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DIARY FOR APRIL.

2. Saturday... Last day for notice of Trial for Toronto Spring Assizes.
3. SUNDAY.. *4th Sunday in Lent*
4 Monday..... Chancery Hearing Term commences. County Court Term begins.
9. Saturday... County Court Term ends.
10. SUNDAY .. *5th Sunday in Lent.*
11. Monday..... Toronto Spring Assizes.
15. Saturday .. Chancery Hearing Term ends.
17. SUNDAY... *6th Sunday in Lent.*
22. Friday..... *Good Friday.*
24. SUNDAY... *Easter Sunday.*
30. Saturday... { Articles, &c., to be left with Secretary Law Society. Last day for completing Assessment Rolls Last day for Non-residents to give lists of their Lands.

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

APRIL, 1859.

CONSOLIDATION OF THE STATUTES.

It is expected that the consolidated statutes will become law during the present session of the Legislature. If no other work were done, it alone would make the present a very important session in the annals of Canadian legislation.

Though the volume containing the proposed consolidated statutes of Upper Canada is comparatively speaking small, it contains the fruits of great labor, unwearied industry, and ripe experience. Had it not been for the fortunate coincidence that, about the time of the appointment of the Statute Commissioners, Sir J. B. Macaulay, saw fit to to resign his high and important trust as Chief Justice of the Common Pleas, and subsequently to accept the appointment of Chairman of the Statute Commissioners, we much doubt if on this occasion we should be in a position to congratulate the people of Canada on the immediate prospects of consolidation; and the invaluable services too of His Honor Judge Gowan, and others who assisted, are not to be forgotten.

The benefits to be derived from the consolidation of our law will be immense. The more simple and more accessable a law is, the more useful it is. But as human law is in theory a complex science, and in practice the collection of the accumulated wisdom of years, as it grows old it grows confusing. It does not need the experience of a lawyer to know how difficult it is to discover the spirit, meaning and effect of an enactment which lies buried beneath a heap of enactments, repealing and repealed clauses. The people generally were able to form a pretty fair idea of the confusion arising from such a source before the consolidation of the various municipal acts.

Then what the Consolidated Municipal Act of last session has effected in the municipal laws, the consolidated acts of the province and of each section of it are about to effect in the laws generally.

No theorist, however wild in his visions, is mad enough to hope for a set of laws so clear in language and so plain in meaning that differences of opinion will not arise upon their construction. Nor is the difficulty of construction at all times to be traced to the vagueness of the particular law. Different men have different minds, which cause them to have different opinions. What may be clear and undoubted to the mind of one man may be involved in a haze of difficulty when presented to the mind of another. Not only the different measures of natural intelligence possessed by different men, but the effects of various degrees of mental culture, produce differences of opinion. Hence upon any law, however well framed, questions may arise and most certainly will arise for judicial interpretation.

But laws may be so framed as to shut out many questions that would otherwise arise. As an expression may be more or less obscure, so may be a law or series of expressions. A statute is the expressed will of the Legislature. If couched in language free from useless verbosity, and in words of a popular and well understood meaning, there will be of course less difficulty in understanding the intent than if framed wanting these desirable qualities. So although it is not possible by legislation to shut out all questions of construction, it is possible by care and skill to shut out some questions. And in proportion to the number thus shut out is there a saving of litigation and consequent quent expense.

Laws judiciously framed are therefore a saving to a people —a saving both of anxiety and money. The consolidated laws which are now before the Legislative Assembly are so framed; and cost what they may to the country in preparation and passing, will when passed save to the country incalculably more than their cost.

It is no ordinary subject of congratulation that we live in a new country, where our written laws are as yet few and in a measure easily consolidated. In older countries, such as England, the attempts at consolidation have been *many and the failures in number equal to the attempts.* There was not a beginning in time. Each consolidation is a rest in legislation. Legislation is a progressive science; and as fresh wants are daily born into the world, so fresh laws are needed. Something is required from time to time to keep down the accumulations, and this cannot be more effectually done than by consolidation or reduction of laws up to a particular epoch, which in its turn becomes a new starting point in legislation.

We are not believers in codification. It is neither pos-

sible nor reasonable to confine the growth of legislation, any more than for the horticulturist or botanist the growth of a flower or plant. Law must grow—it must expand. No bands can confine it, without depriving it of vitality. It must keep pace with the wants of the people. The affairs of men in all places and at all times are not to be regulated by a few abstract principles. There must be the grouping of details as minute as the transactions of life. There must be the alterations and amendments, shown to be necessary by the lessons of experience. If by codification is meant finality in legislation, there is meant an absurdity as egregious as it is unpardonable.

If codification were shown to be practicable, it would no longer be laughable. In the abstract it is perfection. In practice it is an absurdity. And yet we admit that some of the merits of consolidation are its approximation to codification. Consolidation is codification stripped of the ridiculous—it is the reduction and systemization of existing laws, with a view if necessary to future legislation.

LIABILITY OF PERSONS PRACTISING AS CONVEYANCERS.

We are much pleased to see that the Hon. Mr. Patton's bill on this subject has passed through the Upper House. Mr. Patton has brought forward many valuable measures, and amongst them this is certainly not the least important.

There are hundreds, if not thousands of non-professional men through the country, who make a regular business of drawing deeds and other instruments, charging a fee for their services; many of these persons are very competent for the ordinary business of a conveyancer; but again, many are utterly incapable of filling in correctly a common deed of bargain and sale or mortgage, and know nothing whatever of the law of real property. It has been too much the practice of late years to employ such persons, and the public are beginning to feel the evils of entrusting their business to incompetent hands.

At almost every court, one or more cases growing out of defective conveyances appear in the docket; and very lamentable must be the result, unless some check for the safety of the public be imposed on the practice. In our own experience, we have known men turned out of house and home, losing the benefit of their labour for years, or having to pay a large sum of money, in consequence of gross defects in the deeds under which they held.

It is short-sighted economy to get work done by an incompetent person at a few shillings under price of good work, particularly, when as in the case of a conveyance of land, a man's whole means is often involved. But so it is, that in respect to property as well as health, the quack is often preferred to the educated practitioner.

An attorney is liable, if through carelessness or ignorance there is a defect in any instrument he draws; and he must make good to the person who employed him any loss or damage that is sustained thereby. Such is not the case with conveyancers. However gross the error or defect, or great the loss consequent upon it, they are not liable to make it good. Let us illustrate, so as to make the point clear to non-professional persons.

A. purchases a farm and employs a lawyer to draw the deed; the conveyance is executed, and A. pays the consideration money and probably $3 for the deed and memorial. From some cause or other the deed is insufficient, and A. is ejected and loses his farm. But A. is not without remedy. He brings his action against the lawyer. The Courts sustain the claim, and A. gets damages to compensate for loss occasioned by the lawyer's neglect.

B., an emigrant, also purchases a farm; and hearing that Mr. X. draws deeds for $2, whereas a lawyer will charge $3, thinks to save the dollar, and employs Mr. X. to draw the deed. Well, this deed turns out to be no better than so much waste paper, and B. loses his money and the farm. Has he any remedy against Mr. X.? *He has not.* He complains. X. says, I am sorry for the mistake. I did the best I could; but you have no claim on me, as you would on a lawyer. I certainly received your money for drawing the deed, but the law imposes no obligation upon *me* to make good one penny of your loss.

Now what Mr. Patton's bill does is to give a right of action against such persons as X., for negligence or blunders, in the same way and to the same extent as against an attorney employed to draw deeds or instruments.

Nothing can be more just; and we are content to take it as the first instalment towards the security of confiding or illiterate persons. But it will only alleviate the evil; it will not *cure* the mischief. The public ought to be further cared for.

The cure, in our judgment, would be this. Disable any but qualified persons from practicing conveyancing. Persons are not allowed to practice medicine or surveying without a license. Why not extend the wholesome rule?

Let us not be misunderstood. We do not propose that the practice of conveyancing should be confined exclusively to attorneys, but we contend that those only who are competent should be allowed to exercise the calling of paid conveyancers; and this we believe would not be objected to by any such who are competent, and the thinking public we are sure would approve of such a provision.

Our proposition is that the County Judge, either alone or with two associates, should be a Board for the examination of persons desirous of obtaining a license to practice as conveyancers. The candidate for licence should be able to

pass an examination in the rudiments of that branch of the law, and show some practical acquaintance with the subject, which would entitle him to a license, without any fee whatever. Then only licensed persons should be allowed to draw deeds or instruments for fee or reward

This would have the effect of weeding out ignorant pretenders, and giving a certain *status* to competent men. In thus suggesting, we look more to the interests of the public than the attornies; for no inconsiderable share of their present business springs out of the blunders of stupid, ignorant persons, who are no better able to draw a conveyance than a blacksmith to make a watch: men barely able to read and write, who are too lazy to work or to learn any thing beyond the act of "puffing" themselves and obtaining money on false pretences from inconsiderate persons.

PROBATE AND ADMINISTRATION.

DIVISION COURT CLERKS.

(*Continued from p. 61.*)

Let us next suppose the case of a party dying intestate (without having left any will), leaving say a wife and two children surviving him. The widow being desirous of obtaining letters of administration to his estate, seeks the assistance of a Division Court Clerk.

The information to be set down in this case will be in part the same as in case of Probate under the letters A, B, C, D, and E; the further information required may in general be comprised under the following heads.

1st. Names of Children.....	*Mary, age ten years.* *John, age eight years.*
2nd. Names, residence and additions of proposed sureties in administration bond.....	*John Doe, of the township of ——, yeoman.* *James Doe, of the same place, yeoman* *(or as the case may be).*
3rd. Name, residence and additions of party applying for administration ...	*Mary Doe, of the township of ——, widow.*

If any other person than the widow applies for administration, it will be necessary to show what relatives the deceased left; and, if children, to state their age.

As a general rule, the next of kin will be entitled to administer, unless the deceased left a widow, and sufficient information should be given to show in what degree the party applying is related to the deceased; and if there are any others related in the same degree, in a word to show that the party applying *is best entitled to administration.*

The sureties in the bond will be required to justify by affidavit, that is, swear they are worth a certain sum over and above their debts. This amount will vary according to the value of the property devolving, and the nature of the case. For instance, if the property deceased died possessed of or entitled to was $400, the sureties would each, as a general rule, be required to swear they are worth $800; but if a portion of the property left goes to the party applying for administration, it would be in the power of the Judge to reduce the amount of security. And in all ordinary cases where the value of the property is under $200, one surety will be sufficient. So that before giving in the name of a party as a surety, the clerk should enquire whether he is able to justify in the necessary amount; and if desired that the amount of the bond should be reduced, a note thereof can be made by the Clerk, that the Registrar may take the Judge's order thereupon.

The information thus obtained is forwarded to the Registrar by letter, prepaid, with a sum towards the fees, as in the case of application for Probate; and although there will be no original papers sent, the letter ought to be registered, so that in case of question the communication may be traced.

TRADE PROTECTION SOCIETIES.

In other columns will be found a report of the case *In re The Canada Trade Protection Society*, which will, we are sure, be read with interest.

Hitherto some persons have entertained a doubt how far the records of a Court of Record are public, so as to be open to inspection by persons not having a direct pecuniary interest in a particular suit, but the opinion pronounced by the Court of Queen's Bench sets at rest all such doubts.

The Records of the Court, which are preserved in a public office at the public expense, under the charge of a public officer, are so far public that any one of the public who chooses to tender the usual fees may obtain a knowledge of them.

Of course the right to make any such search is subject to the routine of the office, over which the Clerk is to exercise a discretionary power—a power which we are told has been invariably exercised towards the Canada Trade Protection Society in a reasonable manner.

A Trade Protection Society has no greater right than an individual, but no individual representing it is to have a less right than if acting for himself. The records are public; and so far as the object of a Society is to make them more public by the propagation of truth, it may be fairly argued that the Society aids rather than thwarts the object of the law. The aim of such a Society is good, and as it eschews espionage, the means are honorable. With a good end to be attained by honorable means, there is a claim to public support—a claim to which a cordial response has, we are informed, been made by Deputy Clerks of the Crown, Clerks of County Courts, and others in authority. The Clerk of the Crown and Pleas of the Queen's Bench, struck by the novelty of the Society, declined to comply with the request made of him until

instructed by the Judges. The instructions to him will be equally useful to others having custody of public records; and so we without delay place before our readers these instructions, so far as embodied in the judgment of the Court reported elsewhere.

MUNICIPAL LAW.

The last Municipal Elections passed off in a manner, we think, more satisfactory than elections of any previous year within our knowledge.

Returning Officers, and others whose duty it is to know the law and to follow it, have displayed more than ordinary knowledge of their duties. One result is, that there are fewer contested elections—a smaller than average crop of litigation.

This happy consequence is no doubt in great part attributable to the wisdom of the Legislature in reducing the Municipal laws to a consolidated Statute, and in preserving in that Statute, as far as possible, harmony in its parts, and consistency as a whole.

The Municipal Act of last Session is not, we know, perfect; but this we can say, that it is more perfect and more intelligible than any previous Act of the kind. It redounds greatly to the credit of Sir J. B. Macaulay, and the other gentlemen appointed to revise the Statutes, who prepared the bill. The language is simple, repetition is scant, and precision is the rule.

In proof of the satisfaction which the Act gives to the public, we need do no more than point to the fact that few and trifling are the amendments proposed by our Legislators now in Session. Notwithstanding the scarcity of Legislative pabulum, and notwithstanding the ardour of many members of Parliament to do something in the way of legislation, little encouragement is afforded by a reference to the Consolidated Municipal Act.

It does not become us to say how far the Municipal Manual, edited by Mr. Harrison, one of the Editors of this Journal, has tended to settle the law. That we leave to others to say or to controvert. The plain fact, however, is that our Municipal laws are now better understood than they ever have been, and are worked with the confidence and satisfaction which knowledge begets.

Through the courtesy of Mr. Twigg, the Deputy Clerk of the Crown for the County of Prince Edward, and others whom we need not name, we are in this number enabled to publish some very important cases determined by the Judge of that County. It at all times affords us pleasure to make public decisions of the kind; and while thanking Mr. Twigg for his courtesy, we take the opportunity of expressing our hope that his example will be very generally followed.

We watch with considerable attention decisions pronounced in Toronto, our place of publication, but wish in addition to be informed of whatever of interest transpires in outer Counties. If aided by gentlemen occupying local public situations whose position enables them to be useful to us, and through us to the profession and the public, we shall be greatly pleased. Hitherto to some extent we have been so aided, but not to an extent either as cordial or as general as we should like.

The decisions to which we now refer, are reported in other columns, and speak for themselves. The learned Judges who pronounced them have done good service in bestowing upon the questions raised for their opinion much deliberation and learning.

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

(Continued from p. 54.)

Agitation for a Legislative Assembly — Petitions for equality to Franco Canadians—The Quebec Act—Its provisions.

No representation of the people seems yet to have taken place. The promises held out in the proclamation of 1763, to be carried into effect "so soon as the situation and circumstances of the country would admit thereof," were not yet realized.

In the month of October, 1773, the British inhabitants of the Province, having waited ten years for the accomplishment of this promise, began to agitate. On this occasion they invited the French inhabitants of the Province to join with them. Many meetings were convened and many deputations appointed. Repeated conferences were held. The result was that the French inhabitants declined to take part in the agitation, and the English resolved "to proceed in the business by themselves."

The Governor in Chief of the Province being absent on 3rd December, 1773, the British inhabitants petitioned Hector Theophilus Cramahe, Esq., the lieutenant governor. He declined to interfere, alleging as his chief excuse that, from the best information he had received, the affairs of the Province were likely to become the object of regulation in England. Nothing daunted with this decision, the petitioners immediately prepared a second memorial, for transmission to the Earl of Dartmouth, Secretary of State for America. This petition, dated 15th January, 1774, was enclosed to Francis Maseres, the former attorney general of the Province, and was by him presented to the Earl of Dartmouth, in March following. The noble Earl does not appear to have given much satisfaction to Mr. Maseres; but the latter; in acknowledging the receipt of the petition, conjectured that the English ministry were of opinion that

the state of the Province was not then yet ripe for the establishment of an Assembly.

These were not the only petitions with which the Earl of Dartmouth was at this time troubled. The Franco Canadians, while expressing every confidence in the British government, petitioned for a restoration of their ancient laws, privileges, and customs. They petitioned also to be admitted to a share of the civil and military employments in the gift of the government, from which it appears they were excluded. They petitioned further for an extension of territory, to include "all the upper countries known under the names of Michilimackinac, Detroit, and other adjacent places, as far as the river Mississippi," and for a re-annexation of the coast of Labrador, which formerly belonged to the Province.

The desire for an extension of territory arose out of a desire to improve the fur trade in the West and the fisheries in the East. The petitions were signed chiefly by the noblesse and other landed proprietors of the Province.

