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VOL. IV. TORONTO, SEPTEMBER, 1858. No. 9.

THE UPPER CANADA LAW JOURNAL

AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

PRINTED AND PUBLISHED BY MACLEAR & CO., 17 & 19 KING STREET EAST, TORONTO.

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LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Easter Term, 21st Victoria, 1858.

During the Term of Easter, the following Gentlemen were called to the degree of Barrister-at-Law:—

William Baldwin Sullivan, Esquire. | Alexander Forsyth Scott, Esquire.
Henry Massingberd. " | Ward Hamilton Bowlby. "
Anthony George Lefroy, Esquire.

On Tuesday, the 25th day of May, in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows:—

University Class:

Mr. Edmund John Hooper, B.A.

Junior Class:

Mr. Henry Robertson.
" Theophilus Begue.
" Edward Robinson.
" David Lennox.
" John Hoskins.
" James Graham Vansittart.
" Augustus Roche.
" John Bell Gordon.
" Patrick William Darbey.
" Edward James Denroche.
" Alexander Forbes, junior.
" Richard Stotesbury McCulloch.
" Morgan Coldwell.
" Thomas Babington McMahon.
" Kenneth Goodman.
" Robert Smith.
" William Torrance Hays.
" George Augustus Hamilton.
" William Henry Walker.
" John Downey.
Mr. Frederick Nash.
" James Frederick Smith, junior.
" Octavius Prince.
" Hamilton Douglas Stewart.
" Robert Kerr Robb.
" Thomas Ferris Nellis.
" Franklin Metcalfe Griffin.
" Thomas Wellesley McMurray.
" Michael Joseph McNamara.
" John Joseph Landy.
" Jabez Mainwaring Moffatt.
" Thomas James Fitzsimmons.
" Edward Clarke Campbell, junior.
" Gilbert James Wetenhall.
" Henry Mann Briggs.
" Edmund Baynes Reed.
" Pedro Alma.
" Robert John Keating.
" J[illegible] Elloy Harding
" Joseph Aloysius Donovan.
Mr. John McLean Stevenson.

NOTE.—Gentlemen admitted in the "University Class" are arranged according to their University rank; in the other classes, according to the relative merit of the examination passed before the Society.

Ordered—That the examination for admission shall, until further notice, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripedes, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Farnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric, and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively, Mathematics, (Euclid. 1st. 2nd, 3rd. 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd, 3rd. and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 3, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class:

In the same subjects and books as for the University Class.

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books, or Legendre's Geometrie 1st and 3rd books, with the promblems; and such works in Modern History and Geography as the candidates may have read: and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

Ordered—That in future, Candidates for Call *with honours*, shall attend at Osgoode Hall, under the 4th Order of Hil. Term, 18 Vic, on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the latter of such days.

Ordered—That in future all Candidates for admission into this Society as Students of the Laws, who desire to pass their Examination in either the Optime Class, the University Class, or the Senior Class, do attend the Examiner at Osgoode Hall, on both the first Thursday and the first Friday of the Term in which their petitions for admission are to be presented to the Benchers in Convocation, at Ten o'clock A. M. of each day; and those for admission in the Junior Class, on the latter of those days at the like hour.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament, 20 Vic. chap. 63, and the Rule of the Society of Trinity Term, 21 Vic. chap. 1, made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries, 1st Vol.; Smith's Mercantile Law; Williams on Real Property; Williams on Personal Property; Story's Equity Jurisprudence; The Statute Law, and the Practice of the Courts.

NOTICE.—A thorough familiarity with the proscribed subjects and books will, in future, be required from Candidates for admission as Students; and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

NOTICE.—By a rule of Hilary Term, 18th Vict., Students keeping Term are henceforth required to attend a Course of Lectures to be delivered, each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

ORDERED.—That the Subjects of the Lectures, next Term, be as follows: Trusts —S. H. Strong, Esquire; Damages—J. T. Anderson, Esquire.

ROBERT BALDWIN,
Easter Term, 21st Victoria, 1858. *Treasurer.*

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. WM. B. LINDSAY, Clk. Assembly.

LEGISLATIVE COUNCIL,
Toronto, 4th September, 1857.

EXTRACT from the Standing Orders of the Legislative Council.

Fifty-ninth Order.—"That each and every applicant for a Bill of Divorce shall be required to give notice of his or her intention in that respect specifying from whom and for what cause, by advertisement in the official Gazette, during six months, and also, for a like period in two newspapers published in the District where such applicant usually resided at the time of separation; and if there be no second newspaper published in such District, then in one newspaper published in an adjoining District; or if no newspaper be published in such District, in two newspapers published in the adjoining District or Districts."

J. F. TAYLOR,
10-tf. Clerk Legislative Council.

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IS published monthly in the City of Toronto, at $4 per annum if paid before 1st March in each year; $5 if paid afterthat period.

It claims the support of Judges, Lawyers, Officers of Courts, Municipal Officers, Coroners, Magistrates, and all concerned in the administration of the Law, on the following grounds:—

1st. It is the only Legal Periodical published in Upper Canada.

2nd. Each number contains Reports of cases—many of which are not to be found in any other publication.

3rd. Chamber Decisions are reported expressly for the Journal.

4th. Each number contains original articles on subjects of professional interest.

5th. Each number contains articles in plain language for the guidance and information of Division Courts, Clerks, Bailiffs and Suitors, and Reports of cases of interest to all whose support is claimed.

6th. Each number contains a Repertory of English decided cases on Points of Practice.

7th. It is the only recognized organ of intercommunication between Lawyers, Officers of Courts, and others concerned in the administration of law.

8th. It is the only recognized medium of advertising on subjects of legal interest.

9th. It circulates largely in *every* City, Town, Village and Township in Upper Canada.

10th. It exchanges with more than fifty cotemporary periodicals published in England, the United States, Upper and Lower Canada.

11th. It has now reached the fourth year of its existence, and is steadily increasing the sphere of its usefulness.

12th. It has advocated, and will continue to advocate sound and practical improvements in the law and its administration.

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REMITTANCES.

August, 1858.—M. McP., Vroomanton, $2; Judge M., Brockville, $4; Judge Mc Queen, Woodstock, $16; D. C., $4; M. T., $4; J. McD., Ingersoll, $4; J. R. M. Cayuga, $9; R. B. S. Caistorville, $3.

DIARY FOR SEPTEMBER.

1. Wednesday Chancery Examination at Goderich commences.
4. Saturday .. TRINITY TERM ends. Chancery Examination at Goderich ends.
5. SUNDAY.. 14th *Sunday after Trinity.*
7. Tuesday ... Toronto and Cobourg Examination commences.
8. Wednesday Last day for notices of Trial. County Court.
11. Saturday... Examination at Cobourg ends.
12. SUNDAY... 15th *Sunday after Trinity.*
13. Monday ... Examination at Belleville and London commences.
14. Tuesday ... Quarter Sessions and County Court Sittings.
18. Saturday.. Toronto, London, and Belleville Examination ends.
19. SUNDAY... 16th *Sunday after Trinity.*
21. Tuesday ... Chancery Examination at Chatham and Kingston commences.
25. Saturday... Examination at Chatham and Kingston ends.
26. SUNDAY.. 17th *Sunday after Trinity.*
28. Tuesday ... Chancery Examination at Niagara and Brockville commences.

"TO CORRESPONDENTS."—*See Last Page.*

The Upper Canada Law Journal.

SEPTEMBER, 1858.

THE LIBERTY OF THE PRESS.

Reports of Law Proceedings.

The law of human law is the security of the person and property of men in civil society. For this purpose it moderates the force and power of natural rights, and appoints certain forms and measures for their enjoyment.

The rights of the person, being antecedent to civil society, are the first concern of the magistrate. Property, having its origin in convention, is secondary in order as well as import.

The greatest injury which any one can suffer is such as affects his life or produces a bodily loss. The next injury in kind is that which affects him in character.

But it is the natural right of every man to think and to speak, and this involves the consequential right to print and to publish. And yet, neither the natural right of thinking, nor the consequential right of publishing, is to be exercised to the defamation of the individual, or to the detriment of Society.

The liberty of the press properly understood is the personal liberty of the writer to express his thoughts in the more improved way invented by human ingenuity, that is by means of the press. And the press is not only a vehicle for the expression of thought, but oftentimes a record of facts.

The right to commit a fact to paper is a natural right. The right to publish it is its consequential. The question is, how far the force of these rights is to be restrained by the rules of Society; or, in other words, how far the rights are moderated for the good of Society.

Before going further we must state that for more than one of the foregoing propositions we are indebted to the much prized work on libel by Francis Ludlow Holt, a barrister, who was for many years editor of *Bell's New Weekly Messenger*. In some places we have taken the liberty of using his very language. In others, we have differed, not only from his language but from his ideas. To prevent confusion, we deem it unnecessary to separate the one from the other.

Every man may be called upon in a court of law to defend his life or his character. He may be dragged there needlessly, but the fact of his having been there attaches odium to his name. He may have against him even circumstances of suspicion, which before a jury he can thoroughly demolish. He may, no matter what the tribunal is, in the end be satisfactorily acquitted. Is it, then, lawful or right, before a man accused of crime or of wrong is tried, or during the course of his trial, or before his trial begins, to bring his name before the public in the public press? Many questions of great nicety and equally great delicacy here unfold themselves. Each question, like other questions, has more than one side, and each side has manifold arguments.

If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of a person, of whose guilt or innocence they are to decide, with minds pure and unprejudiced. It is scarcely possible that they can do so after having read for weeks and months ex parte statements of evidence against the accused. Are these statements of evidence, for the benefit of the individual, to be suppressed? Or are they, for the good of Society, to be promulgated?

On the one side it is argued, that reports of this description when published are under all circumstances at the expense of harrassing the feelings of every person who is unfortunately taken up on any charge; that when such a charge is published it is extremely difficult to take off the effect of it by any counter statement; that it may, besides, meet the eye of thousands who may never hear that the party accused was ultimately proved innocent or guilty.

On the other side it is argued, that it is of vast importance to the public that proceedings of Courts of Justice should be universally known; that the advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the individual whose conduct is the subject of investigation; that police reports, for example, as remarked by Lord Campbell, in *Lewis* v. *Levy*, in other columns, are extremely useful for the detection of guilt, by making facts notorious, and in bringing those facts more correctly to the knowledge of all parties interested in unravelling the truth.

Each side of the question has had its day. Cases abound in the law reports wherein celebrated judges have espoused contrary views, and argued with all the weight of mighty intellect. A review of the cases would be as tiresome to

the reader as it would be troublesome to the writer. The last of them, and by far the most important (*Lewis* v. *Levy*), is given elsewhere. It shows the tendency in modern times to uphold the public good, even at the sacrifice of private feelings. But this is only justifiable where the two conflict. An editor of a newspaper, though generally protected in giving a fair and impartial report of what takes place in a Court of Justice, has no right now, more than formerly, wantonly to assail the accused. The less comment the better. The less insinuation the better. The more a newspaper editor keeps to narrative when referring to pending law proceedings the better for himself, his purse, and his paper.

Upon a review of decided cases, the following may, we believe, be given as a summary of the law :—

1st. A correct, fair and impartial, though not verbatim, report of a trial in a Court of Justice is lawful (*Curry* v. *Walter*, 1 Esp. 456; *Hoare* v *Silverlock*, 9 C. B. 23; *Lewis* v. *Levy*, 4 U. C. *Law Journal*, p. 213).

2nd. The report, though not correct, if honest, may be given in evidence in reduction of damages (*Smith* v. *Scott*, 2 C. & K. 585).

3rd. A false or highly colored report is unlawful (*Waterfield* v. *Bishop of Chichester*, 2 Mod. 118).

4th. A report of law proceedings which has mixed up with it commentaries reflecting upon any of the parties whose names appear in it, loses the privilege which it might otherwise claim (*Stiles* v. *Nokes*, 7 East. 493; *Rex* v. *Fleet*, 1 B. & A. 379; *Carr* v. *Jones*, 3 Smith, 491; *Rex* v. *Lee*, 5 Esp. 123; *Rex* v. *Fisher*, 2 Camp. 570; *Lewis* v. *Clement*, 3 B. & A. 702; *Lewis* v. *Levy*, *ubi supra*; *Thomas* v. *Crosswell*, 7 Johnson, 264; *Commonwealth* v. *Blanding*, 3 Pickering, 366; *Usher* v. *Severance*, 2 Appleton, 9).

5th. The privilege of reporting is not confined to the Superior Courts of Law and Equity (*Lewis* v. *Levy*, *ubi supra*, but see *Duncan* v. *Thwaites*, 3 B. & C. 556; *Rex* v. *Lee*, 5 Esp. 123; *Rex* v. *Fisher*, 2 Camp. 563; *Charlton* v. *Watton*, 6 C. & P. 385; 13 & 14 Vic. cap. 60, sec. 7).

6th. The same rules apply to the reports of proceedings in Parliament (*Rex* v. *Abingdon*, 1 Esp. 226; *Rex* v. *Creevy*, 1 M. & S. 279).

7th. That which is hurtful and indicates malice is not privileged (*Lewis* v. *Levy*, *ubi supra*).

The object of the law, while punishing malice, is to protect honesty and good faith. It cannot be said that the report of a proceeding in a Court of Justice is under all circumstances, any more than it can be said it is under no circumstances, privileged. The motives of the party publishing are not to be left out of consideration. Malice or no malice is a question for the jury to determine. The conduct of the defendant in other respects may also be taken into consideration.

In an action for a libel contained in a public newspaper or other periodical publication, the defendant may plead that the alleged libel was inserted without actual malice, and without gross negligence; and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in the newspaper, &c., a full apology for the libel, &c. (13 & 14 Vic. cap. 60, s. 3.)

IMPORTANT LAW REFORMS.—THE LAW OF ARREST.

The Parliamentary Session lately past is not devoid of law reforms. In the way of practical legislation, no man has done more for Canada than the Honorable John Alexander Macdonald.

Not the least important of his measures is the Act intitled "An Act for abolishing arrest in civil actions in certain cases, and for the better prevention and more effectual punishment of fraud."

The aim of the Act is to abolish arrest—not in all cases, but "in certain cases." To abolish arrest in all civil cases, would be to commit a piece of absurdity of which we are sure Mr. Macdonald will never be guilty. Again, the Act is not only to abolish arrest in certain cases, but for "the better prevention and more effectual punishment of fraud." This branch of the title also foreshadows important provisions.

As the Act came into force on the 1st of the present month of September, we append a synopsis of it.

I.—After 1st September, 1858, no person to be arrested upon mesne or final process in any civil action, except in the cases and in the manner provided for by this Act.

II.—If any party being a creditor of or having a cause of action against any person now liable to arrest, shall by affidavit of himself or of some other individual, show to the *satisfaction* of a Judge of either of the Superior Courts of Common Law a cause of action to the amount of £25 or upwards, and shall also by affidavit *show such facts and circumstances* as shall satisfy the Judge that "there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit *Canada* with intent to defraud his creditors," &c., it shall be lawful for such Judge to direct, &c., that such person shall be held to bail for such sum as the Judge shall think fit, &c. Thereupon a capais may issue, &c.

III.—Special bail may be put in and perfected according to present practice, and action to proceed as if commenced by writ of summons.

IV.—An order for a capias may be obtained after commencement of action. The capias to be in the form in Schedule A. of C. L. P. A., 1856.

V.—The Sheriff, &c., *within two calendar months after date* of capias to proceed to arrest defendant.

VI.—When capias issued under this Act, not necessary before suing out *Ca. Sa.* to obtain a Judge's order for the issue thereof, or to make or file any further affidavit. But where defendant has not been held to bail, plaintiff must by affidavit

of himself or some other party, show to the *satisfaction* of a Judge of either of the Superior Courts of Common Law that "he has recovered judgment against defendant for the sum of £25 or upwards, exclusive of costs," and show also by affidavit "such facts and circumstances as shall satisfy the Judge that there is good and probable cause for believing either that defendant, unless forthwith apprehended, is about to quit *Canada* with intent to defraud his creditors, &c.," or that defendant "hath parted with his property, or made some secret or fraudulent conveyance thereof in order to prevent its being taken in execution," and then the Judge may direct a *Ca. Sa.* to issue.

VII.—No writ of capias to be renewed. On the expiration thereof a new order to be obtained.

VIII.—Party arrested may at any time apply to one of the Superior Courts of Common Law or to a Judge for a rule or order to show cause why he should not be discharged out of custody. Court or Judge to make such rule or order as they or he may see fit.

IX.—Prisoners in custody or on bail upon mesne process *at the time of the commencement* of this Act may be discharged upon entering a common appearance to the action, provided that every such prisoner is liable to be detained, or after such discharge to be again arrested by virtue of a special order under this Act.

X.—Any Judge of a County Court empowered to make such orders as are mentioned in second and fourth sections of this Statute, and to act under section eight of the same.

XI.—Debtor in close custody at the time of or after the passing of this Act, may give notice that he will after the expiration of ten days from the day of service apply to be discharged from custody. Then it shall be lawful for plaintiff to file interrogatories, or to cause the debtor to be examined *viva voce* upon oath before the Judge of the County Court in the County in which the debtor is confined, or before some one to be appointed in that behalf by the County Judge. County Judge may issue an order to Sheriff or Gaoler to bring debtor before him for the purpose of being examined.

XII.—After the expiration of ten days, debtor may upon proof of service, and upon making oath that "he is not worth £5 exclusive of his necessary wearing apparel, the bed and bedding of such debtor and his family, and one stove and cooking utensils, and also the tools or implements of his trade not exceeding the value of £15, and that he hath answered all the interrogatories filed by plaintiff, and hath given due notice of such answers (or if no interrogatories served that he hath not been served with any interrogatories) and that he hath submitted himself to be examined pursuant to the order of the County Judge (or if no order that he hath not been served with any such order) apply to the Court or a Judge for a rule or summons to show cause why he should not be discharged from custody. Upon the return of summons, if answers &c. be deemed sufficient, debtor may be discharged. Provided Court or Judge may on return of Summons allow plaintiff to file further interrogatories, &c. Provided also Court or Judge may make it a condition of debtor's discharge that he assign any right or interest which he may have or be presumed to have in any real or personal property, credits and effects other than wearing apparel, &c., before mentioned. Provided lastly in certain cases of fraud, &c., specified debtor may be re-committed for any period not exceeding twelve calendar months.

