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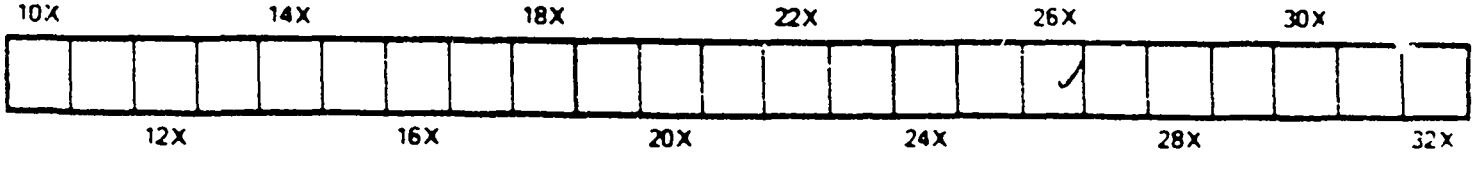

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*Taxation of Costs—Witnesses Fees.*—By the 13th section of the Division Court Act, it is made the duty of Clerks to *tax* (that is, to fix or determine) the costs in every cause.

The 48th Rule is directory to Clerks in respect to the allowance of disbursements to witnesses, and lays down a certain rule for their guidance in taxation.

The Rule and Schedule to which it refers are as follows:—

Rule 48.—"On application made to him in that behalf, the Judge shall determine what number of witnesses shall be allowed on taxation of costs, the allowance for whose attendance shall be according to the scale in the Schedule, unless otherwise ordered; but in no case to exceed such scale, except the witness attends under subpœna from the Superior Courts; and, before allowing disbursements to witnesses, the Clerk shall be satisfied that the witnesses attended, and that the claim for fees is just."

Form 14 —"Attendance per day in Court, 2s. 6d.

Travelling expenses, per mile, one way, 0s. 6d.

The Rule provides that the Judge, *on application* to him, shall determine what *number* of witnesses shall be allowed on taxation of costs. This enables a party interested to take the opinion of the Judge at the trial whether the several witnesses called were all *necessary witnesses*, or upon the materiality of their testimony, and may be used as a very proper check on parties who bring half a dozen witnesses, with a view of heaping up costs, one or two only being needed to prove the case or establish the defence. But Clerks' duties, only, under the Rule we would here notice.

"And *before* allowing disbursements," &c.,—that is as a condition precedent to the allowance of disbursements.

"Allowing *disbursements*," &c.,—that is money *paid out*, and shews that the witness must have been actually paid before the party on whose behalf he attended, can claim the allowance under the Rule and Schedule.

"Disbursements to *Witnesses*," &c.—The term *witnesses* would of course include a party examined as such before the Court, whether attending under a subpœna or voluntarily. Yet if a party attends, but not under a subpœna, and is not actually examined, it would seem that the Clerk cannot allow his fees as witness. Indeed to do so would be to open a door for fraud.

"The Clerk shall be *satisfied*," &c.—This implies matter to be submitted to the Clerk, and the exercise of a judgment thereon. Indeed the term "*tax*" as used in the 13th section of the Act of itself means to determine judicially; and it appears to be the obvious meaning of the rule that the Clerk shall have sufficient knowledge of the facts to enable him to apply the provisions of law to every such matter coming before him. This knowledge may be either in the evidence of his senses, or from testimony; if he *knows* that a witness attended, the number of miles he travelled, and *saw* him paid, the Clerk may certainly allow the fees without hesitation; and it may be that he would be justified in doing the same thing, if a witness in attendance personally admitted to the Clerk the receipt of his allowance as a witness. But in other cases it would seem that an affidavit should be put in evidencing to the Clerk the fact of payment; it is to be remembered that the Clerk exercises a *quasi* judicial duty, and he may not dispense with what the Judge would deem necessary in proof of matters of fact. The Rule says that the Clerk is to be *satisfied*: if we suppose this to be *morally* satisfied, it would be vesting an unsafe discretion in a subordinate officer; we conclude, therefore, it means duly satisfied—that is, satisfied on legal evidence.

"That the *Witnesses attended*," &c.—This we do not understand to mean that they must have been actually sworn and examined in the case, but that they were *bona fide* witnesses, and in attendance at the Court ready to be examined if called on.

"And that the *claim for fees is just*."—We take this to be an adoption of the principle which guides in the Superior Courts; and there the Taxing Officer is the sole judge of what witnesses should be allowed, and rejects or allows a claim according as he may be of opinion that the witness was a material witness, or that there was reasonable ground for supposing so, or the reverse—and the expenses must have been actually paid. The practice is to submit to the taxing officer an affidavit stating that certain persons (naming them) were necessary witnesses on the party's behalf—the time they attended as witnesses—the distance they travelled—and the sums, respectively, paid them therefor. In respect to the proper practice in Division Courts, even if not rendered necessary by the Rule, it seems safer and a better preventative against fraud on the unsuccessful party,* that payment to witnesses, and of the sum they are *entitled* to, should be evidenced to the Clerk by proof on

*Judge Gowan, in his published address on the Division Court Act and his own Rules, alludes to practice of this kind as follows:—"To prevent imposition "by parties obtaining allowances for Witnesses, without paying or intending "to pay them, a piece of chicanery I suspect sometimes practiced, this rule is "in force: that before allowing disbursements to witnesses the Clerk shall be "satisfied by the receipt of the witness, or by the affidavit of the party, that "satisfaction to the witness has been made. So the party obtaining a judg-"ment should at once settle with the witnesses and get their receipts for the "amount paid, or at any time before the execution is required an affidavit of "payment can be sent to the Clerk, who will allow what is fair according to "the scale." This rule, which of course has been done away with by the general rules, prescribed the evidence upon which the Clerk might allow the fees; *satisfaction* to the witness having been made.

oath, when such facts are not within his personal knowledge. Besides it can scarcely be expected of the Clerk to keep note in his mind of the witnesses who attend, &c., particularly as under the late Rules he will require to give his undivided attention to the Judge's *viva voce* decision in each case, in order to enter the minute of judgment correctly in the Procedure Book.

Our advice, then, to Clerks, is (as a general rule) to require an affidavit of disbursements to witnesses, that Suitors may be protected against fraudulent claims, (the expense to them would be trifling, the protection great)—that Clerks may be able to determine properly as to whether the claim made is just, and the amount disbursed within the tariff—and that they may have a written document to fall back upon should the taxation be afterwards questioned.

The allotted space at our command will not allow the subject to be closed in this number; in the next we will give suitable forms and examine further this point, as well as taxation generally.

BAILIFFS.—Punctuality should characterize Bailiffs in all their proceedings; at best the remuneration allowed to them is miserably small, but small as it is it may be reduced "to nothing per day and find themselves," unless strictly punctual in the discharge of their duties. Deficiencies in this particular may arise from an easy disposition; *but though Officers may be quite free to exercise generosity in their own private concerns, they have no right to interfere with the claims of other people; no right to delay a party in the recovery of his demand,—pity is due to the plaintiff, who may suffer as much by delay, as well as to the defendant, and an officer should not venture to deal with the rights of other men as if they were his own.* It may arise from neglect:—*but when any one undertakes an office, he is inexcusable if he fails through indolence to perform its duties.* The want of punctuality may also arise from fraud, *though we hope such cases are rare; we have nothing to say to this class, and if they catch it no one sheds tears.* Lastly it may, and most commonly does, arise from ignorance of the serious responsibilities incurred by delay. To point out to those officers whose attention it may have escaped, and to remind all, we intend noticing a clause in the Division Courts Act respecting Executions.

The 59th section of the 13 & 14 Vic. c. 53, amongst other things provides "that if any Bailiff "shall neglect to return any writ of execution "within three days after the return day thereof," an action may be maintained against him and his bail, and the party suing out the execution shall recover the amount of the execution and interest, or a less sum in the discretion of the Judge or Jury according to the circumstances of the case. This is a most stringent enactment, for whether the debtor has goods or not the creditor has a *prima facie* right to recover the full amount of the execution and interest from the Bailiff or his bail, unless the writ has been duly *returned*—that is, delivered to the Clerk with the Bailiff's answer, *nulla bona*, or otherwise, endorsed—within three days. The propriety of making an early seizure is therefore obvious, that the necessary notice may be given in time for a sale before the return day, if the amount of the execution be not in the meantime paid.

In an action against a bailiff for not returning, the only evidence necessary for the plaintiff is, of the date of issuing the writ of execution, and the non-return thereof *within* the time prescribed; that the bailiff has since made a return will be no answer to the action, the party's cause of action is complete, and the bailiff liable for the amount when the three days have expired.

But—to throw in a little consolation—if the officer has blundered without intending wrong, there is prospect for partial relief. For example; if the debtor had not any property at the time the execution issued, or while it was in force, or had property only to a small amount, the Judge or Jury having a discretion to fix the amount will take the circumstances into consideration, and may, in the former case, allow only a small sum to cover the creditor's trouble in the matter, in the latter case allow in addition the value of the goods which might have been seized and no more. And perhaps, also, there are other circumstances that could be urged in mitigation of damages. The burden of proof will be on the Bailiff to shew that the plaintiff is not in justice entitled to recover the full amount of execution and interest, and he should be prepared with all necessary witnesses to establish the circumstances in his favour. When a judgment is given for the whole claim it is not improbable that the creditor may be required by the Judge to transfer the judgment to the Bailiff, so that, if the debtor acquired property afterwards, the Bailiff might be able to obtain partial indemnity.

SUITORS.—A word to Suitors on the subject of Witnesses. Have those you require summoned in good time: if you have reason to believe that any one of them will not be willing to attend, give the officer or party who serves the Subpœna money to tender to him, according to the distance required to be travelled. You will see in this number, page 61, the scale of fees. When the trial is over, pay your witnesses as soon as possible, and give in a return to the Clerk, who will, if necessary, prepare the affidavit of disbursements for you. Take this

advice, and you will save yourselves trouble and expense.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 45.)

OF THE INFORMATION OR COMPLAINT.

THE mode of commencing summary proceedings of a penal nature before Justices of the Peace is by preferring an information or complaint.[1] The information is the foundation of the Justice's jurisdiction—the basis of all the subsequent proceedings; containing a *formal charge*, it apprizes the defendant of the supposed offence he is to answer, and the Magistrate what facts he is to try and adjudicate; and so, being in the nature of an indictment, or declaration, it ought to be no less certain in substance and form.[2]

In all cases of complaint upon which Justices may make an order for payment of money or otherwise, the complaint must be in *writing and on oath*, unless enacted to the contrary by the particular Statute on which the complaint is framed;[3] but the Magistrate may not unreasonably require the complaint to be reduced to writing in every case,[4] and it is strongly recommended to do so, as the safer and more convenient practice.[5] Where the proceedings are at the instance of one who is not personally aggrieved by the offence, it has always been customary to have the information drawn up in regular form and lodged with the Justice before granting a summons. If the particular Act of Parliament *expressly dispenses* with an oath, it should not be *required* of the informant, unless the information is intended to be the ground-work of a warrant to arrest; but the addition of an oath will not prejudice.[6]

Informations laid without oath are said to be *exhibited*, and are merely required to be in writing and signed or acknowledged by the informant in the presence of the Magistrate. Informations on oath are in like manner signed or acknowledged, and the Magistrate, after reading the document over to the informant, or being otherwise satisfied that he understands the contents, administers an oath to him, that "the contents are true and correct."[7] It should appear on the face of the information itself, whether it was *taken upon oath*, or *exhibited* merely, and the Magistrate's signature must be affixed.

A general form of information upon oath, as well as by way of *exhibit*, taken from the Schedule in the English Act, are subscribed.[8]

[9]The information or complaint should contain and accurately set forth the following particulars, viz.:—*the name and addition of the complainant*, either the party aggrieved or a common informer, as the case may be,—*the name and style of the Justice before whom it is laid, and the date and place of exhibiting:—the name and addition of the defendant—the nature and description of the offence,—and the*

[1] Where a Justice is authorized to convict *on his own view*, no previous information or charge is necessary.

[2] Per Lord Kenyon in *R.* v. *Swallow*, 8 T. R. 286; and see also observations of Abbott, C. J., in *R.* v. *Paine*, 5 B. & C. 251; *R.* v. *Wheatman*, Doug. 232.

[3] 16 Vic. c. 178, s. 7.—Note that in England, under the Act 11 & 12 Vic., it is not necessary that the complaint should be made in writing, unless it is required to be so by some particular Act of Parliament, upon which such complaint shall be framed.

[4] In the great majority of cases the information is expressly required to be laid on oath (see 4 & 5 Vic. caps. 25, 26, and 27), and whenever a Justice issues a warrant, in the first instance the facts must be substantiated by oath, before a warrant can be legally issued—16 Vic. c. 178, s. 2. (See also *R.* vs. *Roddy*, 4 D. & R. 734; *R.* v. *Whately*, 2 Man & Ryl., mag. cases, 313.) Should the party aggrieved be unable to identify the offender, or otherwise unable to make oath to the fact, he can lay the information without oath; and a credible witness who *can swear* to the facts should depose to the commission of the act complained of in order to satisfy the terms of the Statute. Whenever a complainant claims to exhibit the information *without oath*, this caution is given:—Let the Magistrate, before he acts, see that the oath is not necessary in consequence of there being an express dispensation in the particular Statute taking the case out of the general rule (16 Vic. c. 178, s.s. 2 and 7.)

[5] Where the substance of the charge is committed to writing, it enables the Justice to frame his summons or warrant properly; it gives the defendant fuller information of what he has to defend, and serves to keep the subsequent inquiry within proper limits.

[6] See *ante* Note 4.

[7] When taking informations from illiterate persons, either upon oath or otherwise the magistrate should not only carefully explain the contents, but examine as to the facts in detail, that misstatements and confusion of facts may be avoided. Upon this point, Coleridge J. observed: "A Magistrate taking depositions has a discretion to exercise; he is to examine the witness, hear his evidence, and judge of the manner in which it is given." So also Patterson J. observed; "Magistrates should be careful not to commit this part of their duty to a clerk. Depositions of this kind are not like affidavits here which are made to be used or not by a party in a cause, as he sees fit. It is a matter of some discretion to determine how depositions are to be acted upon, and ought therefore, to have the Magistrate's full consideration."