So far as can be ascertained, none of these last petitions received immediate attention from the home authorities; but the reports of the crown law officers on the state of the laws and proposed changes were more fortunate.

The result of the reports made by the British and Colonial crown officers was that the English ministry introduced, and, notwithstanding strong opposition and much excitement here and at home, passed the Quebec Act. (14 Geo. III. cap. 83.) The three chief points of objection were the recognition of the French law in civil cases—the want of a representative assembly—and the abolition of trial by jury. Without doubt, if England were to have consulted her own behests, irrespective of locality, not one of the three points would have existed.

The first was a concession to the Franco Canadians, forming as they did a majority of the inhabitants of the Province, made with a view to reconcile them to their new rulers and to disturb as little as possible landed titles and other near and dear interests. Some writers have contended that as property was secured to the inhabitants of Canada at the time of the conquest, the laws defining, creating and modifying it, were also retained: but the position has been much disputed.

The second, was the result of a dread there existed of confiding legislative power to a people, recently conquered, of strong predilections for their former nationality, and consequent dissatisfaction with British institutions. If this were the real cause, and it is said to have been, it is a cause of self-congratulation that it no longer exists.

The third, was a concession made from motives similar to the first; for it was said that a Franco Canadian gentleman would think himself degraded and more hardly judged by being submitted for life or limb to the judgment of his tradesman, than if he were put to the question and tortured by the king's authority.

The Quebec Act (14 Geo. III. cap. 83) was passed to make more effectual provision for the government of the province of Quebec. It recited the proclamation of 1763, and extended the limits of the Province. It also recited that the provisions made by the proclamation in respect of the civil government of the province, and the powers given to the governors and other civil officers, had been found upon experience to be inapplicable to the circumstances of the country. It enacted that the proclamation and commissions under which the government was then administered, and all ordinances made by the governor and council relative to the civil government and administration of justice, and all commissions to judges and other officers, should be revoked, annulled and made void, from and after 1st May, 1765. It also enacted that his Majesty's Canadian subjects might hold and enjoy their property and possessions, with all customs and usages relative thereto, and all other their civil rights, in as large, ample and beneficial a manner, as if the proclamation, commissions, ordinances and other acts and instruments had not been made; and that in all matters of controversy relative to property and civil rights, resort should be had to the laws of Canada —the old French law—for the decision of the same; and that all causes thereafter to be instituted in any of the courts of justice to be appointed within and for the said province, should with respect to such property and rights be determined agreeably to the laws and customs of Canada, unless varied by ordinances of the Governor General and Council, to be appointed as therein provided.

It authorized the owner of any lands, goods or credits in the province, having a right, to alienate the same in his life time, by deed of sale, gift, or otherwise; to devise or bequeath the same at his death, by his last will and testament, such will being executed either according to the laws of Canada or according to the forms prescribed by the laws of England. It recited that the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, had been sensibly felt by the inhabitants from an experience of more than nine years, during which it was uniformly administered; and enacted that the same should continue to be administered, and should be observed as law in the province, as well in the description and quality of the offence as in the method of prosecution and trial and the punishments and forfeitures thereby inflicted, to the exclusion of every other rule of criminal law or mode of proceeding thereon which prevailed in the province before 1764, subject to amendments or alterations by the Governor and Council.

It recited that it might be necessary to ordain many regulations for the future welfare and good government of the province, the occasions of which could not be foreseen, nor without much delay and inconvenience be provided for, without entrusting that authority for a certain time and under proper restrictions to residents in the province, and that it was inexpedient to call an Assembly; and therefore provided that it should be lawful for his Majesty, his heirs or successors, by warrant under his or their signet or sign manual, and with the advice of the Privy Council, to constitute a Council for the affairs of the Province, to consist of such persons resident in it, not exceeding twenty-three nor less than seventeen years, as his Majesty, his heirs and successors, should be pleased to appoint. Upon the death, removal or absence of any of the members of the Council, further power was given to constitute such and so many other persons as should be necessary to supply the vacancies.

To the Council so appointed and nominated, with the consent of the Governor, was given power to make ordinances for the peace, welfare and good government of the province. No direct or indirect power to levy taxes, except for the purpose of making roads, erecting and repairing public buildings, or similar purposes, was granted. All ordinances were, within six months after their passing, required to be transmitted to his Majesty for approbation. If disallowed, they were to cease and be void from the time that his Majesty's order in council with respect to them should be published in Quebec. No ordinance touching religion, or by which any punishment might be inflicted greater than fine or imprisonment for three months, was to have any force until approved by his Majesty. No ordinance of any kind was to be passed at any meeting of the Council where less than a majority of the whole Council was present. Nor was any meeting of the Council to take place except between 1st January and 1st May, unless upon some urgent occasion, in which case every member thereof resident at Quebec, or within fifty miles thereof, should be personally summoned by the Governor for the time being to attend the same. His Majesty reserved power to himself, his heirs or successors, notwithstanding the provisions of the Act, power by letters patent under the great seal of Great Britain, to constitute such courts of criminal, civil and ecclesiastical jurisdiction, within the province, and to appoint from time to time judges and officers thereof, as he, his heirs or successors, should think necessary and proper for the circumstances of the province.

Our thanks are due to the Reporter of the Common Pleas for reports of important cases published in this No. of the *Law Journal* in advance of the regular series.

An English *Law Journal* advocates the admission of the County Court Judges to seats in the House of Commons, "not of course allowing them to be elected for the districts where they preside." It is urged in connection with the proposed parliamentary reform. "Although," it is said, "we should be sorry to see any of our Judges distinguished as active politicians, yet it has often appeared to us that the present system of excluding all judicial officers, with the single exception of the Master of the Rolls, from seats in the House of Commons, is one which is very questionable both as regards its expediency and constitutional correctness. Law reform has lost some of its ablest, most judicious and most efficient advocates, owing to the adoption of this principle, more especially as regards legislation for the County Courts."

Lord Brougham has brought in a bill to enable defendants in criminal cases to tender themselves as witnesses to be examined upon oath. Lord Campbell and the Lord Chancellor strongly object to the proposition, contending that it would be a practical adoption of the continental practice of examining prisoners, so hateful to the English notions of fair play.

A suggestion made some time since by the *Law Times*, that attorneys should resume their professional costume, the gown, in all the Courts in which they appear as advocates, has met with universal approval amongst the profession in England, and in numerous instances the County Judges have requested the practitioners in their Courts thus to distinguish themselves.

L. S. Comstock, describing himself as "Counsellor-at-Law, 330 Greenwich street, New York," has sent us a circular, in which he advances very grave charges against a firm of Comstock Brother, also of New York. Several members of the profession in Canada having received copies of the circular have also forwarded their copies to us with a request to notice the same. The Comstock cases are too well known for the comfort of many suitors in Canada. They are generally proved by evidence taken under a commission issued in New York. Suffice it to say, that it is charged that the execution of these commissions is, not to say worse, grossly irregular.

Knowing nothing of the truth of the charges we cannot of course be expected to repeat them. Any one interested in Comstock cases may have a copy of the circular upon application to us.

We have received a letter from William Lennox, dated from some place which we cannot decipher, in the County of Londonderry, Ireland, asking for information about his son David Lennox, who in the month of August last wrote from Canada that he was a law student here, and that if living he would write again in a month, but has not done so. The father, who is greatly dissressed, writes to say that he has addressed several letters to the son but has not received any reply. Information as to the young man will be gladly received by us from any of our readers.

LAW SOCIETY, U. C.—HILARY TERM, 1859.

EXAMINATION FOR CALL, WITH HONORS.

JUSTINIAN'S INSTITUTES.

1. To what persons were curators appointed; and by whom was the appointment of a curator made.
2. What were "Servitudes?" Mention some of the principal real servitudes. How were they created?
3. Give a definition of the right of "*Usufruct*" in the Civil Law. How was an "Usufruct" created? How determined, and what things could have been made the subject of this right?
4. What was the enactment of the Falcidian Law?
5. On what ground could a "*donatio inter vivos*" after it had been completed, have been revoked by the donor.
6. Where several "*fide jussores*," or sureties, were bound each for the whole debt, could the creditor enforce the payment of the whole from any one? If one of several "*fide jussores*" so bound for the whole debt, voluntarily paid the whole, could he enforce contribution from his co-sureties? Give reasons for your answers.
7. What was "*novation*?"
8. Was a contract of sale, by which it was agreed that the price should be fixed by a third person, good in the Civil Law; and what was the consequence if the person to whom the question of price was referred, refused or became unable to fix it?
9. Could a mandatory or agent, after having accepted the office, renounce the performance of the duty delegated to him?

COOTE ON MORTGAGES.

1. From what dates does the Statute of *Limitations run* against a mortgagee out of possession?
2. Will the Court of Chancery in any, and what case, in taking an account against a *mortgagee* in possession, take it with annual rests?
3. Blackacre and Whiteacre are by separate deeds, at different dates, and for distinct debts, mortgaged to A., subsequently the same mortgagor mortgages Blackacre alone to *B.*; can *B.* redeem the mortgage on Blackacre without also redeeming that on Whiteacre?
4. What is the remedy given to an equitable mortgagee, who not being able to maintain ejectment, is desirous of applying the rents and profits in reduction of his debt?

DARTS' VENDORS AND PURCHASERS.

1 After the conveyance has been executed, can a purchaser, upon discovering a defect of title, in any case, obtain relief either at law or in equity otherwise than by action upon the covenants for title.
2. Will the Court of Chancery in any, and what cases, set aside a sale of lands for inadequacy of price only?
3. Does it follow that because a court of equity refuses specifically to perform a contract, that it will rescind it?
4. What is the effect of a registered judgment as a charge? What interest in real estate does it bind?
5. What must be shown as to a title to induce a court of equity to compel an unwilling purchaser to take it?

JARMAN ON WILLS.

1. Give a definition of the rule against perpetuities.
2. Under a devise of lands to A. and his children, A. having no children either at the date of the will, or of the testator's death, what estate does A. take?
3. What is the rule by which to determine whether or not a devise to a person in trust for another, gives the legal estate to the person named as trustee?
4. In what cases is parol evidence admissible to show the intention of a testator? Give instances.
5. In what cases are cross-remainders implied in a will? Give examples. Is there any difference between the construction of wills and deeds as to the implication of cross-remainders?
6. Explain the doctrine of constructive conversion?

WATKINS ON CONVEYANCING.

1. In whom does the legal estate vest if on a conveyance by bargain and sale, a use is limited to a person other than the bargainee? Give the reason for you answer.
2. What is a power simply collateral? What a power in gross? Give instances of each.
3. Of what property is a deed of "Grant" the appropriate form of conveyance at common law?

STORY ON PARTNERSHIP.

1. Give a definition of partnership, and illustrates the rule that partnership is a *voluntary* contract.
2. Where the same person is a partner in two different firms, can one of such firms sue the other? Will this rule affect the rights of the holder of a note or bill made by one of such firms to the other and endorsed over? Give your reasons.
3. In what cases will a person be liable as a partner to third persons, when he is not an actual partner?
4. Has one partner in the business of an attorney the power to bind the firm by bill or note? Give your reasons.
5. Is the absence of any express stipulation between the parties conclusive on the question, whether a partnership is at will or for a definite period?
6. State some of the distinctions between the rights of a partner and a part owner of a chattel.
7. Where there are running accounts between a firm and a customer, how will the ordinary rule of law, with regard to appropriation of payments by such customer, affect the liability of a retiring partner.

RUSSEL ON CRIMES.

1. What is the distinction between a principal in the second degree and an accessory; in what cases can there be no accessories?
2. Is a married woman liable for crimes which she commits in the presence of her husband, and why? Does the rule apply to all crimes? If not, state the exceptions.
3. Give a definition of larceny. Is *lucri causa* a necessary ingredient; at what time must the *animus furandi* exist to constitute the conversion of goods found a larceny.
4. What is the presumption of law as to the age at which a person is responsible for crime?
5. Mention some cases in which homicide is justifiable, and some in which it only amounts to manslaughter.
6. Define the crime of burglary. What is considered night for this purpose; does this depend on common law or statute?
7. If a prisoner is acquited on the ground of insanity, how should the verdict be returned, and what is the effect of such finding; is the question of insanity ever raised before plea?
8. If a servant is entrusted with property by his master and converts it, is this larceny or embezzlement? Give your reasons.

STORY'S CONFLICT OF LAWS.

1. Give a definition of the term "Domicil," and state some of the principal rules to be applied in determining the question of "Domicil."
2. By what law is the validity of a will of personality to be determined where the property bequeathed is situate in one country, the domicil of the testator being in a different country, whilst the will is made in the third?

3. Can an action be maintained in Upper Canada on a contract void under the Statute of Frauds but made in a foreign court by the law of which it is valid? Give reasons for your answers.

4. What is essential to make a foreign judgment an estoppel by the law of England? Give a short outline of the law of estoppel by foreign judgment.

5. Supposing a debt, not transferable by the law of Upper Canada, contracted in a foreign country, and there assigned over by the creditor to a third person, who by the law of the foreign country, could maintain an action as such assignee in his own name, who would be the proper person to sue in Upper Canada for the recovery of the debt?

6. Would [illegible] before marriage in Scotland, whose parents afterwards married, be considered legitimate in England? Give your reasons, and state how far the law of England is governed in cases of legitimacy by the law of the country where the birth takes place.

7. Are there any, if so, what exceptions to the rule, that a marriage is valid in England when valid according to the laws of the country where it was celebrated?

EXAMINATION FOR CALL TO THE BAR.

SMITH'S MERCANTILE LAW.

To what extent is an auctioneer the agent of the vendor and purchaser respectively?

2. What is freight, and under what circumstances is it payable?

3. What is the common law liability of a common carrier?

4. In what cases is the insured entitled to a return of the premium?

5. Is a warranty made after a sale binding? Give your reasons.

BYLES ON BILLS.

1. To what extent is an agreement to renew a note or bill written on a separate piece of paper binding between the original and subsequent parties respectively.

2. Upon what grounds, and to what extent, does a promise by an indorser to pay a note or bill after it becomes due, dispense with proof of notice of dishonour?

3. Is it necessary to present a bill or note payable at sight or on demand, or either of them, for the purpose of charging the maker or acceptor?

4. If a bill or note be re-indorsed to a previous indorser, has he any remedy against the intermediate parties? Give your reasons.

5. Where a note or bill is given to a single woman, who afterwards marries, who should indorse, and who should sue upon it during coverture?

BLACKSTONE'S COMMENTARIES

1. What is the meaning of a menial servant?
2. What are the duties of a coroner?
3. What is the difference between a denizen and an alien?
4. What are the two divisions of municipal law?

STORY'S EQUITY JURISPRUDENCE.

1. What is the nature of the equitable right of a married woman usually termed her "equity to a settlement?" Out of what property will a settlement be enforced? Will such a settlement be enforced against the husband's assignee for a valuable consideration?

2. What forfeitures for breaches of covenants in leases will courts of equity relieve against?

3. Upon the death of one of several co-partners, do his real or personal representatives become entitled to his share of the real estate belonging to the co-partnership? Give reasons for your answer.

4. Is a general assignment to a trustee in trust for the creditors of the settlor, and to which no creditor is a party, revocable? What will render such an instrument irrevocable?

5. What is requisite beyond the transfer itself, to perfect an equitable assignment of a chose in action as against subsequent assignees? Does this document apply to the assignment of equitable interests in real estate?

6. Will the Court of Chancery in any, and what cases, interfere at the instance of a private individual to restrain a public nuisance?

7. Mention some of the cases in which a bill in equity is demurrable unless the plaintiff's affidavit is annexed to the bill.

8. Will a bond, void upon its face for illegality, be decreed in equity to be delivered up to be cancelled? Give a reason for your answer.

9. When a debt for which a surety is bound, is due, and the principal debtor refuses to pay, has the surety any, and what remedy in equity to which he may have recourse without first paying the debt himself?

10. In whose favor will a court of equity aid the defective execution of a power?

WILLIAMS ON REAL PROPERTY.

1. What covenants for title should an ordinary vendor give? What covenants should a mortgagor enter into? What covenants is a purchaser entitled to from a trustee for sale?

2. What is the appropriate form of conveyance on a purchase by one joint tenant from another?

3. When a power is required to be executed by writing under hand and seal, attested by two witnesses, what should be the form of the attestation?

4. If the donee of a power having also an estate in the lands subject to the power, convey away his estate, can he afterwards execute an appointment in pursuance of the power, which will defeat the conveyance?

5. Under a devise to husband and wife, and their heirs, what will the wife surviving the husband take?

ADDISON ON CONTRACTS.

1. Can a covenant not to sue be pleaded as a discharge of the cause of action; if not, what is its effect? Is there any exception to the rule that a right of action once suspended is gone forever?

2. Where goods are obtained under a color of a purchase with fraudulent intention of never paying for them, what remedies are open to the vendor?