XIII.—Any person having obtained a judgment in any Court in Upper Canada or any person entitled to enforce such judgment may apply to the Court or a Judge for a rule or order that the judgment debtor be orally examined touching his estate and effects, &c. If debtor do not attend as required by the order, or if he attend and refuse to disclose his property &c., or do not make satisfactory answers, &c., may be committed for any time not exceeding twelve calendar months, or a *Ca. Sa.* may be issued, &c.

XIV.—Debtors fraudulently obtaining their discharge may be recommitted. Sheriff not in such cases liable for escape.

XV.—False evidence, perjury.

XVI.—C. L. P. Act, 1856, and this Act to be read as one Act. Power given to Judges to frame rules, &c., necessary for giving effect to this Act.

XVII.—The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, eighteenth, nineteenth and twenty-second sections of this Act to apply to County Courts, as also all rules, &c., to be made under sixteenth section of this Act.

XVIII.—Every confession of judgment, cognovit, actionem, or warrant of attorney to confess judgment voluntarily or by collusion with a creditor or creditors, given by any person (such person being at the time in insolvent circumstances or unable to pay his debts in full, or knowing himself to be on the eve of bankruptcy) with intent to defeat or delay his creditors, &c., or with intent of giving a preference, &c., to be invalid to support any judgment, and to be void as against the creditors of the party giving the same.

XIX.—Gifts, conveyances, assignments or transfers of any goods, chattels or effects, bills, bonds, notes, or other securities or property transferred under like circumstances, to be void as against creditors: Provided, that nothing herein contained is to avoid "any deed of assignment made and executed by any debtor for the purpose of paying and satisfying rateably and proportionally, and without preference or priority, all the creditors of such debtor their just debts." Provided also, that nothing herein contained is to make void "any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers."

XX.—Misdemeanor for a person to destroy, alter, mutilate, or falsify any of his books, papers, writings or securities, or make or be privy to false or fraudulent entries, &c.

XXI.—Misdemeanor to make or accept any gift, conveyance, assignment, sale, transfer, or delivery of lands or goods, &c., with intent to defraud creditors.

XXII.—2 Geo. IV. cap. 1, s. 15; 23rd, 42nd, 108th and 300th ss. of C. L. P. A. 1856, and also so much of 48th section of C. L. P. A. 1856, as provides "that after obtaining judgment it shall not be necessary for the plaintiff to make or file any other or further affidavit than that on which the writ of attachment was ordered, in order to sue out a *ca. sa.*," together with other inconsistent enactments repealed from the time this Act takes effect.

XXIII.—This Act to take effect on 1st September, 1858.

XXIV.—This Act to be cited as "The Act for the Abolition of Imprisonment for Debt."

XXV.—The word "County," wherever it occurs, to include any union of Counties for judicial purposes.

A perusal of this Synopsis indicates at least three great changes in the law: 1st,—That no arrest can be made in a civil action without a judge's order; 2nd,—That no arrest can be made for a demand under twenty-five pounds. 3rd,—That an apprehension of the debtor's escape from *Upper* Canada is not sufficient to ground an application.

As to the first, it is a decided change for the better. It is neither more nor less than that which we in March last advocated as a remedy for the abuses of the day. It is not only an assimilation to the laws of England, but to the laws of Lower Canada; and as such, a measure of which an Upper Canadian legislator may be justly proud.

As to the second, it is not only a rational concession to the popular demand for the amelioration of the law of arrest but is also an assimilation to the laws of England. Heretofore, in Upper Canada, an arrest might have been made for any demand of, or exceeding ten pounds. The change will we hope have at least one good effect, and that will be to make tradesmen and others more cautious in the giving of credit, and so weaken a most pernicious but now general system of dealing.

As to the third, we cannot say much in its praise.

It was neither so urgent, nor is it so important as the two former. Our fear is that it is premature. The object of arrest in a civil case is to detain the body of the debtor within the jurisdiction of the Court where the arrest is made, so as to be amenable to ulterior proceedings in view of fraud. The removal of a debtor from Upper to Lower Canada would be at present the removal of the body of the debtor without the jurisdiction of the Courts of Upper Canada. Once without the jurisdiction of the Courts, there is no power to bring the debtor back. This trip from Upper to Lower Canada may be as much a fraudulent escape as a trip from Upper Canada to the United States. Were Upper and Lower Canada one Province, judicially as well as politically, there could be no valid objection to the change; but they are not so; and until they become so,—we feel the change is, if anything, premature. One effect of it will be, under the perambulating system of alternate governments in Quebec and Toronto, to relieve government officials from the terror of arrest in civil cases.

We have not space in this number at greater length to review "The Act for the Abolition of Imprisonment for Debt." Having laid before our readers a full abstract of its provisions, we must allow our readers leisure to meditate upon it. It is an Act which our professional readers must at once master. We regret for their sake that we are not able to give *it in hæc verba*. So much as we have given is reliable, and enough is we think given to enable the reader to understand the nature of changes effected, so as to put him upon his guard when inclined to follow the old law of arrest.

LOCAL COURTS JURISDICTION.

We direct attention to the case of Emery v. Barnet, published at length on another page. It is in reference to "question of title" as affecting title in the English County Courts. The words of the County Courts Act 9 & 10 Vic., ch. 95, sec. 58 are—"the Court shall not have cognizance of any action of ejectment or in which the title to any corporeal or incorporeal hereditaments shall be in question." Our Division Courts Extension Act 16 Vic., ch. 177, sec. 1, is word for word the same and the important decision in Emery v. Barnet, should be noted accordingly.

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

(*Continued from p.* 175.)

During the entire rule of Count Frontenac there was much ill feeling between his people and the English of New York, and the other New England States. After several demonstrations of war on the one side and the other, New York and the New England States resolved to attack Canada; simultaneous attacks upon Montreal and Quebec were intended—the former to be effected by a land force and the latter by a naval force. From various causes the former failed, and soon returned without accomplishing much. Quebec then became the point of interest, both to the defenders and the aggressors. The town was no sooner prepared for defence than the English fleet was discerned approaching on the Beauport side of the St. Lawrence.—It was under the command of Sir W. Phipps, Governor of Massachusetts, who had been appointed Chief in command of the expedition, both by sea and land. On 6th October, 1690, he sent a summons to the Town to surrender. In the summons he stated, that the war between the two crowns of England and France did not only sufficiently warrant, but the destruction made by the French and Indians of the persons and estates of the English subjects of New England, without provocation on their part, had put them under the necessity of the expedition for their own security and satisfaction. He thereupon proceeded in a formal manner, in the name and on behalf of their Majesties, William and Mary, King and Queen of England, Scotland, France and Ireland, and by order of the Government of Massachusett colony, to demand a surrender of the place and its inhabitants, threatening in the event of a refusal, by force of arms to avenge all wrongs, and to bring the Count of Frontenac and his people under subjection to the Crown of England. An answer within one hour after delivery of the message was required. The summons was delivered to the Count at his chateau, when in company of the Bishop, Intendant and other officers of the Government. His reply was verbal. He answered, that the Prince of Orange was a usurper, who had violated the most sacred rights of blood and religion, in dethroning King James the Second, whom only he acknowledged as lawful sovereign of England, and after further proceeding in the same strain, peremptorily refused to surrender. Active hostilities were then begun. After some slight successes, the English retired without effecting the object of their mission, and Quebec once more was relieved from the threatened dominion of Great Britain.

The French no longer afraid of hostile attacks from the English, made war on the unfriendly tribes of Indians. After many skirmishes, characterized by great cruelty on

each side, and few results, the attention of the Colony was again drawn to European affairs. In 1698, Lord Bellemont, who was then Governor of New York, notified Count Frontenac of the Treaty of Ryswick, which had been concluded between the Governments of England and France in the fall of the preceding year. This was followed by an angry correspondence between Lord Bellemont claiming the Five Nations as subjects of England, and Count Frontenac claiming them as subjects of France. And while this controversy was being carried on by the two Governors, Frontenac on 28th November, 1698, in the 78th year of his age, and after having been Governor of the colony for seventeen years, died.

The Chevalier de Callieres upon the death of Frontenac became his successor. His commission bears date 20th April, 1699 His manners appear to have been very different from those of his predecessor. His rule was a peaceable one. The only thing that occurred to mar the tranquility of the colony under him was Queen Anne's declaration of war against France and Spain, made 4th May, 1702. Having heard of the declaration, and fearing hostile visits from the people of New England States, de Callieres was busily engaged repairing the fortifications of Quebec, when on 26th May, 1703, death summoned him from the scene of his activity and anxiety. Monsieur de Beauharnois, who on 1st April, 1702, had been appointed Intendant, assumed the chief government of the colony until the arrival of the Marquis de Vaudreuill, who received his commission on 1st August, 1703. About this time the King of France increased the number of the Sovereign Council. By a Royal declaration, dated 16th June, 1703, he directed that the Council should consist of the Governor, Lieutenant-Governor, Intendant of Justice, and twelve Councillors. The number of councillors before this date was seven only. And on 18th of June of the year following, the King by Royal declaration also directed, that in all civil cases before the Sovereign Council, the Attorney-General should in the first instance state his opinion, *viva voce*, and afterwards that the President of the Council and Councillors should consult apart from him. In cases of moment the Attorney-General was allowed a second time to speak and retire. The object of this procedure becomes plain when it is considered that in all probability there was not a single lawyer in the Council. The opinion of the Attorney-General was the opinion of a lawyer, and the legality of that opinion, owing to the rude manner of administering justice at that time prevailing, was determined upon by men who knew little or nothing of law. In the absence of any vestiges of complaint, we presume the system, bad as it was, gave some satisfaction to the Colony.—It is not, however, to be assumed that there was no litigation. For Mr. Rudat who in the place of Mons. de Beauharnois, had on 1st January, 1705, been appointed Intendant; observing the litigious spirit of the Canadians, took measures to turn their attention from law to commerce.—Finding suits protracted to the detriment of the settlement of the colony, he not only shortened the procedure in the courts, but in many cases decided summarily. He, as an experiment, persuaded the inhabitants to cultivate Flax and Hemp, and so gave an impulse to manufacture, which enabled the people in some measure to clothe themselves comfortably, which before owing to the great cost of French manufactures, they were scarcely able to do. He proved himself to be not only a good lawyer but a real philanthropist, and a statesman of much ability. The clergy dissatisfied with him and his regulations, made a direct representation to the King, that one twenty-sixth of the produce allowed as tythes were insufficient for their support, and asked for a larger scale of allowance. But their representations instead of having the desired effect, produced a decree dated 12th July, 1707, which put an end to their pretensions.

On the 31st March, 1710, Monsieur Begon succeeded Monsieur Randat as Intendant. Shortly after his arrival the system of land grants absorbed some attention.—The Crown had with a view to cultivation, been in the habit of resuming wild land and re-granting it. As early as 1672, by an arret dated 4th June of that year, the Intendant was authorized to take away from the owners one half of grants then made, and re-grant the same, provided the new grantee settled in four years. So in a like spirit on 9th May, 1679, an arret was made, 1st, That all grants made before 1665 should be abridged one-fourth. 2nd.—That after 1680 one-twentieth of all uncultivated land should be regranted. 3rd. That the execution of the arret should be conjointly by the Governor and Intendant. Provision was also made for the forfeiture of unimproved lands in the proportion of one-fourth to the whole. While Begon was intendant, that is on 6th July, 1711, all acts done under previous arrets were confirmed. Future Intendants also acted under these arrets, and as may well be supposed much confusion was caused by the system. So much so, that no further allusion will be made to it in this sketch.

On 30th March, 1713, the Treaty of Utrecht was concluded between Great Britain and France, and under it Great Britain became possessed of Newfoundland, Nova Scotia and other lands adjoining. Nothing which requires mention from us then occurred till 1717. On 12th January of this year, regulations were made for the government of the Court of Admiralty, and on 2nd of August, following, regulations were made as to the office of Notary. It was ordered as to Notaries among other things that their mi-

nutes should be annually collected and bound up in bundles, that their offices should be visited annually by the Attorney General, that the Judges should make lists of the papers of the deceased notaries at the instance of the Attorney General, and remove the papers to the office of the Clerk of the Jurisdiction, that the Clerk should be obliged to give a copy of the lists to the heirs of the deceased, and half of the fees of the copies for five years. By Royal declaration dated 4th January, 1724, it was also directed that the disposition of the papers of dismissed Notaries, should be filed in the Clerk's office, and by a still later Royal declaration (6th May, 1733,) Notaries were ordered to keep possession of all their minutes and acts.

In 1721, the limits of the several Parishes of the colony were adjusted. The adjustment was made on the 20th of September, by the Governor, the Intendant, and the Bishop. On the 3rd March of the year following, it was confirmed by the King A few years afterwards, M. De Vuadreuil, who had so long and so successfully governed the Colony, departed this life He died on 10th October, 1725, after having been Govêrnor General for the long term of twenty-one years. He found the colony in war and bloodshed, and left it in peace and happiness.—Much of this desirable result was due to his judgment and energy. On his death M. Begon, who had been Intendant for fifteen years, and his able coadjutor desired to return to France, and having asked to be recalled M. de Chazel was appointed his successor. The latter never reached Quebec. The vessel in which he sailed was wrecked at Cape Breton, and he and all on board perished. Then M. du Pay was on 25th November, 1725, appointed Intendant, who more fortunate than de Chazel, reached the colony. M. Begon left Quebec on 19th October, 1726.

MR. JUSTICE COLERIDGE.

The following address of the Attorney-General of England to Mr. Justice Coleridge on his retirement from the Bench and the reply of that learned and excellent judge, which we take from the *Solicitor's Journal*, are well worthy of being recorded in our pages. The latter especially richly deserves to be written in letters of gold. Never have we read an expression of sentiments more just or more affectionate—more worthy of being treasured up by every member of the bar. The occasion, as well as the address and reply, remind us of the day when under almost similar circumstances we parted from that good and excellent man—Chief Justice Macaulay.

The Attorney-General said—Mr. Justice Coleridge, the moment has now arrived that I am called upon to discharge the duty of attempting to express to your Lordship, in the name of the Bar of England, the sentiments of regret with which they have learned that you are about to quit that station which you have so long occupied and adorned. Three-and-twenty years have now elapsed since your Lordship was raised, by the well deserved-favour of the Crown, to a seat upon that bench. Throughout that eventful period your public life has been distinguished by that dignified and sustained exercise of high judicial qualities which has rendered so many of your predecessors illustrious, and won for the administration of the law in this court the respect and confidence of the people. But, my Lord, it is more especially to the members of the Bar that your long and eminent judicial career has exhibited a bright example of the display of all those attributes which best become a judge in the discharge of his judicial duties. To a clear and powerful intellect—to legal and constitutional learning, at once accurate and profound—to patient assiduity and attention—your Lordship has also added the estimable and scarcely less important qualities of uniform courtesy, evenness of temper, and kindness of heart. My Lord, we rejoice, in bidding you farewell—we rejoice that your country will not altogether be deprived of your invaluable services, and that your well-tried ability and experience may yet be called into action in the councils of the Queen. But, my Lord whether you shall continue to dedicate your efforts to the public good, or shall seek the enjoyment of that repose to which the labours of a long and useful life so well entitle you, be assured, my Lord, that in your retirement from that bench you will carry with you the respect, the regard, and the esteem of every member of the Bar, and their sincere and earnest wishes for your health, prosperity, and happiness.

Mr. Justice Coleridge replied—Mr. Attorney-General and Gentlemen of the Bar, accept my heartfelt thanks for this most gratifying testimony of your regard. I wish I could feel that what has been said is as strictly just as it is abundantly kind. But although this cannot be, I will not deny myself the pleasure of believing that to some extent I have earned the good opinion and affection of the Bar. I should be ungrateful, indeed, if I doubted the sincerity of such a succession of kind testimonies as have attended me in every step of my career. This, gentleman, the close of the whole, will be remembered by me as long as I live; and it is a great comfort to me at this trying moment; for, gentleman, you can well believe that I am under the excitement of conflicting feelings. I have taken the resolution of retiring before I was compelled to do so by sickness, infirmity, or incapacity, and that step has not been hastily taken. Her Majesty, has been pleased to summon me to her Privy Council, which will give me still some occasional judicial employment; and I do not think it right to shrink from any opportunity of being useful, according to my strength and ability; but still I look forward to simple rest—a desire not unnatural at my time of life, and after so many years of labor; and I contemplate a return to those pursuits which were the delight of my youth, but which I find to be incompatible with due attention to my profession. But with all these circumstances in my mind, I may be excused for saying that it is a solemn thought to give up the habits and break off the associations of nearly forty years, which I may find have become, as it were, a part of my very nature. It is a solemn thought that I have come to the end of my professional career, and that the responsibility of that judicial career now rises up before me at a moment when no neglect of duty can be amended, and no breach of duty can be repaired. This moment, too, recalls that long list of associates with whom I have labored within these walls, and whom, in the course of nature, I must expect before long to follow. Gentlemen, I assure you it is a sad thought that I am to part with you. I well recollect with what misgiving I took my seat on this bench. I was told that favourable hopes were entertained of me, but I knew well how imperfect was my experience. False modesty would be out of place now, but I believe there are few men to whom the judge's office does not present great difficulties. I felt them

then, and I feel them now; but both at first and at last I felt that I could rely on the learning, industry, and ability of the Bar. Nothing more lightened my labours than their uniform kindness. I very early learned, that if a judge would be simple and patient, candid and considerate, and without respect of persons, he would reach every honest heart, and would be certain of such encouragement and co-operation from the Bar as would lessen his difficulties and strengthen him to overcome them. With this conviction I have gone on, hopeful and rejoicing; and without being wholly deserving, and yet not wholly unworthy of it, I have always received kindness at your hands. I know not how I could have laboured for so many years without it, and for that kindness I shall be deeply grateful as long as I live. It would argue a want of feeling to suppose that in so many years I have not given some just cause of offence. If, then, there be any one among you now present whom I have injured by word or look, by weariness or impatience, to him I now express my most sincere sorrow, and heartily desire his forgiveness. I will not detain you with a single remark upon the greatness and importance of your profession. So long as England is prosperous, rich, and free, the law must always exercise a predominant influence. I am sure you feel your responsibility is commensurate with your interest; and I have no fear but that in any political difficulties or dangers that may arise you will be found, as your predecessors were—courageous, and entirely equal to any crisis. But the most insidious dangers are those which beset you in your daily business—the excitement of controversy, the desire of victory, the love of intellectual display, and the excessive sense of duty to your clients. Gentlemen, and especially my younger friends, suffer me to put you on your guard. We can well afford to bear with broad pleasantries, but we cannot afford that our professional standard of honour should be questioned, or that it should be said that we would do as advocates in court what as gentlemen we should scorn to do. Sometimes we lend support to this notion by the ease with which we attribute ungentlemanly conduct to one another. That client is dear indeed, that would induce an advocate, in carrying out his views, to go beyond his great and glorious profession. Forgive me, my friends, these free words. I speak in the love of a profession to which I have given the best part of my years, and which I shall continue to love as long as my heart shall beat. I have detained you too long, but I must not close without tendering my thanks to the Masters of the Court. The world knows little of their unostentatious services, but you know them and the judges know them by daily experience, and I gladly seize this opportunity of thanking them for their conscientious discharge of their duties to the suitors. Nor can I leave without pronouncing my regard for those with whom I have so long occupied this bench. I have indeed, been a happy man in my colleagues. Every member of the Court but myself has been changed. With those who have departed, as well as with those who have succeeded, I have lived in peace and harmony, loving and honouring them, and, I trust, loved and honoured by them—certainly guided and encouraged—with so much of general agreement as served to give authority to our judgments, but with so much occasional difference as shewed our individual responsibility and independence. Thus employed in court, out of court we have lived in that easy and happy intercourse which sweetens the toils of office, and makes men more fit to be fellow-labourers I may have said too much. My successor is known, and the undoubtedly wise choice leaves no cause for regret. I trust he may fill the judicial office as long and happily, and more efficiently than I have; but I hope in your happy meetings you will bear in mind that I do desire long to be remembered here. And now Mr Attorney-General, gentlemen of the Bar, and Masters, my dear Lord and brethren, earnestly, gratefully, and affectionately I bid you all farewell, and may God bless you.

