Council to provide the funds, and by giving their order to the creditor. The creditor can demand payment of the order, and enforce it if properly granted to him. If this shall cause any trouble or inconvenience to the Board of Trustees, it can be avoided by their exercising the power the Legislature has placed in their hands. Seeing that the Trustees can levy the amount they require on their own authority—and if they prefer taking the other course, seeing that it is their duty, as I think it is, to give their orders on the treasurer to the creditor, I think the order should be made before a complaint can be made to this court.

ROBINSON, C. J., concurred.

Rule discharged.

TO CORRESPONDENTS.

Visitor.—Your letter is under consideration. We quite agree in your conclusions. *Wedderburn*, when twitted with seeking office by undue means, corrupting the fountains of Justice, said: "I have never solicited office. I will not go to it, it shall come to me. I look upon the office (in question) in its nature as so delicate that it is unfit for solicitation": and in this every right thinking mind must agree; but our impression is, that publicity at this time would do no good.

Querr.—There is no just cause of complaint; nor do we think that under the circumstances the sentence was at all severe. There is a case of Larceny too, in which *Richards, B.*, is reported to have said: "The prisoner not being in distressed or impoverished circumstances aggravates the offence. If a person inferior in point of education, of character, and means, commits an offence such as this, it strikes me they are less morally guilty than a person of the rank and condition of the prisoner," (see C.L.J. C. Vol. 7, page 4): there was clearly no good reason for mitigating the punishment in the case to which you refer.

R. C. L.—It would serve no good purpose if your letter appeared. The very serious difficulty to which you refer will be settled by the Attorney-General's Common Law Procedure Act Bill, which repeals the objectionable clauses.

J.—Send in the case by all means; write only on one side of the paper.

J. R.—We feel much gratified by your favourable opinion of the *Journal*. You will see attention has been given to the matter referred to.

J. M.—You have already our answer. Please yourself about the withdrawal of your subscription. We cannot consent to be the vehicle of mere tittle by disappointed parties.

T. R. (Spencerville.)—The County Treasurer's have been notified of the construction put on the item referred to in Tariff; and you must govern yourself accordingly.

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THE LAW JOURNAL.

APRIL, 1856.

THE BENCH AND THE BAR-ROOM.

We have before us several Communications respecting the sittings of Division Courts in Taverns, the disorder in such Courts, and the great inconvenience and annoyance to suitors and their professional agents consequent thereon.

Let us see where the fault lies. There is no proper provision in the Division Courts Act for securing accommodation for holding the Courts. In Townships where a Town Hall has been erected by the Municipalities, the use of it is commonly given; and it is the same with respect to Common School Houses and Temperance Halls: but the bodies or individuals having the control of these buildings are under no obligation to allow them to be so used. "It is true," as Judge Burns stated in his published letter in 1847, "that the hospitality of the people of the country is great in respect of these accommodations; but it is not right that the Courts should depend upon that, or that it should be expected individuals should furnish such things gratuitously for the community."

But if there happen to be no such buildings in the place where it is desirable to hold a Court, the only alternative seems to be the removal to another locality, or holding the Court in a Tavern. In any case under the present system the Officers have the place at sufferance, and are liable to be turned out at the will or caprice of the person affording the accommodation. Judge Burns, in the letter referred to, complained that it was a great oversight in the Act that the current expenses for fuel, lights, and the use of a room or building was not provided for. "It has happened," said he, "that the Judge has been obliged to adjourn the Court after going to the place appointed for it, because the person, at whose house it was holden, took it into his head to withhold the permission any longer. It has also been the case that the Judge has been obliged to pay out of his own pocket for fuel to warm the room—and, when he has been unable to finish his cause list before dark, to pay for candles, rather than adjourn over till the next day. No one could imagine that either the Judge or Officers should pay these charges, or be obliged to furnish a room. There must have been an oversight in the Legislature," &c.

Judge Burns proposed to remedy this by adopting the provision of the English Act respecting similar Courts, and it is to be regretted that the Legislature while carrying out many other valuable suggestions made by him for the improvement of the Division Courts, did not adopt the learned Judge's suggestion in this particular also.

The Clerks fees are in some Divisions so small that they could not afford to pay for the necessary

accommodation, though there are some Officers so liberal as to erect buildings, *at their own expense*, expressly for the accommodation of the public resorting to their Courts. [1]

All Courts of Justice to which the public resort in numbers should be put on an equal footing, and decent accommodations provided for all, at the public charge. But if this measure of justice is not to be obtained, a small per centage, say as low as a penny in the pound, on suits in the several Courts (which the suitors, we are sure, would not grumble at) would soon be sufficient to procure proper accommodation.

In small Courts the whole sum thus obtained would be needed to pay the current expenses, but in larger Courts it could be funded and money obtained on the credit of this fund to put up buildings expressly for Court purposes. There would be enough received in a number of Courts to pay the interest and a portion of the principal, yearly; and in a few years this "building fee," as it might be called, would cease, the object for which it was created being answered. While things remain as they are, there will continue to be places where the business of Courts cannot be "done decently and in order."

In the back country it is almost impossible to procure a suitable room for holding a Court, and nothing can be more annoying to suitors and witnesses than to be obliged as they are called on to force their way through a densely crowded room, and during a trial, when they should have all their wits about them, to be crushed and pushed—in fact requiring no small effort of strength to keep back those who, in their anxiety to hear what is going on, crowd forward against them—and this continued effort protracted for half an hour or more according to the time the trial may last.