3. Can a contract sufficient to satisfy the Statute of Frauds, be collected from several distinct documents, and can the connexion between them be shown by parol evidence?

4. In what cases will the principal be liable for the negligence of his agent?

5. Mention some cases in which a master will, and some in which he will not, be liable for goods purchased on his credit by a servant.

TAYLOR ON EVIDENCE.

1. What papers is an attorney justified in refusing to produce under a *subpœna deus tecum?* If he refuses, and is not compelled by the judge to produce the papers asked for, can the party requiring them give secondary evidence of their contents; if not, what further steps must he take before he can do so?

2. State some cases in which a notice to produce is not necessary for the purpose of making secondary evidence admissible.

3. Is a witness who refuses to answer a question on the ground that it may criminate him, bound to show how his answer would have that effect? Give your reasons.

4. When a written receipt has been given, is oral evidence of payment admissible, and why?

5. To what extent is it permitted to give evidence impeaching the character of a witness, and what is the proper form of question for this purpose?

6. In what cases, and of what facts, is a dying declaration admissible evidence?

7. Is it necessary to object at all, and if so, to what extent, to inadmissible evidence tendered at Nisi Prius, in order to be allowed to make the reception of such evidence a ground for a new trial?

PRACTICE AND STATUTES.

Is there in Upper Canada any and what statutory enactment as to purchasers seeing to the application of purchase money?

2. What statutory powers has the Court of Chancery in Upper Canada over the real estate of infants and lunatics?

3. For what time does the Statute of Limitations run against a *cestui que* trust seeking relief in equity against a sale of real estate by an express trustee in breach of trust?

4. Can the Statute of Frauds be taken advantage of in equity in demurrer to the bill? Can the Statute of Limitations be so taken advantage of?

5. Is the misjoinder of co-plaintiffs an objection for which a bill will be dismissed at the hearing?

6. From what office can writs of summons in local and transitory actions respectively be issued?

7. Can an equitable defence be set up at common law in an action of ejectment, or in a case stated for the opinion of the court, without pleadings? Give your reasons.

8. What is the effect of the marriage of a woman plaintiff or defendant during the progress of the suit?

9. When a verdict is taken subject to arbitration, what is the method of enforcing the award?

10. Within what time must a rule enlarged from a previous term be mentioned to the court to prevent its lapsing?

11. *In what cases can the court make a compulsory reference to* arbitration, and at what period of a suit?

DIVISION COURTS.

OFFICERS AND SUITORS.

THE FORCED BENEVOLENCE.

We select the following letter from W. H. Serpell, Clerk of the Fourth Division Court of Brant, as a specimen of many communications received by us on the subject.

"May I trouble you with two or three suggestions of a nature which I think should engage the attention of the Legislature, especially as there is a bill before them at the present time to extend the jurisdiction &c. of the Division Court viz: the providing some suitable safe or other apparatus for the Court Books, Records, Monies, &c., which are continually increasing in the offices of Division Court Clerks, and also for building suitable Court Rooms for the holding of the several Courts in those Divisions where business up to a certain amount may be tried or come before the Court.

"*I know of at least one Division in this county where one* of the officers of the Court leases at his own costs and charges the buildings for the holding of the Court, and pays a high rent. Surely it is not asking too much of the Government when they are in receipt of such large amounts quarterly from this source.

"If the buildings referred to cannot be erected, some relief should be granted where the accommodation is obtained at the expense of private individuals.

"I imagine that you can render very material aid in this matter by calling the attention of our members to these and other facts connected with the Division Courts."

We have over and over again pointed out the great defects in the law, of which our correspondent most justly complains. The Division Courts are not private establishments. They are public tribunals for the administration of justice, established by law, regulated by law, and for the benefit of the whole community. The books of the Courts are not private property: they do not belong to the Clerk, whoever may pay for them. Once they are opened and used as Court books, they become public property; records as it were of the Courts. And in case of resignation or *removal of a Clerk, he would have no control* whatever over them. On the contrary, if he refused to give them up to his successor in office, he would be guilty of an offence under the Act, and render himself liable to severe penalties.

In the Superior Courts, books are furnished to the officers of the Courts at the public expense. Offices are provided for them, and all accommodation necessary for due and regular administration of justice. But the Division Courts, to which the main body of suitors resort, are left entirely unprovided for. Why this invidious distinction? Why this strange anomaly? All Courts of justice are equally under the State, and all should be placed on the same footing. The suitors in the small Courts pay quite as much in proportion towards the maintenance of the tribunals they resort to, as suitors in the Superior Courts. Let at least their own money be applied for their own benefit, if the necessary expenses we have referred to are not disbursed from the public purse.

There is something decidedly wrong in the state of things which throws upon the Clerk of a Court the expense of renting a building in which a public Court is to be held. There is no more reason that he should do so than any suitor in the Court.

Every dollar disbursed in this way is so much of a contribution from the individual Clerk towards supporting the administration of justice.

Is the country too poor to support the necessary establishments? If it be, then let not the Court fees be applied to any other purpose than the support of the Courts in which they are collected.

The Division Court Clerks are not over-paid by any means; and yet that "all things may be done decently and in order" in the Courts they are connected with, they must put their hands in their pockets and pay for public property and public accommodation.

We look upon it as exceedingly unfair that this *forced benevolence* should be squeezed out of Clerks; and the instances of it are very numerous. Occasionally a Town or Township Hall, or other building belonging to some private association, is allowed to be used for holding Division Courts; but *in all such cases it is a mere matter of sufferance* by courtesy, and the privilege is at any moment liable to be refused, by which much unseemly trouble and annoyance might be caused to officers and suitors.

Division Courts are often obliged to be held in taverns; and we know of more than one instance in which tavern-keepers have gone to the expense of erecting a building for their accommodation. The inducement for doing this is easy to conjecture; and the effect produced by the contiguity of a bar-room on the order and decorum of the Court may be imagined.

Such a state of things should not be allowed to exist; and we trust that this Session will not be allowed to pass without some remedy being applied to so great a grievance.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal,

Smithville, February 26th. 1859.

GENTLEMEN,—Please give your opinion of the following Case:—

The Bailiff of a Division Court has a summons against B. which requires personal service. B. knows it, and keeps out of the way, and for a time evades service. The Bailiff makes

another attempt to serve, and in doing so knocks at the door of B's. dwelling, which is fastened on the inside by a bolt sliding into a staple in the door-post, the staple flies out as the Bailiff knocks, the door swings open, the Bailiff enters the house and searches it for the Defendant B. without success (although B. is secreted in the house). Next morning B. goes to a Justice of the Peace and in his information alleges that the Bailiff burst the door open violently, entered, and rudely handled some articles in the house, which he contends at the hearing the Bailiff had no right or authority to do. That if the Bailiff can commit such acts without being liable to punishment, he (B.) has no security or protection, the house of the subject being no longer his castle.

The Bailiff pleads that under the provisions of the Division Court Act 1850, sec. 107—and the Extension Act 1853, sec. 14 he is entitled to six days notice in the latter, and one month's notice in former clause, if the Magistrates have any jurisdiction in such cases.

And to which the complainant B. replies that this is not a case that comes under either of the above clauses, and that the document in the Bailiff's hand at the time was not a warrant as mentioned in the Act, but only a summons.

Question 1st. Have the Magistrates jurisdiction in this case?

2nd. How far is a Bailiff justifiable in such cases in entering a house to such service?

3rd. Can the summons be considered as a warrant under sec. 14—Act 1853?

4th. If not a warrant is the Bailiff entiled to the notice mentioned in the Act?

Your reply will oblige, Yours obediently,

A. MORSE.

[This is as much a question of fact as of law. If the facts be established as stated there would be no case made out on which the Magistrate could act. If the facts *proved* bring the case within the Criminal law no notice would be necessary—the notice, &c. only applying to where a party seeks his remedy by action.

The 14 sec. of the Act of 1853 does not apply to a case of this kind.

As to other particulars, we must refer our correspondent to the proper head in THE BAILIFF'S MANUAL which he may find in the back numbers of this Journal.—EDS L. J.]

To the Editors of the Law Journal.

LONDON, March 15, 1859.

GENTLEMEN,—Your opinion on the following in the next number of your Journal would much oblige.

A. is Bailiff of a Division Court and an execution is placed in his hands against the goods and chattels of B., and under it he goes to B.'s premises to make a seizure, but finds no property, or otherwise finds property and levies, but afterwards finds that it is covered by a bill of sale. B., however, promises to pay the Bailiff and the Bailiff calls on B. several times for the money, but has after all his trouble to return the execution "no goods." B. afterwards calls at the office to pay the money: can the Clerk charge him with the Bailiff's fees, or if B. pays the money after the writ has been returned can the Bailiff lawfully charge his fees?

I beg to remain, your obedient servant,

T. B.

[The execution having been returned "no goods," we do not see how the Clerk could charge the Bailiff's fees. The Bailiff has no right to receive the money after the writ had been returned.—EDS. L. J.]

To the Editors of the Law Journal.

BELLEVILLE, March 15, 1859.

GENTLEMEN,—As a somewhat unusual case occurred in a Division Court in this county, may I take the liberty of submitting it to you for your opinion,—as such cases may again come up, and your opinion will be of advantage to those of your numerous readers who consult the *Law Journal* for points of practice in Division Court cases.

A sues B and obtains a Judgment. Both live in the same Division—but in a different one from where the Judge resides. B's agent, who conducted the case in the court and who resides in Belleville, makes an application for a New Trial. Seeing A in town, he serves him with copies of the affidavits and of the application for a New Trial, and then with the proper affidavits of service, *hands the original to the Judge, instead of leaving them with the Clerk of the Court where suit was brought.*

Opposing affidavits are filed by A. The Clerk of the Court where the suit was brought, never saw the application for a new trial, nor knew (officially) of it; so proceedings were not stayed at the proper time; he issued an execution against the goods of B. B, thinking a new trial had been refused, immediately paid the money to the Bailiff, and it was paid over to the Plaintiff. After A obtains his money, the Judge orders a new trial—and at the second trial the judgment is for the Defendant, B.

Will the judgment be for the amount that B has paid over? How can he recover the money which he paid under the compulsion of legal process? Could A be compelled to obey a Judge's order to pay the money over, or could B recover the money from A by another suit for money had and received? Has B any remedy—and if so, will you be kind enough to inform me what it is?

It is clear that B's application for a new trial was informal, being contrary to the 52nd Rule of the "Rules and Orders for Division Court Practice," but this irregularity was waived by A's filing other affidavits and opposing the application.

Yours, &c.,

QUERIST.

[This is really a very complicated case, and is a very palpable proof of the necessity of suitors and Judges, and officers adhering to the practice, which was especially devised to avoid difficulties of the kind, but the *irregularity* in the application for a new trial was cured by the plaintiff A "filing opposing affidavits." It does not appear whether the Judge made any order to stay the proceedings upon the application being left with him, if he did, we presume it was not communicated to the Clerk of the Court.

We take it for granted, that the order for new trial expressly set aside the judgment previously rendered, and also, that A appeared at the second trial when judgment was rendered for B.

There was then no judgment left in favor of A, and in conscience, he has no right to retain the money that was paid over to him. By appearing at the second trial, it may well be contended he has abandoned his right to retain the money paid, that he is estopped as it were by his own act from denying the plaintiff's right to recover it back.

In the Superior Court, an application might be made for a Rule to refund the money improperly obtained, and the *principles* of practice in the Superior Courts are applicable to the Division Courts. The machinery of the Division Courts is not suited to the practice by rule and order, and the ordinary mode of obtaining redress is by action. We are of opinion, therefore, that B, after demand, may maintain an action for the money against A. At the trial it will be for the Judge to say under all the circumstances, and taking the laches of B into account, whether B is entitled, in equity and good con-

science, to a judgment for any thing beyond the bare amount of the money he, B, actually received.

Our correspondent does not say what subsequent action has been had in the case—if any there had been it should have been stated.—Eds. L. J.]

THE MAGISTRATES' MANUAL.

BY A BARRISTER-AT-LAW—.

Concluded from page 62, Vol. V.

Supplement—Summary Trials.

Transmission of papers.—It is the duty of the Recorder to transmit the conviction, or a duplicate of a certificate of dismissal, as the case may be, with the written charge, the deposition of witnesses for the prosecution and defence, and the statement of the accused, to the next Court of Quarter Sessions for the County or Union of Counties, there to be kept by the proper officer among the records of the Court.*

Evidence of conviction, &c.—A copy of the conviction or certificate of dismissal, as the case may be, certified by the proper officer of the Court of Quarter Sessions, or proved to be a true copy, is sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceeding whatever.†

Effect of conviction.—A conviction under the summary powers conferred upon a Recorder or Police Magistrate, is to have the same effect as a conviction upon indictment for the same offence would have had, except that no such conviction is to be attended with forfeiture.‡

Waiver of formal objections.—No conviction, sentence, or proceeding had in pursuance of such summary powers, is to be quashed for want of form. So no warrant of commitment upon a conviction is to be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same.§

Effect of certificate of dismissal or conviction.—Every person who obtains a certificate of dismissal, or is convicted in pursuance of such summary powers, is to be released from all further or other criminal proceedings for the same cause.‖

Restitution of property stolen.—The Recorder or Police Magistrate by whom any person is so convicted, may order restitution of the property stolen, taken, or obtained by false pretences, in those cases in which the Court before whom the person convicted would have be been tried, but for these summary powers may be by law authorized to order restitution.¶

Recorder's Court open to public.—Every Recorder's Court for the purpose of such summary trials, is to be an open public Court, and a written or printed notice of the day of holding such Court is to be posted or affixed by the Clerk of such Court upon the outside of some conspicuous part of the building or place where the same is held.**

Disposition of fines.—Every fine imposed by a Recorder in pursuance of his summary powers, is to be by him paid over to the County Treasurer for County purposes.††

* 20 Vic. cap. 27, sec. 7. † *Ib.* ‡ *Ib.* sec. 11. § *Ib.* sec. 13. ‖ *Ib.* sec. 13. ¶ *Ib.* sec. 8. ** *Ib.* sec. 9. †† 22 Vic. cap. 7, sec. 8.

U. C. REPORTS.

QUEEN'S BENCH.

HILARY TERM, 1859.

In re The Canada Trade Protection Society.

Trade Protection Societies—Public Records—Duty of Clerk of the Crown—Searches.

The Records of this Court are public, and such as any one has a right to search.

The Clerk may, upon payment of the usual fees, if he pleases, permit a general search of the books for a particular month, without naming any individual or individuals.

Semble, the regular business of the office must have precedence over that which appears to be for the purpose of private information, not connected with the regular business.

Harrison made an application for the direction of the Court to the Clerk of the Crown and Pleas of this Court, to allow a person to inspect the docket books and other books of the Court containing entries of judgments for the month of December last, or to furnish the information for the said month upon payment of the usual fees.

It was alleged upon affidavit that the Clerk had declined to allow the searches to be made, or to furnish such general information.

The Court directed Mr. Harrison to give the Clerk of the Crown notice for some particular day of his application, in order that the Clerk of the Crown might be heard by Counsel, if he desired to do so.

Such notice was given, and the Clerk of the Crown informed the Court that he made no objection to allow the searches to be made, if the Court should consider that any person has a right to make a demand for such general information.

Eccles, Q.C., and with him *Harrison*, supported the application.

Burns, J., delivered the judgment of the Court.

The avowed object of seeking this information is that, if it be obtained, the parties intend to publish it, as they say, for the mutual protection of the members of the Society. At present we have nothing to do with any question how far parties may or may not be liable to any individual for making known to the world the extent of liability which the records in the office may shew. No doubt the judgment books in the Crown office are to be allowed to be inspected by any one who pays the proper fees for the purpose; and the only question is, whether a wholesale or general search such as contemplated be allowable.

We do not see upon what principle we can deny a person the right to make five hundred searches continually, any more than he could be denied five, or even one, if he asked to do so and offered the fees. It is not for the Clerk of the Crown to enquire the purpose for which the information is required. These books are public property, and required for the express purpose of affording public and general information.

In stating this, it must be understood that the Clerk of the Crown has also a right, in order to carry on the public business of the offices, to have the use of the books, and other persons have a right to make searches in those books, and the regular business of the office must have precedence over that which appears to be for the purpose of private information, not connected with the regular business. No person would be justified in claiming a right to be continually making searches, so that the regular business of the office would be interrupted or suspended.

As to the time when such general information may or can be afforded without such interruption, the Clerk of the Crown must judge. The internal economy of his office, so that the public business is efficiently carried on, is a matter for his consideration; and of course the Court will give no direction in the matter, or interfere with him, unless an application be made by some of the litigating parties or persons interested in some matter of which any one has a right to complain, and of which the Court will take cognizance.

Subject to this duty, which we conceive is the first duty the Clerk of the Crown owes the public in the performance of the business of his office, we do not see that he can properly refuse the duty of giving or allowing such information as the public records afford, upon being paid the proper fees.