AUTUMN CIRCUITS, 1858.

EASTERN CIRCUIT.

THE HON MR. JUSTICE RICHARDS.

Perth	Tuesday	5th October.
Ottawa	Tuesday	12th October.
L'Orignal	Monday	18th October.
Cornwall	Monday	25th October.
Brockville	Monday	1st November.

MIDLAND CIRCUIT.

THE HON. MR. JUSTICE MCLEAN.

Whitby	Tuesday	21st September.
Peterborough	Tuesday	28th September.
Cobourg	Monday	4th October.
Belleville	Wednesday	13th October.
Picton	Monday	25th October.
Kingston	Tuesday	2nd November.

HOME CIRCUIT.

THE HON. CHIEF JUSTICE DRAPER.

Hamilton	Wednesday	22nd Septemb'r.
Owen Sound	Thursday	23rd September.
Milton	Tuesday	28th September.
Merrittsville	Wednesday	6th October.
Niagara	Wednesday	13th October.
Barrie	Wednesday	20th October.

OXFORD CIRCUIT.

THE HON. SIR JOHN BEVERLY ROBINSON, BARONET, C.J.

Simcoe	Tuesday	21st September.
Cayuga	Tuesday	28th September.
Brantford	Wednesday	6th October.
Stratford	Thursday	14th October.
Woodstock	Wednesday	20th October.
Berlin	Friday	29th October.
Guelph	Thursday	4th November.

WESTERN CIRCUIT.

THE HON. MR. JUSTICE BURNS.

Goderich	Tuesday	28th September.
Sarnia	Tuesday	5th October.
Sandwich	Monday	11th October.
Chatham	Monday	18th October.
St. Thomas	Monday	25th October.
London	Monday	1st November.

HOME SITTINGS.

THE HON. MR. JUSTICE HAGARTY.

Monday,..... 11th October.

LAW SOCIETY OF UPPER CANADA.

The following Gentlemen have, during the present term of Trinity, been called to the Degree of Barrister-at-Law: Nicol Kingsmill, M.A.; John McBride; George Palmer; Thomas Wardlaw Taylor, M.A.; and Robert John Wilson.

The thirty-sixth section of the Error and Appeal Act, (20 Vic. cap. 5,) is repealed by Statute 22 Vic. cap. 92.

"The Surrogate Courts Act, 1858," came into operation on 1st September instant.

All the provisions of the Registration of Voters Act, 22 Vic. cap. 82, took effect on 16th August, 1858, "except those provisions which relate to the Elective Franchise and the use and effect of the Lists of Voters," which "last mentioned provisions" are not to apply to any Election for which the first Polling Day is to be before 1st January, 1859.

We direct attention to the third section of the Surrogates Courts Act, 1858. As we read it—every Registrar both those now appointed and those County Court Clerks, who will by operation of the Act become Registrars, are required *before* being qualified to act as Registrars *under the Act* to take the oath of office prescribed therein.

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22 Vic. CAP. XCVIII

An Act to amend the law relating to petty trespasses in Upper Canada. [Sanctioned 16 August, 1858.]

IN amendment of the Law relating to petty trespasses in Upper Canada: Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I.—Any person who shall unlawfully enter into, come upon, or pass through, or turn any Horses, Cattle, Sheep or Swine, upon, or permit any such to go or range at large upon, or in any way trespass upon any land or premises whatsoever, being wholly or in part enclosed and being the property of any other person, shall be liable to a penalty of not less than one dollar nor more than ten dollars for every such offence, irrespective of any damage having or not having been occasioned thereby; and such penalty may be recovered with costs in every case of conviction before any one Justice of the Peace, who shall decide the matter in a summary way, and award costs in case of conviction, which may be had either on view, or on confession of the party complained against, or on the oath of one credible witness: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, or to any case within the meaning of the twenty-fourth section of the Act fourth and fifth Victoria, chapter twenty-six for consolidating and amending the laws in this Province relative to malicious injuries to property.

II.—Any person found committing any such tresspass as aforesaid, may be apprehended without a warrant by any Peace Officer, or the owner of the property on which it is committed, or the servant, or any other person authorized by him, and forthwith taken to the nearest Justice of the Peace to be dealt with according to law.

III.—Except as herein otherwise provided, all proceedings under this Act shall be subject to and in accordance with the provisions of the Act passed in the Session held in the sixteenth year of Her Majesty's Reign, chapter one hundred and seventy-eight, intituled, *An Act to facilitate the performance of the duties of Justices of the Peace out of Sessions in Upper Canada, with respect to the summary convictions and orders,* which shall apply to cases arising under this Act.

IV.—Nothing in this Act contained shall authorise or be construed to authorize any Justice of the Peace to hear and determine any case of tresspass in which the title to any land, or any interest therein or accruing thereupon, shall be called in question or affected in any manner howsoever: but every such case of trespass shall be dealt with according to law in the same manner, in all respects, as if this Act had not been passed.

V.—This Act shall extend to Upper Canada only.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

Preston, 16th August, 1858.

GENTLEMEN,—The desire of having a uniform system of practice introduced into the numerous Division Court offices, induces me to bring under your notice a few of the subjects on which there exists a difference in the practice; feeling assured that if you would kindly express your opinion on the same, it would greatly tend to accomplish the object desired.

One of the subjects to which I beg to direct your attention is that of issuing executions.

In the Division Court of a certain County it is the practice, by order from the Judge, to issue executions on all judgments that are not paid at maturity; without any special order to the clerk from the plaintiff or party in whose favor judgment was rendered.

In the Division Court of another County the order from the Judge is: not to issue any execution until thereunto required by the plaintiff, or party in whose favor judgment was rendered.

All that is required of a party suing in the former County, is to enter his suit, and establish his claim at Court day, the Clerk will pass the suit through all its different stages, including the issuing of execution, the Bailiff will do his duty and make his return accordingly and the plaintiff only needs to call or send for his money, or receive such other return made by the Bailiff. While in the latter County no execution is issued without special order to that effect from the party in whose favor judgment was rendered.

In consequence of these two different modes of practice plaintiffs are sometimes subject to losses and Clerks to unpleasant arguments, which I will briefly illustrate by an instance.

A party in the habit of suing in the former County, and coversant only with the practice there, having occasion to sue in the latter County; he enters his suit, establishes his claim at Court day and thereafter gives himself no further trouble respecting his suit until about 6 or 8 weeks after Court day, when he calls upon the Clerk in full expectation that his money is ready for him. To his surprise however, he is informed that the suit is not paid and that no execution has been issued because he did not give any order to that effect. His disappointment is increased upon being informed that other plaintiffs, who otherwise would not have had priority over him they having obtained judgment after him, had received their money, by having ordered the issue of execution, that however all the goods and chattels of defendant had been sold to satisfy those executions, and that there is nothing left for him.

The party aggrieved generally at first accuses the Clerk of neglect of duty, (it is so natural for men to place the burthen of blame for losses sustained upon the shoulders of others, instead of ascribing it to their own inability or want of knowledge, and in fact, such shifting is sometimes the only consolation for men, though as a maxim ever so wrong.) The Clerk very naturally will not acknowledge the charge, and in defince will quote his authority.

The disappointed person, if he is a reasonable man, will upon receiving such explanation, relieve the Clerk from all blame, and only express his surprise that the practice in two Counties that are to be governed by the same laws, should be diametrically opposed to each other. But if he is one of those unreasonable fault-finding, mistrusting and grumbling individuals that neither can nor will be convinced, the position of the Clerk in such an instance is anything else but pleasant.

It may Gentlemen, not be out of place here to mention some

of the reasons advanced for these different modes of practice.

For the mode first mentioned, *i. e., that the Clerk shall issue execution without special order from plaintiff*, it is argued that the plaintiff in putting his suit into Court, requires that the money for the same shall be collected without delay, that the very act of placing a claim into Court, tacitly implies that the Court is required and authorized to pass that suit through all the requisite stages of procedure, until the money is recovered or some other ultimate result attained such as a return of *nulla bona*, or the like. That if the plaintiff desires to grant the defendant any longer time than was granted by the judge to whom he applied for assistance in the recovery of his claim, it shall be the duty of such plaintiff to notify the Clerk of the Court to that effect, in the same manner as such plaintiff is required to do if he desire to withdraw a suit.

For the second mode of practice, *i. e., that the Clerk shall not issue execution without order from plaintiff*, the arguments advanced are as follow: That the plaintiff has always the control over the suit entered by him, he may at his option withdraw the same before or during the hearing, he may grant the defendant longer time than the judge is allowed to grant, he may settle with defendant and give him a receipt in full even after the hearing and after judgment is rendered, and that the plaintiff himself ought to know his own business best.

That since it frequently happens that plaintiffs withdraw suits or settle with defendants, it cannot be inferred that the mere putting a suit into Court, tacitly implies that such suit is to pass through all the stages of procedure until money is made, without any order from the plaintiff. That the Bailiff might make himself liable to an action, if he was to levy upon and sell the goods and chattels of a defendant by virtue of an execution, in case the defendant held a receipt in full from the plaintiff.

And in support of these arguments the 53rd section of the Division Court Act of 1850, is quoted which states "*that thereupon the Clerk of the Court, at the request of the party prosecuting such order for the payment of the money, shall issue under the seal of the Court, a precept in the nature of fieri facias,*" and in further support, that i. the Judges of the Superior Court of Common Law at Toronto, and the judges that framed the "*Rules*" had entertained the first advanced views viz., that execution shall issue without special order from plaintiff, that then there would have been no particular necessity for that part of rule 67 which refers to executions on judgments over a year old.

Another subject of difference in practice is that of stating costs on summons.

The practice in the Courts of a certain County is to state a *fictitious* sum for the costs as for instance;

SUMMONS TO APPEAR.

No. 219, A. D., 1858.

Demand	$72 50
Costs	4 00
(Exclusive of mileage.)	$76 50

The practice of Courts in other Counties is to state on the summons the *actual* amount of costs chargeable up to the time the summons is handed to the Bailiff or transmitted for service to another Division.

As a reason for the first mentioned practice, it is stated that such is an old custom, and therefore continued and that this is also the practice of the Superior Courts; while parties in favor of the latter mode of stating costs consider their practice to be in confirmity with the meaning of *form* 6, where at the bottom of that form it is stated:

Claim.....
Costs, exclusive of mileage.....

and in further support of their reasons state, that the summons should correspond with the entries in the Procedure book, that no fictitious charges are therein allowed to be entered, that the stating of a larger amount of costs on a summons which is under signature of the Clerk, and under seal of the Court, is tantamount to *demanding* other than proper fees and may be considered extortion, and that the only act required to be done to complete the grounds for an action under the 76th & 77th sections of the Division Court Act of 1850, is for the Clerk to receive the sum demanded. That it is also necessary for the proper working of the Acts, to state the costs correctly on the summons, since the defendant is allowed to pay to the plaintiff at the time the summons is served, the amount of claim with all actual costs incurred, or pay the same to the Clerk, to whom the summons was transmitted for service instead of remitting it to the Clerk that issued the summons; in the above too cases it will be indispensably necessary for the Bailiff or for the "*receiving clerk*" to know the exact amount chargeable on the suit, at the first office, to this amount the fees for "*receiving*" "*service*" *and* "*mileage,*" may be added and either Bailiff or Clerk will be able to arrive at the exact sum payable by defendant. If however such Bailiff or Clerk should receive such a fictitious sum as above stated he would "*take or accept a fee other than and except such fees as are or shall be appointed and allowed*" and thereby do that for which he might be discharged from his office by section 77.

Besides the above mentioned cases there are several others on which the practice varies, and to which I may in future take the liberty of directing your attention. In the mean time I remain

Respectfully yours OTTO KLOTZ.

[We think that the safest practice and the one least liable to cause confusion and injury to suitors, is that of not issuing execution in a cause until it is ordered by the party in whose favour the judgment has been given.

Suits are constantly settled between the parties, and it would often cause both needless annoyance and injury, to follow the opposite course. We think the Clerk is not in any way bound to issue execution after time for payment has elapsed without the express authority of the party entitled to it, or in pursuance of a general order given when a claim is entered for suit.

We entirely concide with the opinion which our correspondent has evidently formed on the second question in his letter. A Sheriff's bailiff on serving a Superior Court writ of summons is not authorized to accept the amount claimed, even if the defendant should tender the whole sum with the costs, but in Division Court suits it is different, for here the Bailiff not only often receives the money, but takes confessions and if the costs had in every instance to be afterwards taxed by the Clerk and credited to the defendant, it would not only cause him extra work, but prevent his being able to keep his books properly, besides giving the defendant the additional and unnecessary trouble of giving or sending for the balance due him. There is no difficulty in stating the exact amount of costs payable when a summons is put in the Bailiff's hands, and in case the defendant should wish to discharge the claim, the Bailiff always knows what he is entitled to demand in addition to mileage.

It is a matter of great moment to the utility of Division Courts, that a uniform practice should prevail and we strongly recommend Mr. Klotz's letter to the attention of all officers of these Courts.—EDS. L. J.]

To the Editors of the Law Journal.

SARNIA, 16th August, 1858.

GENTLEMEN,—Will you have the goodness to inform me what is the practice in cases removed from a Division Court on return of *nulla bona*, into a County Court, as I cannot find any two of the legal profession to agree upon the point.

The 13 & 14 Vic., cap. 53, sec. 57, says that a plaintiff or

defendant shall have the same remedy as if the judgment had been originally obtained from the County Court; but the commencement of the same section says that, "Whereas it is expedient that judgments exceeding two pounds in said Courts should in certain cases affect *lands*, and that execution should issue, in certain cases against lands, on judgments obtained in any Division Court," &c., leading to the conclusion that the only remedy is against lands.

Now suppose that A. had obtained a judgment in any Division Court for over $40, that an execution had been issued and returned *nulla bona*,—that a transcript had been filed in County Court, and *fi. fa.* issued against lands, and placed in Sheriff's hands; that about two or three months thereafter the plaintiff discovered that the defendant had become possessed of certain goods and chattels; could the plaintiff withdraw his *fi. fa.* against lands, and issue *fi. fa.* against goods and chattels out of the County Court? or must he issue an execution from the Division Court where the transcript had been sent? Does the fact of the transcript becoming a judgment in the County Court act as an extinguishment of the suit in the Division Court, or has the plaintiff a double remedy?

Some are of opinion that a party in whose favor such a transcript has been made a judgment in any County Court, can issue execution against goods and chattels, garnishee and issue *ca. sa.*; others again think that the only remedy is against lands.

Your obedient servant, SIGMA.

[We think that sec. 57 of 13 and 14 Vic., cap. 53, is intended only to give parties the means of satisfying their claims out of defendant's lands. The latter part of the section would seem to bear a different construction if taken alone, but when taken in connection with its preamble it is evident that the words a plaintiff or defendant shall have the same remedy as if judgment had been originally obtained from the County Court, should be read as if followed by the words "in respect to any remedy against the lands of the opposite party."

We are also of opinion that, the holder of the judgment if he wish, after issuing an execution against lands to issue an alias *fi. fa.* goods must do so out of the Division Court, and perhaps can do so without withdrawing his execution against lands; but of this we are *not quite sure*. If he should be satisfied that there are sufficient goods and chattels to satisfy his claim, we think the safer course would be to withdraw the *fi. fa.* lands. By registering the judgment the party would still have the lands bound, and would not lose his remedy against them by withdrawing his *fi. fa.* lands if he were unable to make the full amount on *fi fa.* goods.

Goods and chattels, and lands and tenaments were at one time included in the same writ, and by a reference to the Statute which altered the practice in this respect, (43 Geo. III., cap. 1,) it will appear that the Legislature intended that the judgment debtor's goods and chattels must first be exhausted before his lands are levied upon, and we believe that the spirit of this enactment is carried out by issuing an alias *fi. fa.* goods after an execution against lands has been taken out, provided it has not been acted upon.—EDS. L. J.]

To the Editors of the Law Journal.

Vroomantan, 29th July, 1858.

GENTLEMEN,—This being the first time I have troubled you, I beg leave to ask you two questions.

1st. Does the 23rd section of the Common Law Procedure Act, 1857, refer to executions issued from a Division Court?

2nd. Will the words "Bed and Bedding" protect the Bedstead from seizure. Yours respectfully, M. McP.

[The section referred to only applies to executions from the Superior Courts and the County Courts.

We presume that the Bedstead is protected by the words "Bed and Bedding."—EDS. L. J.]

MANUAL ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—BY V——.)

[CONTINUED FROM PAGE 180, VOL. IV.]