[8] *General form of Information on oath.*

County of ..... } The information and complaint of A. B., of the Township of
to wit. } ——, in the County of ——, *yeoman*, taken and made upon oath before *me*, the undersigned J. J., *one* of Her Majesty's Justices of the Peace for the said County of ——, this —— day of ——, in the year of our Lord one thousand eight hundred and ——, at ——, in the said County, who saith that on the —— day of —— last, at the Township of ——, in the County aforesaid, D. E., of the Township of ——, in the said County of ——, *labourer*, did unlawfully (*here state the offence committed, so as to come within the terms of the statute under which the information is laid*) contrary to the Statute in that case made and provided: and thereupon the said A. B. prays that the said C. D. may be summoned to answer the said charge according to law: (or, *in case of a warrant being issued in the first instance.*—may be apprehended for the said offence, and dealt with according to Law.)

Taken and sworn before me at —— aforesaid, the day and year first above written. } —— (*Informant's signature.*)
—— —— (*Justice's signature.*) }

Form of Complaint or Information without oath.

County of ..... } Be it remembered that, on this —— day of —— in the
to wit. } year of our Lord one thousand eight hundred and ——, and at —— in the said County of ——, A. B. (*the informant*) of the Township of ——, in the said County, *yeoman*, personally cometh before *me*, J. J., Esquire, *one* of Her Majesty's Justices of the Peace for the said County of ——, and complains against D. E., of the Township of ——, in the said County, *labourer*, for that he the said D. E., on the —— day of —— now last passed, at the Township of —— in the County aforesaid, did unlawfully, &c., *here state the offence committed, so as to be within the terms of the Statute under which the Information is laid*), contrary to the Statute in that case made and provided: And hereupon the said A. B. prayeth that the said C. D may be summoned to answer the said complaint.

Exhibited before *me* on the day and year and at the place first above mentioned. } —— —— (*Informant's signature.*)
—— ——. (*Justice's signature.*) }

[9] That is, in cases where a *common informer* is allowed to proceed.

time and place at which it was committed—[10] of these several requisites in their order.[11]

ON THE DUTIES OF CORONERS.

(CONTINUED FROM PAGE 40.)

I.—THE POWER AND DUTY OF CORONERS IN RELATION TO INQUESTS.

It is the duty of the Coroner, when notified, to enquire into all cases of sudden or violent death attended by circumstances of an unusual character; to that end, and the better to provide that every suspicious case may be enquired into, the law has declared it an indictable offence to inter the body before, or without sending for the Coroner.[a] It is also laid down that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrify before the Coroner has viewed it, the Gaoler or Township shall be amerced:[b] and that it is the duty of the party discovering the body to give immediate notice to a Coroner of the neighbourhood.

Duty by Stat. Edw. I.—The only statute professing to define the authority and duties of Coroners is that of 4 Edw. I. c. 2, commonly called the Statute *De Officio Coronatoris;* but many of its provisions are quite inapplicable to this country. This statute provides that the Coroner, upon information, "shall go to the place where any be "slain, or suddenly dead, or wounded, and shall "forthwith, by precept to the constable, command "the attendance of a competent number of good "and lawful men before him at such place, and "when come thither the Coroner shall, upon the "oath of them, enquire in this manner":—

If they know where the party "was slain; whether "in any house, field, bed, tavern or company, and "who were there:

"Who are culpable, either of the act or of the "force; and who were present, either men or "women, and of what age soever they be (if they "can speak or have any discretion): and as many "as shall be found culpable by inquisition shall be "taken and delivered to the Sheriff and committed "to gaol: and such as be found, and be not culpable, shall be attached until the coming of the "Judge of Assize, and their names shall be written "in the Coroner's Rolls.

"If the person slain is found in the fields or "woods, it is to be enquired whether he were slain "in the same place or not; and if he were brought "and laid there, they should do so much as they "can to follow their steps that brought the body "thither: it shall also be inquired if the dead per-"son were known, or else a stranger, and where "he lay the night before."

In like manner, by the same Statute, it is directed that "it is to be enquired of them that be drowned "or suddenly dead, whether they were so drowned, "or slain or strangled, by the sign of a cord about "their necks, or about any of their members, or "upon any other hurt found upon their bodies; and "if they were not slain, then ought the Coroner to "attach the finders, and all others in company." And further, "all wounds ought to be viewed, the "length, breadth and deepness, and with what "weapons; and in what part of the body the wound "or hurt is, and how many be culpable; and how "many wounds there be, and who gave the wounds; "all which things must be enrolled in the roll of "the Coroner."

Duty by Provincial Stat.—The Provincial Act of 13 & 14 Vic. c. 56, after reciting that the regulations for holding inquests were insufficient, and that it was desirable some remedy should be applied, proceeds to point out the cases in which inquests shall be holden. Before the passing of this Act complaints were not unfrequent that inquests were held where there were no well-founded reasons for suspecting foul play—such as when sudden deaths, easily traceable, had happened after lingering illness, or where death had been occasioned by apoplexy or other sudden visitation of the Almighty—the privacy of sorrowing families being thus unnecessarily broken in upon, and their feelings cruelly outraged. The first section provides:—

I. "That from and after the passing of this Act, no inquest shall be holden on the body of any deceased person, by any Coroner, until it has been *first* made to appear to such Coroner that there is reason to believe that such deceased person came to his death under such circumstances of violence or unfair means, or culpable or negligent conduct, either of himself or of others, as require investigation, *and not through any mere accident or mischance:* Provided always, that an inquest shall be holden on the body of any person who shall die while in confinement in any Penitentiary."

The law watches with jealous care over the safety of all imprisoned, and although not so ordered in the stat. of Edw. I., yet from an early period it has been held necessary for Coroners to enquire of the death of all persons dying in prison, "that it may be known whether they died by violence or any

[10] The information must contain "one matter of complaint only," or be laid for "one offence only." 16 Vic. c. 176, s. 9.

[11] The requisites of an information are set down in the order in which they appear in the information itself (*see one* Note b) as being the most natural and convenient for consideration, but it is not meant that, of necessity the information should be so constructed. If all the requisite statements are contained in an information, the order in which they are placed is not material.

(a) *Regina* v. *Clark*, Salk 377.

(b) 2 Hawk. c. 9, s. 23,—and see an Indictment against a Township for a misdemeanor in burying a body without notice to the Coroner. 2 Chit., Cr. L., 276.

unreasonable hardships, for if a prisoner by the duress of the Gaoler came to an untimely death, it is murder in the Gaoler, and the law implies malice in respect of the cruelty."(c) Our own Statute, however, has made it incumbent on the officer in charge of any Lunatic Asylum, Gaol, Lock-up-House, or Penitentiary, to give *immediate notice* to a Coroner of the death of any inmate or person under his care, in order that an inquest may be held upon the body. The second section is to the following effect:—

II. "And be it enacted that upon the death of any prisoner or any lunatic confined in any Lunatic Asylum, it shall be the duty of the Warden, Gaoler, Keeper, or Superintendent of any Penitentiary, Gaol, Prison, House of Correction, Lock-up-House, or Lunatic Asylum, in which such prisoner or lunatic shall have died, immediately to give notice of such death to some Coroner of the County or City in which such death shall have taken place, and thereupon such Coroner shall proceed forthwith to hold an inquest upon the body of such deceased prisoner or lunatic."

Inquest on view of the body.—Although the statute of Edward is silent as to the inquest being *super visum corporis*, yet it is absolutely necessary.(d) And where the body cannot be found, or is so putrified that a view would be of no service, the Coroner, without a special commission, cannot take the inquest; but in such cases it shall be taken by Justices of the Peace.(e) It seems that the whole of the body ought to be viewed to see if any marks appear.(f) The inquest must, moreover, be holden within a reasonable time after the death; thus in *Regina* v. *Clark* the Court held that seven months was too late:(g) and if the Coroner take his inquisition on view of the body, after long putrifaction, it is in the discretion of the Court of Queen's Bench whether they will receive it or not.(h) It is stated that the Coroner may lawfully, within convenient time,(i) as in fourteen days, after the death, take up a dead body out of the grave, in order to view it, not only for the taking of an inquest where none had been taken, but also for the due taking of one where insufficiently taken before:(k) but in the latter case he cannot do so without the leave of the Queen's Bench, the granting of which is discretionary with the Judges, according to the time and circumstances.

(TO BE CONTINUED.)

U. C. REPORTS.

CHANCERY CASES.

STEVENSON v. CLARKE.

Specific performance—Saw Logs.

The Court will decree the specific performance of a contract for the manufacture and sale of saw-logs, where they are capable of being identified and possess a peculiar value for the purchaser. [4 U. C. C. Rep., 510.]

This was a suit instituted by *John Stevenson* and *John David Ham* to compel the specific performance of a contract for the manufacture and sale of saw-logs entered into with them by *Eli Clarke, George Clarke and Charles Clarke*, the defendants in the cause; and the bill set forth that the plaintiffs beings owners of certain saw mills in operation, had for the purpose of obtaining a supply of logs for the use of their mills entered into the contract with the defendants; that the defendants had refused to perform the contract, although a large quantity of saw-logs had been got out by the defendants and marked with the mark of the plaintiffs in order to designate them as being the property of the plaintiffs, and that great loss had been sustained by the plaintiffs in consequence thereof, and if not performed, still greater loss would accrue to the plaintiffs by reason of the stoppage of their mills, for want of the logs, as they had calculated upon the delivery thereof to give employment to their mills.

The bill prayed a specific performance of the contract, and an injunction to stay the sale of the logs by the defendants to any other person.

The defendants did not answer, and an injunction had been obtained for default. The cause was now brought on for hearing.

Mowat, for the plaintiff, referred to *Farwell* v. *Wallbridge*, 2, U. C. C. Rep. 332; and *Flint* v. *Corby*, 4, U. C. C. Rep. 45.

The judgment of the court was delivered by

ESTEN, V.C.—This suit was founded upon an agreement between the plaintiffs and defendants for the defendants to deliver to the plaintiffs from six to eight thousand logs of a certain size and description, in or before the month of June, 1853, at the price of 3s. 9½d. per log, payable in certain monthly instalments, while the manufacture of the logs was in progress, and the residue after their delivery; and the logs, when cut and drawn were to be distinguished by a peculiar mark, and the plaintiffs were to have security upon them for their advances. Several motions were made for an injunction in terms of the prayer of the bill, and finally a motion was made for a decree, upon none of which did the defendants appear, although they had received all the necessary notices. It was proved that a large number of logs distinguished by the stipulated mark were conveyed by the defendants down the Napanee river, the greater part to a point some miles above the village of Napanee, and the residue to the village itself. The plaintiffs had paid the sum of £114 and upwards under the contract, and stated that they had always been ready to pay the remainder of the monies payable for the logs, and had paid all that had been demanded of them. By the terms of the agreement the defendants engaged to receive as much as possible of the stipulated price for the logs in goods from the plaintiffs' store. The plaintiffs appear to have acted with becoming promptitude in the matter, and the defendants have not only failed in performing their contract, but have, as appears, attempted to defraud the plaintiffs by using all or part of the logs conveyed to the village of Napanee themselves, and by disposing of the whole or part of the residue above the village to others. We think the plaintiffs entitled to a decree for the delivery of all the logs distinguished by the mark agreed upon, and remaining in the possession or power of the defendants, with costs. We distinguish this suit from one for the specific delivery of chattels, which rests upon property. The present suit is founded upon contract, of which the plaintiffs are entitled to the specific execution, the chattels forming the subject of it having been identified, and possessing a peculiar value. Such a right, we think, is quite consistent with the stipulation for security for advances. The contract might or might not be performed, but the plaintiffs were at all events to have security for the advances.

(c) 3, Inst. 52, 91.
(d) 4, Inst. 271, 2 Hale 88.
(e) 2, Hawk P. C. 9.
(f) Rex. v. Bond, 1 Str. 22.
(g) Salk. 377.
(h) R. v. Causey, Hil. 3 Geo. 1.
(i) 2 Hawk. 9. s. 23.
(k) 1 Str. 22. 533.

KENDREW v. SHEWAN.

Specific performance—Dower.

Where a party agrees to convey property, he is bound to do so free from dower; or if a wife will not release her dower, then to convey subject thereto, with an abatement in the purchase money.

[1. U. C. C. Rep. 573.]

This bill was filed by *William Kendrew* against *Christopher Shewan, Marcus Rossin* and *Samuel Rossin*, to enforce the specific performance of a contract entered into by *Shewan* with plaintiff for the sale of a small piece of land in the city of Toronto for the sum of £287 10s., but which was bought in reality as agent for one *Walker*, in rear of whose premises the strip of land was situate. After the memorandum of agreement to sell was signed, the defendants *Rossin* having been in treaty for the purchase of it and hearing of the arrangement between *Kendrew* and *Shewan*, expostulated with *Shewan* for having sold to any other person without giving them the option of purchasing at the same price, the land being of greater value to them than any other person. It appeared in evidence that *Shewan*, before concluding an agreement with *Kendrew*, had consulted one *Hutchinson*, the partner of *Walker*, who expressed an opinion that the price was large. Afterwards *Shewan*, discovering that plaintiff had acted as agent of *Walker*, suspected that *Hutchinson* had had an interest in advising him as he had done; upon the examination of *Hutchinson*, however, it was shewn clearly that he had not, but on the contrary, was himself desirous of purchasing the land with a view of selling it to *Walker* at an advanced price.

On plaintiff applying to *Shewan* for a deed, it was alleged that his wife would not consent to release her dower, and a deed was offered without such release, but this the plaintiff refused to accept. Thereupon *Shewan*, treating the refusal of plaintiff as an abandonment of the agreement, sold and conveyed the property to the defendants *Rossin* for £300, in which conveyance the wife's dower was duly barred.

Turner and *McMichael* for plaintiff.

Vankoughnet Q.C., and *Crickmore*, for defendants.