Parties and their witnesses should at least during the trial be freed from this annoyance, and able to give all their attention to what is going on. The Bailiff may be attentive and active, but it is impossible where the attendance is large to guard parties against this inconvenience and to avoid confusion, unless there be plenty of space and some aid in the internal arrangements of a Court-room.

No doubt Tavern keepers will be very ready to offer the best room they have for holding a Court; but why? because they expect to sell their liquors. That is the plain reason. They wish to draw custom to the bar. Our deliberate conviction is that such places should be avoided and the Court held in a barn rather than in a Tavern. Those who have much acquaintance with the Division Courts will know that people seldom separate without a fight when a Court is held there, and that suitors are frequently incapacitated from looking after their interests when their causes come on, or find their witnesses unfit to appear in Court at the proper time.

Just let our readers picture to themselves a small low room, crowded to suffocation, with no desk for the Judge,—no railed compartment for the Officers of the Court—the witnesses, the immediate parties to a suit or their professional agents, but all huddled together—the place redolent of tobacco and whiskey—not a few of the suitors dividing their attention between the proceedings in the Court and the doings in the bar-room—preparing themselves to "fight out their cases." This, it must be admitted, is not a place where the Judge could be expected to preserve order and decorum, and if unfortunately some Courts present rather an undignified aspect the fault should not be charged upon the Officers of the Court, but to the faulty system.

We have said nothing of the pernicious effects of breathing for hours the tainted atmosphere of a small unventilated room; but why should the public be subjected to this? The Division Court suitors have lungs and little appendages of the sort as well as other people; and the Judges who sit day after day in such places, with perhaps the pleasing interlude of a thirty mile ride in the rain, are supposed to have brains, and *good lungs are indispensable*. Why should the Judge's health be undermined by—but we forget ourselves—"these daily delvers in the mine of the law" are paid to "suffer for their country's good." Let them rest in the shade.

[1] In the County of Simcoe two of the Clerks have put up convenient buildings, expressly for the Court accommodation; and there are two more who have like buildings in progress of erection. This is certainly very spirited conduct on the part of these Officers, and evinces a highly commendable appreciation of what is due to the decent administration of Justice, but it should not be necessary to evoke individual liberality—personal gratuity—in a matter of public concern.

Those who have made representations will now, we trust, see where the blame lies, and will urge for a remedy in the proper quarter. Let it not be supposed that we feel indifferent on the subject of decorum and proper form, in the proceedings of the Inferior Courts. There is no moral impediment to the conduct of business in these Courts as decorously as in the Superior Courts; and we will hail with pleasure the time when it will be physically possible to accomplish it.

Even if we admit that forms are nothing in themselves, yet we must remember that they have a value derived from association; the public are familiarized with them—identify them as integral parts of a Court of Justice, and those Courts wherein they have no place do not appear to have the attributes of a legal tribunal.

NOTICE OF STATUTORY DEFENCE IN D. C.

The following Communication is before us under the signature of "Inquirer":—

"Port Sarnia, March, 1856.

"MR. EDITOR,—I observed in your December number, that you lay down as a rule, that a bailiff wishing to avail himself of the provisions of the 107th section must give a notice under the 43rd section. If you are right, then the Statute of Frauds would be inoperative without a similar notice. Is the meaning of the Act, that the Judge shall not take notice of the provisions of the clause without the useless ceremony of a notice? Take the case of a bailiff tendering amends; is not the very fact of his doing so, notice to the party that he means to avail himself of the defence allowed him by the Act? Again, the notice from the plaintiff is a step to be taken previous to his right of action accruing; and as that can be no presumption that he gave it, it must necessarily be proved by him; but what seems to be decisive on the point is the provision enabling a defendant to give the special matter arising under the Act in evidence, under the General Issue—can it be believed that it was the intention of the Legislature to put a greater hardship on a bailiff if sued in the Division Court than in one of the Courts of a higher jurisdiction? If a plaintiff is not entitled to notice by a plea, it would seem that he cannot be entitled to it in another mode, because the suit is brought for a small account, and in a court where proceedings are less strict than in a higher court.

I am therefore compelled to come to the conclusion that the Statute does not apply to cases arising under the 107th section, but to statutory defences similar to those provided by the Statute of Set-off."

We willingly accord a prominent place to the above, as we think everything set down in this Journal, whether editorially or otherwise, should be open to fair discussion. With all respect for "Inquirer," we cannot assent to his view. In the December number we stated the grounds of defence under section 107, and added, "if any one of these defences exist, in order that the Bailiff may avail himself thereof, it becomes necessary to give notice to plaintiff under the 43rd section of the D. C. Act," &c. It might be sufficient for us to take this ground, and say, as our remarks were designed for the information of Bailiffs, and to advise them how *best* to guard themselves in actions against them, and as there is at least a *doubt* on the point, the advice we gave, as addressed to them, is the safest that could be given; but we are of opinion that notice must be given to let in a defence under the section. "Inquirer" will not deny, we presume, that such a defence would be within the literal meaning of sec. 43 as "a relief or discharge under a Statute"; what he thinks decisive in the point is the latter part of sec. 107, "and it shall be lawful in any such action for the defendant to *plead* the General Issue and give any special matter arising under this Act *under such plea*." This language evidently refers to actions in the Superior Courts, and there the defendant's *written plea* is marked "by Statute," which is *notice* of the special defence. Until the enlarged jurisdiction under the Extension Act, very few cases indeed could be brought against Officers, and we take it that in this clause the Legislature had in view actions in the Superior Court. The Extension Act (sec. 2) re-enacts, as it were, the provisions of the D. C., and subjects actions under the enlarged jurisdiction to the incidents of notice of statutory defence when required by sec. 43. Now there are no "written pleadings" in the Division Courts, and as under sec. 107 the general issue is to be *pleaded* (*i.e.* drawn up and filed) we think that by analogy and under the 43rd section the written *notice* of defence should be given.