As to the form of the notice, the defendant is not held to the same particularity as in defences under other statutes, for he is allowed in the Superior Courts to give the special matter in evidence under the plea of general issue, and by analogy in the Division Courts where written pleadings are not in use, a general reference to the clause in question would no doubt be deemed sufficient; yet, it is always better to state specifically the ground or grounds of defence, as in the following *general* form:—

NOTICE OF DEFENCE UNDER STATUTE (D. C. Act, sec. 107.)

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

Between A. B. plaintiff and D. C. defendant.

The plaintiff is required to take notice, that upon the hearing of this cause, the defendant intends to plead and avail himself of the provisions of the 107th Section of the Upper Canada Division Courts Act of 1850, and especially that he intends to insist on the following grounds of defence, viz., that he is not guilty of the matter alleged in the plaintiff's claim against him, that this action is not laid or brought in the County of ——where the fact charged is alleged to have been committed—that this action was not commenced in due time, and that a month's notice of action in writing was not given to the defendant before the commencement of this suit. D. C., Defendant.

Dated this —— day of —— A.D., 185

To A. B., Plaintiff.

Care should be taken to have proof at the hearing of the due service of this notice.

The extension Act, sec. 14, gives a further defence to Bailiffs—it provides that no action shall be brought against any Bailiff of a division Court, or against any person acting by the order and in aid of any Bailiff, for anything done in obedience to any warrant under the hand of the Clerk of the Court and the seal of the Court, until demand hath been made or left at the residence of such Bailiff by the party intending to bring such action, or by his attorney or agent in writing signed by the party demanding the same, of the perusal and copy of such warrant and the same hath been refused or neglected for the space of six days after such demand, and in case after such demand and compliance therewith by shewing the said warrant to and permitting a copy to be taken thereof by the party demanding the same, any action shall be brought against such Bailiff or other person acting in his aid for any such cause as aforesaid, without making the Clerk of the Court who signed or sealed the said warrant defendant, then on producing or proving such warrant at the trial of such action the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the said warrant; and if such action be brought jointly against such Clerk, and also against such Bailiff or person acting in his aid as aforesaid, then on proof of such warrant the jury shall find for such Bailiff and for such other person so acting as aforesaid nothwithstanding such defect or irregularity as aforesaid; and if the verdict shall be given against said Clerk then in such case the plaintiff shall recover his costs against him to be taxed in such manner by the proper officer as to include the

costs such plaintiff is liable to pay to the defendant for whom such verdict shall be found as aforesaid; and in any action to be brought as aforesaid the defendant may plead the general issue and give the special matter in evidence at any trial to be had thereupon.

The object of this clause is to protect Bailiffs in what they may do in obedience to a warrant, under the hand of the Clerk and the seal of the Court, although the warrant may be defective or irregular, and a written demand of the copy of the warrant, is in such a case a condition precedent to any right of action at all. But the statute does not protect where a Bailiff has not a warrant so signed and sealed, or has acted beyond his authority. In such case he is liable for the excess, and no demand of authority is necessary.

Thus if a Bailiff takes a wrong person, or if the warrant direct him to take the goods of A, and he takes the goods of B, he is not within the protection of the statute, (Hoge v. Bush, 1 Man &G. 789, Crozier v. Cundey, 6 B & C. 232, Kay v. Grover, 7 Bing. 312.)

The defences under this section may be arranged as follows:—

1. That no written demand, signed by the party demanding the same, was made of the perusal and copy of the warrant.

2. That the demand of warrant was complied with, and that the Clerk who signed it is not joined as a defendant.

3. That the Bailiff acted in obedience to a warrant signed by his co-defendant, the Clerk, and sealed with the seal of the Court.

These may "be given in evidence under the general issue" in the Superior Courts, and the principle may be so far applied to suits in the Division Courts, as to make a general reference to the clause in question sufficient, but as before mentioned, it will be best to specify the particular ground of defence relied on.

Some question may arise as to the application of this clause to Division Courts, which would be out of place here to discuss. It is assumed that it does apply.

A notice should be given where a defence under this section is open to a bailiff.

It may be in the following form:—

NOTICE OF DEFENCE UNDER STATUTE (D. C. Ex. Act, sec. 14.)

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

Between A. B., Plaintiff, and C. D., Defendant.

The plaintiff is required to take notice, that upon the hearing of this cause, the defendant intends to plead and to avail himself of all and every the provisions of the 14th section of the Upper Canada Division Courts Extension Act, and especially that he intends to insist on the following grounds of defence, viz., that he is not guilty of the matter alleged against him in the plaintiff's claim; that the plaintiff's claim is in respect to acts done by him in obedience to a warrant, &c., (*state the nature of the warrant*) directed to him and issued from (*state Court from which issued*) under the hand of the Clerk of the said Court, and the seal of the Court, and that no demand hath been made or left at his residence by the plaintiff, or his Attorney, or Agent in writing, signed by the party demanding the same of the perusal and copy of such warrant, (*if necessary add other grounds which can be readily framed from the foregoing.*) C. D. Defendant.

Dated, &c. To A. B. Plaintiff.

In addition to the proof of the service of this notice, the Bailiff should, in all cases, be prepared at the trial to produce and prove his warrant, and if he has on demand shown the warrant and allowed a copy of it to be taken, he should also produce proof of that fact. Cases may occur where the defendant, (Bailiff,) may be able to avail himself of a defence under the section above referred to, as well as the 107 sec. of the D. C. Act. When this is the case, both sections should be referred to in the notice of defence. A form embodying a reference to both may be easily framed from the forms given above.

THE MAGISTRATE'S MANUAL.

BY A BARRISTER-AT-LAW.—(Copyright Reserved.)

[*Continued from page* 182, Vol. IV.]

V.—Hearing or Investigation.

Taking depositions.—The accused being before the Magistrate, and the prosecutor and his witnesses being present, the next step is the hearing of the charge. In the first place the magistrate should read over the information to the accused, in order that he may be informed of the specific charge against him. Then the prosecutor should be called upon to bring forward his witnesses. The first witness examined is in general the prosecutor himself. Before any question is put to him or any other witness, the witness should be sworn, to speak the truth, the whole truth and nothing but the truth; or where the witness is allowed to affirm, the same may be done by affirmation. Thereupon the statement of the witness ought to be taken down as nearly as possible in his own language, omitting all irrelevant matter.*

The deposition ought however to state only what the witness saw and did, not what he heard or surmised.

Form of deposition.—Each deposition may be in the following form:

† Province of Canada, (*County or United Counties, or as the case may be*) of ——

The examination of C. W. of ——, (*farmer,*) and E. F. of —— (*laborer,*) taken on (*oath*) this —— day of ——, in the year of our Lord ——, at ——, in the (*County, or as the case may be*) aforesaid, before the undersigned, (*one*) of Her Majesty's Justices of the Peace for the said (*County or United Counties, or as the case may be,*) in the presence and hearing of A. B. who is charged this day before (*me*) for that he the said A. B. at ——, (*&c. describing the offence as in a Warrant of Commitment.*)

This deponement, C. D. upon his (*oath*) saith as follows: (*&c. stating the depositions of the witness as nearly as possible in the words he uses. When his deposition is completed, let him sign it.*)

And this Deponent, E F. upon his (*oath*) saith as follows: (*&c.*)

The above depositions of C. D. and E. F. were taken and (*sworn*) before me, at —— on the day and year first above mentioned.

J. S.

Cross examination of witnesses.—The examination of witnesses must take place in the presence of the accused who is to be at liberty to put questions to any witness produced against him.‡

The provisions as to assistance of counsel or attorney in the cases falling within the summary jurisdiction of justices of the peace are not extended to proceedings before them in their ministerial capacity; and at this stage therefore the accused can only have the benefit of professional assistance

* Cohen v. Morgan, 6 D. R. 8; Crratt v. Morley, 1 Q. B. 18.

† 16 Vic c. 179 sch. M.

‡ 16 Vic. c. 179 sec. 9.

by permission of the magistrate and not as a matter of right. In the absence of any such professional assistance it becomes more obligatory on the magistrate to see that the accused has justice done to him and that he is not entrapped into any confessions or unwittingly made accessory to his own conviction in any mode not authorised by law. *

Any answers made to questions put by the prisoner should be accurately written down at the foot of the depositions already taken if the questions and answers appear to have any bearing upon the charge; but such additional evidence should be distinguished from the examination in chief. †

Depositions to be read over to witnesses and signed.—The depositions when taken should be read over and signed respectively by the witnesses examined, and by the magistrate who took the same. The effect of this is, in certain cases, to make the depositions evidence on the trial of the accused; for if it be proved upon the oath or affirmation of any credible witness, that any person whose deposition is so taken is dead, or is so ill as not to be able to travel, and if it be also proved that the deposition was taken in presence of the accused, and that he, or his counsel, or attorney had full opportunity of cross examining the witness, and the deposition purports to be signed by the magistrate, it is lawful to read the deposition as evidence ‡ Of course it may be shown that the deposition was not in fact signed as it purports to be by the magistrate, in which case it would be rejected. ||

Duty of Magistrates when prosecution closed.—It is for the magistrate, when all the depositions for the prosecution are taken, to review the evidence in his own mind, and to decide whether there is or is not so strong a *prima facie* case against the accused as to justify his being sent before a jury. If nay, he should inform the prosecutor thereof, and discharge the accused, unless the prosecutor satisfy him that additional evidence can be adduced at a future day, or show a reasonable cause for deferring further examination of witnesses to a future time. In such case the magistrate should remand the prisoner as hereinafter mentioned. ¶

Defence of accused.—If the magistrate deem the evidence sufficiently strong to put the accused upon his defence, it is his duty, without requiring the attendance of the witness, to read over to the accused the depositions taken against him, and to say to him these words, or words to the like effect.—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial."§

The magistrate, before receiving any statement from the accused, ought to give him clearly to understand that he has nothing to hope from any promise of favor, and nothing to fear from any threat that may have been held out to him, to make any admission or confession of guilt; but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat.* The magistrate ought entirely to get rid of any impression that may exist on the mind of the accused, that the statement which he makes may be used for his benefit; † but it by no means follows that a magistrate is to dissuade a prisoner from confessing. ‡ Justice is as much due to the party injured as to the accused It is therefore improper for a magistrate to be over cautious in pressing upon the accused the propriety of not stating anything that may tend to his own crimination, as is sometimes done from too strong a feeling on the side of mercy. ||

* Stone's Petty Sessions, 269.
† Stone's Petty Sessions, 271.
‡ Stone's Petty Sessions, 270.
|| Ib. 269. ¶ 16 Vic. c. 179, s. 9.
§ 16 Vic. c. 179, s. 10.

U. C. REPORTS.

QUEEN'S BENCH.

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

HILARY TERM, 21 VIC.

FOLEY v. MCODIE, SHERIFF.

Sale for taxes—Distress—16 Vic. ch. 182.

Under the 16 Vic. ch. 182. the sheriff may sell land for taxes, as directed by the writ, unless he has good reason to believe that there is sufficient distress.

A declaration, therefore, which charged him with neglect of duty in selling when there were goods on the land to distrain, but did not aver that he had notice of the goods being there, was held insufficient.

The plaintiff sued defendant, sheriff of the county of Hastings, in an action on the case, setting forth that the plaintiff owned certain land in the county of Hastings; that an arrear of taxes having accrued upon it, a writ issued, commanding defendant as sheriff to levy upon the land the amount of the taxes in arrear, and costs; that when that writ was delivered to the sheriff, and from thence continually until after the return thereof, there was sufficient distress upon the land, of goods and chattels liable to seizure, to make the amount directed to be levied, and the costs; but that the sheriff, disregarding his duty in that behalf, did not levy the said money out of the said goods and chattels, but neglected and refused so to do, and wrongfully sold the said land, and conveyed away the same, contrary to his duty.

It was not averred in the declaration that the sheriff had at any time notice or knowledge that there was distress upon the land.

The defendant pleaded, in his third plea, that although he gave due notice of the sale of the land, neither the plaintiff nor any other person gave notice, at any time before the sale, or at the time, of there being distress upon the land; and he pleaded, as his fourth plea, that before the time allowed by law for redemption after the sale, the plaintiff had due notice of the sale, and might have redeemed if he would.

The plaintiff demurred to these pleas, and the defendant took exception to the sufficiency of the declaration, insisting that it ought to have shewn that the sheriff had notice or knowledge of the distress being upon the land, for that without this there was no such duty incumbent on the sheriff as is alleged.

Wallbridge, Q. C., for the demurrer

Bell (of Belleville), contra, cited Spafford v. Sherwood, 3 O. S. 441.

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

We are of opinion, after considering the 47th, 54th, 55th, 57th, and 58th clauses of the statute 16 Vic., ch. 182, that whatever may have been the case under the previous acts, which this act repeals, the sheriff may, when he receives a writ under this statute assume, if he hears nothing to the contrary, that it is proper for him to go on and advertise the land for sale, in order to make the arrears, and to sell as the law points out. The writ is not direct-

* 16 Vic. c. 179, s. 10. 8 C. & P. 621, per Lord Denman.
† Stone's Petty Sessions, 272.
‡ Rex v. Green, 5 C. & P., 112, per Gurney, B.
|| Stone's Petty Sessions, 274.

ed to be conditional in its terms: that is, to sell land, *if there are no goods*, as it was required to be under the 6 Geo. IV., ch. 7.

Considering the provisions of this statute to which we have referred, it may be fairly assumed by the sheriff, when he receives a writ command ng him to make the taxes from sale of the lands, that the treasurer has ascertained that they cannot be otherwise made, or else the collector and treasurer, under the 47th and 54th clauses, would have collected the arrears, and no writ to the sheriff would have issued.

All that the plaintiff can insist on is, that if the sheriff, after he got the writ, "*had good reason to believe*" that there were goods on the land, he ought, according to the 58th clause, to have levied the money out of the goods, and should not have sold the land. Till he shews that the sheriff "had good reason to believe," &c., he does not shew any duty incumbent upon him under that clause, nor otherwise, that we can gather from the statute.

If the plaintiff meant to contend that the sheriff had the duty incumbent on him to search for distress upon the land before he proceeded to sell, and that he did not search, then he ought to have rested his action upon neglect of that duty. Whether we could have recognised such a duty as being incumbent on the sheriff we need not determine, for the plaintiff has not rested his action upon the neglect of the sheriff to inform himself. He assumes that if in fact goods were there, the sheriff was bound to know it without any notice, however cunningly they might be concealed, and though they might have been openly on the lot at one time, but withdrawn at another.

Without determining that either of the pleas is sufficient, the defendant is entitled, we think, to judgment on the demurrer.

Judgment for defendant, on demurrer.

Helliwell v. Taylor.

Pathmaster—Notice of action—Proof that defendant acted bona fide—14 & 15 Vic., ch. 54, sec. 9.

In this case the defendant being pathmaster, and assuming to act as such, moved the plaintiff's fences, the effect of which was to take off land from the plaintiff's lot and add it to the defendant's. It was left to the jury to say whether defend acted *bona fide* in the execution of his duty, and they having found that he did, the court refused to disturb the verdict.

Trespass to part of the east half of lot 14, in the 2nd concession from the bay, in the township of York.

Pleas—1st. Not guilty, by statute, marking in the margin statute 14 & 15 Vic. ch. 54, secs. 2 and 5. 2nd. That the land was not the plaintiff's. 3rd. That the land was the defendant's. 4th. Leave and license.

At the trial, before *Burns, J.*, at the last assizes held at Toronto, the facts appeared as follow: in the year 1832, in consequence of the difficulty of making a road upon the allowance for road, that is, the concession, the inhabitants desired that a road should be laid out to connect a road called the Don Mills road, being the road up the river Don to Helliwell's Mills, with the concession line east of the line so impassable. A road was laid out by Mr. Gibson, the surveyor, and this road he placed on the east end of the lots, on the line between lots 14 and 15, and taking 33 feet from each lot for the road. At that time he did not survey the boundaries of the lots, but placed the road between those two lots according to the fences as they then stood. Part of the land was still then covered with wood, and the road, as people travelled it, was not altogether straight. The road was confirmed by order of sessions, and properly established. Of late years the line between Nos. 14 and 15, as held by the respective owners of these lots, had been disputed, and the proprietors of lot 15 contended that the line was further south than had been supposed. The defendant, with other persons, were the owners of lot 15, and some two years ago they had an arbitration respecting a portion of the line, and the award was in the defendant's favour. The defendant had been pathmaster for the last two years for that part of the township, and the road in question was within his division. He regularly qualified himself as pathmaster, and the township council placed in his hands moneys to be expended on roads in his division. In the fall of 1856 the defendant caused the plaintiff's fences to be removed 33 feet further south than they had been, and in October or November, 1857, to be again removed 33 feet still further south, thus making the road the breadth of a chain further south than it was formerly, and in doing so, if the correct division line between lots 14 & 15 were as the defendant contended it was, then 33 feet of that chain would be off lot 14, and 33 feet from lot 15. After the award made between William Helliwell and other parties, the road was opened voluntarily in accordance with what defendant contended for in this case, but the plaintiff refused to remove his fences, and to make the road straight. The defendant put up notices, signed by him as pathmaster, directing all parties to remove their fences, and before removing the plaintiff's fence he sent a notice to him to the same effect. The fences not being removed on the plaintiff's part of the line, the defendant did it by and with the statute labour, and ploughed and ditched the ground, and rolled it and prepared it for using as a road, and expended township money upon it. The defendant and his brothers would be the gainers of the old road—that is, one chain wide—as being part of lot 15, if the new road were established as the correct place to put it; but in laying out and establishing the new road it would follow as of course that the old one might be resumed by the owners of lot 15. At the time of the trial, however, the defendant and his brothers had not taken in that chain of land but it remained as the old road alongside of the new one.

A few days before this trial, another trial came on between the defendant and his brothers, and one Thomas, in respect of another portion of the line between lots 14 and 15, in which the contest was as to the correctness of the line as it was supposed to have been. The jury in that case affirmed the line as contended for now with respect to the new road, and much of the evidence as given in that case was read from the judge's notes by consent, as to the fact of the old road having been laid out upon the ground, &c.

Without going into the question whether the new road should be considered as the legal road or not, under the circumstances, or whether the defendant had a right to move the road without some direction or order on the subject from the township council, the learned judge told the jury to consider first the issue upon the plea of not guilty by statute—that is, to say whether the defendant acted *bona fide* as a pathmaster in opening up the new road, and removing the plaintiff's fences, believing he had authority to do so, or whether he did so to serve some purpose of his own, being one of the proprietors of lot 15.