On the argument the defendants relied chiefly on the objection that *Walker* should have been made plaintiff, and cited *Nelthorpe* v. *Holgate*, 1 Coll. 203. Opposed to this, counsel for plaintiff cited *Sugden's* Treatise on Vendors and Purchasers, page 381, to shew that the principal in such a case might or might not be the plaintiff. This objection, however, was subsequently abandoned, the parties desiring the opinion of the court on the other points of the case, and judgment was now given by

ESTEN, V.C.—In this case the contract is free from objection, and the utmost diligence has been shewn by the plaintiff in carrying it into effect. The suit is resisted on three grounds. The first objection seems to be, that plaintiff appeared to be purchasing for himself, while he was really purchasing for *Walker*; this seems immaterial. The next is, that fraud was used by *Hutchinson* to induce him to sell the property to the plaintiff for *Walker's* benefit, by representing the price as very high. I think this wholly fails: I think *Hutchinson* expressed his real opinion *bonâ fide* to *Shewan*; that there was no mistake or misapprehension as to the real value; that there was no desire to favor *Walker*, much less was there any joint interest with him, or any collusion or concert between them; and a perfectly fair price having been offered for the property, and *Shewan* having upon an honest expression of opinion accepted it and concluded an agreement at that price, it is not because a third person to whom the property is peculiarly valuable was willing to give a little more, that this agreement is not to be carried into execution.

The third objection is, that the refusal to accept the deed divested the interest under the contract, and authorized *Shewan* to enter into the new agreement with the *Rossins*.

The contract, no doubt, bound *Shewan* to convey the estate free from incumbrances, including dower. His duty was to ascertain, *bonâ fide*, whether his wife was willing to bar her dower, and to induce her by any reasonable sacrifice on his part to do so; if she refused, then to inform *Kendrew* of the fact, and offer to rescind the contract, paying his expenses, or offer a conveyance subject to dower, with an abatement; instead of which the defendant and his solicitor, mentioning indeed that Mrs. *Shewan* would not bar her dower, tender a deed without such bar, offering to receive the purchase money if such deed were accepted, but insisting that it was a good and sufficient deed, and refusing to execute any other. This deed the plaintiff refused to accept; offering, however, the purchase-money unconditionally, and calling four times besides in order to tender it in one day.

There is no doubt but that under these circumstances the interest of the contract was not divested: it, of course, could not be affected by the sale to the *Rossins* with notice, and the property having been conveyed to them at an advanced price but with notice, they received it subject to the plaintiff's equity.

I think they are bound to convey to the plaintiff on payment of the £287 10s. to *Shewan*, leaving them to their remedy upon the covenants.

The decree should be with costs.

ALLAN v. BOWN.

Specific performance—Condition precedent.

A vendee covenanted to fence the land contracted for forthwith, and to build a house within a limited time; and the vendor agreed, upon payment of the purchase money *and the due fulfilment of all the other covenants entered into by the vendee*, to convey the premises in question. The vendee, without waiting for the time appointed for payment of the purchase money, and without either fencing in the land or building thereon, tendered the amount of his purchase money and interest and demanded his deed, which being refused, he filed his bill for specific performance of the agreement to convey. The court refused relief, and dismissed the bill with costs.

[4 U. C. C. Rep. 439.]

This was a motion for a decree under the XVI. of the general orders of 1853.

Roaf for the plaintiff.

Read contra.

Fildes v. *Hooker*, 3 Madd. 193; *Williams* v. *Edwards*, 2 Sun. 78; and *White* and *Tudor's* Leading Cases, vol. ii. pp. 31 and 461, were cited.

The judgment of the court was now delivered by

The CHANCELLOR: We are all of opinion that this motion for a decree must be refused, with costs.

The bill is filed under these circumstances:—There was an agreement between the parties for the sale of the property on the 15th of February, 1853. That agreement was carried out in this way; the defendant demised the property to the plaintiff for three years, and the plaintiff covenants, amongst other things, to pay the interest, in the shape of rent, half-yearly, to pay the principal on the 15th of February, 1856, to fence in the land forthwith, and to build a house of a certain value within nine months from the date of the lease. The defendant covenants to execute a conveyance upon payment of the purchase money, *and upon the due fulfilment of all the other covenants entered into by the plaintiff*. Under that agreement the plaintiff is let into possession, and, having tendered the amount due for principal and interest, he files a bill for specific performance, before the time fixed for payment, and without having performed the covenants to fence and build.

It is unnecessary to consider whether the defendant was bound to receive his money before the time stipulated. If he

is to be regarded as a mortgagor, then it is clear, I apprehend, that he was not bound to do so. (Brown *v.* Cole, 14 Sim. 427.) But his actual position may be different. Neither is it necessary to consider how far this court would relieve against a breach of the covenant to build and fence. Whatever may be the proper determination of those questions, I take it to be clear that the fulfilment of the plaintiff's covenants is made a condition precedent. His right to call for a conveyance only arises upon the fulfilment, amongst other things, of the covenants to fence and build; both of which were unperformed when this suit was commenced. Mr. *Roaf* contends that the sole purpose of these covenants must have been to secure the principal and interest due to the defendant; and he argues that there can be no right, therefore, to insist upon the fulfilment of these covenants, because his client long since tendered, and is now prepared to pay, the full amount due for principal and interest. But it is quite impossible to hold that the inforcement of the security was the sole purpose which the defendant had in view. His object may have been altogether different, or, at the least, there may have been additional considerations of equal, or, at all events, of some importance. And it is quite clear, therefore, that the defendant is entitled to have those covenants fulfilled before he can be required to execute a conveyance.

Cook *v.* Smith.

Injunction.

The owner of land agreed to sell a portion thereof, and admitted the party into possession, who improved the premises and afterwards offered to sell his improvements back to his vendor, and, for the purpose of ascertaining the amount to be paid, referred it to arbitrators, who made an award, but its terms were never complied with, and the vendor afterwards brought an action of ejectment against the party in possession. The court, upon motion, granted an interim injunction, restraining the plaintiff in ejectment from executing a writ of possession.

[4 U. C. C. Rep. 441.]

This was a motion for an injunction to restrain proceedings at law. From the statements in the pleadings and affidavits it appeared that in December 1851, the defendant being owner of certain lands in the township of Murray, agreed to sell a portion thereof to the plaintiff, to be paid for in work; and the plaintiff thereupon entered into possession, and built a blacksmith's shop thereon, and did some work for the defendant: that defendant became dissatisfied with plaintiff, and remonstrated; whereupon plaintiff offered to sell to defendant his improvements, to be paid for according to a valuation to be put thereon by arbitrators; accordingly the matter was left to arbitration, and an award made, but nothing further was done under it until after bill filed, the plaintiff alleging that the defendant repudiated the award: that defendant brought an action of ejectment to turn the plaintiff out of possession, and the present bill was filed to restrain proceedings at law and for a specific performance of the contract.

Hector for the plaintiff.

Strong, contra, objected to delay in proceeding to enforce the contract, and also that by the terms of the contract, the consideration for the land being to be paid in work, the court could not specifically perform it.

McLure v. *Ripley*, 2 McN. & G. 276, note b; *Moses* v. *Lewis*, Jacob, 502; *Painter* v. *Ferguson*, 1 McN. & G. 286; and *Daniell's* Chancery Practice, 1497, were referred to.

The judgment of the court was now delivered by

The Chancellor: I have read the answer and affidavits; and I am of opinion that, upon the evidence at present before us, the defendant ought not to be permitted to execute a writ of possession. There is no doubt respecting the original agreement which the plaintiff seeks to have specifically performed; but the defendant insists that the rights of both parties under this agreement were submitted to arbitration, and that an award was pronounced by the arbitrators, by which he became entitled to the property in question. But that cannot be fairly deduced, in my opinion, either from the terms of the submission or from the language of the affidavits. The submission is an extremely informal paper, but, so far as I can understand it, the valuation of the improvements appears to have been the only matter referred to the arbitrators. The matter is differently stated in the answer: but the defendant's affidavit, prepared after the answer had been sworn, and after all the other affidavits had been filed, is in accordance with what appears to me to be the proper construction of the submission itself. If this be a correct view, the object of the reference was not to determine the rights of the parties under the original contract of sale, but it was simply the ascertainment of a fact necessary to enable the parties to carry out an agreement for the sale of the plaintiff's interest, which they appear to have had in contemplation. I am not at all satisfied that any agreement was finally concluded between the parties, either before or after the award. The defendant's affidavit imports that no such agreement had been concluded before the reference, and the evidence goes far to establish that he subsequently repudiated the award altogether. Two witnesses, I think, besides the plaintiff, swear to that; and, so far as I can gather, for the fact is left in considerable obscurity, he brought an action of ejectment without either paying or tendering the amount fixed by the arbitrators. In that view of the case the evidence proves, not an agreement, but only proposals for an agreement which eventually failed, and which ought not to interfere with the plaintiff's right to specific performance. Whatever may be the result, there is quite enough in the evidence at present before us to make it proper to grant an interim injunction.

Peebles v. Kyle.

Will—Construction of.

The testator devised real estate to his wife for life, with remainder to A., B. and C., or the survivors or survivor of all of them, their heirs and assigns, for ever. *Held*, that the clause of survivorship meant the survivors at the death of the tenant for life, and not of the testator.

[4 U. C. C. Rep. 334.]

The bill in this cause was filed for the partition of certain properties devised by one *Allan Patterson*, who, after devising to his wife *Cornelia* a life estate in the land in which the parties to this suit were interested, from and after the determination of the said term, he devised the said land, or the remainder thereof, to the children of his brother *Robert Patterson*; *Elizabeth* the daughter of *Jane Corbet*, and the children of his late sister *Elizabeth Woodrow*, or the survivor or survivors of them their heirs and assigns for ever, in fee simple, to be equally divided among them; and stating that at the time of the testator's death there were living the said *Cornelia* his wife; the following children of *Robert*,—namely, *Elizabeth Patterson*, *Helen Murray Patterson* (both since deceased), *Alexander Patterson* and *Janet Peebles* (two of the plaintiffs;) also *Elizabeth* daughter of the said *Jane Corbet*, afterwards married to one *John Findlay*; and *Elizabeth Balfour Thompson* and *Maria Woodrow*, being the children of the testator's said deceased sister *Elizabeth*.

That afterwards, and during the life-time of the testator's widow, the said *Elizabeth Patterson* and *Helen Murray Patterson* died intestate and without issue, leaving the plaintiff *Alexander Patterson* their heir-at-law.

The bill then went on to trace the title to the defendants in the suit, but it is unnecessary to state them: the only question involved was the share to which each of the parties was entitled under the will, and the events occurring since the death of the testator. The plaintiff *Alexander Patterson* insisting that being heir-at-law of *Elizabeth* and *Helen Murray Patterson*, he was entitled to three-sevenths of the property devised. The defendants, on the other hand, contended that

the shares of the deceased devisees went to the survivors, and that each of those who outlived the widow of the testator was entitled to an equal proportion—that is, one-fifth of the whole estate.

Mowat, for the plaintiff, submitted the matter to the consideration of the court; the whole question being whether the survivorship referred to the death of the testator or that of the tenant for life.

Strong for the defendants.

Buckle v. *Fawcett* (4 Hare 536;) *Cripps* v. *Wolcott* (4 Madd. 11;) were referred to.

The judgment of the court was now delivered by

The CHANCELLOR: The only question argued before us in this case arises upon the will of *Allan Patterson*. After devising the premises in question to the testator's wife for life, the will proceeds in these words: "And from and after the determination of the said term, I give and bequeath the aforesaid real estate and lands, or the remainder or remainders thereof, to the children of my brother *Robert Patterson*; *Elizabeth*, the daughter of *Jane Corbet*, widow, now residing in Scotland, and the children of my deceased sister *Elizabeth Woodrow, or the survivor or survivors of all of them, their heirs and assigns, for ever, in fee simple, to be equally divided among them.*" And the question is as to the construction of this clause of survivorship,—does it mean the survivors at the death of the testator, or the survivors at the period of distribution?

The cases upon this subject have varied so much from time to time, that it would be impossible to adopt any construction which would not be inconsistent with some of them. In this state of the authorities, it is necessary to look to the reason of the thing rather than to the rules which have been from time to time propounded; and, viewed in that light, I concur in the construction placed upon this will by the learned counsel on both sides. I agree in the observation Vice-Chancellor *Wigram* in *Buckle* v. *Fawcett* (4 Hare 512,) "that the grounds upon which it was holden, as a rule of construction that indefinite words of survivorship should be referred to the death of the testator, are not conclusive." (*Doe d. Vere* v. *Hill*, 3 Burr. 1882; *Doe d. Dorwell* v. *Abey*, 1 M. & S. 428.) I am of opinion that the clause of survivorship in this will, placing upon the language of the testator its natural construction, refers to the period of distribution, and not of the death of the testator; and that construction appears to me to be sanctioned by the current of modern authority. It must be admitted that the Vice-Chancellor appears to have proceeded upon a very imperfect, if not an erroneous view of previous decisions in determining *Cripps* v. *Wolcott* (4 Madd. 11,) the first case in which the old rule was expressly disavowed; and in *Doe Long* v. *Prigg* (8 B. & C. 231,) a case subsequently decided, and as it would seem carefully considered, the doctrine of the older cases was adhered to; but the rule laid down by Sir *John Leach* appears to me to be so much more accordant with reason, and has been so often recognized by subsequent judges (*Gibbs* v. *Tait*, 8 Sim. 132; *Blewitt* v. *Stauffers*, 9 Law Jour. ch. 209; *Spurrel* v. *Spurrell*, 17 Jur. 755; and see *Pope* v. *Whitcombe*, 3 Russ. 124,) that I have no hesitation in following it in the present case.

U. C. COUNTY COURTS.

(County of Frontenac—Kenneth Mackenzie, Judge.)

REG. EX REL. RANTON v. COUNTER, MAYOR OF KINGSTON.

(*Reported by W. Geo. Draper, Esq., Barrister-at-Law.*)

Quo Warranto—Contractor with Corporation.—16 Vic. ch. 181.