On general grounds special and peculiar privileges in answering to an action are of questionable propriety, and it is certainly just and expedient to inform a plaintiff of a special defence of this kind, and thereby to narrow the evidence and prevent the party being taken by surprise in hearing of it for the first time when the case is called on; nor can we see any hardship on an officer in requiring notice of some kind, for it is probable that a general reference to the clause would be sufficient. The *practice*, however, of *specifying* the defence is, we contend, better and fairer towards the plaintiff.

The 43rd section of the D. C. Act is taken from the 79th section of the English Acts, but our section declares that the defendant "*may* avail himself" of certain specified defences, and "of any other relief or discharge under any statute or law in Upper Canada"; whereas the English Act aims at prescribing terms preliminary to certain enumerated defences. Section 43 in our Statute enacting that statutory defences generally *may* be given in evidence, and then followed by a proviso in these words, "*provided* always that no *statutory* defence shall be admitted, *unless notice* thereof in writing" be given, &c. appears to us, taken in connection with the 26th section of the D. C. Ex. Act, entirely to uphold our view of the point.

By the 23rd section of the D. C. Act the Judge is empowered to make such orders, &c., as shall to him appear to be agreeable to equity, and by the 10th section of the D. C. Ex. Act, in matters not expressly provided for, the general principles of practice in the Superior Courts may be adopted and applied to actions in Division Courts. The *practice* in the Superior Courts could not be well applied in the matter under consideration, because in the D. C. there are no written pleadings, but the *principles* of their practice may be applied, and in our opinion should be applied to defences under section 107; for it would be a great hardship to suitors to be unexpectedly met by such a statutory defence, and the giving notice would be attended with very little trouble: should notice not have been served, and the ends of justice required it, the Judge could under the 26th sec. of the D.C.E. Act adjourn to enable service to be made.

"Inquirer" also comments on a case reported in the March number; we cannot agree with him, but must postpone observations for the present:—

"The case of *Halford* v. *Hunt* reported in your last number, presents a case of some importance, and it is worth while to examine whether such is correct or not. It seems a rather strange doctrine to hold that one of two parties can *settle* an account, or rather a portion of it, by giving credit to a certain amount. In the case reported a sum over £50 is put down in plaintiff's claim and a credit given which reduces the plaintiff's demand below £25; this seems to be just the case that the Act prohibits the Court from not entertaining. The intention of the Act seems to be that Division Courts are in no case take cognizance in any shape of an account which amounts to more than £50, but as in the case reported any portion of the £64. 1s. 10d. is open to dispute, how can it be said that the whole amount is not unsettled? Does not the true construction seem to be that accounts or portions of accounts that are still the subject of action are unsettled? The argument on the 3rd section does not amount to any thing, because that clause must be construed with reference and in subordination to the 26th, a set-off being in reality a mode of recovering a debt is a suit for it—the defendant as much seeks to recover as the plaintiff; the jurisdiction of the Court is obviously as much limited in the one case as in the other."

THE DUTY OF MEDICAL MEN IN CASES OF SUSPECTED POISONING.

The case of *Wooler* lately acquitted on a charge for the murder of his wife by arsenic, most of our readers will have seen noticed in the papers, as "The Burdon slow poisoning case." The conduct of the medical men in the case has elicited much comment; on the one hand it appears to have been urged that the medical men had nothing to do with Mr. Wooler, on whom their suspicions of poisoning rested; "the whole object of their regard ought to be the disease and rescue" of their patient Mrs. Wooler; on the other hand it is stated that their duty was to have acted at once on their reasonable suspicion, for it would certainly seem that they believed the husband to have been guilty.

There has been no *medico-legal* case for the last twenty years, involving so many points of interest to the profession, and we will endeavour in our next to give all the leading features. In the meantime we subjoin the substance of a letter from *Dr. Williams*, (published in *Association Journal*) showing in our opinion what is clearly the proper practice, the plain duty, of medical men in cases of suspected poisoning. It is the duty of every member of society to expose or prevent crime, and there is nothing in the medical profession that can morally or legally excuse from this obligation. We can suppose (says the *Dublin Medical Press*) the gentleman whose "wife was so much better" after the doctor's inuendo, must have been rather uncomfortable when he read the narration:—

"It happened to me a few years since, to have a case somewhat similar, though with a different result; and without assuming that the course I adopted was the best, I will relate it; and if others will do the same, the experience of the past may be greatly useful to us in future. A lady had been ill some weeks, under the care of her ordinary medical attendant, who told me that the case was a difficult one, his patient being sometimes better and sometimes worse, with many symptoms of enteritis and peritonitis, and great irritation of the mucous membrane, if not ulceration and rapid emaciation; the symptoms yielded to opiates, anodyne fomentations, &c., but always recurred in a few days. I scarcely altered the treatment the first and second visits, as I wished to make a careful examina-

tion in every way. The lady had no children, and she was nursed by her husband and one of her servants, and I remarked we were never left alone, excepting when we retired for consultation.