This should be governed by another principle also, which is this, if a person asks for a general search of the books for a particular month, without naming any individual or individuals, we apprehend the Clerk of the Crown may properly refuse to have his time and that of his Clerks to be taken up with giving that information. He may give the information if he pleases, but I think we should not hold him bound to do so. If the search be desired in respect of A. B., or C. D., or E. F., or five hundred persons, I apprehend the Clerk of the Crown could not legally refuse to permit the searches to be made.

I think we are not called upon to make any order in the matter as it stands now.

SIDDALL v. GIBSON ET AL.

Reported by C. ROBINSON, ESQ., *Barrister-at-Law.*

Division Court—Prohibition—13 & 14 Vic., chap. 53, sec. 23.

It is no ground for a writ of prohibition to a division court that the judge decided against law and good conscience, if he had jurisdiction in the case.

The affidavit on which such writ is moved for should not be entitled in any court.

Semble, that a recovery should not be allowed in such court against an indorser of a promissory note without proving either presentment or notice.

Simpson moved for a writ of prohibition to the judge of the County Court of the County of Lambton, and of the first Division Court of the said county, to restrain his proceeding in this case.

The case was tried on the 10th of August, 1858, and a verdict was rendered for the plaintiffs on a demand against John Gibson, one of the defendants, as indorser of a promissory note for $40, payable in six months.

The complaint was that the plaintiff was suffered to recover when no evidence was given of presentment of the note or notice of non-payment. The defendant in court raised the objection. Judgment was entered on the 10th of August.

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

The affidavit on which this motion was made should not have been entitled in any cause.

But, independently of this irregularity, we cannot properly grant the prohibition. There is no excess of jurisdiction. It is not denied that the defendant indorsed the note, but on the return of the summons he attended, and objected that it was necessary to prove presentment and notice. The judge was then called on to consider whether the plaintiff could recover without giving such evidence, and he determined that he could, probably considering that under the 23rd clause of 13 & 13 Vic., ch. 53, he could determine that the defendant as indorser was in conscience liable upon the note, whether it had been presented and notice given or not. Undoubtedly in this court we could not so have determined; but admitting that in determining as he did the judge determined wrong, both as regarded the law and the good conscience of the case, yet that is not a ground for prohibition when he had jurisdiction, as he certainly had here.

Though we think he should have insisted at least on evidence of presentment, yet we cannot interfere by prohibition consistently with the legal principles which govern this remedy, because the judge had jurisdiction to dispose of the case according to his ideas of law and good conscience.

We refer to *Toft* v. *Rayner*, 5 C. B. 162; *Ellis* v. *Watt*, 8 C. B. 615; and *Zohrab* v. *Smith*, 5 D. & L. 639.

We have been asked also to grant a *certiorari* to remove the case; but under the 23rd clause of the Division Court Act that lies only before judgment, and with a view to trial in the superior court.

Rule refused.

IN RE THE SCHOOL TRUSTEES OF COLLINGWOOD AND THE MUNICIPALITY OF COLLINGWOOD.

Mandamus to levy rate for schools—Demand and refusal.

Mandamus to a municipality to levy a rate for school purposes refused, because the demand and refusal of a *certain sum* was not sufficiently shewn.

Quære, however, whether a mandamus would lie in such a case, the trustee having power themselves to raise the money.

Boomer applied for a *mandamus* to compel the municipality to levy a rate for school purposes for 1858.

The facts are stated in the judgment of the court, delivered by

ROBINSON, C. J.—The affidavits shew that the school trustees in march last called upon the municipality to issue debentures for £1,000, currency, redeemable in twenty years, at six per cent., in order to borrow money for meeting an estimate submitted to the municipality of moneys required for school purposes, and to provide a sinking fund.

Afterwards the trustees changed their minds, and requested the municipality not to act upon their requisition.

Further circumstances then took place, and it appears to us, as the result of what has occurred, that besides the fact that a *mandamus* cannot be said to be a necessary remedy in any such a case, because the statute gives to the trustees themselves power to raise the money, there has not been an explicit call upon the municipality to raise a *certain sum* as remaining yet to be supplied after the payments which the trustees have made to teachers, and limiting the requisition to such amount as the trustees have resolved to insist upon, after changing their first resolution upon the subject.

They should have specified a certain sum as being now required, and on refusal to provide that sum they would be in a condition to apply, subject to the question whether they cannot raise the money by exercising the powers which the statute gives to themselves as trustees; and if so, whether the *mandamus* should nevertheless go.

IN RE MCPHERSON AND BEEMAN.

Assessors—Appointment of—Quo Warranto.

The council *by resolution* appointed one B. assessor, who was sworn into office and made an assessment. This appointment was made by a vote of three against two. The election of one of the three was afterwards set aside, and by a subsequent vote the resolution was rescinded, and a by-law passed appointing another assessor. Both made assessments, and much confusion arose.

Under these circumstances, the court granted a *quo warranto* to determine the validity of the last appointment.

Read obtained a rule on defendant to shew cause why an information in the nature of *quo warranto* should not be exhibited against him, to shew by what authority he claimed to be an assessor of the incorporated village of Napanee, in the county of Lennox and Addington, on the ground that he was not duly elected or appointed to the office of assessor; and that at the time of his pretended appointment the office was full, and no vacancy in the office of assessor for the said village had occurred by death or removal of residence of John Benson, the assessor therefore appointed; and that the appointment of the said Beeman was made at an irregular and unauthorised place of meeting of the council, and at a meeting not duly held or authorised.

The applicant swore that he was a resident freeholder of the village of Napanee, and reeve of the same.

On the 18th of January, 1858, Donald McPherson and four other members of the council elected for 1858 for the village of Napanee, met and were organised and sworn into office. They then by resolution appointed Benson assessor for the municipality, and he was sworn into office, and gave security, and had made an assessment for the year. No By-law was passed appointing Benson.—This appointment of the assessor, and the appointment of the other officers for the year, was made by the votes of Bartell, Martin, and the reeve; the other two members, Detlor and Miller, voting against all the appointments.

Bartell's election had been contested by Mr. Forward, who was afterwards adjudged to be entitled to be returned in place of Bartell, and took his seat on the 15th of March.

The meeting on that occasion was held at the usual place, being the council room in the market building; but a great crowd attending, as was alleged, it was moved by Detlor, seconded by Miller, that they should adjourn to the town hall. The reeve declined to put the question. Mr. Detlor then moved, seconded by Miller, that the by-law or resolutions appointing officers be rescinded, and a new by-law made appointing other officers for the current year. The reeve declined also to put that resolution, deciding that it was out of order, there being no vacancy in the offices by death, resignation, or removal.

Detlor, Miller, and Forward, then left the council, and went to the town hall. The reeve and Martin remained a short time, and then adjourned for want of a quorum.

Detlor, Miller, and Forward, then, in the town hall, proceeded to business, in the absence of the reeve and Martin. They there

passed a resolution rescinding all the resolutions that had been passed appointing officers, including the appointment of Benson to be assessor; and suspending rules of proceeding, they passed a by-law appointing defendant Beeman assessor, who was sworn into office, and had made an assessment for the year. So there were two assessments made by these two persons, thus appointed, differing from each other, and much confusion and perplexity in consequence. This was the substance of the case on the part of McPherson, the relator.

The councillors who appointed Benson justified their conduct by stating that Bartell's seat being contested, they desired that all appointments to office should be suspended till it should be determined whether he should retain his seat or Forward be returned instead; but that they were over-ruled in this, and that afterwards, when Forward was seated, they rescinded all the appointments and made others.

Adam Wilson, Q. C. shewed cause. *Read*, contra, cited Cole on Quo Warr. 177; Rex v. Clark, 1 East 38; Rex v. Morris, 3 East 213.

The statutes referred to are noticed in the judgments.

ROBINSON, C. J.—There are several questions arising on these proceedings which require to be settled: *first*, as to whether Benson ever was legally appointed, being appointed by resolution only, and not by by-law, nor, as appears, under the corporate seal,

Then, if he was legally an officer, it is a question whether he could be removed by the council in March last at their pleasure, or for any reason that is shewn.

And whether Beeman has been regularly appointed, supposing that it was in the power of the council to remove Benson and appoint another assessor in March, is another question.

We should therefore grant the information, unless there is legal difficulty in the way, and we do not think there is any such difficulty. The office is of a public nature. It highly concerns the inhabitants of the municipality that the duties should be discharged by a person having legal authority to discharge them; and when we find that there are two persons in the office, which can be filled by one only, and that the council are divided in opinion upon the question which of the two could legally act in making the assessement, it is fit that the legal right should be solemnly adjudged.

I think an information in the nature of *quo warranto* may go, in the case of such an officer, under the statute 9 Anne, ch. 29, and that it might go at common law.

BURNS, J.—The question involved in this application is an important one to have settled, for it appears by the facts disclosed in the affidavits that the safety and integrity of all the municipal institutions of the country are at stake if similar proceedings can be allowed, and if the defendant's appointment should be held to be legal, and I think would call for the interference of the legislature.

A seat of one of the members of the council was questioned, and proceedings were taken, the result of which was that he was unseated, and his opponent put in his place. While he held the seat, and was acting *de facto*, the assessor and other officers of the corporation were appointed to office, but when the opponent was seated that vote changed the majority which had appointed the village officers, and then they undo what had been done before.—The ground for it is stated by themselves thus: "That whereas the right of Mr. Bartells to a seat as a member of this council has been a matter of dispute since the last elections, and the courts have decided that Mr. Forward was duly elected, and therefore entitled to the seat, and pending this decision Mr. Bartells was sitting as a councillor; and whereas certain resolutions have been passed naming certain persons as officers of this council, and such resolutions were adopted by and in consequence of the votes of Mr. Bartells, and against the remonstrances of two members, who alleged and urged that there was no necessity for such haste in the matter, as the former officers would according to law remain in office until superseded, and it would be better and more seemly to defer the appointments until a decision was obtained as to the contested seat: be it therefore resolved that the several resolutions &c., be rescinded, and such appointments cancelled,"

The 28th section of 12 Vic., ch. 81, requires the councillors, *so soon as conveniently may* be after their own elections, to appoint the assessor of the village. The reason for this is obvious, because, under the 24th section of 16th Vic., ch. 182, the assessor is required to complete his assessment between the 1st of February and no later than the 15th of April in each year. Waiting until it would be seen whether the court would declare the seat of some particular member vacant certainly would be no compliance with the act of parliament, that the appointment should be made as soon as convenient.

Again, it is a question raised whether the council, once having appointed an assessor, can cancel that appointment at their mere will and pleasure. They invoke to their aid as authority for it the 6th sub-section of section 31 of 12 Vic., ch. 81; but that section says they may appoint a sufficient number of pound-keepers, fence-viewers, overseers of highways, road surveyors, and of such and so many other officers as may be necessary for carrying into effect the provisions of the act, and in like manner displace all or any of them, and appoint others in their room. If this provision covered the appointment of the assessors and collectors there would have been no occasion for the 28th section at all, but we see that whole section applies exclusively to those two offices, and only gives the council authority to make a new appointment within the year, when there shall be a vacancy by death or removal of residence from the municipality; and the vacancy is to be filled up at the next meeting of the council—that is, after the vacancy—or as soon as conveniently may be. If it were necessary to determine the matter finally now, I should say I had no hesitation in pronouncing that the legislature advisedly placed those two officers named upon a different footing from the other officers named in the 5th sub-section of section 31, for it can easily be seen to what utter confusion the proceedings of the municipality may be put by a wanton change of the assessors and collectors in the midst of their duties.

Besides this, the affidavits shew other things with respect to the manner in which the defendant had been appointed, and the other assessor was attempted to be removed, which might properly be animadverted upon; but as the rule should be made absolute for an information in the nature of a *quo warranto*, if the defendant thinks proper to defend the action, and thus place the proceedings upon record, it may be time then to speak of them. If the defendant does not, however, wish to contest the matter further, or take the formal opinion of the court upon the subject, he may enter a disclaimer to the office, upon being served with the writ.

McLEAN, J., concurred.

Rule absolute.

COMMON PLEAS.

HILARY TERM, 1859.

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

GLADSTONE ET AL v. FRENCH ET AL.

Sheriff—Payment of money into Court—Per Centage.

Semble, that a Sheriff is not authorized to pay money made on a *fi. fa.* into court. *Held*, that the per centage chargeable upon money paid into court in ordinary actions, could not be deducted in such a case.

The plaintiffs issued a *fi. fa.* to the Sheriffs of the United Counties of Stormont, Dundas and Glengarry. The Sheriff returned money made as follows:

Damages	£1569	8	10
Costs taxed	14	1	10
	£1583	10	8
Interest from 9th January, 1858	92	18	7
Writs	2	5	0
	£1678	14	3

Some difficulty arose between him and the plaintiffs' attorney, the latter insisting on his right to have the money paid to him at his office in Toronto, but declining to incur the risk of its being transmitted by post, or to deduct the per centage which a bank would charge for a draft. Thereupon the sheriff sent up the money by express, the charges of which were £1 12s. 6d., and he paid the balance, after deducting these charges, into court—£1677 1s. 9d.

The plaintiffs' attorney then applied for the money, and the Master paid it to him, deducting $67 8c., *being* 1 *per cent.* on the money paid in, under the authority of the Act 2 Geo. IV. c. 1, s. 26, and $4 under the Schedule of Fees in the Rules of Court, and 4d. for filing the writ; and he then applied to have the $67 8c. paid to him as improperly charged.

DRAPER, C. J.—That the sheriff had no right, *sua sponte*, to pay the money into court, is settled by *Shuter v. Leonard*, 3 U. C. Old Series, 314. If his doing so causes a loss to the plaintiffs, they are not protected by the act being done in the proper and necessary discharge of his duty. But I am of opinion that the plaintiffs are not chargeable with the 1 per cent. on the sum thus paid in. I think the 25th and 26th sections of the Act must be read together, and authorize this per centage only in cases where a defendant pays money into court in discharge of a pending action. It may be found that under the operation of subsequent statutes, though not so expressed directly, the whole of this provision as to payment of money into court is not suspended. But it is unnecessary to examine that question now, or to intimate an opinion one way or the other. I have no doubt the charge of $4, and that for filing the writ, is properly made. The per centage retained, claimed as payable under the statute, should be returned to the plaintiffs.

ROBINSON v. BELL.

Ejectment—Amendment at Nisi Prius.

Held, that neither under s. 68 nor s. 291 has a Judge at Nisi Prius power in an action of ejectment to strike all the plaintiffs on the record and substitute others. *Quære*, do ss. 67 and 68 of the C. L. P. Act, 1856, apply to actions of ejectment.

On the 6th of May, 1858, Philip Vasbinder, Executor, and Amelia Robinson, Executrix, of the last will and testament of Thomas Robinson, deceased, issued an ejectment summons against the defendant, claiming to be entitled to the south half of lot No. 11, 2nd concession, north side Talbot road, Township of Middleton, to which summons the defendant duly appeared on the 18th June following.

The record was made up and entered for trial, setting out the writ as above. The title on which the claimant intended to rely, was under the will of Thomas Robinson; but on examining the will it was found this lot was not mentioned in it. Thomas Robinson died about three years before the trial, which took place at Simcoe, on 21st September, 1858, before the Chief Justice of Upper Canada.

The plaintiffs' counsel applied before the trial, but after the record was entered, on filing the consent of the plaintiffs named in the writ, and of Charles Robinson, Philip Robinson, Edward Robinson, and of John R. Havens, who signed the consent in his own name, and that of his wife Cornelia; and on shewing that the said Charles, Philip, Edward, and Cornelia were the only children and heirs at-law of Thomas Robinson, to strike out the names of the plaintiffs, the executor and executrix, and to insert in lieu thereof the names of the four heirs and of John R. Havens.

It was sworn that the defendant executed a mortgage in fee of the premises in question to Thomas Robinson, dated 7th December, 1852, on which default in payment had been made.

Under the circumstances, the Chief Justice allowed the amendment expressing doubt. The trial proceeded, and the mortgage was proved; and the Chief Justice gave leave to the defendant to move thereafter if so advised; and the plaintiffs—the new plaintiffs—had a verdict.

In Michaelmas term, *James Paterson* obtained a rule *nisi* to enter a non-suit or verdict for the defendant on the leave reserved or for a new trial without costs, on the ground that the original plaintiffs had no title, and that the learned Chief Justice had no authority to change the names of the plaintiffs, changing the style of the cause, and the nature of the title of the plaintiffs: that the notice of title was not amended, and the title as heir-at-law was therefore not admissable, because not set forth in the notice of title: and that that the plaintiffs, whose names were substituted as heirs, were infants, and could not sue except by guardians or prochien amy.