A stockholder in a Gas Company having a contract with a Municipal Corporation is disqualified from being a member of such Municipal Corporation.

This was a summons in the nature of a quo warranto, issued against John Counter, Mayor of the City of Kingston, calling on him to shew why he usurped the office of Alderman of Victoria Ward in said Mayor of the City of Kingston. The objection to the defendant's election was that he was a Contractor under 16 Vic. ch. 181, sec. 24; in this that he was a stockholder in the City of Kingston Gas Light Company at the time of his election, which Company then had and still have a contract with the Corporation of Kingston to supply the said city with gas at a certain rate to be paid therefor to the said Company.

Cooper and *Draper* for relator.

Forsyth for defendant.

The defendant was elected to the office of alderman for Victoria Ward in the City of Kingston, on the 2nd Jan. last, and to the office of Mayor on Monday the 15th day of the same month. The fiat was signed and the summons issued on the 13th February, but the copy was not served until the 15th. The defendant was at the time of the election a stockholder to the amount of £140 12s. 6d. in the City of Kingston Gas Light Company, which Company on the 12th day of September, 1851, had entered into a contract with the Mayor, Aldermen and Commonalty, of the City of Kingston, to supply fifty lamps with gas for £300 a-year, to be paid by the said Mayor, Aldermen and Commonalty. The contract to continue in force until 1st Sept., 1855.

It was objected that the writ should have been served within the six weeks under 16 Vic. ch. 181, s. 27.

It was proved that defendant was, before the election and at the present time, indebted to the Company in a large amount, and it was urged that under 16 Vic. ch. 193, the defendant, in consequence of his indebtedness to the Company, had not such an interest in the stock as would make him a contractor within the meaning of the statute.

MACKENZIE, Judge: The fiat was signed and the writ issued within the statutory six weeks. It is not necessary that the service should be within the six weeks. The 16 Vic. ch. 181, s. 27, merely enacts, "*That the original writ of summons shall be applied for within six weeks.*" The service may be made after the six weeks. There is no notice or protest necessary under the statutes regulating our municipal elections. A protest made or a notice given at the commencement of an election might have a bearing upon the decision, if an opposite candidate claiming the seat was the relator, as it is generally held that when voters give their votes to a disqualified candidate, with knowledge of the disqualification, such votes are considered thrown away. But in the present instance the relator is merely a municipal voter, having an interest as such in the election in question, consequently a protest or notice could make no difference, as the relator cannot ask for the seat of the defendant. I think the stat. 16 Vic. ch. 173 refers only to joint-stock companies to be formed after the passing of that Act, and not to companies like the Kingston Gas Light Company, formed before it; but if it could be construed as applying to the City of Kingston Gas Light Company, it could not affect the decision of the present case. It is true that the defendant was, before and at the time of the election, indebted to the Company in a considerable sum for gas and otherwise, but the 23rd section of 16 Vic. ch. 173, merely enacts, "That it shall not be lawful for any shareholder who is or shall become indebted to the Company for Gas, Water, rent, fixtures or otherwise, to transfer any shares of stock held by him until payment be made to the Company of all sums due by the stockholder." This enactment creates merely a charge upon the stock in the event of the stockholder becoming indebted to the Company to the extent of the stock, but does not thereby divest the stockholder of his interest therein. The defendant could only be divested of his interest in the stock by sale, transfer or forfeiture. The seizure by the Sheriff of the stock in question, took place after the election for Victoria Ward; but even if a seizure had been made before the election and no sale followed, it would make no difference, for the effect of a seizure would be to bind and hold the stock, but the property would not be altered until final execution and sale by the Sheriff. (*Sewell*

on Sheriff 258, *Lucas* vs. *Nockels* 6 *Bing.* 182.) But in the present instance the Sheriff swears that *the seizure was made by him after the day of election.* The defendant was beyond doubt a stockholder in the Kingston Gas Light Company, and one of the directors, at the time of the election now under consideration. And it is equally clear on the evidence laid before me, that the Company had at the time of the elections a contract with the mayor, aldermen and commonalty of the City of Kingston to supply the city with gas for £300 a year. The simple question, then, is, Was the defendant, under these circumstances, qualified, on the 2nd January last, to be elected alderman for Victoria Ward? If not, his election to the office of mayor falls to the ground, as a matter of course. Sec. 24 of 16 Vic. ch. 181 enacts "That no person, having by himself or partner any interest or share in any contract with or on behalf of the Township, County, Village, Town or City, in which he shall reside, shall be qualified to be or be elected Alderman or Councillor, for the same or any Ward thereof." If the contract had been made by the defendant with the Corporation of Kingston, he would clearly be disqualified, but the contract is made by an incorporated company, of which the defendant is a member. I find that the Imperial Act 5 & 6 Wm. IV. ch. 76, s. 28, contains the same provisions as to the qualification of aldermen and councillors of municipal boroughs in England and Wales as our own Act with the following important proviso: "That no person shall be disqualified from being a councillor or alderman of any borough, by reason of his being a proprietor or shareholder in any company which shall contract with the Council of such borough, for lighting or supplying with water, or insuring against fire any part of such borough." It is evident from the above proviso that the British Parliament considered that stockholders in companies contracting with the municipality would be disqualified from being an alderman or councillor under the general enacting words of the statute in reference to contracts. I cannot understand how our Provincial Parliament should have omitted so important and useful an exception. By 12 Vic. ch. 10, s. 4, known as the "Interpretation Act," the word "person" used in any statute in this Province includes any body, corporate or politic. Then does not the word "person" in the 24th section of 16 Vic. ch. 181 extend to corporations such as the City of Kingston Gas Light Company, and thus to the persons who compose that Company? If so, the defendant was disqualified at the time of his election. An incorporated company, such as the City of Kingston Gas Light Company, may be defined to be an assembly of persons, or a joining together of many persons into one fellowship for the promoting certain purposes in a joint or corporate capacity. The Company is composed of several persons, and each person has an interest in all the contracts of the Company to the extent of his stock therein. The defendant, at the time he was elected alderman for Victoria Ward, and at the time he was elected Mayor of Kingston, had an interest in a contract with the Corporation of Kingston. In the case of the *Queen* v. *Cummings*, Mayor of Hamilton,* C. J. Macaulay decided that stockholders in the Hamilton Gas Light Comp'y, which had a contract for furnishing gas light to the city of Hamilton, were disqualified from holding office in the Corporation of Hamilton, and that the election of Mr. Cummings was void,—and ordered a new election. That decision has not been reversed, so far as I know. It is binding on me, and is in accordance with the existing law. The circumstances attending the election of Mr. Cummings were the same as those at the election of the defendant. Therefore I do adjudge and determine that the defendant was not duly elected to the office of alderman for Victoria Ward or to the office of Mayor of the City of Kingston, and that he the defendant do not in any manner concern himself in or about the said offices; but that he be absolutely forejudged and excluded from further using or exercising the same under pretence of the said elections, and that a proper writ of mandamus do issue to the aldermen and commonalty of the city of Kingston, commanding them to hold another election for Victoria Ward for the purpose of electing another alderman, and to elect another mayor for the city of Kingston, in place of the defendant, removed, and that the defendant pay the relator his proper costs.

*This judgment was given in February, 1854, but is not reported.

MUNICIPAL CASES.

(Digested from U. C. Reports.)

From 12 Victoria, chap. 81, inclusive.

(Continued from page 51.)

ELECTIONS.

XIII. *Election for Township Councillors—Qualification of Voters—Power of Returning Officer.* 12 Vic. c. 81; 14 & 15 Vic. c. 109.

A returning officer had received and entered in the poll book a vote, which was at the time objected to. At the close of the poll, the returning officer having then learned that he had received the vote erroneously, struck it out, which produced an equality of votes for the candidates, and the returning officer gave the casting vote. It appeared that other votes had been improperly received, which being struck out, the candidates would still be equal.

BURNS, J. *Held.*—The returning officer erroneously exercised his judgment in receiving the vote. Though he discovered afterwards that his judgment was wrong, he had no right to alter or change the poll book; and it was his duty to have proceeded with the election till the electors themselves might have made a change in the numbers by their votes. The irregular conduct of the returning officer (as appeared from affidavits) both in receiving votes and exercising a control over the poll book, requires that his vote under those circumstances should not be allowed to decide the election. A new election ordered;—and the conduct of the returning officer being illegal and improper, and he having clearly struck off the vote for the express purpose of himself deciding the election, he was ordered to pay the costs of relator. No costs allowed to the unseated councillor.

Reg. ex rel. Mitchell *v.* Rankin & al., 2 Cham. Rep. 161.

XIV. *Service of summons in the nature of a quo warranto—Costs.* 12 Vic. c. 81, s. 148; 13 & 14 Vic. c. 64, sched. A. No. 23.

BURNS, J.—*Held*—Personal service of a writ of summons in the nature of a quo warranto cannot be dispensed with, except in the case provided for by the Act 12 Vic. ch. 81, sec. 148.

The power of a judge, under 13 and 14 Vic. ch. 64, sched. A. No. 23,(a) to award costs for or against the relator, or defendant or returning officer, "in disposing" of every case, extends only, and has reference to the *final* determination of each case. A case might happen in which it would be proper not only to give the relator his costs against the returning officer, but also to make the returning officer pay the costs of the other defendant; and if a preliminary inquiry could be gone into before the principal defendant is in court, for the purpose of determining the costs *quoad* the proceedings as far as they have gone, it might lead to great difficulty, and at times to injustice.

Reg. ex rel. Arnott *v.* Marchant & al. 2 Cham. Rep. 167.

(a) The substituted section, 16 Vic. c. 181, s. 27, contains similar provision to the repealed section in this respect.

XI. *Election for Township Councillor—Qualification for voter—Copy of Collector's Roll not furnished to Returning Officer.* 14 & 15 Vic. c. 109, sched. A. No. 12.

BURNS, J.: The copy of the Collector's Roll, which by the 14 & 15 Vic. ch. 109, sch. A. No. 12,(b) should be furnished to the returning officer, although intended to be *primâ facie* a guide for him at the election, is not conclusive upon a judge when objections are made to the qualifications of voters.

A party (the gaoler) who lived in apartments in the county gaol, paying no rent, and *being lessee of land* rated at the annual value of £10 4s., was held not entitled to vote at the election of councillors, as not being a householder within the meaning of 14 & 15 Vict. ch. 109, sch. A. No. 12.

Where the returning officer was not furnished with a copy of the Collector's Roll, as required by 14 & 15 Vict., ch. 109, sec. A. No. 12:—

Held, That it was an irregularity which subjected the election to be avoided, when the objection was taken by one qualified to urge it, although it might not *ipso facto* render the election void: and

Held, also, That the acquiescence of the candidates in the election being proceeded with under these circumstances, though it might preclude them from disputing the validity of the election on that ground, could not affect the right of a voter, who was no party to such acquiescent arrangement.

Reg. ex rel. Charles v Lewis & al. 2 Cham. Rep. 171.

XVI. *Election of Township Councillors—Quo warranto—Costs.* 12 Vic. c. 81, 13 & 14 Vict. ch. 64.

One Robert Gillis had a farm, through which ran the division line between wards Nos. 2 and 3. His house stood on that part of the farm included in ward No. 2, but his barn on the part in ward No. 3. The township municipality passed a by-law that the election of township councillors for 1852, "for ward No. 3," should be held at *Robert Gillis'*.

DRAPER, J.—*Held*, That the by-law must be read as meaning on some part of his property in ward No. 3, as otherwise it would be void. 2ndly, That as the election took place in the house, it was null, being without the limits of the ward. 3rdly, That relator was not by his *quasi* acquiescence precluded from subsequently raising the objection.

Reg. ex rel. Preston v. Preston, 2 Cham. Rep. 178.

XVII. *Election of Township Councillors—Disclaimer—Costs.* 12 Vic. ch. 81; 13 & 14 Vict. ch. 64.

The defendant filed a disclaimer, but a day too late:—

SULLIVAN, J. *Held*, That he must pay relator his costs.(c)

The returning officer having by order of a judge become a party, but acquitted and discharged: and the relator's statement not being strictly correct:—

Held, That the relator should pay the officer his costs.

Previously to the stat. 14 & 15 Vic. ch. 109, it was not necessary that it should appear on the Collector's Roll whether the persons therein named were freeholders or householders

Reg. ex rel. Hawke v. Hall, 2 Cham. Rep. 182.

(b) See 16 Vic. c. 181. sec. 65.

(c) Where a person wrongfully elected to a corporate office has accepted it, so that the office is *full*, the Court will not, *in making a rule absolute by his consent* for a quo warranto, make it one of the terms that the relator should bear the expenses of the information and disclaimer, though the person in possession of the office does not defend it, and offers to undertake to do him if required.

Reg v. Hanley, 3 U. C. Rep. 112. S. C. Reg. C. L. Rep. 114.

XVIII. *Township Councillor—Who eligible—Improper conduct of Returning Officer—Costs.* 12 Vic. c. 81, sec. 132.

A person holding the office of local superintendant of schools, entitled to a salary to be paid by the County Treasurer, is not disqualified from being elected Township Councillor by 12 Vic. ch. 81, sec. 132.

Where the returning officer improperly closed the poll, both candidates having at the time received an equal number of votes; and when in the act of recording his own vote, a vote was tendered by an elector (who had been present a long time without voting) for the candidate against whom the returning officer voted, which he refused to record:—

Held, That there should be a new election.

Held, also, That under such circumstances the returning officer should pay the relator's costs, and also the costs of defendant, if he chose to exact them.

Quære, whether it would be proper for a Judge in Chambers under the above circumstances, to have ordered the name of the voter whose vote the returning officer refused to record to be entered on the poll book, instead of ordering a new election?

Reg. ex rel. Arnott & al. v. Marchant, 2 Cham. Rep. 189.

XIX. *Quo warranto—Time within which to apply for—Estoppel of relator by previous acquiescence.* 13 & 14 Vic. c. 54, sched. A. No. 23.

MACAULAY, C.J.C.P.—In the computation of six weeks the day of the election is to be excluded, whenever it follows that the application was made on the last day, but still within the time allowed. Six weeks at all events is allowed to impeach an election, although the office may have been accepted more than a month; but if the application be not made within six weeks, then the test is whether the office has been accepted more than a month previously.