"All the symptoms, which I need not detail, indicated the exhibition of repeated small doses of arsenic, but we were not satisfied the urine shown to us was that of our patient; we therefore made an unexpected visit, took with us a clear empty bottle, filled it with urine passed whilst we were there, and took it away with us for analysis. The husband was from home. Arsenic was reproduced from that urine, and all hesitation on my mind ceased. The next morning, after our consultation, when the husband came into the room, I told him we had taken away some urine, and tested it; and from that examination and the symptoms, we advised him never to give his wife any more of her medicine or her diet himself, and also to take care the servant never gave her anything but what we had ordered. I added, 'the bad symptoms ought not to recur again; our medicines will save her from the past, but if she should get worse and die, we shall require a post-mortem examination and a coroner's inquest.' I also told the lady's nearest relation the same day what I had done. The patient was much better the next day, and gradually recovered without any relapse. As a matter of course, I received, what I anticipated, a note from the husband to say, his wife was so much better, my visits were no longer required. We were both convinced we had the satisfaction of saving our patient's life, and we were not answerable, if no legal steps could be taken in so delicate and difficult a case. You will perceive that the caution and advice given to the husband had a beneficial influence on everybody but myself; but, as no self-interest, I am quite satisfied, influenced those medical gentlemen in Mrs. Wooler's case in not revealing their suspicions, so, I may be allowed to observe, no fear of any loss to ourselves for one moment influenced us in taking the steps we did."

TRICKERY AND TRUTH.

We cannot sully our pages with an account of what is termed an "ingenious professional scheme."

We trust the terms were used in a sense the reverse of laudatory, and believe that none but a pitiful trickster would be guilty of deliberate deception in the concerns of Justice. It is recorded of Sir Matthew Hale that "he abhorred the practice of misreciting the evidence, quoting precedents in books falsely or unfairly so as to deceive ignorant juries or inattentive judges"; and no *lawyer* considers himself the mere agent for the party. The Judge, the Barrister, the Attorney, have their several duties, but all are ministers of Justice, and the honourable mind never forgets the obligation it is under.

"Professional scheme,"—the term is a foul slander. Nothing scheming or dishonourable pertains to the Bar. There are no "tricks of the trade" in the profession of the law. It must not be reduced to a mercenary act,—its appropriate place is amongst the liberal sciences interesting to the whole community. Need we add that a science which employs in its theory the noblest faculties of the soul and exerts in its practice the cardinal virtues of the heart, is only properly placed "on the basis of moral rectitude and the principles of eternal truth."

IMPORTANT DECISIONS LAST TERM.

Very important points have been decided in the Court of Queen's Bench (*Baby qui tam v. Watson*) on the effect of the 14 & 15 Vic., ch. 7, the sale of right of entry and the Stat. 32, Hen. VIII.; the following is the Head Note of the case—we will publish the report at length in the next number:

"A. the owner of certain lands, conveyed to the plaintiff by deed, which was never recorded; the plaintiff conveyed to others, who registered their deeds: the defendant, A.'s son and heir at law, subsequently released to S., which was also recorded; the defendant had never been in possession, but the persons to whom the plaintiff conveyed were. The plaintiff having sued the defendant for the penalty under 32 Henry VIII., ch. 9, for selling a pretended right:

"*Held*, that the 14 & 15 Vic., ch. 7, would not apply in defendant's favor, for that only allows the sale of a right of entry, and as his father's deed was binding upon him, he had no such right; but

"*Held*, also, that by the registry of the deed to S., the conveyance to the plaintiff became fraudulent in its inception, and therefore he could not recover.

"*Semble*, that the effect of the 14 & 15 Vic., ch. 7, is to repeal the 32 Henry VIII., and not merely to permit the sale of a right of entry subject to the penalty."

There is also an important decision in *Reg.* v. *Cokely et al*, on a point reserved for the opinion of the Court: that on an Indictment for *forcible entry and detainer* of land, evidence of title in the defendant is not admissable—and *Reg.* v. *Williams*, 4 M. & Ry. 472 was recognized as a direct authority.

In *Silman* v. *McLean*, the defendant purchased goods at auction on these terms: "Under £2. 10s. cash down; over that amount, but under £125, eleven months' credit, on approved endorsed notes with interest"; and it was *held*, (confirming *Wakefield* v. *Gone*, 5 U.C. Rep. 159,) that an action would not be open upon the common Counts until the time of credit had expired.

REMUNERATION OF D. C. BAILIFFS.

In the last number under the caption of County Officers was an article respecting the class of officers who are remunerated by fees. Bailiffs stand on the same footing, and the principle therein

urged would equally apply to them. A correspondent suggested "an increase to 6d. per mile on suits up to five pounds, and 6d. for service; over that amount 1s. 3d. for service; and making service on some member of the defendant's family, if the defendant could not be found, a sufficient service in cases not exceeding £5." We are disposed to agree with this suggestion. In the Common Law Procedure Bill, as introduced by the Attorney General, there is a clause dispensing with *personal* service of process in the Superior Courts where it is shown that service is evaded and a provision similar in principle to that contained in the 34th section of the C. L. P. Bill, might with advantage be introduced into the Division Courts.