In Hilary term, *McMichael* shewed cause. He urged that the amendment was allowable either under the 68 section of the C. L. P. Act, 1856, or the 291 section of the same Act: that the real question in controversy was the defendant's right to hold possession after default on his mortgage to Thomas Robinson, the notice of title explicitly stating that the right to eject him was founded upon that mortgage: and that that the amendment was only equivalent to adding a new demur under the old practice.

Paterson, contra, argued first, that these powers of amendment did not extend to actions of ejectment which were *sui generis*, and were specially provided for under the C. L. P. Act, 1856; and, second, that this was not an amendment, but the instituting a new action, and not authorized at Common Law or under the Statute.

DRAPER, C. J.—The case was argued as if the amendment took place at the trial, *i. e.*, after the jury were sworn; and having been made in that manner, that leave was reserved to the defendant to move to enter a verdict or non-suit, and the motion has been made accordingly.

I find on reference to the note of the learned Chief Justice, that he was applied to to allow the amendment, and as I understood his note did make it under the 67th section of the C. L. P. Act, 1856.

The 67th gives power to the Court or a Judge, at any time before the trial of the cause, to "order that any person or persons not *joined* as plaintiff or plaintiffs in such cause shall be so joined, *or* that any person or persons originally *joined* as plaintiff or plaintiffs shall be struck out from such cause if it shall appear to such Court or Judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing under his, her or their hands, to be joined, *or* that the person or persons to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be struck out, and such amendment may be made upon such terms," &c; "and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs, shall be subject to any terms imposed as aforesaid, to the same as if such person or persons had been originally joined in such cause."

Under this section the Judge would, I apprehend, proceed by summons and order at Chambers The authority is not apparently intended to be exercised by the Judge sitting at Nisi Prius.

The next section (68), "in case it shall appear at the trial that there has been a *misjoinder* of any plaintiffs, or that some person or persons not *joined* as plaintiff or plaintiffs ought to have been so joined, *and the defendant shall not at or before the time of pleading have given notice in writing that he objects to such non-joinder*, specifying the name or names of such person or persons, such *misjoinder* or *non-joinder* may be amended as a variance at the trial by any Court of Record holding plea in civil actions, and by any Judge sitting at Nisi Prius." In like manner as variance under the Act of Upper Canada, 7 Wm. IV cap. 3, if it shall appear "that such misjoinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done," &c., concluding in almost the same words as sec. 67.

Whether the amendment was made by a Judge in Chambers or as sitting at Nisi Prius, the case has been argued before us exclusively on the power of the Judge in either event. No objection being urged that no Judge's order is shown, or that no motion was made to rescind a Judge's order, but a motion to enter a non-suit or verdict for defendant, which leave is not in express terms reserved in the notes, but only that defendant's counsel if he "chooses can move thereafter."

I think the doubt expressed by the learned Chief Justice was well founded, and that neither section above quoted was intended to permit the striking out the names of all the plaintiffs named in a writ of summons, and inserting a new set of plaintiffs altogether.

To take the first of these sections, this order is not to join any person or persons as plaintiffs who were not joined; for this is a substitution of one set of plaintiffs for another, not a joining of one or more additional plaintiffs to those already named in the suit; and the concluding words of the section leave no room for doubt, for they speak of the liability of the person or persons "who shall have been added as *co*-plaintiff or *co*-plaintiffs."

This power of amendment, therefore, seems to me clearly to be confined to adding new plaintiffs to those already named. It extends no further. The next power in this section is to order

"*that any person or persons originally joined as plaintiff or plaintiffs* shall be struck out." Now, this power is disconnected from the power to add, and read as so disconnected it must necessarily mean that *some* of the parties originally joined as plaintiffs may be struck out; not all, or that would be an end to the suit. Admitting that in the same suit an order might be made (as I incline to think it might) to add plaintiffs, and also to strike out plaintiffs, I think the power to strike out must be qualified by the power to add; and if this be, as I am clearly of opinion it is, a power to join new plaintiffs as co-plaintiffs with some or all who were originally named, then the whole of the original plaintiffs cannot be struck out; and this I take to be the clear intention expressed.

But it is still clearer under the 68th section: for there the alternatives are, a misjoinder of plaintiffs, or a non-joinder of persons who ought to have been made plaintiffs. Now this case appears to me not to be within either. By the term misjoinder of plaintiffs I understand that there are some who should not have been plaintiffs joined with others who are properly named. The error is not bringing an action in the name of parties, *none* of whom have a right to sue, but only *some* of whom have no such right. And when the Statute speaks of persons not joined who ought to have been joined, I can only understand the language as meaning that the action as originally brought contained the names of *some*, but not of *all*, who should have been joined in it. It is obvious that neither of these definitions are applicable to the present case, and therefore I think the amendment was not authorized by this section.

The plaintiffs' counsel, however, submitted that at all events the amendment was warranted by the 291st section of the C. L. P. Act, which authorizes the Courts, and every Judge thereof, and any Judge sitting at Nisi Prius, "at all times to amend all defects and errors in any proceedings in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not." "And all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy *between the parties* shall be so made.

I do not think this section is applicable. In construing the corresponding section of the English Act, (*See Wilkins* v. *Reed*, 15 C. B. 205; *see*, also, *Ritchie* v. *Van Gelder*, 9 Exch. 562), MAULE, J., says, "It often happens that there being a controversy, the parties are unable to try that controversy properly, because the pleadings between them do not correctly shew upon the record what the controversy is. *It was to obviate that inconvenience that this section was framed.*" Now apply that to the present case. The 234th section of the same Act declares that the question at the trial shall (with some exceptions having no bearing on this case) be "whether the statement in the writ of the title of the claimant is true or false." Now, it cannot be said that this record, as originally framed, did not bring up that question; the controversy was, whether the claimants had title to eject the defendants, and it was as completely varied as it could be. The amendment raised a different controversy, no longer touching the "real question in controversy *between the parties*" to the suit as first brought; but raising a question of title between other parties.

In *Wickens* v. *Steel*, 2 C B. N. S. 488; 3 Jur. N. S. 671, the Court held that the corresponding section of the English Act did not apply to the case of misjoinder of defendants, which was provided for by the 37th section of that Statute, the 70th of ours. A similar decision was made in *Robson* v. *Doyle*, 3 El. & Bl. 396, and the reason given by CROWDER, J., is expressly applicable to the misjoinder of plaintiffs, for if the amendment could be made under section 291 of our Act, it would override the 67th, 68th, and 70th sections, and the conditions annexed to the amendment by the earlier sections could not be secured.

I do not any weight on the supposed analogy of adding a new demise in an action of ejectment under the old practice. The action was then the mere creation of the Court moulded to attain by a fictitious proceeding, the truth as to alleged titles to land; and with that view, amendments or changes in averments of matters wholly fictitious, were permitted. The amendment now in question is in an action no longer fictitious, and depending on the powers conferred by Statute.

The objection raised by Mr. Paterson that the 67th and 68th *sections of the Act do not apply to ejectments*, receives some support from the language of the 221st, 254th, and 255th sections, but I do not rest my judgment on that ground.

For the other reasons given, I am of opinion the amendment should not have been allowed. The consequence would have been that the original plaintiffs must have failed, as they claimed under a will which passed no estate or title to them. I think therefore the rule for a non-suit should be made absolute.

ELECTION CASES.

(Before His Honor JUDGE FAIRFIELD, of the County of Prince Edward.)

THE QUEEN UPON THE RELATION OF ROBERT JOHNSTON THE ELDER v. JOHN MURNEY ESQ., AND WILLIAM CURRY RETURNING OFFICER.

Municipal Act— Voters' Resignation— Voters.

Held,—1. That reading Statute 16 Vic., cap. 182, sec. 17. in connexion with the Municipal Act, non-resident freeholders whose names do not appear on the last revised Assessment Roll are not entitled to vote.

2. That where a relator who was himself a candidate, alleges not only that the person declared elected was illegally elected, but that he the relator was duly elected, the latter cannot be deprived of his seat by the resignation of the former.

3. That a returning officer who receives illegal votes not on the assessment roll may be made to pay costs.

4. That a candidate who consented to this nomination, and was illegally declared elected, and who afterwards sat and voted as a Councillor and was elected Reeve, may be made liable to costs.

The relator set forth that at an election for a municipal Councillor for Green Bush Ward, in the township of Hallowell, held on the 3rd, 4th and 5th days of January, 1859, he and John Murney, Esq., were candidates, and William Curry, Returning Officer; and although he, the relator, had a majority of legal votes, and was entitled to be returned, yet the returning officer wrongfully returned the said John Murney as Councillor for the said ward.

The relator gave a statement of the following facts, verified by affidavit, as entitling him to the seat, and stated that he has an interest in the election as a voter and candidate:—

1st. That the returning officer received two votes for the said John Murney, of persons who were not on the copy of the last revised assessment roll for the said ward delivered to him by the Clerk of the municipality of the township of Hallowell, and that these names made the number of votes, for the two candidates equal.

2nd. That the relator had a majority of at least three legal votes over the said Murney, (4 votes received for the said Murney not being legal votes,) viz: the vote of John H. Appelby, whose name was not upon the copy of the revised assessment roll for the said ward, and was not rated for real property either as freeholders or householders in the said Greenbush ward; and two others, viz: Trueman Case, and Henry Sponenburgh, who were aliens.

3rd. That the election was not continued until 4 o'clock on the second day, and there was no riot or other emergency to justify the returning officer in continuing it the third day. That on the second day at half-past two o'clock the returning officer unfairly closed the poll for that day, and adjourned the election until the following day, and at the time of the adjournment the relator had a majority of six legal votes.

4th. That although the election was adjourned at half past two o'clock on the second day until ten o'clock on the third day, and was then opened, yet the returning officer refused to close it at twelve o'clock on that day after it had been open more than 12 hours, and all the electors had had a fair opportunity of recording their votes, and although requested so to do, and that the said relator had then a major ty of three votes over the said Murney.

5th. That at the hour of four o'clock in the afternoon of the third day, the said relator had a majority of one vote, but the returning officer would not close the poll though requested: but after the hour of 4 o'clock he received three votes, one for the relator, and two for the said Murney,—making the votes for each candidate equal, and afterwards gave his casting vote for the said Murney, and returned him duly elected.

6th. That one Nicholas Lighthall tendered his vote on the second day, when the returning officer was requested to put the

oath against bribery to him, which being read, the said Lighthall refused to take, and the returning officer notwithstanding received his vote on the third day.

The affidavits in support of the relation were sworn on the 14th day of January last. The fiat for the summonses obtained on the fourth day of February, and the summonses issued on the same day.

Previous to the issuing of the summonses, Mr. Murney had taken his seat in the Municipal Council, and been chosen Reeve at their first meeting.

At the second meeting of the Council on the 2nd day of February—two days before the issuing of the writ—he resigned his seat in the Council, and his resignation was accepted on the same day.

On the 5th day of February he disclaimed in due form.

On the second day of February, the Deputy Reeve issued his warrant for a new election for Greenbush ward, directed to the same returning officer, requiring him to hold an election to supply the vacancy in the Council, caused by Mr. Murney's resignation on the 9th day of February instant.

FAIRFIELD, Co. J.—The questions to be disposed of are:

1st. The validity of the first election, and the relator's right to be returned.

2nd. The effect of Mr. Murney's resignation of his seat in the Municipal Council, and the validity of the second election pending the trial of the first.

3rd. The liability of the parties to costs, and the effect of Mr. Murney's disclaimer in relation thereto.

Upon the first point, from the evidence and inspection of the copy of assessment roll furnished the returning officer, I think neither John & S. Appelby, nor William Smith were entitled to vote in Greenbush ward. The first lives in Picton, and a part of his farm extends into Centre ward of the township of Hallowell, no part of it extends into Greenbush ward, and he is not assessed therein.

As to Smith, his name is not on the copy of the assessment roll for Greenbush ward, but is assessed as a householder in West Lake ward, on a quarter acre of land belonging to John Collins, but appears to have resided in Greenbush ward at the time of the election, and for about a month previous; he did not appear to vote on any property held by him in the ward, and was not assessed there for anything but upon the house he was assessed for in West Lake ward. If he has a vote, it is in West Lake ward. Both these votes were given for Mr. Murney, and in my opinion were bad votes.

Daniel Spafford voted for the relator; his name is not on the copy of the assessment roll for Greenbush ward, but lives there and has been a householder in the ward for the past 18 months, and is assessed as a freeholder in the adjoining ward. There is no doubt in my mind that he had a right to vote although his name does not appear on the copy of the assessment roll.

The Act of 22 Vic. cap. 99, sec. 75, declares, the electors of every municipality for which there is an assessment roll, shall be the male freeholders thereof, and such of the householders thereof as have been resident therein for one month next before the election, who are natural born or naturalized subjects of Her Majesty, of the age of 21 years, and who were severally rated on the last revised assessment roll for real property in the municipality.

The 2nd sub-section of the 97th section, requires the clerk of the municipality to furnish the returning officers with a correct copy of so much of the assessment roll for the ward or electoral division as contains the names of the male freeholders or householders rated on the roll, in respect of real property lying in the ward or electoral division.

These two clauses give the qualification of electors, and in my opinion, fix the locality in which they may vote. If we looked no further than this list, it would seem that every freeholder, not otherwise disqualified, would have a right to vote in the ward in which his freehold lay—whether a resident of the ward or not; but on referring to the Assessment Law of 16 Vic., cap. 182, sec. 17, and which appears in force, the right of non-residents is entirely taken away. But two votes were received by the returning officer for Mr. Murney, of this class, viz: those of Mr. Low, and Mr. Ross, both of whom reside in Picton, and have farms running into Greenbush ward, and are entered as freeholders on the copy of assessment roll as "non-residents."

These facts would show, *prima facia*, that of the votes on the copy of the assessment roll, polled, the relator had a majority without counting those of Mr. Low and Mr. Ross, over Mr. Murney of one vote, and in that case the returning officer ought not to have voted. Counting Spafford's for, and striking off the votes of Messrs. Low and Ross, his majority would have increased to four. A scrutiny of the votes was partially gone into at the trial, evidence offered to justify the striking off of votes gave for Mr Murney—five or six others; and of those for the relator perhaps had it been continued, four or five would have been found bad, but the scrutiny was abandoned on the part of Mr. Murney and the returning officers; and I have no hesitation in saying, that the relator has clearly established his right to have been returned in place of Mr. Murney.

I will next allude to Mr. Murney's resignation of his seat in the Council, and examine whether his doing so ought to effect Mr Johnston's seat.

The 149th section empowers any of the Council with the consent of the majority, to resign. This consent appears by a certified copy of a resolution passed by the Council, to have been obtained on the second day of February instant, two days before the issuing of the summonses.

The 2nd sub-section of the 128th section of the Municipal Act says, in case the relator alleges that he himself, or some other person, has been duly elected the writ shall be to try both the validity of the election complained of, and the alleged election of the relator, or other person. The 10th sub-section provides, that in case the Judge determines that any other person was duly elected, he shall forthwith order a writ to issue causing such other person to be admitted.

I think it was not intended by the Legislature, that by the resignation of a person unduly elected, the person duly elected, and who should have been returned, is to be deprived of his seat. Such a construction would in the present case have the effect of putting the wrongfully returned member in the seat which he resigned—for he presented himself at the second election held after his resignation, and was again returned. I must therefore give it as my opinion, that until the first election was disposed of he had no seat which he could resign. He was a mere usurper, if I may use the expression, and I am a little surprised that the Council, under the circumstances, if they knew the intention of the relator to contest the seat, should have accepted or permitted the resignation. It has the appearance, on the face of the proceedings, of an attempt to dodge the statute, and give the legal proceeding, about to be instituted to try the election, the go-by. I take it for granted that they were in ignorance of the fact that Mr. Johnston intended to vindicate his right to the seat.

I now come to the question of costs, and the effect of Mr. Murney's disclaimer thereto, and will first examine the charges against the returning officer. These are:

1st. That he received two illegal votes for Mr. Murney, not on the copy of the assessment roll.

2nd. That the election was not closed on the second day at four o'clock.

3rd. That there was no riot or other emergency, to justify him in closing at half-past two o'clock of the second day.

4th. That he refused to close at twelve o'clock on the third day.

5th. That he took several votes after four o'clock on the third day.

The copy of the assessment roll is given to the returning officer for his guide as to what votes he ought to receive. The names on the copy are those he should look to; if he goes beyond his list he does so at his peril. I do not mean to say that a person's name must be on the list to entitle him to vote, or that the returning officer must receive all as good votes who are on the copy of the roll, and that he cannot go beyond the copy,—but the names on the copy are *prima facia*, the voters for the ward, and the decisions, as far as I can gather, will hold the returning officer liable for the costs, if he receives illegal votes not named on the copy of the list. I also think that Appelby's vote, at all events, was received after four o'clock on the third day, and Mr. Spaf-

ford's and Mr Low's after the election ought to have been closed. For these reasons I shall, in accordance with other decisions feel bound to make him pay a part of the costs.