The court will not set aside an election on the relation of a party who concurred in the election, and voted for the person whose election he afterwards attempts to set aside.

Reg. ex rel. Rosebush v. Parker, 2 U. C. C. P. Rep. 15.

XX. *Costs of quo warranto—Indemnity to Councillor.*

A by-law passed to indemnity a Township Councillor elect for the costs of a *quo warranto*, by which his election was set aside, is illegal.

In re Bell v. Municipality of Manvers. 2 U. C. C. P. Rep. 507.

CORRESPONDENCE.

R M.—It is a misdemeanour for the Operator, "or person employed by any Telegraph Company," to divulge the contents of any Telegraphic despatch. By 16 Vic. c. 10. sec. 11. the Court in their discretion, may impose a fine of £25 and 3 months' imprisonment. If you have well-founded suspicions, the better course would be to make representation to the Directors: they would certainly dismiss the Operator.

A CLERK OF THE PEACE.—The principle upon which the *Law Journal* is based sufficiently shews that no rights will be treated lightly, nor any change that would prejudice them advocated without due compensation being made. But the proper time for bringing such claims forward, and the way in which they are urged, is a matter of wise discretion which must of course be left to the Editors. Clerks of the Peace may be assured that their just interests will be cared for.

P.T.P.—We are much indebted for your contributions in this number. The decision in Trespass we are unable to use, as we do not contemplate publishing County Court cases involving questions of General Law dealt with by the Superior Courts as well. Cases, however, decided by the County Court Judges on Municipal Law will be very acceptable.

H.L.—Hitherto we have not been in a position to mail the *Law Journal* before the 29th or 30th of the month; but with the June number we anticipate that our arrangements will be such as to admit of its being mailed between the 15th and 18th of each month.

J.R.R.—The Act of 16 Vic. c 179 gives power to the County Judge in all cases of felony (except when party accused of Treason or Murder) to order party committed to Gaol to be bailed out before *two Justices of the Peace*. The amount of bail is discretionary with the Judge. Before the passing of this Act, when once the party accused had been committed to Gaol, application to put in bail had to be made to a Judge in Chambers, in Toronto.

S.—Your communication respecting the practice in Certiorari cases will appear in the May number.

J.N.—The Hon. Attorney-General Macdonald has brought in a Bill which will meet the difficulty you complain of. It was very much to be regretted that the rights of execution creditors should be so grievously affected. In other respects the present law of Replevin works well.

W.T.—We have always counted upon the best services of Clerks and Officers of the Division Courts: indeed without an active canvass by them in their respective localities we could never anticipate more than a limited circulation. It is for *their* interest equally with our own. Every Clerk and Bailiff could with ease induce 3 or 4 of the Magistrates and Rate-payers in his neighbourhood to subscribe. We are much obliged by your active exertions.

THE LAW JOURNAL.

APRIL, 1855.

DIVISION COURTS: MEETING OF CLERKS: PROPOSED ALTERATION OF FEES.

BEING the only legal Periodical in Upper Canada, and the doings of the Local Courts, their advancement, working, and improvement, forming a leading feature in the *Law Journal*, we expected to have been informed of the proceedings at a late meeting of the Clerks of Division Courts. As the organ of the Local Courts, we looked for an official report of the business transacted at this meeting; but having procured a correct report from another source, we may not omit a suitable notice.

A meeting of the Clerks of Division Courts, was convened at the City Hotel, in Hamilton, on Tuesday the 20th day of February, 1855, for the purpose of suggesting certain amendments to the present Division Court Acts to be submitted to the Legislative Assembly.—Present: *Geo. W. Whitehead*, Cl'k 1st Div.; *James Barr*, Cl'k 4th Div.; and *David Caufield*, Cl'k 5th Div., County of Oxford: *Henry Racey*, Cl'k 1st Div.; *John A. Penton*, Cl'k 2nd Div.; *Samuel Stanton*, Cl'k 3rd Div.; and *W. M. Whitehead*, Cl'k 4th Div., County of Brant: *Wm. R. McDonald*, Cl'k 1st Div., and *A. F. Begue*, Cl'k 2nd Div., County of Wentworth: *Robert Palmer*, Cl'k 5th Div., and *S. Fenton*, Cl'k 9th Div., County of Halton: *Wm. B. Winterbottom*, Cl'k 1st Div., and *Abishai Morse*, Cl'k 3rd Div., County of Lincoln; *William Thompson*, Cl'k 1st Div., and *Duncan Campbell*, Cl'k 2nd Div., County of Haldimand: *Oliver Blake*, Cl'k 2nd Div., County of Norfolk; *John Irwin*, Cl'k 2nd Div., and *W. F. Bullen*, Cl'k 4th Div., County of Middlesex; and *Thomas D. Lloyd*, Cl'k 1st Div. Court, County of Simcoe.—Col. Whitehead was called to the Chair, and John A. Penton, Esq., was appointed Secretary.

It was resolved, that the Rules and Forms appointed by the Judges for future practice in the Division Courts in Upper Canada greatly increase the labours and expenses of the Clerks of these Courts for Books, Blank Forms, and Stationery, without adding to their emoluments. And after an animated and very interesting discussion it was further resolved to petition the Legislature for a revision of the present Tariff of Fees. The following resolution was then proposed by Abishai Morse, Esq., seconded by Wm. B. Winterbottom, Esq.:—

"That Messrs. Whitehead, Begue and McDonald, be a Committee to draft a Petition to the Legislature respecting the present Division Courts Acts and Tariff of Fees, and have the same transmitted to the Clerk of the First Division Court in each County, for him to obtain the signatures of the Clerks in his County, and afterwards transmit to the Member for his County for presentation."

The Petition prepared sets forth clearly and concisely the grounds upon which relief is prayed.

To the Honourable the House of Assembly in Parliament assembled. The Petition of the undersigned Clerks of Division Courts for the County of ——,

HUMBLY SHEWETH,

THAT the Tariff of Fees to be received by the respective Clerks of Division Courts in Upper Canada was established by 13 & 14 Victoria, c. 53, passed in 1850.

THAT a reference to the Returns to Government will shew that this Tariff has not produced to the Clerks even the salary usually allowed to Merchants' Clerks, and has proved totally inadequate to the support of competent persons.

THAT since 1850 the extraordinary rise in all the necessaries of life has rendered the already narrowed circumstances of these Officers still more difficult to bear, until the pressure has become so great, as to compel them to imitate the example of other classes and seek, not higher emoluments, but such an addition to their income, as will at least equal the indispensable increase in their expenditure. They have the less hesitation in approaching your Honourable House with such a Petition since they are informed that all the employées under Government and in the House of Assembly have received an addition to their salaries, as an act of simple justice rendered imperative by the increased expense of living, and from the fact, that a Petition to the Judges of the Superior Courts in Upper Canada is at this moment before them, praying an increase of the Fees of Attorneys and Counsel practising in these Courts.

But irrespective of all these considerations your Honourable House will recollect that a commission was appointed in the year 1853, under the authority of an Act of Parliament for the purpose of framing Rules for the Division Courts in Upper Canada. These Rules were promulgated on the 1st October, 1854, by the Commissioners, consisting of S. B. Harrison, M. O'Reilly, E. C. Campbell, Geo. Malloch, and Jas. Rob't Gowan, Esquires, Judges of the County Courts; and on reference to them it will be found that a large addition has been made to the labors of the Clerks, for which no compensation whatever has been provided.—This fact would alone seem to call for a revision of the Tariff.

Your Petitioners would also beg to draw the attention of your Honourable House to the fact, that although the consumption of expensive books, and of very large quantities of stationery, including a great variety of printed forms, has been considerably increased by the new Rules, no provision has been made for meeting this heavy additional expenditure.

In order to bring more directly before your Honourable House the compensation now derivable in gross by your Petitioners[a] as Clerks of the Division Courts of the County of ——, they beg to mention, that for the year 1854 their

(a) We may illustrate the position of the Clerks of Division Courts in most Counties by a Tabular Statement herewith given from a County in which there are 8 Division Courts. It will be seen by it that the highest salary is but a trifle over £30, while the others range between £10 and £10. In some Counties we believe the Returns will shew even smaller salaries! And yet clerks must of necessity be competent to fill the office to the satisfaction of the Judge, and able to give the required securities:—

whole receipts were the sums set opposite their respective signatures hereto, from which is to be deducted the expense of Books, Stationery, Printed Forms, Rent, and Fuel.

Your Petitioners beg to append a draft of such a Tariff as they think would be no more than just to the Clerks, while it would not, in their opinion, bear too heavily on suitors, and they pray that action will be taken by your Honourable House, to amend the present Tariff, either by adopting the suggestions humbly made in this Draft, or in such other way as your Honourable House shall, in its wisdom and justice, think fit and reasonable.

And your Petitioners, as in duty bound, will ever pray, &c.

Tariff of Fees to be received by Clerks of Division Courts referred to in above Petition.	Not exceeding £5 0 0		Exceeding £5, and not exceeding £15.		Exceeding £15.	
	s.	d.	s.	d.	s.	d.
Entering every account and issuing summons	1	3	1	6	2	0
Copy summons, particulars of demand or set-off, each	0	7½	0	7½	0	7½
Every summons to witness, with any number of names	1	0	1	0	1	0
Entering Bailiff's Returns	0	6	0	6	0	6
Entering set-off or other defence requiring notice to plaintiff	1	3	1	3	1	3
Adjournment of any cause	1	0	1	0	1	0
Entering every judgment, or discharging suit	1	0	1	3	1	6
Taking confession of judgment	1	3	1	3	1	3
Every warrant, attachment, or execution	1	3	2	6	2	6
Every copy of judgment to another county	2	6	2	6	2	6
Transcript or certificate of judgment for registration			2	6	2	6
Entering and giving notice of jury being required	2	6	2	6	2	6
Making out summons to jury, sixpence each.						
For every affidavit taken, and drawing same	1	0	1	0	1	0
Filing each separate paper	0	2	0	2	0	2
Calling out and swearing witnesses, each	0	4	0	4	0	4
Returns to Treas'r to be paid out of the Fee Fund, 20s. each.						
Every search, to be paid by the party applying	0	6	0	6	0	6
Receiving and paying out monies, 2½ per cent.						

On the substance of the Petition we need say nothing; the matter it contains is fairly and candidly put, and discloses sufficient to establish the reasonable and just claim of Clerks to consideration. The services of capable and trustworthy men can only be secured by giving them a proper compensation: and if the office of Division Court Clerk is suffered to fall into improper hands, these Tribunals instead of being useful and valuable, will become a nuisance and a curse to the country. We hope the Petition will receive attention from the Legislature. The subject it embraces is more important to the Public than to Officers, and on public grounds should be fully considered.

Upon the proposed Tariff we have a word to say, keeping in view on the one hand the just claims of the Clerks, on the other the interests of the Public. We think one half the charge, viz., 6d. for Summons to Witness, sufficient: in practice there is a separate Summons for each Witness, and the charge of 1s. for each would be too much. Entering Bailiff's returns might also be fairly reduced to 3d.

	Gross amount of Fees received.			Expenses incurred in discharging duties of office.			Net income derivable from office.		
	£	s.	d.	£	s.	d.	£	s.	d.
T. D. Lloyd, clerk Division Court No. 1	69	11	6	16	17	6	52	14	0
T. Macconchy, cl'k Division Court No. 2	36	0	0	7	10	0	28	10	0
F. S. Stephens, cl'k Div. Court No. 3	39	5	3	5	10	3	33	15	0
A. Jardine, clerk Division Court No. 4	32	12	4	6	5	9	26	2	7
John Craig, clerk Division Court No. 5	18	11	6	2	7	6	16	4	6
A. Patterson, clerk Division Court No. 6	10	8	6	0	0	0	0	0	0
John Little, clerk Division Court No. 7	11	8	10	1	18	0	10	3	10
G. McManus, cl'k Division Court No. 8.	62	3	3	12	6	9	10	2	6

The uniform charge for entering special defences is better than a graduated scale, and the charge reasonable. The words "discharging suit" in the next item is not very clear in its scope, and might open a door to improper claims: these words should be struck out, and the following inserted in lieu—"or final order on Hearing." The fee for filing each paper we decidedly object to as inexpedient and unsafe; there is no such fee allowed in the English County Courts, and we think it ought not to be introduced here.

A fee for every return made by a Clerk is no more than reasonable. The Clerk collects and keeps the account of fees payable to the Fee Fund—has the responsibility of keeping the monies—is required periodically to make a return of the same—and for so doing receives no remuneration! The accounts are intricate, and involve more labour than an ordinary Postmaster's account,—yet the country receives the labour of the Clerk, exacts a duty from him, and pays nothing! This is most unjust. We do not agree, however, in the amount proposed: all things considered, we think that 15s. for each return, including returns to the Judge, would be sufficient.

The fee for search we would allow to stand as in the present Tariff, to be only claimable if the proceeding were a year old; the charge, to commence with the entry of the suit, would be considered oppressive. The fee for receiving and paying out monies is a questionable one, and in its present shape indefinite. Is the 2½ per cent. claimable both on receiving and paying out—making in all 5 per cent. on monies passing through a Clerk's hands? No doubt some allowance on this head should be made, for the Clerk incurs a heavy responsibility in having the charge of monies, and for all monies paid out he is obliged to obtain and file a voucher.

The Clerk should, in our judgment, *give* as well as take receipts; we would, therefore, suggest the following, instead of the last item in the proposed Tariff:—

"Receiving money paid into Court; entering "same in the Books; and giving receipt therefor, "3d. in the pound.

"Paying money out of Court; entering same in "the Books; and taking receipt therefor, 3d. in the "pound.

"(N.B. The fees in the last two items to be "costs in the cause; and, in calculating the pound-"age, all fractions of a pound to be treated as an "entire pound.)"