The jury having retired to consider this point, decided that the defendant acted as pathmaster *bona fide* in that character, in doing what he did, and thereupon the learned judge decided that the defendant was entitled to notice of action, and for want of notice being proved, directed the jury to find for the defendant on the plea of not guilty which they did, and he discharged the jury upon all the other issues.

Eccles, Q. C., obtained a rule to shew cause why the verdict should not be set aside, as being contrary to law and evidence, and for misdirection. He cited Lidster v. Burrow, 9 A. & E. 654.

M. C. Cameron shewed cause, and cited Carswell v. Huffmann, 1 U. C. Q. B. 381; Barton v. Bricknell, 13 Q. B. 393.

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

The ninth clause of the statute 14 and 15 Vic., ch. 54, in our opinion settles the question which has been raised, respecting the necessity of notice of action, in favour of the defendants. It is not disputed that the defendant, when he did the act complained of, was a pathmaster. It was proved that he assumed to be acting in the proper exercise of his duty in doing that act, but it is suggested that, as the consequence of his removing the fence in question so as to make the road correspond with what, according to the evidence, appears to be its proper line, would be to add to the land in his own possession, he should be taken not to have acted in the matter as pathmaster, but as a private individual, with no other object in view than to serve his own interests. There might be a doubt whether that circumstance clearly called upon the learned judge, at the trial, to submit it as a question to be pronounced upon by the jury, whether the defendant did act in the supposed execution of his duty as a pathmaster; but the judge having left that question expressly to the jury, they found that the defendant was acting *bona fide* in the execution of his duty, and the consequence of that is, that defendant being in fact the path-

master at the time, he was entitled upon that finding of the jury, to a verdict of not guilty, although in the act done he may have exceeded his powers or jurisdiction, and have acted clearly contrary to law. This is the provision of the ninth clause of the statute, in its exact words.

We do not hold that it may not in such a case, as well as in others, be put to the court, whether the finding of the jury had any thing sufficient in the evidence to warrant it, though the case must be a very strong one which would make it proper for us to differ from the jury on such a point.

But in this case we think the jury judged rightly, and the rule should therefore be discharged.

Rule discharged.

COMMON PLEAS.

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

*DARK v. THE MUNICIPAL COUNCIL OF HURON AND BRUCE.

Court house—Municipal council.

The plaintiff brought an action for the use and occupation of a room in his hotel as a court room, and proved that the Sheriff of the county had engaged the room, and that the chairman of the municipal council had signed an order for the payment of his charges. *Held*, not recoverable.

DEBT—for use and occupation of certain rooms to hold the courts of assize and quarter sessions.

Pleas, never indebted.

The plaintiff proved that the rooms were engaged by the sheriff, and used as alleged, and that an order had been issued, signed by the chairman of the quarter sessions, dated 14th of January, 1854, upon the treasurer of the Huron District, to pay plaintiff £34, for accommodation for holding the courts of assize and quarter sessions in the British Exchange Hotel, from January to November, 1853.

At the trial before *Draper*, J., at the Goderich assizes, the facts, as stated in the declaration—except that no request was made by defendants—were proved, but the Sheriff proved that he had hired the rooms. No evidence was given of the want of a court house, or of any necessity or of any authority to him to hire them by order of the quarter sessions, or of the defendants.

MACAULAY, C. J., delivered the Judgment of the court.

Under the foregoing state of facts we do not think the action maintainable; but that they fail to establish a legal liability against the defendants, who do not seem to have authorised or approved of the hiring of the rooms directly or indirectly, under seal or otherwise; nor is any other authority shewn beyond the sheriff's spontaneous act, which is not sufficient, in our opinion, to create a debt recoverable against the defendants in an action of this kind. The utmost the facts amount to is, that the sheriff having engaged the apartments, for reasons not explained, the court of quarter sessions, through the chairman, ordered the treasurer to pay the plaintiff the amount, which he refused to do.

This does not establish a debt against the defendants, who do not appear to have been requested to pay, and who, for all that is shewn, may have been entirely ignorant of the whole proceedings.

At all events, no authority is cited that seems sufficient to maintain this action.

The verdict must therefore be for the defendants.

See 12 Vic., ch. 81, secs. 36, 40, and 41, No. 2 and 92, Hinkley v. Mayor of Stratford, 6 Ex. 279.

THE QUEEN v. JAMES HAGAR.

Indian lands—Statute 13 & 14 Vic. ch. 74.

The defendant entered into a verbal agreement to farm the land of an Indian woman, on shares for five years, and took possession.
He was guilty of a misdemeanor under 13 & 14 Vic., ch. 74.

The indictment contained two counts, framed under the 2nd section of 13 & 14 Vic., ch. 74, which enacts that if any person without the authority and consent of her Majesty, attested by an instrument under the great seal of the province, or under the privy seal of the Governor-General, for the time being, shall "*in any manner or form, or upon any terms whatsoever*, purchase or *lease* any lands in Upper Canada of or from the said Indians, or any of them, or make any contract with such Indians or any of them, for or concerning the sale of any lands therein, or shall in any manner give, sell, demise, convey or otherwise dispose of any such lands, or any interest therein, or offer so to do; *or shall enter on, or take possession of*, or settle on *any such lands by pretext*, or colour *of any such right or interest* in the same *in consequence of any such purchase or contract* made or to be made with such Indians, or any of them, every such person shall in every such case be deemed guilty of a misdemeanour," &c.

At the trial before *Burns*, J., at the last assizes for the county of Brant, the facts appeared to be as follows:—an Indian woman of the name of Mary Martin lived upon and had cultivated lot No. 46, in the 6th range of the township of Tuscarora, which was Indian lands. Her husband, Joseph Martin, had not lived with her upon this lot for some time. The woman was poor, and raised a few vegetables and other things upon the lot, and received an allowance of £6 a-year from the Indian funds. She desired to make the lot profitable to her, and thought it would be better to have it worked by a white man than by Indians, and therefore applied to the defendant, who is not an Indian, to take the farm from her on shares. This was done in spring of 1857, and the arrangement was that the defendant should take the farm and work it upon shares for five years, and give Mary Martin one-third of the crops raised from it. Nothing in writing was signed, it being merely a verbal arrangement. After the agreement the Indian chiefs persuaded the woman to break it off, and she went to the defendant and told him not to enter into possession, but he said he would have the place for the five years as agreed upon, and accordingly afterwards did take possession, and still had it, and has sown several acres with fall wheat shortly before the trial. A witness (an Indian) proved that she could get along without letting the place in the manner she had, but still that he thought the arrangement was advantageous to her.

The defendant's counsel raised the objection that the defendant could not legally be convicted, because under the second section of the act, a lease meant a legal lease, whereas, in the present case, the verbal lease was void. That the kind of arrangement proved in this case being a beneficial one for the woman, was not within the meaning of the second section of the act. The defendant, it was proved, had no permission or consent of the commissioner for Indian affairs on the Grand River, to make any arrangement with the woman.

The jury, at the recommendation of the learned judge, found the defendant guilty, with the understanding that the case should be reserved for the consideration of the court of Common Pleas to say whether the defendant could be properly convicted upon these facts.

In Michaelmas Term, *Harrison*, *R. A.* was heard in support of the conviction; and *Cameron M. C.*, against it.

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

It seems to me quite clear, that on the second count, at all events, the defendant was properly convicted. The evidence shews that although after the bargain made, he was in consequence of the interference of some of the Indian chiefs, told not to go into possession, that he insisted that he would have the place for the five years mentioned; and that he has taken, and still retains, possession.

I think also, that the evidence sustains the first count, for it brings the defendant within the letter of the statute, if any person shall "*in any manner or form, or upon any terms whatsoever*" lease. Now leasing upon shares is certainly within both the letter and spirit of these words, and it is as well an understood mode of leasing as any in the country; and the defendant, by insisting on a right to have the possession according to the agreement made, and entering in affirmance of that right, has claimed the benefit of such a lease, though void as to *five* years under the Statute of Frauds, and void under the act for want of the consent of her Majesty.

As to the argument that the arrangement was really and substantially for the benefit of the particular Indian, to give effect to it, would be to legislate, instead of to administer the law.

The statute is designed to protect the Indians from all contracts

*This judgment was delivered in the time of Chief Justice Macaulay, but was not when delivered reported: having been since cited on various occasions, it was thought advisable by the Reporter to publish it.

made by them in respect to the plans set apart for their use, in consequence of their own improvidence and liability to imposition. The condition precedent to make any such contract valid, is the consent of the crown, and it is not left to the court or jury to consider, whether in their opinion the bargain was such that the crown ought to consent to, but whether in fact the consent was given.

Conviction affirmed.

Loucks v. The Municipality of Russell.

Municipal Townships—Division of into wards.

Upon an application to quash a by-law dividing a township into rural wards where neither the townships sought to be divided, nor the union of townships of which it formed one, were prior to the passing of the by-law divided into wards: and the by-law dividing the same was not passed within the first nine months of the year in which the junior township had 100 resident freeholders and householders on its collector's roll. *Held*, that the by-law was invalid.

In Easter Term, 20 Vic., *S. Richards* obtained a rule *nisi*, calling upon the municipality of the township of Russell to shew cause why the by-law passed by the municipality of the united townships of Russell and Cambridge, on the 4th of December, 1856, intitled a by-law to divide the township of Russell into wards, should not be quashed with costs; because, 1st, neither the township of Russell nor the united townships of Russell and Cambridge were previously to the passing of such by-law divided into wards. 2nd. That the by-law was not passed within the first nine calendar months of the year in which the junior township, Cambridge, had a hundred resident freeholders and householders on its collector's roll. 3rd. That while the union continued, the municipality of the united townships could not legally divide the township of Russell alone into wards. He put in the by-law duly vertified, and certified by the clerk of the municipality of the late united townships, and town clerk of Russell, under the seal of both municipalities, passed on the 4th of December, 1856, reciting that the separation of Russell and Cambridge was to take effect on the 1st day of January, 1857, and that it was necessary to divide Russell into wards; such division to take effect on the 1st of January, 1857, and dividing that township into five wards, describing them, and appointing a place of election for each ward. He also filed the affidavit of Elisha Fox Loucks, stating that he was, during all the year 1856, a resident inhabitant householder, and a municipal elector of the township of Russell. That until 1st January, 1857, Russell and Cambridge were united for municipal purposes, Russell being the senior township. That the municipal council of Prescott and Russell, under the 11th section of 16 Vic., ch. 181, did, on 30th September, 1856, pass a by-law whereby, upon, from and after the 1st January, 1857, the townships of Russell and Cambridge were separated. That on the 4th December, 1856, the municipality of the united townships of Russell and Cambridge passed the by-law complained against. That neither Russell nor Cambridge were divided into wards at any time during their union.

On Friday, August 28th, in the following term, *Richards* moved his rule absolute, on an affidavit setting forth that in January last, two setts of municipal councillors for the township of Russell were elected, one by ward elections, the other by general election of the whole township: that William Hamilton is the reeve of the council elected by wards, and William Eadie the reeve of the coun- elected at general election; that William Hamilton was the reeve of the council of the united townships for 1856: that James Keays was town clerk of the united townships for 1856, and claims to be town clerk of Russell for the current year; and then service of the rule on Hamilton, Eadie, and Keays is proved, the last service being on the 23rd July, 1857.

Eccles, Q. C., asked, on the last day of term, to enlarge the rule until the 1st day of next term.

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

The following sections of the statute seems to contain all that may be referred to:

12 Vic., ch. 81, sec. 4, and sec. 8, as amended by 13 & 14 Vic., ch. 64, schedule A., No. 1, sections 11, 12, 13, 14, and 16; and 16 Vic., ch. 181, sec. 11.

Every union of townships may be divided into *five* rural wards, and such division may be altered and a new one made. In the first instance the power of dividing into wards is to be exercised by the municipal council of the county, (sec. 4) but subsequently the municipality of the township may divide or re-arrange a previous division (secs. 8 and 15).

Whenever a junior township has on its collector's roll 100 resident freeholders and householders, it shall be a separate corporation, upon, from, and after the first January next but one after the roll shall so contain 100 names; and the township or townships to which it had been united shall be, and be considered separate townships (secs. 12 and 16, the latter is amended by 13 & 14 Vic. ch. 64, schedule A., Nos. 2 & 3).

The municipal council of the country, may (by by-law to be passed during the first nine months of the year next following that in which the collector's roll of any junior township has 100 resident freeholders and householders named on it,) *divide such junior township into wards* according to the 4, 5, 6, and 7 sections of the act (11th section).

The municipality of the union of townships may, (by by-law to be passed during the first nine months of the year next following that in which the collector's roll of the junior township has 100 resident freeholders and householders named on it,) divide the remaining, *i. e.*, the senior township or townships *anew* into rural wards, in conformity with the provisions in the 8, 9, & 10th sec. tions of the act (sec. 13).

If the municipality of the union of townships omit to make a new division under sec. 13, and in consequence of the whole of any rural ward of the union lying altogether within the limits of the junior township, so that in fact the senior township, or the remaining townships, are left with less than five wards, then the elections of councillors for the senior township, or remaining townships, shall, after the dissolution of the union, be made at a general township meeting, and not by rural wards, until the municipality of the senior township, or remaining townships, shall have made a new division into wards. But if, after the dissolution of any union, *parts* of rural wards remain within the senior township or remaining townships, parts only of such wards being within the junior townships separated from the union, then the election of township councilors shall continue to be by wards. In other words, the parts of rural wards which remain within the senior township or remaining townships, shall be deemed to be complete wards in such senior or remaining township or townships (sec. 14).

Whenever a majority of at least two-thirds of the freeholders and householders rated on the assessment roll resident in and junior township, having within at least 50 resident freeholders and householders on such roll, petition the municipal council of the then county, stating their desire to be formed into a separate county, and the county municipality may by law separate such junior township from any other township to which it is united, and declare that such separation shall take effect from 1st January next, after three calendar months from the passing of the by-law, and from such 1st day of January such junior township, and that to which it shall have been united, shall be separate townships.

In Michaelmas Term, Mr. *Richards* has again asked us for judgment, and the opposite party have expressed no desire for further delay, and have shewn no cause in fact or in law against the rule being made absolute.

I think it was *extra vires* for the municipal council of the united townships to pass this by-law on the facts set forth at the time at which, on the face of it, it appears to have been past. The objection as to the date is apparent on its face and connected with the recital it contains, and the matters stated on affidavit satisfy me we ought not to allow it to stand.

CHAMBERS.

Reported by A. McNabb, Esq., B.A.

Carr v. Baycroft.

Garnishee—Attaching order.

An order attaching a debt obtained under C.L.P.A., though it do not order payment, is a good defence when served to an action against the garnishee for the amount of the debt attached.

An attorney who knowing the issue of an attaching order advising his client how to defeat it, censured.

One Baycroft owed one Wm. Duff a certain amount on a promissory note, and some person had a judgment against Duff and attached the debt due by Baycroft to him to the extent of the

judgment. Baycroft told Duff that the debt was attached, shewed him a copy of the order, and told him he was ready and willing to pay it to whoever was entitled to receive it. Duff wanted to get rid of the effects of the attaching order, and consulted Messrs. Boulton & McCarthy, barristers, as to what he should do. Mr. McCarthy told him he would manage it by sueing for the debtin the name of a person for whom his firm did business. They then sued Baycroft in one Carr's name, and Baycroft was to have sent to Mr. Hopkins, his attorney, the attaching order, &c., so as to plead; but owing to some mistake in the post office, it never reached him. He to save judgment pleaded did not make payment and set off. After issue was joined and record entered, an order was made on Baycroft to pay over to the attaching creditor, and he paid over, and applied for leave to plead the order to pay over by way of *quis darein continuance*, and to pay balance into court. This was granted and he pleaded it. The plaintiff withdrew the record, took the money out of court, and entered judgment for his costs. *Jackson* applied to set aside the judgment and *fi. fa.* as to costs, with costs to be paid by the attorney, because it was attempt on his part to evade the order of the court attaching the debt, and that it was a fraud on the court and defendant. Duff being the real plaintiff. BURNS, J., discharged the summons without costs, on grounds that Baycroft's latches were too great: that he should have pleaded the attaching order in the first instance, which he might have got from the deputy clerk of the crown. He thought it would have been a defence. He considered it highly improper in Mr. McCarthy to pursue the course he did in the matter, and therefore discharged the summons without costs.

ARMOUR v. CARRUTHERS.

Appropriation of payments—C. L. P. A.—Effect of C. L. P. A., 1857, s 17 & 18.

If a debtor pay a sum of money to his creditor who has a judgment debt against him, and also a debt arising out of a current account, and no directions be given as to the application of the payment so made, the creditor may if he choose apply it to the reduction of the account current, though the judgment debt were earlier in date.

Semble. C L. P. A., 1857, s. 17 & 18, do not apply to the case of a cognovit on which judgment had been entered before the passing of the statute.

If an application be made to a judge in Chambers against a judgment entered and it does not appear that the appellant has a right to move against the judgment the application will not be entertained.

On 8th July, 1858, Mr. Justice Richards issued a summons at the instance of the defendant upon the plaintiff to shew cause why the amount indorsed upon the writ of *fi. fa.* in this action, should not be reduced by striking out £92. This summons was enlarged from time to time till 21st July, 1858.

Another summons was signed in this cause, though not at the instance of the defendant and not shewn on whose behalf,—but it was said in the argument that the application was made on behalf of one Andrew Carruthers, another creditor of the defendant, who wished to remove this judgment out of his way, the objection being that the cognovit on which it was entered was not filed of record as required by the C. L. P. A., of 1857, sec. 17 & 18.

ROBINSON, C. J.—As to the application to reduce the direction to levy by striking out £92:

The plaintiff took a *cognovit from defendant on which judgment* was entered on 28th April, 1857, upon which judgment execution issued and is now in the hands of the sheriff.

The defendant paid £92 in July last, to the plaintiff through Hector Cameron, Esq., but he does not shew that he paid it on account of this judgment debt, that is he does not prove, nor does he swear himself that he gave any intimation on what account he made the payment.

The plaintiff on his part swears, that when that payment was made, the defendant owed him a sum of £100 over and above the judgment on an open account for goods sold, besides another debt which he does not swear to in such positive terms. He states also that when the £92 was paid to him for the defendant neither Mr. Cameron who made the payment nor the defendant gave any direction as to the appropriation of the payment. Mr. Cameron confirms this and so also does a clerk of the plaintiff who received the money from Mr. Cameron.