As to the second complaint, that he did not continue the election until four o'clock on the second day, and then finally close it, I hardly think there was a sufficient emergency to justify him, but will not say, that he was guilty of any unfairness. There was no riot or breach of the peace, but there was a good deal of noise and unseemly conduct on the part of the relator's friends, caused by one Lighthall attempting to make a speech when intoxicated, and refusing to take the oath against bribery, on coming forward to vote. The returning officer after repeatedly attempting to restore order, and telling the people that he would adjourn the election until the next day. I think he must be left to decide whether the emergency was such as to warrant him in doing so, but he should not have continued to receive votes after four o'clock on the last day.

Lastly, as to the disclaimer and whether it ought to exonerate Mr. Murney from costs. The 15th sub-section of the Act says no costs shall be awarded against any persons disclaiming unless the Judge is satisfied that such person consented to his nomination as a candidate or accepted the office, in which cases the costs shall be in his discretion. From the evidence I am satisfied that Mr. Murney both consented to be a candidate and did accept the office. Now are there any circumstances in the matter which ought to excuse him from the costs necessarily incurred by the relator to obtain a seat at the Council Board from which he was improperly kept by Mr. Murney taking his place there? The election took place in the beginning of January. At its close, Mr. Johnston and his friends protested against Mr. Murney's return, and the returning officer promised to enter the protest in the poll book, but did not do so. I will not stop to enquire whether the law required him to do it, but merely state what appeared in evidence and which Mr. Murney should have taken as a notice that ulterior proceedings would be had if he continued to hold the seat. Under these circumstances he should have satisfied himself that the law was with him, and if he found that he was wrongfully elected, and disclaimed at once; had he done so he would not have been answerable for costs. Instead of this he attended at the organization of the Council, was sworn in, or made the declaration of office; on the third Monday in January, was elected and accepted the office of Reeve, which he held up to the 2nd day of February, when he resigned. The Deputy Reeve on the same day issuing his warrant for a new election in Greenbush Ward. After all this was done, on the 5th of February he disclaimed, and on the 9th of February went to the second election in the same ward, as a candidate for re-election. Under such circumstances I think I would not be exercising a sound discretion if I decided he was not liable to costs.

My judgment therefore, is as follows:

Be it remembered, that on the 14th day of February, in the year of our Lord, one thousand eight hundred and fifty-nine, at the Court House in the town of Picton, before me David Sockwood Fairfield, Judge of the County Court in the County of Prince Edward, came as well the above named relator, by Richard John Fitzgerald, his attorney, as the above named John Murney and William Curry, by Phillip Low, their attorney; and service of writs of summons hereto annexed, having been duly proved upon affidavit, and upon the said days and upon other days thereafter, at the Court House aforesaid, having heard and read the statement and proofs of the said relator, touching and concerning the usurpation by him alleged against the said John Murney, of the office of Municipal Councillor for Greenbush ward in the township of Hallowell; and the charges and allegations against the said William Curry, the returning officer at the said election in the said summons and relation filed, and the election of the said Robert Johnston to the said office of Municipal Councillor for Greenbush ward aforesaid, and the answers and proofs of the said John Murney, and the said William Curry, the returning officer as aforesaid and having heard the said parties by their counsel, and upon due consideration of all and singular the premises now, that is to say, this twenty-sixth day of February, in the year aforesaid; I do adjudge and determine:

1st. That the said relator had at the time of his making his aforesaid complaint, an interest in the election to the said office of Municipal Councillor for Greenbush ward in the township of Hallowell, as an elector and candidate for the said office.

2nd. That the said Robert Johnston had a majority of legal votes given at the said election, over the said John Murney, and was duly elected to the said office, and ought to have been returned.

3rd. That the election held in the said ward, on the 9th day of February, was void.

4th. That the said John Murney hath usurped and does still usurp the said office, and that he be removed therefrom, and that the relator is entitled by law to be received into and to use, exercise and enjoy the said office.

And I do adjudge and order that the said John Murney do not in any manner concern himself in or about the said office, but that he be absolutely fore-judged and excluded from further using or exercising the same, under pretence of either of the said elections: and further, said Robert Johnston be admitted to the said office in his place, and I do further order, adjudge and determine that the said relator do recover against the said John Murney, and the said William Curry, his costs and charges by him about his said relation, and prosecution thereof expended, to be taxed in the said Court.

All of which the said writs of summons and the said judgment and the statements and answers and proofs of the said relator, and the said John Murney and William Curry, and all other things had before me touching the same, I do hereby certify and deliver into the said Court, according to the form of the statute in such case made and provided.

D. S. FAIRFIELD,
Judge County Court, County of Prince Edward.

THE QUEEN UPON THE RELATION OF ROBERT MCLAUGHLIN V. JOHN G. HICKS, JAMES CAVAN, WILLIAM KERR, AND EDWARD W. WRIGHT, MUNICIPAL COUNCILLORS, FOR THE TOWNSHIP OF MARYSBURGH.

Municipal law—By-law abolishing Wards—Illegality Contested Election.

A Judge of a County Court cannot, in determining the validity of a contested election, decide incidentally the validity or invalidity of a Township By-law abolishing Wards. The By-law, if illegal, must be quashed by the Judges of the Superior Courts of Common Law.

An elector who takes part in an election will not be allowed afterwards, if dissatisfied with the result, to say that the election was wholly void.

The Relator stated that the Defendants usurped the seats of the Municipal Councillors for the Township of Marysburgh, under pretence of having been elected thereto, at an election held at Milford on the Third and Fourth days of January last, and which election he contended was illegal and void, for the following reasons:—

The Township of Marysburgh was many years ago divided into Wards, known as Rock, Island, Mountain, Milford, and Long Point Ward, and continued so divided until the year 1857.—each Ward electing one Municipal Councillor for the Municipal Council of the Township.

On the 21st of November, 1857, a By-Law was passed, by a majority of the Council, to abolish Ward representation, and establish Township representation instead.

The By-law was as follows:—By-Law—passed 21st Nov., 1857.

"WHEREAS it is necessary and expedient to pass a By-Law in accordance with the prayer of the petition for abolishing of Wards in the Township of Marysburgh.

Be it therefore enacted by the Municipal Council of the Township of Marysburgh, constituted and assembled by virtue of and under the Upper Canada Municipal Corporation Act, and also in compliance with the 16 Vic., cap. 181, sec. 6, that the said By-Law doing away with Ward representation in said Township, and the establishing of Township Municipal representation in said Township of Marysburgh, come into effect on the first day of November, 1858, any thing in any By-law heretofore passed to the contrary notwithstanding.

(Signed,) N. DODGE,
Reeve.

(Signed,) ROBERT B. TURNBULL,
Clerk.

The Relator contended that the By-Law never came into force or effect for the following reasons :—

1st. Because a majority of the Freeholders and Householders in the Township, qualified to vote at the next Township election, did not ratify it or vote for the abolition of the Wards; only 20 votes having been given for the measure, out of at least 500 qualified voters in the Township.

2nd. That fair copies of the By-law were not put up in four conspicuous places in Rock Ward, or Island Ward, when the Polls were held, and in fact no notice of the By-Law in the last named Ward was given.

3rd. That neither the Reeve nor Deputy Reeve did, within one month after the vote was taken upon by the By-law, examine the votes given for and against it, and give public notice that it would take effect and go into operation, or the contrary, but that he did in open Council of the Township, on the 3rd day of July, 1858, give notice that the By-Law would not take effect.

4th. That on the 18th of December, 1858, he, for the first time, gave notice in the Council, it would go into effect.

5th. That notwithstanding the By-law was void and inoperative, an election was held under it at Milford on the 3rd and 4th days of January last, and the Defendants returned as Councillors for the Township.

6th. That the Relator was elected in Rock Ward, on the 3rd day of January, as Municipal Councillor for that Ward, no Returning Officer having been appointed by the Council, the electors chose one from among themselves.

The evidence shewed that in 1857 a Petition, containing 433 names of the Freeholders and Householders of the Township, was presented to the Council, praying for the enactment of the By law, and there were for that year 580 Freeholders and Householders in the Township on the Assessment Roll.

This gave a large majority in favour of such a By-law, and would have authorized the Council to pass it under the 6th Sec. of the Act of 16, Vic. ch. 181.

This Act requires that a By-Law of this nature shall have the following requirements:—

1st It shall contain a recital of the Petition on which it was founded, and of the same having been passed in compliance with the prayer of such petition, and the directions of that Section of the Act.

2nd. It shall contain a clause limiting the same to take effect and come into operation on the 1st day of December next, but one after it shall have been passed.

These requirements are to appear on the face of the By-Law.

Then there other directions that it shall not be passed unless a majority of the voters shall, at the next annual election for Councillors, confirm it by their votes, and that it shall not be obligatory upon the council to pass the By-Law in compliance with the Petition, unless the Petition have been signed by a majority of the voters of the Township.

The next Section provides for taking the votes on the By-law, and prescribes the duty of the Reeve in ascertaining the result and giving public notice of the result of the votes for and against the By-Law, and whether it will or will not go into effect.

It further appeared from the evidence that votes were taken in most of the Wards, with the following result:—In Mountain Ward there were 207 voters, only one hundred voted, two of these recorded their votes against the By-law, no votes are recorded for it. Whether the Returning Officer considered it was necessary to record only the votes of those opposed to the Law, or not, did not appear.

In Island Ward, Mr. Kerr was elected without opposition, and no votes were recorded either for or against the By-law; there are 68 votes in the Ward.

In Long Point Ward, 91 votes were polled for Councilmen, 34 for the By-law, 55 against it.

In Milford Ward, Mr. Clapp was returned by acclamation, but a vote was taken on the By-Law—163 for, and one against it.

In Rock Ward, 89 votes polled for Councilmen—8 for the By-Law, 81 against it.

The number of votes recorded, therefore, in *all* the Township stood,

For the By-Law	205
Against it.....	140

making a majority in favour of the By-law of 65 of the votes polled, and two Wards without expressing any opinion for or against, except as to two votes in one Ward recorded against the By-Law.

The 6th Clause appears to require that the By-Law shall be ratified by a majority of the Freeholders and Householders entitled to vote in the Township. The concluding part of the next Section, however, requires the Reeve to examine the returns of such Poll as respects the votes for and against the proposition, and to give public notice of the result, that the By-law will or will not take effect, according as he shall find there was a majority for or against the proposition.

It was further in evidence that not until the 18th day of Dec. last, the Reeve gave notice, as required, that it would go into effect, and the elections in the ensuing month, be held under it.—An attempt was made to shew that he gave the notice at a previous meeting of the Council, that the Law would not go into effect, but that was not established.

FAIRFIELD, Co. J.—The question for me to decide is, is this a By-Law, or is it so imperfect and defective that I must treat it as a nullity, after it has been accepted by the Township, and an election held under it in which a very large majority of the voters among whom was the Relator himself—recorded their votes.

All the requirements of the Statute may not have been complied with, and and there may be some irregularity in passing it, but I think I cannot say, it is a nullity. If it is a By-Law, I have *no* power to quash it, that power rests with a Superior Court, and even had I the power, I think I could not exercise it at the instance of the Relator, who comes to oust two of the Councillors for whom he voted. On the authority of the case of the Queen Ex. Rel. Rosebank v. Parker. Com. Pleas Rep. 2nd Vol., page 15, where it is decided, That the Court will not set aside an election on the relation of a party who was concurred in the election and voted for the person whose election he afterwards attempts to set aside.

There are something under 600 votes in the Township, I find that of these 525 were polled, and the several defendants were elected as follows:—

Mr. Clapp,	.....	375
" Hicks,	.....	292
" Cavan,	.....	275
" Kerr	.....	272
" Wright,	.....	212 votes.

There were four other Candidates, viz :—

Mr. Dodge, who polled	.....	119
" Wycott	.....	162
" Rose,	.....	69
" Clark,	.....	63

and Mr. McLaughlin, the Relator, who polled 7 votes. He voted for Mr. Cavan and Mr. Kerr, as to those Candidates, at least, he he *cannot* object to their election.

Looking also at the 200th and 407th sections of the Act of 22 Vic., ch. 99, I am inclined to think that any irregularity in the passing of the By-Law is cured, unless proceedings at Law are taken to set it aside. (See notes to these clauses in *Harrison's Municipal Manual.*)

Upon the best consideration I have been able to give the subject, I shall hold the election valid.

As to Mr. Hicks, who disclaimed a new election must be held to supply his place. My Judgment, therefore, is as follows:—

Be it remembered, that on the fifteenth day of February, in the year of our Lord one thousand eight hundred and fifty-nine, at the Court House, in the Town of Picton, before David Lockwood Fairfield, Judge of the County Court of the County of Prince Edward, came as well the above-named Relator, by Richard John Fitzgerald, his Attorney, as the above named James Cavan, William Kerr, and Edward W. Wright, by Philip Low, their Attorney; and service of the Writ of Summons, hereto annexed, having been proved upon affidavit, and upon the said day, and upon another day thereafter, at the Court House aforesaid, having heard and read the statements and proofs of the said Relator touching and concerning the usurpation by him, alleged against the said John G. Hicks, James Cavan, William Kerr, and Edward W. Wright, of the offices of Municipal Councillors in and for the Township of

Marysburgh, in the said Writ of Summons mentioned, and the election of the said Robert McLaughlin to the said office of Municipal Councillor for Rock Ward, in the said Township of Marysburgh, and the answers and proofs of the said James Cavan, William Kerr, and Edward W. Wright. And the said John G. Hicks having disclaimed the said office, and all defence of any right to the same. And having heard the said parties by their Counsel, and upon due consideration of all and singular the premises, and the relation and proofs of the said Relator, and the answers and proofs of the said James Cavan, William Kerr and Edward W. Wright being seen and fully understood. I do consider and adjudge that the said office of Municipal Councillor of and for the Township of Marysburgh, severally claimed by them, the said James Cavan, William Kerr, and Edward W. Wright, be allowed and adjudged to them, and that they do recover against the said Robert McLaughlin, the Relator, their costs by them respectively laid out and expended in defending themselves in this behalf, to be taxed in the said Court.

Second,—I do adjudge and determine that the said Robert McLaughlin do not in any manner concern himself in or about the said office of Municipal Councillor for Rock Ward, in the said Township, but that he be absolutely forejudged from using or exercising the same under pretence of the said election in the said Rock Ward.

Third.—I do adjudge and order that a Writ of election shall issue for a new election to elect one Municipal Councillor for the said Township, in the place and stead of the said John G. Hicks, who has disclaimed the said office.

All which the said Writ of Summons, and the said Judgment and the statement and answers, and the evidence of the said Relator, and the said disclaimer of the said John G. Hicks, and the said James Cavan, William Kerr and Edward W. Wright, and all other things had before me touching the same, I do hereby certify and return into the said Court, according to the form of the Statute in that case made and provided.

D. L. FAIRFIELD, Judge County Court,
County of Prince Edward.

Dated this 26th day of Feb. 1859.

DONALD MCKAY v. GEORGE BROWN.

Municipal law—Disqualification—Innkeeper.

A man may be an Innkeeper though he take out a license in the name of another and if he fraudulently is disqualified to be a Municipal Councillor.

(Before His Honour Judge Mackenzie.)

A writ of summons in the nature of a quo warranto was issued in this cause on the 15th day of January last, calling upon the defendant to answer and show by what authority he claimed to exercise and enjoy the office of Councilman for Saint Lawrence Ward, in the City of Kingston.

The relator in his statement set out three distinct grounds of objection against the return and election of the defendant as Councilman for St. Lawrence Ward. The three grounds substantially amounted to one objection, namely, that the defendant was an Innkeeper, and consequently disqualified to be a member of the Municipal Corporation of the City of Kingston under the 73rd section of the Upper Canada Municipal Corporations Act of 1858, 22 Victoria, chapter 39.

The defendant denied that he was an Innkeeper as alleged by the relator.

Hamilton for relator.

Agnew, for defendant.