It would be well before any action such as that intimated to us, County Meetings of Bailiff's, was taken, if the subject was properly laid before the public; and our columns are open to Communications from well informed officers on the subject of their inefficient remuneration and the difficulties that obstruct them in the execution of their duties.

PARTIES AS WITNESSES ON THEIR OWN BEHALF.

The bill now before the House providing for the admission of parties as witnesses, is at present under consideration by a special committee.

We sincerely trust the subject may be thoroughly investigated. It must be admitted that the practice would be a saving of time and expense on the hearing of causes—a thing valuable in itself, but not to be purchased at the expense of a vast amount of perjury, to which it would inevitably lead. We are satisfied that the County Judges, who have had experience in respect to the testimony of parties, will join us in saying that even the modified rule in the Division Courts would be productive of great evil, unless discreetly worked. We every day hear the argument—Erect a barrier to intemperance by removing the temptation. May it not be said with more force, encourage not perjury by presenting strong temptations to commit it. We do not profess to have a worse opinion of public morals than our neighbours, but think that "*it is not wise to place temptation in poor sinners way.*" Seriously we believe the proposed change would not aid in the discovery of truth, but on the contrary would prove most demoralizing in its effects. With a fair seeming we should have the bitter fruit. The apples of Sodom are fair to look upon, but part the surface and you find abominations within.

THE COMMON LAW PROCEDURE BILL.

What has become of this great and really valuable measure of Law Reform? Is it overlaid by an insect tribe of bills, "the beings of a summer day"? Have the Railroad Locomotives crushed it in their course, or is it in the "finers pot" again to appear more worthy of its author? We trust this last is so. Should the bill become law and its provisions extend to the Local Courts, Mr. Attorney General will have done more towards improving the administration of the law than any man of his day. A measure that a lawyer and a statesman may be justly proud of, forms a lasting monument of honour, to which no public man can be indifferent. The "first law officer of the Crown" is under peculiar obligations to promote the public good by improving the legal institutions of the country, and though he has not to make a reputation as a lawyer, yet may he add lustre to his name.

Index to Vol. I.—The Index for Vol. I is on hand, and we hope to have it, with the Title-page, ready for distribution with the next (May) number.

Errata.—We would indicate a few errors which we regret have crept into this number. At page 61, third and fourth line from the foot of the second column, for "apply" read "appear," for "convenient" read "inconvenient." At page 61, in the third line, for "thereunto" read "therewith." At page 66, thirty-sixth line, for "such" read "each."

DIVISION COURTS, U. C.

(Reports in relation to)

In the First Division Court, County of Carleton,—C. Armstrong, Judge.

Kennedy v. Henderson.

Quere.—If Interim order under the Insolvent Debtors Act a protection from commitment under 92 sec. of D. C. Act. Not a protection if direct fraud shown.

In this case a judgment was obtained against the defendant in December, 1854, and a summons under the 91st sec. of the Division Courts Act of 1850 was issued for the Court held in November, 1855, and the defendant not appearing (although personally served) were ordered to be committed to gaol for twenty days, unless debt and costs be sooner paid.

The plaintiff took out a Warrant of Commitment on the 31st of December, 1855, and had the defendant arrested and committed to gaol.

The defendant, by *R. Lees*, Esq., Barrister, applied for the discharge of the defendant, on the ground that the defendant

being in the Insolvent Debtor's Court, and an interim order of protection having been granted to him, and running till the 15th of January, could not be arrested or detained under the order of the Division Court while such interim order was in force. The Judge refused to discharge the defendant on the mere production of the interim order, although granted by himself; but said, that upon an affidavit of the facts, he would give a summons to shew cause why the defendant should not be discharged. Accordingly, Mr. Lees produced the defendant's affidavit, in which he merely states that he was arrested and is in custody, and that an order for protection from process, &c.. under the Insolvent Debtor's Act was made by the Judge of the County Court, which continues in form until the 15th day of January. A summons in the Division Court is accordingly granted "to shew cause why the defendant should not be discharged from custody under the Warrant of Commitment upon the ground that the defendant was protected from process by virtue of the interim order from the Insolvent Debtor's Court." The summons was personally served on the plaintiff, and —— *Campbell, Esq.*, Barrister, appears to shew cause, and refers to the 95th sec. of the Division Court Act of 1850, the latter part of which says that, no protection order or certificate granted by any Court of Bankruptcy, or for the relief of Insolvent Debtors, shall be available to discharge any defendant from any commitment under an order from the Division Court according to the provisions of the 92nd section of the Act of 1850.

Mr. Lees does not contend that the order for commitment was void, or should not have been made at all, but urges that now as the entire facts of the case are brought to the knowledge of the Judge of the Division Court, he should order the discharge of the defendant, his commitment being in the face of the order for protection.

When the party was called upon for the summons of enquiry, I asked the Clerk whether he was the person then in the Insolvent Debtor's Court, and although I had no doubt he was the same, yet his not appearing or offering any excuse for his non-attendance, left me no alternative but on the application of the plaintiff to order his commitment under the authority of the 92nd section of the Division Court Act of 1850. Had the defendant appeared and submitted himself to examination, it is possible such facts in his conduct with regard to his dealings with the plaintiff might have been brought to light as would, notwithstanding the order for protection, justify me in ordering his commitment; but with such an order in force, nothing short of direct fraud on the part of the defendant would have caused me to order his commitment.