I am of opinion that under such circumstances the plaintiff receiving the money without direction is not bound to appropriate it on account of the judgment debt but might elect at any time to appropriate it to the current account. The fact of the other debt being earlier in date and that the plaintiff has a judgment for it does not interfere, I think with his right of election.

On looking over the account I observe that a considerable portion of it is for goods sold before the confession was given, but I am not therefore at liberty to infer that it forms any part of the demand for which the defendant confessed judgment.

If it did, then the plaintiff would have to shew that there was a debt due to him besides, sufficient to cover the £92. otherwise there should be some credit given upon the execution.

Upon the other application to set aside the judgment, the only affidavit filed in support of it, state that judgment on the cognovit was entered on 28th April, 1857, and that it could not be found upon search in the proper office in this Court, in which such judgment was entered, that any copy of the cognovit "had been filed in the cognovit book, nor was the original cognovit filed, so far as could be seen by searching the cognovit book."

Andrew Carruthers, swears that on 10th December, 1856, he obtained judgment against defendant for £75 8s. 7d., in the County Court for York and Peel, and took out execution—but is informed that nothing can be made on his writ, in consequence of an execution in this cause being in the Sheriff's hands for a large amount. He states further that he understands from defendant that he has discharged this debt, though some misunderstanding seems to exist on that point.

The defendant says nothing in his affidavit respecting the want of filing of the cognovit, and there is indeed nothing before me on that subject, except on affidavit of Wm. Stanton, Esq., to the effect stated by me already, and he does not assert that he makes the affidavit as attorney or agent for Andrew Carruthers or in any way at his desire, nor that he is his Attorney or Agent.

I should not set aside a final judgment on the ground alleged, *if the objection were shewn to be raised by any one who had a* right to raise it, though if I thought the judgment liable to be set aside for the reason given, *i. e.*, the failure to file the cognovit, I should stay proceedings on the execution till term.

Now the defendant in this cause is not taking the objection, if it were competent to him to do so, neither is it shewn on whose behalf the application is made, so that I cannot interfere.

If it were sworn, as I dare say the fact is, that Andrew Carruthers is making the application, I might perhaps stay the execution till term, though I am at present under the impression that the 17 and 18 clauses of the C. L. P. Act of 1857, do not apply to the case of a cognovit on which judgment had been entered before the passing of that statute.

That however is a question, on which doubt may be fairly raised. The judgment was entered on the cognovit in April 1857. The Statute was passed 10th June, 1857, and it cannot be decided (upon anything now before me) that the cognovit is still *unsatisfied*. But if the 18th clause can be held to apply to all cognovits i t which the debts are not fully paid up, the inconvenience will be great, so much so that I should abstain from determining such a point summarily and leave the parties applying in such a case to indemnify the Sheriff for acting on his later execution, or a any rate to prosecute *him if he declines doing so. But I discharge* the application in this case, because it is not shewn that it has been made by any one who has a right to move against the judgment.

GLADSTONE ET AL v. MCDONELL.

Interpleader—Rights of claimant.

As a rule applications arising out of or consequent upon an interpleader ought to be made to the judge who made the interpleader's order.

Right of claimant to make applications in regard to the proceeds of the goods when sold considered.

Plaintiffs obtained a summons on the Sheriff of the United Counties of York and Peel, to shew cause why the master should not revise his taxation of the fees and expenses of the Sheriff on certain interpleader suits against the estate of George B. Holland,

And why he should not strike off all costs and charges incurred or charged by the Sheriff on account of sales made by him of the goods and effects of G. B. Holland, on the ground that he was not ordered or directed to sell by the claimants, which in the interpleader order is made a condition precedent to the sale.

And on grounds disclosed in affidavits, &c.

And also why the master should not strike off all charges for keeping possession after the sale, on the ground that the Sheriff should have paid the proceeds of the sale into Court.

Or why he should not strike off all charges for possession money after the 16th April, in case he should find that after the service of orders for the abandonment of proceedings in this and another interpleader suit on the sheriff he had sufficient money in his hands arising from the sales he had made, after deducting such reasonable charges and expenses as the master might allow, to pay off the last execution under which he was then holding possession—and why the said Sheriff should not pay into Court the balance of all monies received by him through sales or otherwise, on account of the estate of the said George B. Holland, after deducting the amount of the bill as revised.

The following cases were cited in the argument, Bryant v. Kay, 1 Dowl. P. C. 428, Cox v. Fenn, 7 Dowl. P. C. 50, Clarks v. Ridgway, 1 Ex. 8.

Robinson, C. J.—I have read all the affidavits and other papers which have been before Mr. Justice Hagarty, in this cause as well as those filed afterwards upon, and in consequence of the application to revise taxation.

Mr. Justice Hagarty's order of the 16th April last, in this cause disposes of all questions except such as may be raised regarding sums to be obtained on taxation, and the ordinary practice in such cases makes it the more proper course that even as to such questions the Judge who made the interpleader order should be referred to, and not another Judge.

If I were to dispose of the case, (and as there may be some doubt of my right to do it, the parties had better go before Mr. Justice Hagarty), I think I should consider that upon the terms of the judge's order of the 16th April, the execution creditor gave way to the claim, the claimants Gladstone and others have no ground for making this application.

Their claim is upon the Sheriff for seizing their goods. The order takes nothing from them and gives nothing to any one at their expense. It is nothing to them what charges are allowed to the Sheriff. The defendant McDonell has to pay them and not the claimants of the goods. *He* might, of course raise questions in regard to the items allowed, but I do not see that he *is* doing so.

The claimants deny that they ever authorised a sale of any part of the goods. If that is so, it is of no consequence to them what sacrifice attended the sale for they would not be bound by it. So also it would be of no consequence to them what deductions the Sheriff desires to make from the proceeds.

If they do not dispute the Sheriff's right to sell or rather should give up any complaint on that account and should be willing to be bound by the sale, and to take the *net proceeds* of the sales for the value of the goods sold, then they would have an interest in contending against the Sheriff's charges. At present I do not see what interest they have.

I have already stated that I think it is reasonable to allow for taking the inventory, or rather the principle that should govern such allowance. But the claimants have nothing to do with that, or the other items unless they acquisce in the sale made and agree to take the proceeds instead of the goods.

COUNTY COURTS, U. C.

In the County Court of the United Counties of Frontenac, Lennox & Addington. (Before Kenneth Mackenzie, Esq., Q. C., Judge.)

The Frontenac Division, No. 2, Sons of Temperance, *vs.* Rudston and Stacy.

Replevin.—Pleas. 1st.—Did not take the Goods.
2nd.—Goods were not the plaintiffs.

The cause was tried at the sitting of the Court in June last, when a verdict was returned for plaintiffs. As the Sheriff was not able to replevy the goods sought to be recovered, in consequence of the same having been eloigned or secreted, the plaintiffs proceded for the full value of the goods. Before the cause was called on for Trial a motion was made on behalf of the defendants to put off the trial until the September Court, in consequence of the absence of certain witnesses. The Judge refused to put off the trial, as he thought the proper steps were not taken to secure the attendance of the absent witnesses. The defendants made no defence.

Kirpatrick, Q C, in July Term, obtained a rule nisi upon the the plaintiffs, to show cause why the verdict should not be set aside and a new trial had, on the ground of the absence of material witnesses at the trial, or why the verdict should not be reduced to nominal damages, or why further proceedings in the cause should not be stayed, the plaintiffs having now no corporate existence. Affidavits and papers were filed on the part of the defendants, showing the By-Laws, Rules and Proceedings of the Grand Division of the Sons of Temperance of Canada West.

Henderson also supported the Rule.

Draper showed cause.

Mackenzie, Judge.—As to reducing the verdict to nominal damages, the objection taken in the rule was not taken at the trial and consequently should not prevail here. The court has no power to order further proceedings to be stayed, notwithstanding the resolution of the Grand Division. The only point then to be decided is whether there should be a new trial in consequence of refusing the motion made to postpone the trial from the June to the September Court. It may be laid down as a general rule of law, that when an application is made to the Judge at Nisi Prius, to postpone a trial, it is a matter in his discretion to grant or refuse it, and the Court in Banc will not in general reverse his decision. But when the Court can see that a miscarriage of justice has been caused or that a defence which ought to be heard, has been excluded by reason of refusing to postpone the trial, without default of the party complaining, it will grant a new trial, on terms. If my mind had been sufficiently impressed with the fact that a notice of countermand of trial could be given any time during Saturday, the 5th of June, and that an attempt was made to serve the witness, Jones, early on Monday morning, the 7th of June, I probably would have ordered a postponement of the trial In disposing of this rule I cannot exclude from consideration the fact that the plaintiffs are, or at all events profess to be an Incorporated Association, deriving authority from a Statute of the Province, and that the defendants represent themselves as Officers of another Incorporated Association, deriving authority from the same source; and that the trespass complained of was an alleged execution of some order or rule of the Grand division of the Sons of Temperance. The proceedings of the Grand Division in reference to this matter, are not in proper form before the Court, so that it is impossible, in the present state of the case, to form an accurate judgment touching their legality or illegality. Under the circumstances, I think the defendants should be let in to place their alleged defence in due form of law before the Court. In adopting this course I am only carrying out the liberal spirit and enlarged views which the Common Law Procedure Acts, and other remedial Statutes have infused into the administration of the law, and the practice of the Courts. Every man who honestly believes he has a good defence on the merits, should be heard in the Queen's Courts, if possible, unless he has by his own act rendered this impracticable. There must be a new trial in the present case, on payment of costs. In arriving at this conclusion my mind was considerably impressed with the peculiar position of the cause as respects the right of appeal. If the Court ordered the present rule to be discharged, I am afraid there could be no appeal; for after all it would be an appeal for refusing a motion to postpone a trial which is not an appealable matter. But, after another trial, when all the facts are properly disclosed in evidence, whatever judgment this Court may form the party against whom it may be formed will have the right to apply to one of the Appellate Jurisdictions of Upper Canada, to have it reviewed, and, if erroneous, revised. In the County Courts of Upper Canada, as constituted at the present time, considerations of this kind should have a due and proper weight. In the County Court the same Judge who tries the cause is in general the same Judge who examimes his own decision in Banc. Every proper facility should be afforded by him to have his judgment examined in the Courts of Appeal. So far as I am myself concerned, I consider it my duty, upon every proper occasion, to give every facility in my power, consistent with law and its obligations, to parties to appeal from any order I may make, or any judgment I may render. Consequently that portion of Mr. Kilpatrick's argument

which pointed out that the rule should not be disposed of in such a manner as to exclude the right of appeal, had its due weight. The rule is made absolute for a new trial on payment of costs, with leave to the plaintiffs to amend their declaration if they think proper so to do, In a preliminary judgment in this cause, I stated it as my opinion, that to enable plaintiffs in an action of Replevin to recover substantial damages, the non return of the goods, or the inability of the Sheriff to replevy them, or any part thereof. by reason of the same having been secreted by the defendants, or eloigned should be alleged in the declaration as a special damage, I adhere to that opinion still. I would refer to the case of Goldicut v. Beagin 11 Jurist, Ex. 544, and the Molson Bank v. Bates, 7 U. C. C. P. 312.

Rule absolute for a new trial, on payment of costs, with leave to amend the pleadings.

CONTESTED PARLIAMENTARY ELECTIONS.

In the County Court of Essex—A. CHEWETT, Esq., Judge.

IN THE MATTER OF THE CONTESTED ELECTION OF THE COUNTY OF ESSEX.

An application to commit the sitting member for contempt in not attending the investigation before the County Judge, as a witness for his adversary, refused.

The facts sufficiently appear in the judgment delivered by

CHEWETT, Co. J.—On the 23rd February, at the rising of the court, application was made on affidavit to commit the member declared elected, for contempt in not appearing to give evidence when then called. I took till the 24th February to consider the application. On the 24th February, the application was renewed to commit John McLeod, the sitting member, for not having attended on warrant to give evidence.

I refused the application, stating that I was not satisfied that I had the power to commit the sitting member, or that, if I had such power, that he ought to be committed on this occasion, he being the member declared to be elected, and being served on the 22nd February, and called in court to appear and give evidence on the 23rd, at the rising of the court—Parliament meeting on the 25th. As it might reasonably be believed that he was, on the 22nd, preparing for it, and was on the route on the 23rd, to attend Parliament on the 25th, and therefore engaged in his duties a part of which I conceive is to use due diligence to be there in time, and which, under and by the 129th section of the Act of 1851, in the case of a member, these circumstances of themselves would present a lawful excuse for not appearing here to give evidence, and if so, proceedings for and commitment following is not as I conceive the proper course.

Then I am not certain that a member declared to be elected and the party contesting his election are the sort of persons contemplated in the 16th Vic. ch. 19, and liable to be called on by their adversaries to give evidence here, wherever else or by whatever proceeding they may be compelled to do so. I have not the cases at hand cited in the *Upper Canada Law Journal*, February number, p. 31, on these heads.

As in the preamble of that act it is recited—"That it is desirable that full information as to the facts in issue in criminal and civil cases should be laid before the persons who are appointed to decide upon them, and that such persons should exercise their judgment on the credit of the witnesses adduced and on the truth of the testimony," it might be intended that the parties contemplated in the act might be compelled to appear before the Judge Commissioner, whose duty only is to take the evidence, but who could not exercise his judgment on the credit of the witnesses adduced, or on the truth of the testimony; or if he did, from his appearance in giving testimony, exercise his judgment on their credibility, he is not anywhere empowered by statute to transmit his impressions or his opinion of the credibility of this or any other witness to the select committee. Indeed that would be useless, as the committee alone, like a judge or jury, must exercise that judgment.

It is true the evidence may be examined under a commission from the ordinary courts of record (sec. 3), but that is only where the witnesses reside in a foreign country, *ex necessitate rei*, or as of necessity, and does not apply to this procedure in the nature of a commission, where the witnesses are in this country.

If the statute intends parties such as these, then what is the penalty for not appearing on subpœna, or notice, or warrant?

By the 2nd section, it is ordered that such non attendance shall be taken as an admission *pro confesso* against them in such suit or action, whatever effect that may have upon their position before the select committee.

This act is not embodied in the Controverted Elections Act, so that the one may be used towards executing and carrying out the other, and does not admit of the application of the power of summary attachment for non attendance, given in the Act of 1851, as the penalty, instead of its being taken *pro confesso* against them, as in 16 Vic. ch. 19, sec. 2, and no other resort is by the latter act given in lieu of or together with it, as is often done, by providing that the new remedy shall not deprive parties of those already existing, if there are any.

I conceive the course towards obtaining the evidence of the member declared to be elected in this case, under these circumstances, is the same as that for any other member whose evidence is wanted. It is under the 129th section of the Act of 1851, upon application, by the Judge Commissioner certifying to the Speaker that his attendance to give evidence is requisite. The necessity is to be made to appear in some satisfactory manner to the Judge, who is to certify, so that the Speaker may be able to report the reasons for the same to the House, for its direction thereupon, and thereby ascertain if such attendance here is proper, and whether it could be had under the order of the House or otherwise.

COURT OF COMMON PLEAS.

[From the Law Times.]

EMERY *v.* BARNET

County Court—Question of title—Jurisdiction—19 & 20 Vict c. 108, s. 50—Landlord and tenant—Estoppel.

The plaintiff, as landlord, levied his plaint in the County Court, under s. 50 of 19 & 20 Vict. c. 108, against the defendant, to whom he had let certain premises, for the recovery of premises and for rent. When the case came on for hearing it appeared that the defendant had gone out of possession of the premises, on a third person setting up a claim to them, who paid him for his crops; and the defendant sought to set up that third person's title against the plaintiff his landlord. The County Court Judge, on objection made that question of title arose, without inquiring whether the defendant went out of possession voluntarily, or was evicted, dismissed the case on that ground:

Held, that the duty of the County Court Judge was to have gone further, before he dismissed the case, and have ascertained whether the defendant went out voluntarily or by compulsion: if voluntarily, then the defendant was estopped from setting up the title of the third person, and the County Court has jurisdiction; if evicted by compulsion, then defendant is not so estopped, title comes into question, and the jurisdiction of the County Court is at end.

Bovil on a former day having obtained a rule calling on the judge of the County Court of Shropshire to show cause why the said judge should not hear and determine a plaint, in which one Emery is plaintiff and one Barnet the defendant, for the recovery of a tenement at Stokeheath in that county, and for 11*l.* 8*s.* 3*d.* rent and arrears of rent due from defendant to plaintiff in respect of the said premises. At the hearing of the plaint, it was proved that on 25th March. 1856 the plaintiff verbally let the said premises to defendant at the yearly rent of 8*l.*, and that defendant entered and occupied the premises and paid in Feb. 1857, half a year's rent due the 29th Sept. 1856. That afterwards the plaintiff and defendant on the 7th of April 1857, signed an agreement or demise in writing for the tenancy of the said premises from 25th March 1857 at the like rent of 8*l.*, payable half-yearly, terminable by six months' notice on either side on or before the 29th Sept. in any year. That a person named Stone came forward and set up a claim to the premises, and the defendant informed plaintiff that notice had been given to him not to pay any more rent. The defendant offered to give up possession of the premises, to the plaintiff prior to 29th Sept. 1857, in terms which were not agreed to. That on 22nd Sept. it was verbally agreed to between the defendant and one Dutton, with the consent of the plaintiff, that defendant should give up the premises to him on the following Michaelmas-day; that Dutton should pay defendant for his hay on the premises, and that defendant should pay rent up to that day; but that defendant did not carry out the said agreement, but, on the contrary, gave up the said premises before the said Michaelmas day to the said Stone, who claimed to be entitled to them. That on the 29th Sept. 1857 due notice was served on defendant by plaintiff, to quit the premises at the next Lady-day; and on the

2nd Oct. following a distress was taken for 8*l*., being a year's rent due from defendant to plaintiff. That at the hearing of the plaint, defendant's attorney objected that the Judge of the County Court had not jurisdiction to hear the plaint, as title to the premises came into question therein; and the judge dismissed the case accordingly.