MACKENZIE, Judge Co.—An Innkeeper means a man who keeps a public-house for the lodging and entertainment of travellers and guests. The keeping of an Inn is not a franchise, but a lawful trade when it is not exercised to the prejudice of the public good, and therefore at common law there was no need of any license or allowance for such houses. The modern transmutation of those houses into groggeries and drinking shops is a vile innovation on the common law understanding of an Inn or Hotel. A person who exercises the calling of an innkeeper, or who carries on the trade or business of Tavern-keeper, whether the license to keep the Inn be taken out in his own name or that of a friend for him, is disqualified to be elected a member of the Council of the Municipal Corporation of the City of Kingston, under the 73rd section of the Upper Canada Municipal Corporations Act of 1858. A person may be an Innkeeper within the meaning of that section, who has not taken out a license in his own name to keep an Inn. And a person may take out a license to keep an Inn, and still may not be an Innkeeper within its meaning. It is not the taking out of the license that causes the disqualification, but the exercise and the carrying on of the calling or trade of an Innkeeper. A different interpretation of the law would enable all the Innkeepers in the country to evade the disqualification imposed by the statute upon them by taking out the license in the name of some friend or relative. The question to be decided in the present case is not whether the defendant George Brown took out a license to keep an Inn; but whether he carried on and exercised the trade or calling of an Innkeeper on the 4th day of January last, when he was elected Councilman for St. Lawrence Ward. The evidence laid before me in the present case discloses a very curious history. It appears that the defendant George Brown was in the beginning of last year, 1858, the owner and occupant of a certain house and premises on the corner of Princess and Barrie streets, in the City of Kingston, wherein he carried on the business of an Innkeeper and Grocer; in a corner room of the building, groceries were sold on one side and liquors from a bar on the other side of the room. At this time one John Newman, a brother-in-law of the defendant, a young man, was living in the house. In the month of February, 1858, a short time before the day pointed out by law for the issuing of licenses, an understanding was arrived at between the defendant and John Newman that the license for 1858 should come out in Newman's name. Newman offered a dollar a day for the bar, but defendant refused that sum, thinking it was worth two dollars a day. The defendant however stated that they would afterwards agree as to terms. The license however was not taken out on the 1st March, 1858, as required by law, still the business of the Inn went on as usual. On the 17th March John Newman married a young woman who had been boarding for some time before in defendant's house. Newman and his young wife continued to board in the house afterwards, not as master and mistress, but as lodgers, until the latter end of April, when owing to some difference between Newman's wife and the defendant's wife, Newman and his wife left defendant's house and took up their residence on Sydenham Street, in a house taken by Newman for that purpose. Newman continued to reside on Sydenham Street until July or August following, working at his trade of Carpenter during this time. In July or August he, with his wife, commenced to keep a Saloon on King Street, in Kingston, where he, Newman, has continued to reside since, up to the present time. Newman's wife never entered the defendant's house after she had left it in April, and Newman himself but seldom. His wife paid for her board to defendant after her marriage, the same as she did before it. The license was not taken out until the 15th May, 1858, several weeks after Newman took up his residence on Sydenham Street. The license was paid for by an order of the defendant upon the City Chamberlain, in favour of John Newman, it appearing that the defendant had funds in the hands of the Chamberlain, and it is alleged that the defendant Brown was indebted to Newman. The receipt for the license money runs thus: 'Received from Mr. J. Newman, Thirty-eight dollars for T. License for the year 1858. Settled by George Brown's act, per order.

WM. ANGLIN, per R. A.'

After the license had been taken out, and issued before, Newman had no more to do with the keeping and conducting of the Inn in question than any other citizen of Kingston had. The defendant and his wife continued to keep the Inn during the year 1858. The following advertisement appeared in some of the Kingston newspapers in the month of December, 1858:—

PREMISES TO RENT,—For one or three years, optional with the tenant, those convenient premises on the South-west corner of Princess and Barrie Streets, recently occupied by John Newman, as a Tavern and Grocery Store. The owner being about to enter into the lumber business, will give advantageous terms to a good tenant.

'For particulars apply to

'GEORGE BROWN.

'Kingston, Dec. 10th, 1858.'

On the 31st day of December, the defendant made a lease of the premises in question for one year, to one Samuel Mason, at a rent of 300 dollars a year, payable quarterly.

One David Drury, who was bar-keeper for Brown, is now alleged to be bar-keeper to Mason Drury produced a book in which it is alleged an account against Brown was kept, but on being pressed, Drury admitted the book had been made up that morning after he was served with a subpœna to produce Mason's book.

Those who have known Mason formerly represent him as a man of good character, and to all appearances a poor man, a sea-faring man. Mason states that the defendant and his family reside with him for a certain period until an adjoining house of defendant shall be completed.

I am clearly of opinion that John Newman was never the Innkeeper of the premises in question. On the other hand, according to the evidence, the defendant Brown, was to all intents and purposes the Innkeeper, at all events up to the time of his alleged selling out to Samuel Mason, on the 31st of December last. The right of the defendant to hold the seat rests entirely on the character and legal effect of the alleged lease of the premises, the sale of the goods, and the transfer of the license to Samuel Mason. If the transaction with Mason was a colorable one, a mere sham, there is an end of the matter; if it was a *bona fide*, real transaction, still a question of law arises on the evidence whether Brown or Mason should be treated as the landlord or innkeeper on the 4th day of January last, the day of the election. So far as the *bona fides* of the transaction with Mason is concerned, the evidence discloses a state of things strongly in appearance against the defendant. The lapse of time has developed the true character of the defendant's dealings with Newman. They have turned out to be mere pretences, un-realities This itself is well calculated to invest with suspcion the subsequent doings of the defendant and Mason in this matter. The initiatory step to the transactions between the defendant and Mason was the advertisement in the public prints, on the 10th day of December last, over the signature of the defendant. This advertisement tells against the defendant in several respects. In the first place, it does not altogether convey a truthful statement of facts. Secondly, it was published about three weeks before the election. The advertisement runs thus: 'Premises to rent, for one or three years, &c., those convenient premises, &c., recently occupied by John Newman as a Tavern and Grocery Store.'—There is not a word of truth in this part of the advertisement. The premises were never occupied by John Newman as a Tavern, and certainly not as a Grocery Store. Newman and his wife, who were mere lodgers in defendant's house, left it so far back as the month of April. Was the defendant acting in good faith when he published to the world over his signature three weeks before the election, that the premises were recently occupied by John Newman? The inference is almost irresistible that he was not acting in good faith The inference is almost irresistible that this advertisement was a well considered commencement of a plausible contrivance to evade the disqualifying provisions of the new Election Law in reference to Innkeepers. The receipt of Newman to Mason, filed by the defendant as a part of his case, is equally insincere. Newman thereby professes for £5 to relinquish all claims of profits arising from the sale of liquors at the bar in grocery store formerly occupied by him. Newman had no more claim in this respect than the relator McKay had, and the defendant knew it well. The defendant, Brown, gave the order on the Chamberlain to pay for the license issued in Newman's name he gave a £5 cheque to pay for the transfer from Newman to Mason.—They both say however that the defendant was owing them money. The defendant is is to pay Colonel Jackson his £6 10s. According to the evidence, strange as it may appear, neither Newman nor Mason ever expended one six pence in reference to those questionable transactions, all was paid by defendant. The sale of goods of the value of 800 dollars; the leasing of premises in which a flourishing business was carried on, for 300 dollars a year to a sea-faring-man of limited means on a long credit without any security whatever, and without one six-pence being paid on account may be a real transaction, but is so contrary to the experience of mankind and to the principles on which men in their senses act in such cases as to render faith or belief in their reality almost impossible. According to the Provincial statute 20th Victoria, chap. 3, sec. 2, every sale of goods which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods must be in writing, accompanied by various forms. The provisions of this Act are only an enlargement of common law principles. In the case of *Wordal* v. *Smith*, 1 Camp. 332, it was decided that an assignment or sale of personal property is void as against creditors unless there be a complete change of possession, and that it was not enough too keep possession jointly with the assignor. The case is very like the one now under consideration. Lord Ellenborough, C. J., said, 'there must be a *bona fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colourable, there must be an exclusive possession under the assignment, or it is fraudulent and void as against creditors.' In the present case I think it is clear law that the goods in question would be liable under the statute and at common law to be seized and sold as the goods of the defendant by his creditors so long as he continues in possession of the premises alone or jointly with Mason. So long as this possession continne the transaction is invested with a badge of fraud Twyn's case is a leading authority, and contains valuable principles upon the subject of sales which are not followed by an immediate actual and continued change of possession. The assignment there was held void because the assignor continued in the possession of the goods assigned; I would refer to the case of *Armstrong* v. *Moodie*, 6 U. C. B. R. O. S. 538, and the case of *Hunter* v. *Corbett*, Sheriff. 7 U. C. B. R. 75, for an exposition of the law as respects creditors, when an assignor remains in possession of the goods sold or assigned, and to the case of *Doe Roy* v. *Hamilton*, 4 U, C. B. R. O. S. 410 as it respects creditors, when a debtor continues in possession of lands conveyed by him—when a debtor remains in possession of lands conveyed by him—a seller in possession of goods sold by him—a lessor in premises demised by him the law construes such after-possession as a badge of fraud sufficient to render the transaction null and void when creditors come in to dispute their validity. It may be urged in the present case that the statute and the cases cited refer only to creditors and subsequent purchasers for a valuable consideration. It is true enough that the statute only extends its protection to creditors and such purchasers. But the principles embodied in the statute, and the rules deduced from the adjudged cases are applicable to cases like the present. Although the relator does not come to dispute legality of the transactions between Mason and the defendant as a creditor; still he comes to dispute them as a third party who has rights by law as binding as the rights of creditors. In disposing of this case and in pronouncing upon the character of the transactions between the defendant and Mason, I am bound to examine the rules of law which had been laid down by the Courts in cases where creditors have come in to dispute the validity of transactions similar to the present, and to apply them so far as they can be applied. Now if the relator had come in as a creditor of the defendant to impeach the genuineness of the transactions between him and Mason, the law would at once pronounce against Mason and declare the transactions void by reason of the possession of the premises continuing in the defendant and no apparent change of possession of the goods having taken place. Had the defendant evacuated the premises immediately after the alleged lease of the premises, and the alleged sale of goods to Mason, the transaction would be very different in the eye of the law, from what is by his remaining in possession. I do not feel myself at liberty to make a less stringent application of the rules of law in this case of a relator coming in to question the reality of the transaction that I would if a creditor had been the impeaching party. The character of the transaction from beginning to the end is invested with suspicion and clothed in doubt and improbability. The license was not transferred until 26th January. Taking all in connexion with the fact that the defendant with his family, after the making of the alleged lease, and the effecting of alleged sale of the goods, has continued in the possession of the premises demised, and in which the Inn is kept and in which the goods are contained up to the present time in the same manner as he did before the alleged sale and demise, the law must pronounce the alleged demise of the premises and the alleged sale of the

goods as colourable and not real, and hold the defendant who occupied the premises of the Inn with his family long before the 4th of January—on the fourth of January and after it, as the real landlord and keeper of the Inn. Being at the eve of the law then an Innkeeper on that day, he was disqualified to be elected Councilman for St. Lawrence Ward, and now must be removed. My judgment therefore is, and I adjudge, determine and order that the defendant, George Brown, be removed from the office of Councilman for St. Lawrence Ward in the City of Kingston, and that the Municipal Corporation of the City of Kingston shall without delay cause another election to be held for Saint Lawrence Ward, to elect another Councilman in place of George Brown, removed, and I further adjudge and order that the defendant pay the relator his proper costs and charges.

Judgment for the relator with costs.

DIVISION COURTS.

Before His Honor Judge Hughes, Judge of the County of Elgin.

LAMONT v. THE SCHOOL TRUSTEES OF SECTION No. 3, ALDBORO'.

School Trustee—Contract—Validity.

A School Trustee cannot, even by the consent of his co-Trustees, be a contractor for the building of a school house.

The plaintiff had been a trustee of this school corporation; whilst in office had contracted with his co-trustees for the building of a school-house for the section, which he erected, and for which he was partially paid. However, a balance was left due to him upon the contract price, before the annual election, when he retired. He brought this action for that balance, but was nonsuited at the trial on the ground that it is contrary to law and public policy for a trustee to make a profit out of his trust.

The plaintiff subsequently applied to set aside, and for a new trial, because he had "appealed" the matter to the Chief Superintendent of Education, and produced the following letter from that functionary as his authority for the application:

"(No. 3432. Z.) "Department of Public Instruction,
"Education Office, Toronto, Nov. 29, 1858.

"Sir,—I have the honor to state, in reply to your letter of the 23rd instant, that there is no provision in the law against a trustee taking a contract to build a school-house, any more than against a trustee acting as collector, provided his two colleagues agree to it. A warrant, signed by a majority of the trustees, and attested by the corporate seal, is valid authority for collecting of rates for payment of such contract, as well as for any other funds required by the school corporation for school purposes.

"I have the honor to be, Sir, your obedient servant,
"E. Ryerson."

Hughes, J., in answering this application, gave in effect the following judgment:

I altogether dissent from the view taken by the Chief Superintendent of Education. It matters not whether the co-trustees agreed to the contract or not, or whether it was under seal or not. A trustee may, it is true, act as a collector, by the appointment of the other trustees; but that is by express enactment provided for, and is an exceptional case. The rule, however, that a trustee is not to be allowed to make a profit of his trust, in other respects, remains as it stood before the exception was made. It is based on a rule of human nature, that "no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict." Lord Cranworth, in *Broughton* v. *Broughton*, 31 English Rep. 590, says: "The rule is based upon a rule of human nature, that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict; and such is the case where a trustee, though he might employ others to do certain things, and pay them out of the trust fund, does them himself, and takes payment from the trust fund. The good sense of the rule is obvious, because it is one of the important duties of a trustee, placed in a fiduciary character, to take care that no improper charges are made for the performance of the business." And again: "It is an obvious corallary flowing from the rule, that no person from whom fiduciary duties are expected, shall be enabled to make a profit of the trust by employing himself." Then the same learned Chancellor, in answering the argument that there is a distinction to be made between the case of a person who acts as one of several trustees, and that of one who acts alone, says: "I have never comprehended the distinction. It may indeed be a case in which there may be less danger to apprehend; but that is only a question of degree, and not of principle; for it is clear that where a testator appoints three or four trustees, it is the duty of every one of them to see that no improper charges are made against the trust fund. When, therefore, one of them is put in a situation to perform duties for which he is to be paid, there is one less person than the testator intended, to see that no improper charges are made against the trust fund." So here, when the trustee of a school corporation wishes to take upon himself the position of a contractor for any work or service connected with the objects of the trust, he ought first to get rid of his fiduciary character, and resign the trust, or he should altogether decline having any private or personal interest in the funds of the corporation. When the inhabitants of a school section appoint several trustees to watch their interests and husband and dispose of their funds, they naturally expect that all personal considerations and interests are laid aside by the trustees for the time being at least, and that a single eye is kept by them to the common interest of the section; and if one of them takes a personal or private interest, independent of the common good, and undertakes duties for which he is to be paid, there will be that one person less than the inhabitants intended to see after their interests—to see that contracts are duly performed, supplies furnished, and money not unnecessarily squandered. It is too common in the present day for municipal officers, school trustees, and other public functionaries, to misunderstand their position with regard to their public trusts; and the letter of the Chief Superintendent of Education will certainly not have a tendency to discourage the practice, but the opposite.

New trial refused.

GENERAL CORRESPONDENCE.

School Law—Townships—Qualification of Voters.

TO THE EDITORS OF THE LAW JOURNAL.

Derry West, March 2nd., 1859.

Gentlemen.—The freeholders and householders of our school section are at a loss to know, whether the qualification required for voters under the 7th section of the 13th and 14th Vic., ch. 48, or the qualification under the 3rd. section of the 16th Vic., ch. 185, is at present the law of the land; or whether the qualification under the 16th Vic., sec. 3, ch. 185, is applicable to all schools both in cities, and towns, and townships, or whether there is a qualification for cities and towns, and a separate qualification for townships and school sections.

At a special school meeting held in our school section a few days ago, the chairman decided that the qualification under the 3rd section of the 16th Vic., was applicable to school sections as well as cities and towns—he then rested his decision on the 26th and 27th sections of the 16th Vic., ch. 185, —where you will see that such of the provisions of the Upper Canada School Act of 1850 as are contrary to the provisions of this act "shall be and are hereby repealed," and also 'the provisions of this act shall apply to school affairs and to all persons referred to in the said provisions."

Gentlemen, your view on the above will set at rest a good deal of dissatisfaction which now prevails in our school section.

I remain, &c., J. T.

[The 16th. Vic., ch. 185, sec. 3 does not, we think, apply to townships. As to townships the 13th and 14th Vic., ch. 48, sec. 7, appears to be still in force.—EDS. L. J.]

To the Editors of the Law Journal.

CLERK'S OFFICE, SPENCERVILLE,
28th March, 1859.

GENTLEMEN,—Please answer the following questions through your valuable Journal.

1. A. enters into contract with the Council of the Municipality of the Township of Edwardsburgh to build a town hall, for the faithful fulfilment of said contract A. is required to give bonds with two sureties. B. signs said bonds and becomes one of A.'s sureties, and is afterwards elected a Councillor in the Township of Edwardsburgh. Is B. disqualified under the statute, although he has no interest in the contract?

2. In a township divided into wards, can the same individual be nominated and receive votes for election as a Councillor in more wards than one; if so, doth his election depend upon him receiving the highest number of votes in any one of the wards, or upon the collective number of votes in all the wards which he may have contested?

THOS. ROBERTSON, *Town Clerk.*

[1. We think B. disqualified.