There are some services for which the proposed

Tariff does not provide a fee; one contained in the present Tariff is omitted. We set down what we consider might be reasonably added:—

"Every notice to the Judge of application for "new Trial, or other special application, or notice "to the parties by order of the Judge in respect to "the same, when required by the Statutes or Rules, "and entering a minute thereof in the Books, 1s. "each notice.

"For taking charge of, and securing property "seized under attachment, such sum as the Judge "may order in each particular case."

We have now gone through the Tariff, taking an impartial view of the proposed charges: where not otherwise noticed we assent to the reasonableness of the charge. We have merely reviewed the matter in the shape it comes before us. Were we to take up the question as a substantive one, it would be to advocate the payment of Clerks by salary for the most part, placing the fees payable by parties at a very low figure; for we think that the general funds of a Country ought to bear the expense of the establishment of Inferior Courts, and that suitors should not be called on to sustain in their individual capacity the whole expense of maintaining such Courts—we look upon it as levying an income on the necessities of suitors.

COUNTY COURTS IMPROVEMENT: REMEDY AGAINST OVERHOLDING TENANTS.

For the "Law Journal."

Can any one shew cause why A.B., the proprietor of a couple of small cottages, should not have the possession of cottage No. 1, which C.D., his late tenant, wrongfully and unlawfully detains?—I can, says the Law, "cause why" it would cost A.B. as much as cottage No. 1 is worth to obtain it!! "There is no right without a remedy," says A.B., and I want my cottage.—Ah, replies the Law, you are quoting one of my own maxims, but I have another to meet it—"de minimis non curat lex."

The former maxim is somewhat too boastful, and the latter perverted—but in sober earnest there is virtually little protection to the proprietors of tenements of small value. In such cases the remedy against overholding tenants is worthless, for redress is to be obtained only by action in the Superior Courts. Though the freehold value of a tenement is but £30—the monthly rent under a dollar—though the party in possession does not deny that his term has expired—yet he may hold, in defiance of the landlord, till turned out by the Sheriff at the termination of an action of ejectment. The overholding tenant may offer *passive resistance*, or he may, at a trifling expense, *plead to the action*. In the former case the landlord's expenses would be about £7, supposing the property to be within 20 miles of the Court-House,—in the latter case it would cost the landlord, say £20, as much as the freehold value of his tenement. He would have a *right*, certainly, to recover some portion of these costs from the tenant, but—"can you get blood from a stone," can you obtain the costs from a man who is worth nothing? And such would be the case in 99 cases out of every 100. Nor can the loss on wrongful overholding be estimated by the costs out of pocket merely. A farm, say, is rented; the term ends just before the sowing season—a knavish tenant may hold in defiance of honesty and law till it has passed, and the year's crop is thus lost to the landlord. The law protecting rights to personal chattels is on a much better footing.

In the law of landlord and tenant a reform is urgently required. There is not a greater blemish in our jurisprudence than the one pointed out. the remedy, to be effectual, must be cheap and speedy. Such an one it is intended to propose—not anything unsanctioned by precedent—not any untried scheme but merely an enlargement of the admirable provisions in the Chief Justice's Act, 4th Wm. 4, c. 1, respecting overholding tenants—this was at the time it was devised the best remedy that existing tribunals permitted, and though in point of expense of little advantage, in the element of time it is an immense saving. It enables a landlord to apply to a Judge of the Court of Queen's Bench on affidavit making out a case of overholding. Upon an order of the Judge a writ issues, directed to some barrister selected for the occasion as Judge to try the question. This *ad hoc* Judge, or Commissioner, as he is called, issues his warrant to the Sheriff for a special jury to try the facts, and the case is heard, as at Nisi Prius. The finding of the jury is certified by the Commissioner to the Court above, and if in favor of the landlord, a writ is issued directing the Sheriff to put him into possession.

In many particulars Upper Canada has taken the lead of England in legislative improvements respecting the administration of Justice. For example, in the Local Courts system, and the law of attachment against absconding debtors—but in the subject of this article we are lamentably in the background. The statutes regulating the Civil Bill Courts in Ireland made provision for the redress of such wrongs years ago—giving a jurisdiction in ejectment by landlords against their tenants when the latter desert the premises—also against overholding tenants, and against tenants owing a year's rent, &c. And the English County Courts Act confers similar jurisdiction on County Courts, by enabling the possession of small tenements, under the annual value of £50, to be recovered, where the relation of landlord and tenant exists between the parties and the tenancy has ended. Seeing then that an

improvement in the law is necessary, that a principle on which it may be based has been adopted by the U. C. Legislature in the Chief Justice's Act—that a like principle is to be found in the Imperial Acts to which we referred, and a procedure under them in successful operation for years—may not the Legislature here be fairly invoked, at least to begin in the way of amendment. No rash or sweeping change is advocated—nor would new and untried tribunals be necessary to carry out the desired reform: we have no need to create Courts to which to delegate the jurisdiction. There are in existence tribunals similar to the Civil Bill Courts in Ireland and the County Courts in England—the machinery in our County Courts is just suited to the purpose.

The alterations proposed are these: *Jurisdiction* to be given to the Upper Canada County Courts for the recovery of tenements when the value of the premises or the rent payable in respect thereof does not exceed £—— (*some small amount*) per annum, when the term has expired or been determined by legal notice to quit and the tenant or occupant wrongfully overholds. *Procedure* as follows: The landlord to file a claim stating the determination of the tenancy, &c., and the fact of overholding. A summons to be issued thereon requiring the occupant or tenant to answer in ten days, or in default to be turned out of possession. Should defendant plead, the case to be set down for trial at the sittings of the County Court, or of any Division Court; the Judge to determine the law and facts of the case, unless either party should demand a jury; the decision to be enforced by writ of possession, &c., as in the Courts above.

Here is a proceeding both simple and inexpensive, and in from 10 to 30 days the landlord might have his writ of possession. The jurisdiction would not be conferring more important powers than the County Courts now exercise; every question that could arise in such a proceeding may now come up in actions of Replevin or other actions involving questions between landlord and tenant. The public expense would not be increased, for such cases would be referred to competent courts already constituted.

A few cases might perhaps be withdrawn from the Superior Courts, but the many owners of small tenements who are now without redress, or obliged to seek it at a ruinous sacrifice, would be afforded facilities for relief, while the *honest* tenant would be in a better situation—for where there is more than ordinary risk, there must be an increased charge for it.

The writer has no selfish interests to serve in what he has urged, and he does not belong to the school of presumptuous innovaters. Speaking from a large experience, he ventures to assert that no more important measure of reform in legal procedure, as affecting small right, could engage the attention of the law officers of the Crown. It involves no organic change, it is defensible, it is called for on every possible ground; it is warranted by precedent, supported by legal principle, and pregnant with obvious and extensive advantages.

A. B. V.

LIABILITY OF SHERIFF—WRITS OF EXECUTION.

As information on the points raised by the letter of "A Deputy Sheriff" will be acceptable to a large class of readers of the *Law Journal*, we have thought it advisable to refer somewhat fully, to one or two of the leading decisions of the Superior Courts of Upper Canada:—

To the Editor of the "Law Journal."

SIR,

I shall be glad to learn, through the medium of your Periodical, whether a Sheriff, having made a seizure of goods under a writ runs any risk, or incurs any liability in allowing the goods seized to remain in the possession of the defendant, pending an arangement for settlement, or until called for by the Sheriff? And in a case where goods so permitted by the Sheriff to remain in the debtor's custody, are afterwards seized on by a Division Court Bailiff under process of that Court, what course must the Sheriff adopt to recover possession?

Yours truly,
A DEPUTY SHERIFF.

As to the risk which may be run, that obviously is matter of judgment and discretion in which one must be guided by a knowledge of the character, and responsibility of the execution debtor: but in no case should a Sheriff permit detention by the debtor of goods seized, without being amply secured by bond of third parties for his indemnity. C. J. Robinson, in *Corbett Sheriff* v. *Hopkirk*, 9 U. C. R., 485, recommended the forms of Bond in somewhat similar cases, given in Watson on Sheriffs, 379, 380.

The question of the Sheriff's liability involves, however, other and legal considerations. "Pending a settlement" implies acquiescence on the part of the plaintiff in such a course as is suggested, and such acquiescence and how far it would relieve a Sheriff would be determinable according to the peculiar circumstances of the case: but that in the absence of any such acquiescence a Sheriff does incur serious responsibility will be seen in the following late cases.

A Sheriff seized goods under an execution, but left them in the possession of the execution debtor, agreeing not to sell until just before the return of the writ, upon receiving a receipt for the same with an undertaking to deliver them to the Sheriff when requested so to do; the landlord of the execution debtor having, subsequently and whilst the goods

were so in possession of the execution debtor, distrained and sold them for rent due to him by the debtor, in an action of Trover by the Sheriff against the landlord:—*Held*, That the Sheriff had not, at the time of the distress, such a possession of the goods as precluded the landlord from his distress for rent,—that Trover could not be maintained, if the goods were rightfully distrained, and that under the circumstances, the only remedy of the Sheriff was against the parties who failed to deliver the goods to him according to contract when thereto requested.—*McIntyre, Sheriff, &c.*, v *Stata et al.*, 4 U. C. C. P. Rep. 248.

A Sheriff having seized the goods of a debtor, under an execution, took a bond for the delivery thereof when required by the Sheriff, and allowed the debtor to remain in possession of the goods and carry on his business as before the seizure: and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the Sheriff, to which he returned *nulla bona*:—*Held*, in an action against the Sheriff for a false return, that the second writ took precedence of the first and bound the goods, and that therefore the Sheriff was liable.—*Castle* v. *Ruttan, Sheriff*, &c., 4 U. C. C. P. Rep. 252.

The above cases would decide the question put relative to a Division Court Bailiff; the Sheriff could take no action against the Bailiff for the recovery of the goods: but must have recourse on the security he would have taken for their production from the debtor.

Proposed Abbreviations.—In order to give as much reading matter as possible, the following abbreviations will be found in our columns after the present issue. Our contributors and correspondents we leave to follow their own inclination. We trust they will see the great economy in room these abbreviations will secure:—D. C. for "Division Court," D. C. Act for "The Upper Canada Division Courts Act of 1850,"—D.C.E. Act for "The Upper Canada Division Courts Extension Act for 1853,"—Co. for "County,"—Q.B. for "Queen's Bench,"—C.P. for "Common Pleas,"—Plt. for "Plaintiff,"—Dft for "Defendant,"—J.P. for "Justice of the Peace."

DIVISION COURTS.

(Reports in relation to)

ENGLISH CASES.

Q.B. Carter v. Smith. *Jan.* 30.

County Court—Power of Judge in matters of Practice—New trial—Prohibition—Rules of Practice.

By sec. 89 *of* 9 *&* 10 *Vic.* c. 95, *the Judge of a County Court has "in every case the power, if he shall think fit, to order a new trial, upon such terms as he shall think reasonable." By the* 141*st Rule of Practice "the party intending to apply must,* 7 *clear days before the holding of the Court at which the application is to be made, deliver a notice in writing" to the Clerk and the opposite party; and unless the application be made as the rule directed "no subsequent application for that purpose can be made, unless by leave of the Judge."*

The defendant not having given the 7 *days notice as required by the* 141*st Rule, applied at a subsequent Court to the Judge to grant a new trial, which application was granted. The Court refused to make absolute a rule for a Prohibition to restrain the Judge from granting a new trial on the ground that it was a matter of Practice on which he might exercise his discretion.*

The action was brought against an undergraduate of Oxford for £23, the items consisting of hunting whip, studs, money lent, &c. There was a plea of infancy. The jury considered the goods necessaries, and found a verdict for plaintiff. At the next court defendant applied for a new trial: no notice of his intention to apply had been given. Plaintiff objected to the application being made, but the Judge held that under the 141st Rule he had discretion to waive the objection, which he exercised, and granted a new trial. A rule had been obtained for a prohibition to restrain the Judge from proceeding any further in the matter.

Griffith shewed cause.—It is submitted that it is for the Judge in his discretion to waive the rule if he think fit. He has a jurisdiction under Rule 141 to do so. This is a mere matter of practice, and this Court will not interfere with the County Court Judge in matters of practice.

Cripps, in support of the rule.—If that rule may be dispensed with, the successful party in an action in the County Court will never be safe; a new trial may be applied for at any time. [Lord Campbell, C.J., it is in the discretion of the Judge to grant it or not.]

Lord Campbell, C.J.—I am of opinion that no ground has been shewn for granting this prohibition. A discretion is vested in the Judges of the County Courts. By sec. 89 of 9 & 10 Vic. c. 95 the Judge has "in every case the power, if he shall think fit, to order a new trial upon such terms as he shall think reasonable, and in the meantime to stay proceedings."

Then looking at rule 141, if the application for a new trial be not made as therein directed, "no subsequent application can be made *unless by leave of the Judge*, and on such terms as he shall think fit." If, then, reasons satisfactory to him be adduced why he should, notwithstanding the want of proper notice, grant a new trial, it would be monstrous to say that he had not the power to do so. It seems quite analogous to the rules guiding the Superior Courts, which are very useful as general rules, but in special circumstances the Courts have the power to dispense with them. This is a matter of practice. The Judge of the County Court had jurisdiction, and in the exercise of his discretion he has granted a new trial.

Coleridge, J.—I should have been very sorry to have been compelled to make this rule absolute for a prohibition, because the argument for it is founded on a very strict construction of rule 141. If Mr. Cripps' argument be good for one particular, it is good for all. Suppose through some inevitable accident, or by the misconduct of the other side, notice had not been given in time, or what was necessary had not been done, could it be said that the Judge was so tied by the rule that he could not dispense with the notice and could not grant a new trial?

Wightman, J.—I am entirely of the same opinion. Under the 89th sec. of 9 & 10 Vic. c. 95, the Judge had a general

power to grant a new trial. That Act was followed by 12 & 13 Vic. c. 101, and the rules made by Judges of the County Courts, and approved by the Judges of the Superior Courts under sec. 12, afterwards became an Act of Parliament.

There is a well known distinction between clauses directory and obligatory. These rules are merely for practice, and are so to be considered. They are directory, only, and not obligatory.

CROMPTON, J.—The rules of the County Court in this case are very analogous to our rules, as to granting new trials.