The defendant, if advised that his order of protection justified him in disregarding the summons of Enquiry, was led into error—he should have appeared to the summons; his absence was the cause of the order having been made, and now that it has been enforced, and no reason or argument advanced against it other than the existence of the order for protection. I do not see how I can in direct opposition to the latter portion of the 95th section of the Act of 1850 order his discharge, nor can I bring myself to the conclusion that as Judge of the Division Court I have such knowledge of facts or circumstances beyond what are disclosed in the affidavit and summons as would justify me in annulling the order of commitment, and particularly as it is not attempted to be shewn that I had not authority to make the order.

The summons is discharged, but without costs.

First Division Court, County of Essex,—A. CHEWITT, Judge.

C. B. v. J. C.

Jurisdiction—Where cause of action arose—Where and how to be tried..

J. C. residing at H. in the County of W. by letter directed C. B. an attorney of Sandwich, in Essex, to bid for him at Sheriff's sale in Essex up to a certain sum (£95) on lands owned by A. M. D.—under H.'s own executions and an execution for one B., for whom H. was attorney, saying, that if there was higher bidding, he would send other executions to cover the difference, and sending a prepared Sheriff's deed to himself for the land advertized, to be executed as soon as land was bid in, to secure himself—he having as he said some incumbrance (not shewn) on the same; besides which he wished to have perfected by the Sheriff's deed. C. B. bid in the land in J. C.'s name at £20, but Sheriff refused to execute deed to J. C. till the poundage, being £11 7s 6d, was secured and paid. C. B. signed a draft on J. C. in favor of Sheriff for the sum, which J. C. did not pay on presentation—having knowledge previously of the deed executed to J. C. on giving the draft. The Sheriff sued C. B. in the Division Court at Sandwich, in Essex, and recovered the amount of the draft and interest £12 3s., which J. C., though required, did not pay—though he admitted that bidding and getting the deed was requested, but said C. B. had bid too high, but said he would pay £10 in full, which however was not tendered or accepted. C. B. sues J. C. in First D. C. of Essex; J. C. before trial moves on affidavit (that he resides in and the cause of action arose in another county) to quash proceedings. The Judge held that this could not come up on affidavit, but must be urged at trial. At which, the above facts being elicited by defendant's letter and Sheriff's evidence and that of the Clerk of the D. C.

The Court was of opinion, that the cause of action arose in Essex within the limits of the First D. C., and not in the county from whence J. C. sent his letter of authority to bid; J. C. having sent the prepared Sheriff's deed to himself to be executed immediately after the bidding to secure the land (and not having sent the money to pay the poundage, &c.) which deed the Sheriff would not execute till the Fees were secured or paid, which was then and there done for J. C.'s benefit and advantage—the sending the Sheriff's deed with request to have it executed, carried (it is conceived) with it the *implied request*, to pay the necessary fees to obtain the deed when so executed. The defendant argues that as the request to do the work of bidding and getting deed came from another county, that the cause of action arose in the county where the letter of *authority* to bid in J. C.'s name was written. This is thought erroneous. It is apprehended that if C. B. had sued J. C. in the First D. C. of Essex for the charges for agency for attending at the bidding, &c., postage, &c., attorney, sheriff for deed, &c., the cause of action for this work (not however charged for) could only be said to arise within and where the work was commenced and finished; none arose when the letter was written or even when received. C. B. might have refused to act; but when he did act at Sandwich, in Essex, the cause of action was in its inception; and when the work was completed, the cause of action arose where it was so commenced and completed. The letter was only the authority to do a thing in another's name *at this* place by the agent or attorney. The charges of the agent or attorney were earned by acting from beginning to end at this place, and the assumpsit, express or implied, arose here also. The letter, it is true, (written at H. in W.) contained the request to bid, &c., but it was no request to C. B. until he received it, which was at S. in E.—*Breckley v. Hann*, U. C. L. J. 119.

So where C. B. pays out money for J. C. at Sandwich, in county of Essex, on his implied request (not contained in this letter from H.) but arising from the peculiar nature of the necessity in doing J. C.'s business as his agent or attorney pursuant to an authority to do something in J. C.'s name *there, i. e.*, bidding in and getting Sheriff's deed to same title *at once*, (even if not assented to afterwards, as in this case.) The paying the money necessary to complete that business as required, raises then and there for the first time an implied promise to repay it without express words, at the time and place, when and where it was so paid—and where, in fact, all the evidence necessary was on the spot, and to be had at a very small expense; but which would have been very heavy if tried

where the defendant resided, at H. in county of W. See cases cited in *Haneman v. Smith*, U. C. L. J. 118-9.

The reason of C. B.'s bidding more than £95 was not entirely explained, except that the two executions amounted to £202, and Sheriff did not feel justified in letting land go at only £95, as there were still other executions in J. C.'s hands without rendering execution on return of goods on hand, &c.; for which reason this judgment was limited however to £10, defendant's offer—not including the costs on the Sheriff's judgment against C. B., which he could have avoided by paying without suit—nor interest on the £10 offered, as it may be fairly presumed that it would have been paid at the time if accepted.

MONTHLY REPERTORY.

COMMON LAW.

Q.B. CORLAN *v.* IRELAND. *Jan.* 11.

Banker crossed cheque—"Bona fides" of taker of crossed cheque.

The crossing of a cheque payable to bearer does not restrain its negotiability; the effect of it, is to throw upon the person who cashes it, the duty of shewing that he took it *bona fide*, and gave consideration for it, but it does not cast upon him the responsibility of enquiring into the title of the holder.