Unthank now showed cause against the rule.—In this case a *bona fide* claim was made to the premises, and what was done was equivalent to an eviction. The defendant had actually been out of possession half a year, and the claimant Stone had been in; how is it possible then to say that title to land did not come into question? The question with the judge was this: "Was Stone a trespasser?" or whether, having good title to the premises, he had evicted the defendant: (*Mountnoy* v. *Collier*, Ell. Bl. 630.) That was a case where the tenant remained in possession. (Byles. J.—Must not he, before he could get rid of the estoppel, give up the premises, not to a stranger, but to Emery the landlord?) No, I think not. In the case cited the man remained in possession; it was admitted then the title had expired. This was an eviction by title paramount. [Crowder, J.—If defendant were threatened to be turned out, that might amount to an eviction.] Yes, that is the point. The defendant was not to incur the heavy costs of an action of ejectment brought by Stone. [Crowder, J.—He not only controverts his landlord's title, but gives up up the premises to a mere claimant. Byles, J., referred for the law of the case to *Doe* v. *Austin*, 9 Bing. 51, where the Lord Chief Justice says, "The principle is, that a tennant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such a title let him go out of possession."] It is submitted that the present is quite a different question. There Thrupp came in by assignment, but here Stone came in adversely. [Crowder, J.—There was a case in this court where a stranger having threatened an action, it was held a constructive eviction.] Your Lordships cannot interfere in the present case, unless it be shown that title to land did not come into question. Assuming that Stone had title paramount and in June he gave defendant notice not to pay plaintiff any more rent, then it was competent for the defendant to go out of possession. [Crowder, J. referred to *Doe* v. *Mills*, 2 Ad. & Ell. 17. Willes, J. referred to *Carpenter* v. *Roberts*, 27 L. J. 78, C. P. Crowder, J.—The case of *Carpenter* v. *Roberts* is very much in point as to the question of eviction.] It was for the County Court judge to decide whether this was a case of collusion between defendant and Stone to let him into possession, or whether, as I say was the case, a *bona fide* question as to title of land arose. The question the judge had to try was, whether this amounted to an eviction by title paramount, and should the case be sent back to him that will be the question he has to try. It was a question of law for the judge, and the court will be usurping the jurisdiction of the County Court if it decides against the defendant.

Bovil (*Prentice* with him) for the plaintiff, in support of the rule.—There is in this case a letting of defendant into possession of the premises by the plaintiff, the payment of rent, and a submission to distress, and therefore such a relation created between the parties as to estop defendant from disputing the plaintiff's title. [Williams, J.—The question is was there any evidence before the County Court judge to support an eviction?] There was no eviction at all. It is not to be tolerated that a tenant should have the power to put his landlord to the proof of his title by taking money from the adverse claimant to go out of possession and let him in. The defendant ought to have delivered up the premises to the plaintiff his landlord. In any point of view this rule must go, because the plaint is for half a year's rent of the land and premises.

Williams, J.—We are all opinion that this rule must be made absolute. The judge of the County Court did not consider the point on which he decided the question of jurisdiction. He appears to have thought that a question of title arose, but he did not go far enough in ascertaining that; he ought to have gone further, and have enquired and determined whether Stone had in fact a *bona fide* claim to the premises, and whether the defendant left them voluntarily or was compelled to leave them against his will. If it appeared that defendant was turned out, then question of title would arise and the County Court judge could not proceed with the case. On the other hand, if defendant went out of possession at the instance of Stone, on his promising to pay him money for the hay, then it appears to me no question of title could arise, because, by the ordinary rule of landlord and tenant, both the defendant and Stone would be estopped from disputing title.

Crowder, J.—I am of the same opinion. The County Court judge seems to have proceeded on the notion that a *bona fide* question of title to land had arisen, and that that ousted him of jurisdiction; but the words of the Act are, that he shall have no jurisdiction when title to land is in question. I think the judge was wrong. It seems that defendant, was here let into possession by the plaintiff; a person named Stone claimed the premises, and when the case came before the judge he thought that Stone had been let into possession on a *bona fide* claim, and so he stopped the case. But where the relation of landlord and tenant exists, the tenant cannot dispute his landlord's title. If he lets in another person, he cannot dispute the title. Here he let Stone in, who promised to pay him for his crops. There was some evidence that he let Stone in voluntarily, for he had previously asked the plaintiff (his landlord) to release him from the tenancy and take the crops. The question for the County Court judge was, whether this was so, or whether what took place amounted to eviction by title paramount. As to a portion of this case—the claim for half a year's rent—it must go back to the County Court judge; it must also be remitted back to him to decide the other point.

Willes, J.—I am entirely of the same opinion. The question of eviction depends upon two considerations; first, had the evicting party title paramount? Secondly did the tenant leave voluntarily, or under pressure? The matter may be tested by inquiring whether a prohibition would lie. If a prohibition were applied for I think the court would not grant it. (His Lordship referred to *Duten* v. *Robson*, 1 H. Bl. 100, where it was held that where the subject of a suit in an inferior Court is within the jurisdiction of that court, though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going to try such matter, a prohibition will not lie.)

Byles, J.—I am also of the same opinion. It strikes me that Mr. Bovil's observation that there was not in this case an eviction at all is well founded. In any event the case must go down again to the court below, for the judge must entertain the question as to one half year's rent; he will then have to decide on the question as to the remainder of the rent, whether Stone was let in voluntarily or not. On both questions, therefore the case must go down again to the County Court.

Rule absolute, without costs.

COURT OF QUEEN'S BENCH.

[From the *Law Times*.]

April 28, *May* 5 *and June* 4.

Lewis *v.* Levy.

Libel—Report of proceedings before a police magistrate—Privilege.

The privilege accorded to a fair and impartial report of proceedings in a public court of justice extends to preliminary proceedings on a charge for an indictable offence before a magistrate sitting in an open police court, where the proceedings terminate in the dismissal of the charge, and where the report, keeping pace with the proceedings which occupy several days, is published in parts in different numbers of a newspaper.

But the privilege does not extend to comments by the reporter reflecting on any of the parties, as, in an account of proceedings out of which an abortive charge of perjury arose, to the statement that the evidence of certain witnesses entirely negatived the story of the defendant, and satisfied the court that he knew that it was false.

The first count of the declaration stated that the defendant, on the 26th June, 1857, falsely and maliciously printed and published of the plaintiff, in a newspaper called the *Daily Telegraph* the words following, that is to say:—"Guildhall. Wilful and corrupt perjury. Mr. E. L. (meaning the plaintiff) the manager of a loan office in Fetter-lane, called, &c., appeared on a summons before Alderman Rose to answer a charge of wilful and corrupt perjury, alleged to have been committed by him in this court in some proceedings taken by Mr. L. against Mr. J. E. Collett, for obtaining the sum of £30 by means of false representations. Mr. Pattison, for the complainant, applied for an adjournment, to compel the attendance of two witnesses, one of whom was alleged to have been outlawed, which, it was stated, incapacitated him from giving

evidence. Mr. Giffard, for the defendant, opposed the adjournment, unless it was shown that there was reasonable expectation of procuring the attendance of the witnesses. After some further discussion the witnesses were ordered out of the court, and ultimately examined one by one, after which the case was adjourned; but as the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing."

The second count charged that on the 4th July the defendant falsely, &c. published of the plaintiff in the said newspaper the words following:—"Guildhall. Wilful and corrupt perjury. A man of the name of Edward Lewis (meaning the plaintiff), who conducts a loan shop at, &c., appeared before Alderman Rose upon a summons charging him with wilful and corrupt perjury, alleged to have been committed by him in evidence, which he gave in this court on the 3rd June last in support of a charge which he preferred against Mr. C. for obtaining money under false pretences. The case arose out of some transactions between Mrs. B. and the defendant, in the course of which she represented herself as a widow in a declaration she made respecting the property she offered as security for loans prior to August last. In that month she negotiated a loan through Mr. C. with the defendant, who advanced the money upon a warrant of attorney jointly signed by Mrs. B. and Mr. C., and upon default being made in payment of instalments, he entered up judgment for the full amount of the loan, and arrested Mr. C., who was released a few days afterwards, upon affidavit being made by Mrs. B. before a judge at chambers; upon which the defendant (meaning the now plaintiff) preferred a charge against Mr. C. for obtaining the sum of £30 under false pretences, alleging that Mr. C. told him at the time he applied for the loan that Mrs. B. was still a widow, and that he, L. (meaning the plaintiff) never knew she was a married woman until she made the affidavit in March last, which released Mr. C. from prison. He (meaning the plaintiff) also said that if he had known she was a married woman he would not have advanced the loan, notwithstanding he had taken the precaution to have the additional security of the warrant of attorney. Evidence was given by Mrs. B. and Mr. C. which entirely negatived L's (meaning the plaintiff) story, and satisfied this court that L. (meaning the plaintiff) knew from a conversation, &c. that she was not a widow; and the summons was immediately dismissed upon which an application was made that L. (meaning the plaintiff) should be forthwith committed for perjury. The magistrate declined taking such a summary course, and therefore granted a summons, calling on the defendant (meaning the now plaintiff) to answer that charge on the 26th of June last. The evidence was gone into, which was merely a repetition of that given for the defence of Mr. C., and the case was then adjourned until to-day, when Mr. Sleigh appeared for the prosecution and Mr. Giffard for the defendant.—(The evidence given was then detailed, and, after stating that the counsel for the prosecution applied for a remand, which was opposed, the report concluded as follows): Alderman Rose said there was sufficient in the evidence for a remand, but not to justify him in committing the defendant (meaning the now plaintiff) for trial in the present incomplete state of the case. The defendant (meaning the now plaintiff) was then remanded on bail."

The third count charged that, on the 18th July, in the same year, the defendant falsely, &c. published of the plaintiff in the said newspaper the words following:—"The Fetter-lane Loan office. E. L. (meaning the plaintiff), the manager, &c. appeared in discharge of his recognizances to answer a charge of perjury, alleged to have been committed in evidence which he gave in this court on the 3rd June last. The magistrate dismissed the summons, there not being sufficient evidence to secure a conviction;" meaning and insinuating thereby that the plaintiff was guilty of wilful and corrupt perjury. The declaration concluded with an allegation of special damage.

Pleas:—1. Not guilty. 2. A justification on the ground that the alleged libels were fair and correct accounts of proceedings before a justice sitting in a public court, and were published without malice.

Issue having been joined, the trial took place before Lord Campbell, C.J., at the sittings in Westminister, after last Michaelmas term, when a general verdict was given for the defendant.—What took place at the trial is fully stated in the judgment. A rule on behalf of the plaintiff was then obtained to enter up judgment *non obstante veredicto* on the second plea; and to enter the verdict for the plaintiff on the first plea, on the ground that the second plea was no answer to the action, and that therefore the verdict on the first plea, which was entered for the defendant on the ground that the matter stated in the second plea was a defence under the general issue, was erroneously entered.

Edwin James, Q.C., and *Ballantine*, Serjt., showed cause.

Petersdorff, Serjt., *H. Mills* and *Laxton* in support of the rule.

The following authorities were cited:—*Duncan* v. *Thwaites*, 3 B. & C. 556; *Lewis* v. *Clements*, 3 B. & A. 702; *Curry* v. *Walter*, 1 B. & P. 525; *R.* v. *Burdett*, 4 B. & A. 323; *Cox* v. *Coleridge*, 1 B. & C. 37; *R.* v. *Fisher*, 2 Camp 563; S. C., Stark. Libel. vol. 1, p. 290, n.; *R.* v. *Fleet*, 1 B. & A 379; *Macgregor* v. *Thwaites*, 3 B. & C. 24; *Hoare* v. *Silverlock*, 9 C. B. 20; *Charlton* v. *Watton*, 6 C. & P. 385; *Davison* v. *Duncan*, 7 Ell. & Bl. 229; *R.* v. *Borron*, 3 B. & A. 432; *R.* v. *Lee*, 5 Esp. 123; *R.* v. *Wright*, 8 T. R. 298; *R.* v. *Creevey*, 1 M. & S. 279; *Smith* v. *Scott*, 2 Car. & Kir. 583; *Daubney* v. *Cooper*, 10 B. & C. 237; Starkie on Libel, vol. 1, p. 265; Holt on Libel, p. 110; Cooke on Defamation, p. 50; Borthwick on Libel in Scotland, p. 108; Taylor on Evidence, v. 1, p. 111; 6 & 7 Will. 4, c. 114, s. 2; 11 & 12 Vict. c. 42 s. 19. *Cur. adv. vult.*

June 4.—Lord CAMPBELL, C. J. delivered the judgment of the court.—The declaration in this case contains three counts for three alleged libels on the plaintiff, published in a newspaper called the *Daily Telegraph* on the 26th June, 1857, on the 4th of July and on the 18th of July following. Each alleged libel professed to give a report of what had taken place in a proceeding before a magistrate upon a charge of perjury against the plaintiff, which was preferred on the 25th June, and after adjournment to the 3rd of July, was finally dismissed on the 17th of July. The defendant pleaded first not guilty, and secondly a special justification, that the alleged libels were and are true, fair, just, accurate and correct accounts and reports of certain proceedings had before a justice of the peace in a public court of justice, on a charge of wilful and corrupt perjury against the plaintiff, which was dismissed. At the trial, the question made between the parties was, whether the reports of these proceedings which appeared in the defendant's journal were fair and correct reports. The publication of the alleged libels been admitted, the defendant's counsel contended that it lay upon the plaintiff to falsify them; but the judge held that the onus was cast upon the defendant to prove that they were fair and correct. The defendant then gave in evidence the summons and all the proceedings before the magistrate upon the charge referred to, with all the depositions and the adjournments by the magistrate, and his final adjudication dismissing the charge for want of sufficient evidence. There was no request on the part of the plaintiff that the jury should find separately on on any of the counts, or on any particular part of either count, or that they should assess damages on the plea of not guilty. The Plaintiff's counsel, in his reply, complained chiefly of the suppression of some parts of the cross-examination of the witnesses, which he contended were favourable to the plaintiff. The question as to whether the report was impartial and correct was left to the jury, with the observation that partiality and inaccuracy might be made out by suppression as well as by invention. The jury retired, carrying along with them the three newspapers containing the alleged libels and all the depositions taken down by the magistrate's clerk, and on their return they found generally for the defendant. The verdict was accordingly entered for the defendant on both pleas. A few days after an application upon the part of the plaintiff was made and granted, that execution might be stayed, on the authority of *Duncan* v. *Thwaites*, in which it had been held that the privilege accorded to reports of proceedings in courts of justice does not extend to preliminary examinations before a magistrate, on a charge of an indictable offence; and in the following term a rule was granted to show cause why judgment should not be entered for the plaintiff on the second plea, notwithstanding the verdict found found for the defendant on that plea; and why the verdict found for the defendant on the first issue should not be set aside, and a verdict entered for the plaintiff on that issue instead thereof, on the ground that the second plea is no answer to this action, and that, therefore, the verdict

on the first issue, which was entered for the defendant on the ground that the matter stated in the second plea was a defence on the general issue, was erroneously entered. There seems strong reason for contending that the special plea is insufficient after verdict on the ground that it is pleaded to the whole declaration; and there are matters in the second count of the declaration which cannot be considered as a report of what took place before the magistrate on the occasion referred to. But if we were to give judgment depriving the defendant of any benefit from this special plea, we can by no means order that the verdict found for the defendant on the first issue should be set aside and a verdict entered for the plaintiff on that issue instead thereof. It is a good defence to an action for a libel, that it consists of a fair and impartial, though not *verbatim*, report of a trial in a court of justice, and such defence is admissable under "not guilty," which puts in issue as well as the lawfulness of the occasion of the publication, as the tendency of the alleged libel: (*Hoare* v. *Silverlock*.) So far as the first and third counts of the declaration are concerned, we cannot adjudge that the plaintiff is entitled to a verdict and to damages; for, according to what the court decided on the validity of the sixth plea in Duncan v. Thwaites, there is strong ground for contending that, at all events, the defendant was entitled to a verdict on those counts. They contain no detail of the evidence, nor any comment upon the case, but nakedly state the result of what the justice thought fit to do. The second count is much more objectionable, for it begins with professing to give an account of a former proceeding before the magistrate, in which the plaintiff was prosecutor, and out of which the charge of perjury against the plaintiff arose; and in this account the reporter takes upon himself to aver that the evidence adduced against the plaintiff entirely negatived his story. Such conclusions are wholly unjustifiable, and, when the report of law proceedings has mixed up with it commentaries reflecting upon any of the parties whose names appear in it, it entirely loses the privilege which it might otherwise claim. Nevertheless, after the course which was pursued at the trial of this cause, and after the verdict of the jury, we think that we ought not to do more for the plaintiff in respect of this count than to allow a verdict to be entered for him upon it, on the plea of not guilty, unless we should be of opinion that the remainder of this count, which gives a detailed report of what took place before the magistrate upon the charge against the plaintiff on the 3rd of July, although unaccompanied by the introductory statement, and although impartial and correct, could not in point of law be justified. The plaintiff's counsel contended that the privilege of reporting legal proceedings must be confined to the Superior Courts of law and equity; but on such a question the dignity of the court cannot be regarded, and we must look only to the nature of the alleged judicial proceeding which is reported.—For this purpose no distinction can be made between a court of *pie poudre* and the House of Lords sitting as a court of justice.—As to magistrates, if, while occupying the bench from which magisterial business is usually administered, they, under pretence of giving advice publicly, hear slanderous complaints, over which they have no jurisdiction, although their names may be in the commission of the peace, a report of what passes is as little privileged as if they were illiterate mechanics assembled in an alehouse. Hence the well-decided case of *Macgregor* v. *Thwaites*.—Where magistrates are duly acting within their jurisdiction, questions of great importance and difficulty arise as to the publication of all the proceedings before them. It was contended at the bar that in no case have the reports of proceedings before magistrates any privilege. To this general proposition we can by no means assent. Proceedings before magistrates under the 11 & 12 Vict. c. 43, "with respect to summary convictions and orders," in which, after both parties are heard, a final judgment is given, subject to appeal, are, we think, strictly of a judicial nature; the place in which such proceedings are held is an open court; the defendant, as well as the prosecutor, has a right to the assistance of an attorney and counsel, and to call what witnesses he pleases, and both parties having been heard, the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct. But the proceedings which we have to consider in the present case were before a magistrate acting under 11 & 12 Vict. c. 42, "with respect to persons charged with indictable offences." By a summons a charge was brought before an alderman of London at Guildhall, against the now plaintiff, for wilful and corrupt perjury; and an application was made that he might be committed to prison, or give bail to take his trial for this offence. After several adjournments, and examining all the witnesses brought before him, the magistrate dismissed the summons. In three different numbers of the defendant's newspaper there were reports of these proceedings, all which reports, after the verdict of the jury, we must suppose to have been impartial and correct, and published without malice. With respect to the alleged libels in the first and third counts (as we have already observed), the defence seems to be sufficient. The great doubt seems to be as to the report of the proceedings against the plaintiff in the second count of the declaration, which gives a true account of what had been done on the 3rd July, and sets out evidence injurious to the plaintiff, the charge against him being still pending—that is what causes the doubt—the charge against him being still pending when the second publication took place. The decision of this court on the second plea in *Duncan* v. *Thwaites* is said to have determined the general doctrine that a correct report of the proceedings which took place in the course of a preliminary inquiry before a magistrate, upon a charge of an indictable offence, cannot be justified. But we must recollect that there the alleged libel contained a highly-coloured statement of the reporter, evidently insinuating the guilt of the accused in having indecently assaulted a female child thirteen years old and attempted to violate her person. "The evidence of the child herself and her companion of the same age displayed such a complication of disgusting indecencies that we cannot detail it." (That is the language of the statement.) The second plea averred generally that the evidence of the child herself and her companion of the same age did, upon that occasion, display a complication of disgusting indecencies, and that the alleged libel contained no other than a fair and just report of the proceedings before the magistrates. Great stress was likewise laid by Lord Tenterden, in delivering the judgment of the court, upon the fact that there "the proceedings terminated by holding the party accused to bail, to take his trial before a jury, so that a trial might be expected at the time of each of the publications." In the present case, the examinations terminated in the dismissal of the summons; no other proceeding took place against the plaintiff; he did not commence his action till after the summons had been dismissed, and although he alleges special damages by a pecuniary loss in his business, none was proved. We are not prepared to lay down for law that the publication of preliminary inquiries before magistrates is universally lawful, but we are not prepared to lay down for law that the publication of such inquiries is universally unlawful. Although there are numerous *obiter dicta*, there is no decision to this effect. In the cases which were relied upon to establish the general doctrine, it will be seen that there were vituperative comments accompanying the statement of of the evidence, or some aggravation attending the publication of the report, or some peril which it was likely to cause to the person complaining of it. Here we have a preliminary inquiry before a magestrate, which turned out to be unfounded, and was dismissed. If the whole inquiry had taken place before a magistrate during one hearing, would an impartial and correct report of the proceeding published in a newspaper next morning have been actionable? We think not. In *Curry* v. *Walter* it was decided, above sixty years ago, that an action cannot be maintained for publishing a true account of the proceedings of a court of justice, however injurious such publication might be to the character of an individual. The alleged libel there consisted of a report in the *Times* newspaper of an application by Mr. Erskine in the Court of Q. B. for a rule to show cause why a criminal information should not be filed against magistrates for a conspiracy corruptly to refuse a license to a public-house. The rule was refused on the ground that the magistrates had not been served with notice of the motion. The report truly set out the contents of the affidavit making the charge. One of the magistrates having brought an action for the alleged libel, it was tried before Eyre, C. J., and he told the jury that "though the matter contained in the paper might be very injurious to the character of the magistrates, yet he was of opinion that, being a true account of what took place in a court of justice, which is open to all the world, the publication