Rule discharged without costs.

[The 84th section of the Division Courts Act of 1850 is taken from the 89th section of the English Act of 9 & 10 Vic. c. 95, but a proviso which is not in the English Act is added in ours, viz.: "Provided that such new trial be applied for at furthest "within 14 days, and good grounds be shewn therefor by the "party so applying."

Division Courts Rule No. 52 appears to have been partly taken from the English rule 141, but does not give any such discretion to the Judge as in the English rule is contained, (indeed the 84th section of the 13th & 14th Vic. ch. 53 is peremptory that the application must be made within 14 days); and the whole tenor of our Rule appears to require notice to the opposite party, &c., as a condition precedent to moving for a new trial.—*Ed. L. J.*]

Reports from Division Courts.

(County of Lambton.—Read Burritt, Judge.)

McCART AND ANOTHER *v.* YOUNG.

(Reported by P. T. Poussett, Esq., Clerk of the Peace.)

Law of average application to inland waters—Action for freight and average.

[December, 1851.]

The plaintiffs being owners of the schooner "Loyalty," received on board their vessel a quantity of bricks, at Chatham, belonging to the defendant, to be carried thence to Port Sarnia. The vessel on her voyage across Lake St. Clair encountered a fog, ran aground, and the wind rising, the captain was compelled to throw overboard 7,500 of the bricks, in order to save the remainder of the bricks and the vessel from destruction.

The plaintiffs claimed for freight, and also a proportion of the expences incurred in saving the vessel and remainder of the cargo as average, and the particulars of their demand took into account the loss of the defendant's bricks, and made the vessel contribute its average share of the loss.

The plaintiffs having proved their case as stated, and the defendant alleging for defence want of care and unskilfulness in the conduct of the voyage as a bar, the learned Judge charged the jury, and said the case was not new, but rare in this country, where the maritime law was seldom called into requisition; and it had been strongly urged by some, that it was not applicable to inland waters. He, the learned judge, did not hold that opinion. The Court of Queen's Bench, in *Grover* vs. *Bullock*, 5 U. C. R. 297, had held that the maritime law did extend to inland waters and fully sustained the principle of average. That if the jury were of opinon from the evidence that there was no unskilfulness or carelessness, and that the expenses incurred were unavoidable and absolutely necessary for the preservation of the vessel and remainder of the cargo from destruction, they should find for the plaintiff the amount of the claim; if not, then only for freight of the bricks which were delivered at Port Sarnia. That the jury were to be satisfied that there was not a mere fancied apprehension of danger to justify the throwing overboard a portion of the cargo to save the rest, but an absolute and imperative necessity.

The jury gave a verdict for the plaintiffs for the whole amount claimed.

(County of Lambton.—Read Burritt, Judge.)

YOUNG *v.* McCART AND ANOTHER.

(Reported by P. T. Poussett, Esq.)

Estoppel—Owners of vessels navigating the inland lakes not common carriers.

[February, 1852.]

This was an action of tort to recover damages for the loss of 7,500 bricks of the plaintiff which the defendants had failed to deliver to the plaintiff.

The plaintiff set forth in his particulars of demand that defendants are common carriers by water, &c., and as such plaintiff caused to be delivered to them, on board of their vessel at Chatham, 22,500 bricks to be by them carried and conveyed from Chatham aforesaid to Port Sarnia, for certain reward to be paid, &c. Yet defendants did not, &c., but on the contrary took such little care of same, and behaved so negligently and imprudently about the same, that a large portion, to wit, 7,500 of said bricks, were wholly lost to plaintiff, and he claimed damages, £10.

Defendants put in a written plea, in substance as follows: That plaintiff is not entitled to recover because they say that in this Court, wherein defendants were plaintiffs and the present plaintiff was defendant, the then defendant and now plaintiff claimed by way of set-off the value of the 7,500 bricks for which damages are now claimed by him, in this cause. Moreover, that the subject matter of his demand in this cause, and the value of the 7,500 bricks, whereof the said damages are now claimed, were stated, and allowed by the then plaintiffs in their particulars, by way of credit in adjusting the average. And upon the trial the said matter or claim in this suit was adjudged and allowed, as will appear by the record and proceedings thereof, and which defendants now pray may be brought into Court and inspected by the Court on the trial of this cause.

On the cause being called, the plaintiff's attorney requested a jury to be impanelled. The defendants' agent asked the Judge to read the plea which had been put in, before the jury was called. The Judge, upon reading the plea, refused any submission of merits until the matter of the defendants' plea was disposed of; and after examining the proceedings of the former suit, gave the following judgment:—

The defendants contend by their plea that the subject matter of this suit has been already adjudicated, and that the plaintiff is estopped. Upon reading the record of the proceedings in *McCart & another* vs. *Young*, it appears that the then plaintiffs, in adjusting the average claim, credited the now plaintiff with the value of the bricks thrown overboard, allowing the same number and the same price. When a subject matter has once been litigated and finally adjudicated, their is an end of it, otherwise there would never be finality or end of litigation. The defence in the former suit was negligence, and that was as effectually urged when the plaintiff was defendant as he could now urge it as plaintiff. He submitted his defence to a jury, and that jury found against him, and he now wishes to try his chance as plaintiff with another jury. This I cannot allow even if the amount he now claims as damages had not been allowed by the jury. It would be

wrong for me to allow a subject matter of defence—already fully adjudicated—to be a cause of action, merely by the party changing his position from that of defendant to plaintiff. There must be judgment for defendant with costs. [See *Outram* v. *Morewood*, 3 East.; *Russell* v. *Rowe*, 7 U. C. R. 484; and *Eastmure* vs. *Lawes*, Easter Term, 1839, Com. Pleas, England, reported in the *Jurist* (New York) No. 6, page 475.]

(County of Wentworth—Alexander Logie, Judge.)

EX PARTE W. R. MACDONALD.

IN RE ALEX. MAWHINNEY *vs.* JAMES GIBSON, AN ABSCONDING DEBTOR.

W. J. BROWN *v.* JAMES GIBSON.

SILAS BOND *vs.* JAMES GIBSON.

Attachment—Priority of claim of attaching creditor.

This was an application by Mr. Macdonald, Clerk of the 1st Division Court of the County of Wentworth, to determine to whom certain monies now in Court shall be paid.

An attachment was sued out by Mawhinney, under which certain perishable goods were seized and sold, and the money, amounting to £5 17s. 6d., paid into court. Mawhinney obtained judgment, and on the 13th January, 1855, took out execution. Previous, however, to the suing out of the attachment, the other execution creditors had obtained judgments, and after the issuing of the attachment, but before Mawhinney had taken out execution, the other plaintiffs took out executions—Brown, on the 3rd of Jan., 1855, and Bond on the 4th of Jan., 1855. The attaching creditor claimed the money, and also the execution creditors, the amount being insufficient to pay all.

LOGIE, J.—I think the attaching creditor, Mawhinney, is entitled to the money realized from the goods seized under his attachment and paid into court. The 64th section of the Division Courts Act of 1850 authorizes the issuing of attachments from the Division Courts, and points out the mode of proceedure. In that section it is enacted as follows:—

"That the property seized upon any such attachment shall "be liable to seizure and sale under the execution to be issued "upon such judgment," (that is, the Judgment in the attachment suit) "or the proceeds thereof, in case such property "shall have been sold as perishable, *shall be applied* in "satisfaction of such judgment." And in the following section, the 65th, the mode of proceeding by other creditors desiring to participate in the property is pointed out. The intent of the statute appears to be to give creditors suing out attachment a sort of lien or claim upon the property seized under the attachment until judgment is obtained, when the property is to be sold, or the proceeds in case of a previous sale, *applied in satisfaction*. The statute provides for the claims of other creditors by allowing them to take out attachments, and share pro rata with the first attaching creditor; if they neglect or refuse to do this they cannot by any other means, as by first obtaining execution, deprive the attaching creditor of his claim upon the property.

In the Superior Courts the law appears to be the same, except in cases where the execution creditor had sued out process and served the debtor personally prior to the issuing of the writ of attachment and obtaining judgment before the attaching creditor. In such cases the execution creditor is entitled to priority by the 4th sec. of the Act 5th Wm. IV. c. 5, and see also Bank of British North America *vs.* Jarvis, 1 U. C. Q. B. R. 182. The making of such an exception shews that in the contemplation of the Legislature the claim of the attaching creditor would in general prevail. There is no such exception in the Division Courts Acts, and I think in all cases where goods are seized under attachment, even after other creditors have obtained judgment, the claim of the attaching creditor obtaining judgment is entitled to prevail, and that the goods must be first applied in payment of his judgment. I think, therefore, that the money should be paid over to Mawhinney.

[The point involved in this case has been decided otherwise in some Counties, but *on what grounds we are not informed*. Judge Logie's views, we have heard, accord with those of Judges Gowan and Malloch, both having decided in the same way. So far as we see, the decision is sound.—*Ed. L. J.*]

(County of Essex—A. Chewett, Judge.)

DAVIS *v.* THE MUNICIPALITY OF WINDSOR.

Action for work and labour—Contract with Corporation not under seal—How far equity and good conscience relieve.

The plaintiff sued for three days' levelling for side-walk of a street, and amount paid the men employed. The performance of the work, its value, and also that it had been done under the direction of the Board of Works of the Municipality of Windsor, were respectively proved.

The defendant contested the claim on several grounds:

1st, That it was for work to be done by one Donelly (under a sealed contract) for the Municipal Council for 1854.

2ndly, If not so, that the Board of Works had no right to employ the plaintiff, but only to superintend the work required by the Council.

3rdly, That in any case, there could be no valid contract with the Municipal Council, unless under seal.

To support defence, the sealed contract of Donelly with the Municipality for 1854 to perform certain levelling, &c., was put in; and Donelly stated that he completed his work under the contract,—that there was dissatisfaction amongst the inhabitants and the Council, and they required it to be altered and done differently,—that plaintiff made the alteration under the direction of the Board of Works,—that the municipality had the benefit of plaintiff's work, and that if he (Donelly) had done it, he should have charged for it as an extra. A witness also proved that the plaintiff was not employed by any resolution of the Municipality.

CHEWETT, J.—In ordinary cases between individuals the plaintiff could recover where a party, clerk, or agent, directed another without his express leave to do any work for him of a beneficial nature, and necessary to be done, in any matter which he was obliged to do, and lawfully carrying on. If such used the work, being well done and answering his purpose, the law considers he had tacitly assumed and adopted the work, and thereby impliedly agreed to receive it in making use of it.

The question then arises whether the Board of Works had a right to direct plaintiff to do this work as far as the plaintiff was concerned. I think impliedly it had, as the work was a necessary preparation for the planking of the street and side-walk by the contractor for that purpose, who was furnished with a working plan, and the plaintiff completed the work without objection or enquiry by the Municipal officers. This I take to be the assuming, adopting, and impliedly accepting by the Council of the piece of work. If, as is contended, the work is the same as intended in Donelly's contract, the Municipality having rejected Donelly's performance of it must look to him; but as it would not in an ordinary case deprive the plaintiff of his right to recover, does it in the case of a Municipality, where the work done is within the scope of its authority? I think it should not, where the contract,

express or implied, is in a small matter, or executed, as in this case, and incidental and necessary to the carrying out of a much larger contract (planking walks) which could not be carried on till this small piece of work was first completed. No attempt is made to say that the work of plaintiff was repudiated as unskilfully or insufficiently done, and thereby really of no use to the Municipality; the evidence being quite of a contrary nature. I think, therefore, that justly and equitably, and therefore in this Court legally, the plaintiff must recover the reasonable price of the work against the defendants, the Municipal Council of Windsor.

In the Superior Courts, there has been lately some conflict as to the necessity of sealed contracts in similar cases. The cases on the point are Clark *v.* The Hamilton and Gore Mechanics' Institute, 12, U. C. B. R. Rep., 178; and Marshall *v.* The School Trustees, &c., of Kitley, 4, U. C. C. P. Rep., 373, *(see 1, U. C. Law Journal*, p. 26, note *). In the first mentioned case, it was held that upon an executory agreement, the plaintiff must prove a contract under the seal of the Corporation, unless the cause of action should be of that trivial kind, and so constantly recurring in the course of their business, that it would be absurd and intolerably inconvenient to exact such a formal undertaking. But when the contract has been executed, and the Corporation has benefitted by their labour, and that in the course of business within the scope of their charter, the law saves the Corporation the trouble of undertaking, by their seal, to pay for what they have approved. I think that these services were of such a nature; but even were it otherwise, as the plaintiff performed the work which was necessary for the Corporation, and they having subsequently profited by it, the claim of the plaintiff comes within the words of the Division Court Acts, as "just and agreeable to equity and good conscience."

Judgment for plaintiff, £6 5s.

MONTHLY REPERTORY.

Notes of English Cases.

COMMON LAW.

EX. C. COOPER *v.* PARKER. *Feb. 1st.*

Consideration—Acceptance of less sum in satisfaction of greater—Pleading.

The withdrawal by a defendant of a plea of infancy, whether true or false, is a sufficient consideration for an agreement on the part of the plaintiff to accept a smaller in satisfaction of a greater sum.

Judgment of C. P. affirmed, 14 C. B. 118.

PARKE, B.—The satisfaction pleaded in this case is clearly sufficient, and the plea is good. Where the thing given in satisfaction of a liquidated debt is of uncertain value, the Court will not interfere to inquire into the sufficiency of the consideration it discloses, or set a value upon it.

C.P. SMART *v.* HARDING. *Jan. 24.*

Frauds, Statute of s. 4—Interest in land.

A., a tenant from year to year of a milk-walk, agreed with B. to yield up possession to B. and permit him to occupy the premises, and to assign over the stock in trade to B., and to retire from the business and suffer B. to carry it on; the consideration on B.'s part being to pay A. £80. There was no agreement or assignment in writing. B. was let into possession and paid part of the consideration money, but refused to pay the balance, alleging that the milk-walk did not accord with A.'s representations. A. having brought an action on the agreement to recover the residue of £80,

Held, That there being an interest in land in question, and no writing within s. 4 of the Statute of Frauds, A. was not entitled to recover.