2. The right of a councillor to sit in a council of a township divided into wards, must be in respect of the votes of some one ward and not of several wards. If elected for more wards than one, he must elect to set for one in particular.—EDS. L. J.]

To the Editors of the Law Journal.

FORT ERIE, C. W., 30th March, 1859.

DEAR SIRS,—Will you be pleased to give your opinion, through the *Law Journal*, on the following case, tried before Judge Price.

Under the 11th section of the Assessment Law of 1853, A.B. was assessed, in 1858, for $2,400 income, as chief engineer on the Buffalo and Lake Huron Railway. He had a permanent office in the village, at which he attended daily, with several assistants employed under him. Was not assessed in any other municipality, but *resided* in Buffalo, State of New York. The only plea set up at the trial, was *residence in a foreign country;* and a verdict was rendered for defendant.

Without giving my name, will you notice this case in your next issue.

Situated as we are, near Buffalo, other cases may arise of a similar kind, and it would be desirable for the interest of this municipality to know how far persons situated as above stated are liable to be assessed, in your opinion.

You will find enclosed $5, to pay for my last year's subscription.

Yours truly,

A SUBSCRIBER.

[We incline to the opinion in the case submitted, that A.B. was rightfully assessed on his income. His residence abroad does not, we think, free him from liability to assessment.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

EX. *May* 27, *Nov.* 19.

VAUGHAN v. THE TAFF VALE RAILWAY COMPANY.

*Railway Company—Negligence—*14 *Geo. III. cap.* 78, *sec.* 34; 8 *&* 9 *Vic. cap* 20, *sec.* 35.

Some combustible grass adjoining a railway was set fire to by a locomotive engine which was passing, and caused the destruction of plaintiff's wood. The Railway Company to whom the engine belonged had adopted every practicable means to avoid the danger; and moreover, it did not appear from the evidence whether the coal fell on that portion of the grass which grew on the railway, or that portion which grew on the soil of the plaintiff.

Held, that the Railway Company were liable for the damage; and that they were not protected either by 14 Geo. III. cap. 78, sec. 83, or by 8 & 9 Vic. cap. 20, sec. 6.

The declaration in this case contained two counts, for negligence and for throwing hot coals on the defendants' embankment, knowing that the grass thereon was combustible. As the jury were charged strongly in favour of the plaintiff, the Court in delivering judgment asks was the evidence such as to warrant the opinion of the learned judge, and answers in the affirmative. As here undoubtedly there was the use of an instrument likely to produce damage and producing it, which, according to the general rule, would make the defendants liable. But two answers were suggested: first, that if the fire originated on their own land they were protected by 14 Geo. III. cap. 78, sec. 34. But the Court were of opinion that that Statute does not apply when the fire originated in the use of a dangerous instrument, knowingly used by the owners of the land on which the fire breaks out. The next answer was that the Railway Clauses Act, 8 Vic., cap. 20, afforded a defence to this, which was negatived on the ground of there being negligence if the fire originated on the defendants' land; and if on the plaintiff's land, there was a trespass.

EX. *November* 23.

DAVIS v. THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Damages—Detention of Goods—Illegal Claim—Carriers.

Where goods are detained under an illegal claim to a sum of money in respect of them, upon payment of which the owner might recover posession of his property, the measure of damages is not necessarily that sum, but the circumstance that the owner may, by paying the sum, have obtained the goods, is an element for the consideration of the jury in assessing the damages.

In this case cause was shown that the defendants were responsible for such loss only as was the necessary consequence of their neglect in not delivering the goods within a reasonable time; but the goods would have been delivered within a reasonable time, if the plaintiff had chosen to pay the demand: therefore any ulterior loss was the consequence of the plaintiff's refusing to pay the demand, and not the defendants' negligence; and the demand constitutes the measure of damages. To which it was opposed, that if goods are detained under an illegal demand, it would be absurd to say that the owner shall not recover a shilling more than that sum if he does not choose to yield to the extortion.

The Court in delivering opinion said,—We are, I believe, all of opinion that though it cannot be said that the £1 3s. is the measure of damages, as plaintiff could have got his goods for £1 3s., which he did not choose to pay: the real damage is nothing more than that. We are certainly not of that opinion.

I think (said POLLOCK, C.B.) it is so impossible to say that a person who could avoid an injury of which he complains, is at all all times entitled to act in an obstinate, wilful, and perverse manner, and say, I care nothing about the loss that is occasioned by this, I shall have a claim against the other party, I will let it go on. On the other hand, the persons who do the injury are no doubt responsible for the actual and legitimate consequences of of the injury or violation of the right. He also said they are responsible for the damage, but not all the damage, when part of it might have been avoided: and we think that the jury are entitled to look at the conduct of the parties, and to see where the real blame lies, and to whom in reality the mischief is to be attributed.

C.P. SIMMONS v. HESELTINE. *Nov.* 10, 11, *Dec.* 8.

Vendor and Purchaser—Title to Land.

Where the title is dependant upon a question of fact which it is impossible to regard as reasonably certain, such a title ought not to be deemed a good or sufficient title, as between a vendor and a purchaser.

This was an action brought to recover deposit money and expenses on the ground that a good title could not be given to a portion of the premises included in the sale.

Verdict for plaintiff. Leave reserved to enter a non-suit or a verdict for defendant.

It appears that the defendant sought to enforce specific performance by a bill in equity, but failed in doing so, on the ground that plaintiff had received notice from D., a third party, to the effect *that he, the said third party, had the title to the disputed portion.*

In this action it was said by COCKBURN, C. J., that it was a doubtful question both of fact and law, whether the third party had the title to the disputed part or not, and a new trial would have been granted; but that should the next jury find for the defendant, the plaintiff would have to choose between loosing deposit money and expenses, or bringing a law suit, as D. might after the purchase was complete, file a bill against him, and establish as a fact that the title was in him.

Rule discharged.

Q.B. CUCKSON v. STONES. *Nov.* 25.

Master and Servant—Agreement—Condition precedent.

The plaintiff agreed to serve the defendant for ten years as a brewer, to observe his commands, and keep his secrets; and the defendant agreed to pay the plaintiff £20 on the execution of the agreement, to provide him a house and coals during the ten years, and to pay him the weekly sum of £2 10s. during the same period.

Held, to a claim for weekly wages during part of the period, that a plea that the plaintiff was not during such part ready, willing, or able to, and did not in fact render the agreed service, meant that he wilfully refused to render it, and that the plea was therefore good.

Held, also, to the same claim, that absence from service by reason of temporary illness was no answer.

In this case the plaintiff, by reason of illness, was unable to perform his duties; when he became able he again resumed service. It was admitted by the defendant's counsel that the contract was not rescinded. Under the contract it was held there could be no deduction from the weekly sum in respect of plaintiff being disabled for a day or a week; and while the contract remained in force, we (said the Court) see no difference between his being disabled for a day, a week or a month. The plaintiff was not *permanently* incapacitated to fulfil his engagement.

Q.B WARLOW v. HARRISON. *Nov.* 25.

Auction—Sale without reserve—Duty of Auctioneer—Agent.

Where an article is to be sold by auction *without reserve*, and after a bidding is made, and before the hammer falls, the owner bids a higher sum, whereupon the article is bought in for him; the auctioneer is neither the agent of, nor is it his duty to the bidder to complete the contract on his behalf.

LORD CAMPBELL, C. J., in delivering judgment, said, The auctioneer is agent for the vendor only; but after the sale he may, at the request of the purchaser, or his representative (being present) sign a memorandum for the purchaser: he is then his agent, but for this purpose only. Further, a bidding at an auction is only an offer, not a conditional purchase; and until the hammer is knocked down, either party may retract; and as the article was never knocked down to him, the relation of principal and agent never existed between the plaintiff and defendant.

At the auction, the plaintiff bid 60 guineas for the article; the owner bid 61 guineas: and plaintiff who knew that the *owner* had bid over him, would bid no higher. The auctioneer knocked down to the owner, and said that the article was bought in. The plaintiff subsequently tendered the amount of his bid to the auctioneer and demanded the article, which was refused to be given up. The action was against the auctioneer for not completing the contract for the purchaser as alleged.

EX. C. HOLMES v. KIDD AND ANOTHER. *Dec.* 1.

Bill of Exchange—Indorsee of over due bill—Equities attaching thereto—Set off.

A bill of exchange is endorsed by a drawer after it is over due. *The bill was accepted on the terms that the drawer should hold* certain goods with power to sell and apply the proceeds in payment of the bill, if the same were not paid at a maturity. The drawer, on non-payment of the bill when due, sell the goods, and realizes part of the amount of the bill.

Held, affirming the judgment of the Court of Exchequer, that these facts afford a good answer *pro tanto* to an action by the endorsee against the acceptor; the terms above stated establishing such equities as attach to the bill in the hands of the indorsee of a bill so over due; and preventing his recovering the amount raised by sale of the goods by the drawer.

It was argued that the equities contended for do not attach absolutely, but on a contingency that they should attach *eo instanti* on the indorsement of the bill; that not doing so it was the same as the right of set-off, which does not affect the rights of the holder of an over due bill.

CROMPTON, J., said this case is not at all like those of set-off, as in *Borough* v. *Moss*, 10 B. & C. 558, where the set-off arises out of collateral matter. Here the equities attach directly to the bill; and what the holder takes from the drawer is, in this case, only a defeasable title to the bill in question.

CHANCERY.

V. C. S. MACRAE v. ELLERTON. *July* 25.

Mortgagor and Mortgagee—Costs.

A. is mortgagee of freeholds and leaseholds. The mortgagor being dead, A. files his bill against the devisee and executors of the mortgagor seeking for foreclosure or sale. Both the freeholds and leaseholds are sold with the concurrence as to the freeholds of the devisee, and as to the leaseholds of the executors, of the mortgagor; but the money produced is insufficient to pay the debt due to the mortgagee.

Held, nevertheless, that the devisee and executors of the mortgagor were entitled to their costs out of the funds.

V. C. S. MEEK v. CARTER. *July* 27.

Lessor and lessee—Covenant—Injunction—Fire Insurance—Fraud.

In a case of fraud or misleading, the court will interfere by injunction to restrain the lessor from proceeding in an ejectment against the lessee, who has strictly complied with the terms of a covenant to insure against fire.

V. C. S. TINDAL v. POWELL. *May* 15, *July* 28.

Agent—Steward—Bill for an account.

A bill for an account against a person who was alleged to have acted as steward or agent to an aged lady up to the date of her decease, dismissed with costs, there being no circumstances of suspicion against the defendant, and no duty to keep accounts having been undertaken, and the education and capacity of the defendant, as well as the course of dealing between himself and his employers, being inconsistent with the notion of his keeping regular accounts.

M. R. WILKINSON v. BEWICK. *July* 30.

Trustee—Liability—Failure of Bank

Trustees included in their account brought into Chambers certain sums which they had received, and which stood in their names in a bank. They were ordered to pay the amount found due into Court, and ultimately did so partly out of subsequent receipts, leaving a portion of the sum found due on the account still in the bank, on the failure of the bank.

Held, that the trustees were liable for the loss of the sums included in the account but not for sums subsequently paid in.

V. W. LANGDALE v. WHITFIELD. *June* 30, *July* 1.

Will—Construction—"Monies."

Testatrix after giving the residue of her monies, securities for monies, goods and personal estate to M. by her will, by a codicil gave all the residue of her monies of or to which she might at the time of her death be possessed or entitled to N.

Held, that monies in the codicil included not only monies actually in hand, but also monies due to the testatrix on securities or otherwise, at the time of her death.

REVIEWS.

THE CANADIAN CONVEYANCER: comprising a selection of Conveyancing Precedents, carefully revised and adapted to Canadian practice, forming a correct and reliable Compendium of all the instruments required to be used in the ordinary transaction of legal affairs. By J. RORDANS, Law Stationer, Court Street, Toronto.

Mr. Rordans submits his collection of conveyancing precedents, just published, to the legal practitioner, the justice of the peace, county conveyancer, and others, as a reliable hand book of all ordinary legal instruments used in Canada, and such we believe it will be found to be, and very generally useful.

It contains many precedents adapted to this country, which cannot be found in English and United States works of this description, but which are much in use in Canada; and we are aware of the frequently expressed want of such a book, to which Mr. Rordans, in his preface, attributes its origin.

The compiler's business of a law stationer (we believe Mr. Rordans was the first person in that business in Toronto), having the benefit of an English as well as a Canadian experience, gave him many advantages in making this collection so full and reliable, as few special documents leave any lawyer's or conveyancer's office without having first passed through his hands to be engrossed.

There is an introductory chapter of 27 pages "On the laws affecting real property in Upper Canada," which gives much useful information on the subject, which it would require much time and not a little knowledge of Canadian law to extract from the text books and statutes.

We can recommend the book for its utility; and as to the cost, we need only say that, although containing 276 pages and being full bound, the price is only $2.

THE LONDON QUARTERLY. New York: Leonard Scott & Co.

We have received from the Publishers the January number of this well known serial. The first article gives a sketch of Lord Cornwallis' life, in which that distinguished Statesman is given a much higher place in history, than has been conventionally assigned him. The article on Mr. Dyce's Shakspere seems to confirm the usual compliment, that "the last edition is the best." The article on the Consular service is well worthy of perusal. The remaining articles which our space is not sufficient to notice are as follows: Pius VIII, and Gregory XVI, Patents; Lodging, Food, and Dress of Soldiers; Life and Writings of Johnson; Bread; Reform.

THE NORTH BRITISH, for February, has also been received. Perhaps the articles in this Review which will be most generally read are Carlyle's Frederick the Great; the Philosophy of Language; Sir Thomas More and the Reformation; Intuitionalism, and the limits of religious thought; and the article on Reform. The first article is a terse and pleasing review of Mr. Carlyle's new work which as it were makes you look into his hero's heart, as he raises his hand to strike or arrest a blow, showing a complete lyric or tragic poem in the act, which from the outside appears sufficiently unpoetic. Philologists will find an instructive essay in the article on the Philosophy of Language, as well as an impartial review of the theories of some of our latest writers on Comparative Philology; and in connection with it may be read with interest Archdeacon Williams essay on the pre-historic races of Great Britain; and the short review of the Literature of the American Aboriginal Languages.

THE UNITED STATES INSURANCE GAZETTE. New York: G. E. Currie.

In the February number now before us we find a couple of of articles on Canadian Insurance Law, and a great deal of valuable statistical and general information in regard to Life and Fire Insurance.

We acknowledge the receipt from Mr. Lovell, Montreal, of the Index to the second volume of the Lower Canada Jurist, compiled by Strachan Bethune, Esq.

We have received also No. 12 of the WEEKLY LAW GAZETTE, published in Cincinatti, U. S.

APPOINTMENTS TO OFFICE, &c.

CORONERS.

REGINALD HEMWOOD, Esquire, M.D., Associate Coroner for the Town of Brantford.

GILES M. ROGERT, and HENRY M. EAANS, Esquires, M.D., Associate Coroners for the United Counties of Stormont, Dundas, and Glengarry.—(Gazetted, 5th March, 1859.)

STEWART JOHNSTON, Esquire, Associate Coroner for the County of Lambton

JOHN BOYD, Esquire, Associate Coroner in and for the United Counties of York and Peel.—(Gazetted, March 12th, 1859.)

GEORGE NIEMEIEZ, Esquire, M.D., Associate Coroner for the County of Grey.—(Gazetted, March 19th, 1859.)

NOTARIES PUBLIC.

WILLIAM FLETCHER PETERSON, of the Town of Bath, Esquire, to be a Notary Public in Upper Canada.

ALEXANDER McMICKEN, of Clifton, Esquire, to be a Notary Public in Upper Canada

JOHN DOUGLAS, of Fort Erie, Esquire, to be a Notary Public in Upper Canada.

NICOL KINGSMILL, of Toronto, Esquire, Barrister and Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted, March 5th, 1859.)

HARVEY WARNER, of Wilton, Esquire, to be a Notary Public in Upper Canada.

JOSEPH W. CALDWELL BROWN, of Uxbridge, Esquire, to be a Notary Public in Upper Canada.

JOHN SYMONDS, of the City of London, Esquire, to be a Notary Public in Upper Canada

ADAM PATERSON, of the Village of Orillia, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, March 12th, 1859.)

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

PETER MORGAN, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, March 19th, 1859.)

WILLIAM P. WILLSON, of the Village of Komoka Esquire, to be a Notary Public in Upper Canada.—(Gazetted, March 26th, 1859.)

TO CORRESPONDENTS.

A. MORSE—T. B.—QUFRIST—Under "Division Courts."

J. T.—THOS. ROBERTSON—A SUBSCRIBER—Under "General Correspondence."

JUDGE C.—A. S. CADENHEAD—JAMES COLEMAN—OTTO KLOTZ, and "CLERK"—Communications too late for insertion in April number.