Q.B. JEFFERIES *v.* SOUTH WESTERN RAILWAY. *Jan.* 11.

Trover—Setting up "jus tertii" by the defendant, a wrong-doer, against the party in possession at the time of the conversion.

Where goods are in the order and disposition of a bankrupt at the time of the act of bankruptcy, but after that time come into the owner's possession, the person in possession may maintain trover against another, converting the goods to his own use, relying upon a valid sale of the goods to him, before the act of bankruptcy, and such person cannot by way of defence, set up the title of the assignees under whom he does not claim.

C.P. WHEELER *v.* SCHILIZI. *Nov.* 5.

Contract—Tale quale—"Such as it is."

The defendant agreed to sell to the plaintiff "Calcutta Linseed," "tale quale," the two last words signifying "such as it is." The linseed was found to be mixed with other seeds—but it appeared that "Calcutta linseed" was always mixed with other seed to some extent. On the trial, in an action for breach of warranty for not delivering "Calcutta linseed," the Judge asked the Jury if there was such an adulteration and admixture as to alter the substantive character of the article more in truth than might reasonably have been expected.

Held, no misdirection.

DENTON *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Q.B. *Jan.* 19.

Railway Company—Passenger—Time tables—Contract—False representation—Action.

A railway company are bound except where prevented by some *vis major*, such as a convulsion of nature, by the representations contained in their time-tables, and where they profess that a train will run at a particular time from a station on their line to a station on another company's line, it does not relieve them from liability in respect of failing to carry a passenger the whole distance accordingly, to show that they ran the train to the limit of their own line, and that the detention was entirely owing to the other company having ceased to run a train in connection with it: they knowing at the time at which the tables were continued to be published by them that such other train had ceased running.

EX. BROADBENT *v.* RAMSBOTTOM AND ANOTHER. *Jan.* 12.

Easement—Flowing water—Overflow from a pond—Natural channel.

Water, the occasional overflow of a marsh, pond, or well, which, spreading over the surface without flowing in any channel, or by means of subterraneous courses, not traceable, is not the subject of an easement.

Q.B. DOEL *v.* SHEPPARD. *Jan.* 18.

Factory act, 7 & 8 Vic., ch. 15. s. 21—"Fencing machinery," meaning of.

In an action for an injury sustained by the plaintiff in consequence of the non-fencing of a certain shaft, a plea alleging that the shaft, from its position could cause no danger, and therefore did not require to be fenced.

Held, no answer to the declaration, and therefore bad.

Q.B. SEEDHAM *v.* BAXTER. *Jan.* 19.

Attorney—personal undertaking—Liability.

After issue joined in an action, an agreement was signed by the plaintiff's attornies, the defendant's attornies, and the defendant, which, after providing that the record in the action should be withdrawn, and that certain things should be done by the defendant within a specified time, stipulated that, if these things were not so done by him, his plea should be withdrawn by his attornies, so as to allow judgment to be signed by the plaintiffs.

Held, that the defendant's attornies, who had signed the agreement without professing to sign on his behalf, were personally liable in respect of the plea not having been withdrawn.

WALL *v.* LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

EX. *Jan.* 22.

Practice—Costs—Abortive trial—Jury discharged without costs.

The costs of a writ of trial where the jury are discharged by the judge, without returning a verdict, being unable to agree upon it, do not follow the event.

EX. KINGSFORD AND ANOTHER *v.* MERRY. *Jan.* 23.

Goods—Sale of goods—Fraud—Right to rescind contract—Property—Trover.

When a vendee obtains possession of a chattel with an intention by the vendor to transfer both the property and the possession, although the vendee has made a false and fraudulent representation in order to effect a contract or obtain the property, the property in the goods vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance

the fraudulent vendee has transferred over the whole or part of the chattels to an innocent transferree, the title of such transferree is good against the vendor.

EX. WINTER *v.* BARTHOLOMEW. *Jan.* 24.

Practice—Interpleader Act—Trespass—Staying proceedings in action of trespass against Sheriff.

Where an action of trespass is brought against the Sheriff for seizing under a writ of execution the goods of a third party in the same house with the goods of the judgment debtor, and which have afterwards been returned to the real owner, it is competent to the Court or a Judge to stay proceedings in the action under the Interpleader Act. (1 & 2 William IV, chapter 58.)

EX. MANN *v.* THE GENERAL STEAM NAVIGATION COMPANY. *Jan.* 28.

Practice—Damages—Special damage—Remote—Carrier.

A carrier of packed parcels sent a number of parcels in one case to a steam packet company to be carried from A. to B. The delivery of the packet was delayed for an unreasonable time. An action was brought by the carrier against the company to recover damages for the delay, and it did not appear that the latter had any notice of the contracts of the package.

Held, that the plaintiff was not entitled to recover damages in respect to the loss of customers who had ceased to employ him in consequence of the delay, although claimed as special damages by the declaration.

Q.B. MARE *v.* CHARLES. *Jan.* 30.

Bill of Exchange—Personal liability for other persons—Acceptance by drawer for others.

Where the drawer of a Bill which on the body of it appears to be for goods supplied to a company, accepts the bill in his own name, adding in the acceptance, the words "for the company."

Held, that he is nevertheless personally liable on the bill or acceptor.

CHANCERY.

V.C.K. EDWARDS *v.* MARTIN. *Jan.* 22.