C.C.R. REGINA *v.* LUCK, BURDETT & COX. *Feb. 3.*

Cross-examination and reply, right of—Acquitted prisoner called as witness—Criminating evidence—Co-defendant.

At the close of the case for the prosecution of three prisoners defended by separate counsel, one was acquitted and was called as a witness on behalf of one of the two remaining. This witness criminated the other prisoner.

Held, That the counsel of the prisoner criminated had a right to cross-examine and address the jury on the evidence so given. That as this right had been refused, the conviction of the prisoner must be quashed, although the Court had offered to put the questions suggested by his counsel.

E.X. DOBIE *v.* LARKAN. *Feb. 3.*

Bill of Exchange—Plea—Holden for special purposes.

To an action on a bill of exchange by D., the indorsee, against L., the acceptor, L. pleaded that M. drew the bill which was accepted by L. and indorsed to D. for the purpose of D. getting it discounted, and handing the proceeds to L. for L.'s own use, but that D., colluding with M., got it discounted, and handed only part of the proceeds to L., and that there was no other consideration for the acceptance of or for D.'s holding the bill.

Held, On motion *non obstante veredicto*, that the plea was good.

CHANCERY.

THE PARIS CHOCOLATE COMPANY *v.* THE CRYSTAL PALACE
V.C.S. COMPANY. *Feb. 3.*

Specific performance—Agreement for a lease—Variation—Injunction.

When an agreement has been varied, the Court will not decree specific performance unless there is certainty as to the variations, which must be consistent with the original agreement: nor where the violation of the agreement as to its main subject matter may be adequately compensated by damages.

But *semble*, every stipulation of the agreement need not be such as, if it stood alone, would be specifically perfomed.

Semble, also, if the parties themselves did with an incomplete performance of an agreement on the footing of pecuniary compensation, neither will obtain relief in equity for the non-performance of the entirety of the agreement.

M.R. COARD *v.* HOLDERNESS. *March 3, 5.*

Will—Construction—Estate effects, and Property.

Gift of all estate, effects, and property whatsoever and

wheresoever.—*Held*, to be restricted to personalty by the general scope of the will.

V.C.W. STEPHENS *v.* HOTHAM. *March 15, 20.*

Executor—Renewal of lease—Covenant by testator.

Lease to B. for 21 years, with a covenant by A., the lessor, that he will grant a new lease at the expiration, for a further term of 9 years, and by B., for himself, his executors, administrators, and assigns, to execute a counterpart of such new lease. B. dies before the expiration of the 21 years.

Held, (following Phillips *v.* Everard, 5 Sim.) that the executors who had admitted assets were bound to execute the new lease for the further term, which had been tendered to them.

CORRESPONDENCE.

To the Editor of the "Upper Canada Law Journal."

DEAR SIR,

Within the last few days I have been shewn a Circular, signed by most of the legal practitioners in Toronto, to the effect that certain increased Agency Fees would be required by all signing the document I refer to. You have doubtless seen it, and it is unnecessary for me further to refer to it. But I would, though the medium of your very useful paper, offer a few remarks with reference thereto, which have suggested themselves to me, while probably many gentlemen whose names are appended to this agreement, placed them there without giving the matter a thought, simply induced to do so by the fact, which it is not my object now to dispute, that many of the Fees for Agency are very inadequate to the duties required and the labour and time expended. With regard to myself I may remark, that I was never asked for my signature, and never knew of the existence of this Circular till within the last week, and consequently have never had an opportunity of expressing any opinion on the subject. But on reflection (induced by my having to consider whether I agreed with the object of this Circular, or the means adopted to carry it out, and should therefore notify those gentlemen for whom I act to that effect, or not) several, as they appear to me, grave objections to the course pursued present themselves to my mind.

I pass by the question itself, whether the fees for Agency demand revision and increase—I will go further, and admit that oftentimes they are inadequate—neither will I object to any unfairness toward the country practitioners, involved in the mode adopted to effect the end in view, but I do think that on professional grounds it is open to many objections.

In the first place, I cannot but think that this is a precedent to a system of "Clubbing" for a higher tariff, against which I most decidedly set my face, and fervently hope that, at least in our profession, we may never be driven to such extremities; besides, I see no end to it—neither can I foresee to what purposes it may be applied: I would therefore object to it at the very first.

Again, when a step of this kind depends on the views taken by each and every individual, who is asked to agree to it, a door is at once opened to dissension between the members of the profession; you risk that unanimity of feeling and uniformity of practice, which hitherto has always existed amongst us, and which is the very essence of that "Esprit du corps" which I trust may ever be seen in our profession. What perhaps is still worse, a temptation is held out to any unprincipled practitioner to refuse to accede to the step contemplated, from the very hope that he may possibly benefit thereby in obtaining, for that very reason, an increase of that class of business; and all this because the change is effected by no competent authority, to which every man would feel not only justified in yielding, but even bound to, no matter what his own ideas might be. If it be true that as between the Principal and Agent, the relation is of so private a character, that the Courts would decline making a rule on the subject, or the Legislature to pass an Act to regulate the Fees, at least we might have a proper committee formed to report on the subject: or better still, an "Incorporated Law Society" under whose cognizance all such matters might come. But while it is a matter of mere private opinion, though it may be very true for Messrs. A. & B. in a very large and lucrative practice of their own, to say that it is not worth their while to attend to agency duties, unless at a higher rate, it may be quite *untrue* for another who is just beginning his profession to say so. The proof of this is that there is scarcely a practitioner of any eminence, who has not for years been engaged in agency business at the old rate of fees. I confess, to me, who only within the last few weeks undertook to act as agent for a gentleman practising in the country at the old established tariff for agency, it seems an absurdity to write to him now and say that I suddenly feel the agency fees are so inadequate, that in justice to myself, I consider they must be increased; and yet, unless I say this, I must confess that I simply follow suit—an admission I do not feel at all desirous of making.

Again, I do not think it is fair to the junior members of the profession. A few seniors determine that they will not transact a certain species of business at the recognized rates; now if they simply declined to act unless at increased fees, it is true that probably much of that business might find its way from them into the hands of juniors; and if it did, I don't see the [illegible]t objection, that when a man has reached a certain point in his profession some of the simplest descriptions of practice, should be given up by him, and thus his success should indirectly be beneficial to those whose turn has yet to come. But if you introduce this system—the moment a man thinks he can afford to demand a higher rate for his services, he gets a few, who are in the same position as himself, to join him—they sign their names to a declaration to that effect, and, as I think, a false influence induces younger men to sign their names, without the same reasons for doing so, because they don't like to oppose their brethren of higher standing.

If such a change is not effected by some competent and acknowledged authority, then it is far better to leave it as it is, and as it has for years been recognized.

If the relation of Principal and Agent be purely a private one, it should not be sought by a side wind to make it a *quasi* professional one. If it be as I conceive it really is a professional one, no change should be attempted from what is recognized, unless by acknowledged authority which no one could dispute.

For these reasons I consider that, however just the end itself may be, the means adopted for effecting it are faulty and objectionable.

I enclose may name, which is entirely at your service, should any one care to know it. Possibly my remarks may call forth an answer, which will satisfactorily dispose of my objections. If so, no one will be better pleased than myself, nor will any one then more readily accede to an arrangement, of which, at present, I cannot feel justified in approving.

I remain, dear sir, truly yours,

Toronto, April 25, 1855. Æ. N.

[The subject matter of the above Letter is interesting and of importance to the members of the profession generally—

especially so to those who are resident in the country. Want of space and the late period of its receipt, prevent further remarks than an expression of our individual acquiescence in its contents, especially in the suggestion of the formation of an Incorporated Society, or Tribunal before which all matters connected with the minor branch of the Profession might be submitted, and which we cannot but think would tend to the more general maintenance of high professional feeling and strictness. We insert it without delay, as the *Law Journal* thus attains one of its objects in affording room for discussion of Professional matters, of which there is no other opportunity. —*Ed. L. J.*]

THE STUDENT'S PORTFOLIO.

THE ADVOCATE—EDUCATION—MORAL TRAINING.

(Continued from page 20.)

To be a *gentle*man is rightly held in higher esteem among gentlemen than to be a *noble*man; for the latter is usually the accident of fortune, and the title independent of personal worth; the former is nature's endowment cultivated by education. A *Duke* cannot be more than a *gentleman*, but he may be less. The word, however, is not used here in its vulgar sense, as descriptive of any class or calling, or of any circle, social, religious or political; nor even is it intended to designate any degree of wealth or poverty, but simply *the man*, be he of any rank, who, to that instinctive sense of right which shrinks from the very shadow of wrong, adds that consciousness of kindred with humanity which makes him respect the rights and feelings of others, and establishes a sympathy between him and every soul that is.* This is the characteristic of the *gentleman*, whatever his creed or colour.

But to this proud title one more proud should be joined in *our* time and country—a title which implies something more, and claims other and loftier duties. The Advocate should aspire to be the *Christian* gentleman.

To the characteristics described as belonging to "the gentleman"; everywhere, the *Christian Gentleman* will add the sanctions of Religion. That which in the one case is *cultivated instinct* ascends in the other to the distinction of duty.‡

But the superiority of the Christian gentleman lies not in this alone. Ever present to his contemplations is a code of the purest and loftiest ethics, and a model of sublimest virtue. His piety is not a formula, or an observance of times and seasons, as if it were only the performance of obligation; but it is a part of his being, an ever present pervading influence, moulding his thoughts and guiding his actions, seen upon his face and heard in his voice. Christianity, *the law of love*, whose divinity is in nothing so proved as this—that it is the *only* religion the world has known that is *not a rite* but a *feeling*—is visible in all his sayings and doings, public and private; and thus is the stern and lofty honour of the gentleman gracefully combined with the mildness and loving kindness of *the Christian*. If the high calling of the Advocate be rightly estimated, the advantages of—nay, the necessity for—the possession of such a character, will be readily acknowledged. It will be required alike for self-sustainment in the discharge of his difficult duties, and to enable him to influence the minds of his fellow men.

[The following Notes, and those which will hereafter appear to our extracts from the "Advocate" are not in that work, but are intended to further illustrate the important subject treated of.—*Ed. L. J.*]

*The lawyer, when he becomes a lawyer, ceases not to be a man; when he received from the guardians of his order the badges of his calling, he laid not aside any of those sympathies which should warm every brother of the human race. If the Pagan could say—*homo sum, humani nihil a me alienum puto*, much more can he. God, by his Providence, has appointed divers orders of men in the State, even as he has in the human body set various members, no one of which can say to another "I have no need of thee."*

'The Lawyer, by O'Brien.

Charity is the end of commandment, and the end of the command is love; love to God first, and love to our neighbours afterwards, as from necessity springing from love to God.

Ibid.

‡Whatever may be wanting, either in the laws of men, or the laws of reason and conscience, to make us *just* and *merciful*, is abundantly supplied by the laws of God, by which all will be restrained who walk humbly with Him. For these, far from being limited like human laws, to what only regards the body, reach to the very innermost recesses of the soul; and by their sanctions are fitted to withhold us, not barely from such crimes as would render us obnoxious to Civil judgment and *outward* tribunals, but from every the least impurity which can stain and deform us *within*. They censure not only our actions but even our wills, not only our foulest misdemeanors, but the very thoughts which give them birth.

Hackette.

NOTICES OF NEW LAW BOOKS.

English Reports in Law and Equity; containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts: including also case in Bankruptcy and Crown cases reserved. Edited by Edmund H. Bennett and Chauncey Smith, Counsellors-at-Law. Vol. 25. $2. Boston: Little, Brown & Company, 1855; pp. 674.

The cases collected in this volume of the "English Reports" of Messrs. Little, Brown & Co., include those in the Common Law Courts to the end of the year 1854. The series will be continued henceforth, we observe, in four volumes annually; three being devoted to Law and one to Chancery cases. The Editors have, without any alteration of the text, interspersed throughout the work notes as to the American Law on the subject of the decisions, which render it additionally useful. Its price places it within the reach of every one, and should be an additional recommendation to those of the Profession who, residing in the country, may not have the advantage of immediate access to a Law Library.

APPOINTMENTS TO OFFICE, &c.

COUNTY AND SURROGATE COURTS JUDGES.

READ BURRITT, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County and Surrogate Courts of the County of Perth, in place of Charles Robinson, Esquire, resigned.—[Gazetted 31st March, 1855.]

CHARLES ROBINSON, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County and Surrogate Courts of the County of Lambton, in place of Read Burritt, Esquire, resigned.—[Gazetted 31st March, 1855.]

NOTARIES PUBLIC IN U.C.

DONALD CAMPBELL, of Toronto, and SAMUEL JONATHAN LANE, of Collingwood, Esquires, Barristers-at-Law, and HUGH TORNEY, of City of Ottawa, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—Gazetted 31st March, 1855.]

DANIEL MACAROW, of Kingston, Esquire, Attorney-at-Law, and ROBERT NEWTON LIGHT, of Woodstock Esquire, Barrister-at-Law, to be Notaries Public in U.C.—[Gazetted 7th April, 1855.]

WILLIAM DAVIS, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in U.C.—[Gazetted 14th April, 1855.]

CORONERS.

WALTER H. BURRITT, Esquire, M.D., to be Associate Coroner for the United Counties of Leeds and Grenville.

THOMAS F. SYMES, M.D., and JOHN WOOD, Esquires, to be Associate Coroners for the County of Grey.

JAMES W. CHADWICK, M.D., and HARTLEY S. LAYCOCK, Esquires, to be Associate Coroners for the County of Oxford.—[Gazetted 31st March, 1855.]

ARCHIBALD McVICAR, Esquire, to be Associate Coroner for the United Counties of Huron and Bruce.—[Gazetted 7th April, 1855.]

JOHN REGINALD COUSINS, of Chingacousy, Esquire, Surgeon, to be Associate Coroner for the United Counties of York and Peel.

GEORGE ROSS, of Renfrew, Esquire, to be Associate Coroner for the United Counties of Lanark and Renfrew.—[Gazetted 14th April, 1855.]