Foreclosure before principal due.

Where default is made in payment of interest on a mortgage of leaseholds, and there is the usual proviso for redemption on payment of principal on a given day, and of interest in the meantime, although the day for payment of the principal has not arrived, the mortgagee may file a bill to foreclose on the authority of *Burrows v. Molloy*, 2 Jo. & Sat.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN:—

May I take the liberty of suggesting to you the expediency of publishing forms with respect to Probate and Administration, which might very well come after those you are now publishing. I think they would be acceptable in most co .nties.

Your obedient servant,

CHARLES ROBINSON.

Port Sarnia, Feb. 6, 1856.

[We would be glad to receive any forms that may be furnished to us, and will select those we consider best, or prepare from them forms, in our judgment, answerable. It is very desirable that there should be uniformity in all the Surrogate Courts, and we willingly aid in the matter.—ED. L. J.]

APPOINTMENTS TO OFFICE, &c.

The Honourable Sir JOHN BEVERLY ROBINSON, Baronet, C.B. Chief Justice of Upper Canada.

The Honourable WILLIAM HUME BLAKE, Chancellor of Upper Canada.

The Honourable WILLIAM H. DRAPER, C. B. Chief Justice of the Court of Common Pleas.

The Honourable ARCHIBALD McLEAN, Puisne Judge, Court of Queen's Bench.

The Honourable JOHN G. SPRAGGE, one of the Vice-Chancellors of Upper Canada.

The Honourable WILLIAM B. RICHARDS, Puisne Judge, Court of Common Pleas.

The Honourable JOHN H. HAGARTY, Puisne Judge, Court of Common Pleas.

The Honourable JAMES B. MACAULAY, late Chief Justice, Court of Common Pleas.

The Honourable SAMUEL B. HARRISON, Judge of the County Court of the United Counties of York and Peel.

JAMES GRANT CHEWETT and FREDERICK WIDDER, Esquires, and GEORGE DUGGAN, junior, Esquire, Recorder of the City of Toronto, to be Commissioners under the *Heir and Devisee* Acts, 8 Vic., chap. 8, and 14 & 15 Vic., chap. 12.

[Gazetted 19th April, 1856.]

QUEEN'S COUNSEL.

The Honourable JAMES BUCHANAN MACAULAY, late Chief Justice of the Court of Common Pleas, to be a Queen's Counsel in U. C.—[Gazetted 12th April, 1856.]

NOTARIES PUBLIC.

THOMAS LEVELL HAMMOND, of Caledonia, Gentleman, and WILLIAM P. OSBORNE, of Simcoe, Esquire, Attorney-at-Law, to be Notaries Public in U. C.—[Gazetted 29th March, 1856.]

CHARLES MAGRATH, of Toronto, Esquire, Barrister and Attorney-at-Law, and WILLIAM MENDELL, of Toronto, Esquire, Barrister and Attorney-at-Law, to be Notaries Public in U. C.—[Gazetted 19th April, 1856.]

ASSOCIATE CORONERS.

ANDREW HICKS, Esquire, to be an Associate Coroner for the United Counties of Prescott and Russell.

JAMES ALLEN, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.

GEORGE PATTERSON, Esquire, to be an Associate Coroner for the County of Carleton.

[Gazetted 19th April, 1856.]

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

His Honour GEORGE BOSWELL, *Judge.*

First Division Court—Clerk, C. C. Neville.—Bowmanville P.O.; *Bailiff*, Peter Coleman—Bowmanville P.O.; *Limits*—The Townships of Darlington and Cartwright.

Second Division Court.—Clerk, Samuel Wilmot.—Newcastle P.O.; *Bailiff*, Orvin Dean,—Newcastle P.O.; *Limits*—The Townships of Clarke and Manvers.

Third Division Court—Clerk, Thos. T. Day,—Port Hope P.O.; *Bailiff*, H. H. Marmion—Port Hope P.O.; *Limits*—The Township of Hope and Town of Port Hope.

Fourth Division Court—Clerk, William Brodie, Esq.—Milbrook P.O. (Township of Cavan); *Bailiff*, Robert Jones—Milbrook P.O. (Township of Cavan); *Limits*,—The Townships of Cavan and South Monaghan.

Fifth Division Court—Clerk, Thos. Eyre, Esq.,—Cobourg P.O.; *Bailiffs*, Orville Dean and Almond Buck,—Cobourg P.O.; *Limits*—The Township of Hamilton and the Town of Cobourg.

Sixth Division Court—Clerk, James G. Rogers,—Grafton P.O.; *Bailiff*, John Aukland,—Grafton P.O.; *Limits*—The Township of Haldimand and Alnwick.

Seventh Division Court—Clerk, George S. Burritt,—Colborne P.O.; *Bailiffs*, Thomas Fortune, Colborne P.O., and Ira Hodges, Brighton P.O.; *Limits*—The Township of Cramahe and part of the Township of Brighton.

Eighth Division Court—Clerk, Edward H. Smith,—Smithfield P.O.; *Bailiff*, John Wright,—Smithfield P.O.; *Limits*—The Township of Murray and part of the Township of Brighton.

Ninth Division Court—Clerk, John Douglass,—Percy P.O.; *Bailiff*, Charles Jones,—Percy P.O.; *Limits*—The Townships of Percy and Seymour.

† *Vide* observations *ante* page 196, Vol. I. on the utility and necessity for this Directory.