of it was not unlawful." The verdict was for the defendant, and a rule nisi for a new trial having been granted, and fully argued, the judges of the court of C. P. were all clearly of opinion that the action could not be maintained. Now this was an *ex parte* proceeding; whereas, in the case which we have to consider, the present plaintiff was fully heard before the magistrate, and had an opportunity to call what witnesses he chose on his behalf. Nor was the proceeding more final there than here, for the application to the King's Bench for a criminal information might have been renewed on an affidavit of notice given to the magistrates, and an indictment for the conspiracy might have been found by a grand jury. The difference to be relied on must therefore be the difference of the tribunals. But although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that, while he continues to sit *foribus apertis*, admitting into the room where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth, and the satisfactory administration of justice (as in most cases it certainly will be), we think the court in which he sits is to be considered a public court of justice. The case of *Curry* v. *Walter* has been often criticized, but never overturned, and often acted upon; and in *R.* v. *Wright* it received the unqualified approbation of that great judge, Lawrence, J., who observed that, "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be thus the subject of such proceedings." Therefore, we think that a fair and impartial report of this proceeding against the plaintiff, supposing it to have terminated in one day, would have been privileged, and for the same reason an impartial and correct report of the proceedings at the three different hearings would have been privileged if published simultaneously on the 18th July. We have therefore only to consider the effect under the circumstances of the case of there *having been three publications* instead of one. Considering that the three taken together are found by the jury to have been a true, faithful and *bona fide* report of the proceedings against the plaintiff on this charge of wilful and corrupt perjury, we think that the second cannot be selected and taken separately to be a libel.—Had there been no other notice of the charge in the defendant's journal, it might well have been deemed malicious and actionable; but the number of the 26th June, after stating the adjournment, says: "As the publication of what transpired might frustrate the ends of justice, we reserve our report until the next hearing."—From the number of the 4th July it might reasonably be inferred that a report would subsequently be given of what should be done at the adjourned meeting; and the number of the 18th July concludes the history of stating that "the magistrate dismissed the summons." We do not see how, on principle, this is to be distinguished from the daily report in a newspaper of a criminal trial which lasts several days before the Court of Q. B. or the Central Criminal Court, or at the assizes. It has been adjudged that, if the due administration of justice is supposed so to require, the court has authority to make an order against publishing any part of the trial till the whole is concluded. Nevertheless, where no such order has been made, the practice has long existed of daily publishing, without any disapprobation from the court, each day's proceedings till the trial is concluded, and in several instances this practice (which, in reality extends the area of the court) has been found highly beneficial in the discovery of material evidence. Suppose that a newspaper had daily given an impartial and correct report of the whole of Frost's trial for high treason at Monmouth, which lasted many days, could an action have been maintained against the proprietor by selecting one number containing the opening speech of the Attorney-General or some material evidence against the prisoner? The law upon such subjects must bend to the approved usages of society, though still resting upon the same principle that what is hurtful and indicates malice should be punished, and that what is beneficial and *bona fide* should be protected. The decision of Eyre, C. J. and his brethren in *Curry* v *Walter* rested on sound legal principles and is now almost universally approved. On the same principles we think we ought to hold in this case that no action can be maintained for any part of the impartial and correct and *bona fide* report of the proceeding against the plaintiff before a magistrate, which ended in the charge being dismissed, although, the proceeding having been adjourned from day to day, the report appeared in portions in different numbers of the defendant's journal. We give no opinion in favour of the general legality of publishing reports of preliminary examinations before a magistrate, when the party accused has been committed or held to bail for an indictable offence; but we cannot join the sweeping condemnations of police reports which have been pronounced *obiter dicta* before the benefit arising from these reports had been fully experienced. We believe that they often lead to the detection and punishment of crime, and that they sometimes assist in the vindication of character. Against the severe denunciation of police reports by several eminent judges may be placed the following opinions of Lord Denman, C. J., solemnly delivered by him before a select committee of the House of Lords in the year 1843 on the law of libel: "I have no doubt that police reports are extremely useful for the detection of guilt, by making facts notorious, and by bringing those facts more correctly to the knowledge of all parties interested in unravelling the truth. The public, I think, are perfectly aware that those proceedings are *ex parte*, and they become more and more aware of it in proportion to their growing intelligence. They know that such proceedings are only preparatory to trial, and they do not form their opinion till the trial comes on. Perfect publicity of judicial proceedings is of high importance in other points of view, but most of all in its effects on character. The statement made in open court will probably find its way to the ears of all in whose good opinion the party assailed feels an interest—probably in an exaggerated form, and the imputation may often rest on the wrong person; both these evils are prevented by correct reports in the public journals." One of the resolutions of this court in *Duncan* v. *Thwaites*, lays down the doctrine that the report of a preliminary examination before a magistrate is unlawful where the party accused has been committed or held to bail for an indictable offence. *Yet, as the actual pendency of a prosecution was a main* ingredient in that decision, and here the party accused was neither committed nor held to bail, but absolved by the magistrate, we think that we are at liberty to hold that in this case the impartial and correct report of the proceedings was lawful. Upon the whole, we give judgment that the verdict for the defendant on the second plea is no bar to this action, and we direct a verdict to be entered for the plaintiff with 1s. damages, on the plea of not guilty to the second count of the declaration; and that the verdict entered for the defendant on the plea of not guilty to the first and third counts of the declaration shall stand.

Judgment for the plaintiff non obstante veredicto on the second plea; the verdict on the issue of not guilty to stand for the defendant on the first and third counts, and to be entered for the plaintiff on the second count, with 1s. *damages.*

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

ETOBICOKE, August 11th, 1858.

GENTLEMEN,—I respectfully request your opinion upon the following: Have Councils of Municipalities authority to compel the performance of or commutation for Statute labour which is in arrears? There are cases in which statute labour has been in arrears *for two or more years.* I will give you an instance. In our own municipality in consequence of a road being in dispute the labour has not been demanded, and consequently not performed, for I think three years. The dispute has now been settled, and the Council wish to apply the labour for its improvement. Sometimes the arrears may also arise from the neglect of Pathmasters.

I also request your opinion in reference to the following, viz:—Are persons whose property lies within the boundaries of a village, (the plan of which is on record) liable to taxation for the defining and establishing of the boundaries of the concession or block or part thereof, or of the lot or lots in the concession or concessions or part thereof in which such village is situated, as provided by stat. 12 Vic., cap. 35, sec. 31, and 18 Vic., cap. 83, sec. 8. In the section of 12 Vic. cited, it is provided that the survey shall be made at the cost of the proprietors of the land in each concession or part; and in sec. 8 of 18 Vic., cap. 83 it is provided that, application for the establishing of the boundaries of lots may be made by Municipal Councils on application of one half of the resident landholders to be affected thereby. It would seem to me that residents of a village the plan of which is on record, as provided by 12th Vic., cap. 35, and secs. 42 and 43 cannot be affected by the establishing of the boundaries of lots, &c., because the original plan of such village is unalterable, except as provided by said Act; therefore as they derive no benefit, is it just to tax them for such survey, and as they are not entrusted in the establishing of such boundaries have they any right to be parties to an application for that purpose?

W. A. Wallis,
Deputy Reeve of Etobicoke.

[1. We doubt the power of a Municipal Council *ex post facto* to enforce arrears of statute labor or commutation for it. If such a course were allowed where would be the limit? A resident of a township for one year only might be called upon to perform statute labor for ten years during which time he may have been on the other side of the Atlantic! The law we think was never intended to permit such a procedure.

2. The boundary of a village may in certain cases be liable notwithstanding the registry of a plan to fluctuate with the concessions of the township in which it is situate. Statute 12 Vic., cap. 35, sec. 31 applies only to concessions or parts of concessions in townships, but statute 18 Vic., cap. 83, sec. 8, authorizes "the Municipal Corporation of any township, city, town or *incorporated village*" to make the application for a survey. When the application is made by the corporation of an incorporated village, the proprietors of land in the village interested would be liable to the cost of the survey. But no survey of any concession or part of a concession in a township can affect cases coming strictly within sec. 41 of 12 Vic., cap. 35, for under that section "all lines which have been run and the courses thereof given in the survey of such towns and villages, and laid down on the plans thereof, and all posts or monuments which have been placed or planted on the first survey of such town or village, to designate or define any such allowance for road, &c. shall be, and the same are hereby declared to be *the true and unalterable* lines and boundaries of all such allowances for roads, &c."—Eds. L. J.]

To the Editors of the Law Journal.

County Clerk's Office,
Sarnia, 10th August, 1858.

Gentlemen,—You would oblige by answering the following in your next issue of the *Law Journal*:—

A presented himself as the Deputy Reeve of the township of B, and *presented the certificate* of the collector of the township sworn to, to the effect that there were five hundred and two names on the resident's roll for the year 1857. Upon the committee of the County Council of 1858 examining the roll for the purpose of equalization at the June session, they find that twenty-five of the above-mentioned names are of non-residents.

Query.—Is the Deputy Reeve entitled to sit? If not, how can he be unseated?

Alexander Scott,
County Clerk, Lambton.

[The Deputy Town Reeve is *entitled* to take his seat upon filing with the clerk of the county council a certificate under the hand and seal of the township clerk of the township for which he is elected of his having been duly elected, and an affidavit or affirmation of the collector or such other person who shall have the legal custody of the collector's roll of such township for the previous year, to the effect that the roll contains the names of at least 500 resident freeholders or householders in such township as then appear upon the roll. (16 Vic. cap. 181, s. 13.) And having once taken his seat it is not for the county council but for the courts to determine his *right* thereto. (In re Hawk et al and the Town Clerk of the Municipal Council of Wellesley, 3 U. C., C. P. 241.) Proceedings to unseat him ought to be taken under statute 16 Vic. cap. 181, s. 27.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. Morley *v.* Morley. *March* 5.

Mortgage—Assignment of debt without security—Foreclosure.

A mortgagee who has assigned his mortgage debt expressly reserving to himself the benefit of the mortgage security is entitled to the common foreclosure decreed.

V. C. K. McLarty *v.* Middleton. *March* 2.

Merchants accounts—Del credere commission—Credit transfer of account.

Where a mercantile firm in England borrows money of another firm, and both have a common agent abroad, if that agent credit the lending firm with sums received for the borrowing firm in pursuance of an agreement between them that credit is not a payment.

If an agent in anticipation of the receipt of the contract of sales for his principal remit such amount, and the purchasers fail to pay, it is not the loss of the agent but the loss of the principal. *contra*, if the agent sells on a *del credere* commission. The transfer from one account to another in the book of an agent is not payment as between the agent and the transferee of such account, and the entry is not an acknowledgment unless the transferee is informed of the fact.

M. R. Re Osborne. *March*, 17, 18.

Solicitor and client—Taxation—Retainer.

A solicitor who was employed as an election agent, and who advised and assisted the committee was held to have been retained as a solicitor, and to be liable to have his bill taxed accordingly.

COMMON LAW.

C. P. *Feb.* 10.

PRITCHARD v. THE MERCHANT'S AND TRADESMAN'S MUTUAL LIFE ASSURANCE SOCIETY.

Life assurance—Payment after the death of the person insured—Days of grace.

By a policy of insurance the premium was to be paid annually on the 13th of October. By the conditions endorsed the policy was to become void and the premiums forfeited, if the annual premiums were not paid within 30 days after they became due; the policy, however, might be revived on certain conditions, if satisfactory proof could be given of the health of the person insured. The person insured died on the 12th of November. the previous premiums not having been then paid; on the 14th of November this premium was paid and accepted by the defendants, who at the time were ignorant of the death of the person insured.

Held, that the defendants had not by accepting the premium waived their right to insist on the conditions of the policy, the money having been accepted under a mistake of fact.

Semble also, that if the premium had been tendered within the 30 days, that the assured being dead, the office were not bound to accept it.

EX. LEY ET AL v. PETER. *Feb.* 2, 5, 6, 25.

Statute of Limitations—Tenancy at will—Authority of land agent.

The defendant's grandfather had been owner of two undivided thirds of a meadow, and held the other third under a lease, which expired in 1818. The father of the defendant and defendant succeeded in their turn: and at the time the action was brought, the defendant was owner of the two-thirds, and occupied the whole, no rent having been paid since 1818. The only evidence relied upon for the plaintiffs was a letter of the land agent, who managed the defendant's property, written within 20 years of the action being brought, in which he said the defendant "Would no doubt accept a lease of Ley's one-third at a fair rack-rent."

Held, in ejectment for the one-third. First, that this was not an acknowledgment of title within 3 & 4 William IV, cap. 7, sec. 14, as not being signed by the person in possession, but only by an agent.

Secondly, That the land agent had no authority by virtue of his employment as such to write such a letter. MARTIN B., *dissentiente.*

Thirdly, That the letter was no evidence of a tenancy at the will of the plaintiff.

V. C. W. MARTIN v. THE WEST OF ENGLAND INSURANCE COMPANY. *March* 1.

Policy of Insurance—Debtor and Creditor—Mistake—Notice.

A. appealed to the Assurance Company in which he was assured and from which he had already obtained a loan, for a further loan on the security of a reversionary interest to which he was entitled contingent upon his surviving; B. who was also a trustee of the fund, his existing policy and such further assurance as the Company might think necessary.

The proposal was accepted by the directors, and their solicitors was directed to prepare the security. It was necessary that the further policy should be effected in another office as A was assured in the W. office to the full extent allowed. The security for the loan which contained an assignment of the new policy treated such policy as effected by A. in his own name and was executed by A. with this understanding. The policy was in reality effected by the security in the name of the W. office and not in that of A.

A. died shortly after executing the deed and before the money thereby secured had been advanced to him, a difficulty having arisen from the refusal of B. to notice of the deed.

Held, that the proceeds of the policy, subject to the charges and payments of the W. office belonged to A's. estate, the Company not being entitled to avail themselves of the mistake of their security as against the agreement concluded between the parties which was not affected by the refusal of B. to receive notice of the transaction.

REVIEW.

THE LEGAL JOURNAL, Pittsburgh, Pa., United States. Published every Saturday Evening, at two dollars per annum in advance. Edited by THOMAS J. KEENAN, Prothonotary of the Superior Court of Pennsylvania, W. D.

This Journal has lately commenced a new series, and bids fairly to acquire more than local support. It is explained that hitherto it has been owned, conducted, and published in connexion with a daily paper, and as is reasonable to suppose, could not well have received that separate labor, attention and care which its successful management requires: but that separated as it now is from every other establishment, it will be free from many disadvantages which hitherto preventing it from being what the Editor hopes to make it for the future. He purposes to devote to the paper his untiring efforts to make it, as far as lies in his power, a most useful and interesting publication to the legal profession, and also to every intelligent citizen desirous of keeping himself well informed as to the construction given by the Courts to the laws which protect and govern his property and personal rights. Judging from the numbers before us, the Editor is faithful to his promise, and thoroughly bent on the execution of his purpose. Every number abounds with decided cases in advance of the regular series; and considering the office which the Editor holds—that of Prothonotary to the Superior Court of Pennsylvania, W. D.,—there can be no room to doubt their entire accuracy. We have been much pleased in perusing the reported cases, several of which if cited could not fail to command the respect of every tribunal where English law is administered. We particularly admire the comprehensive and lucid epitome or digest which precedes each case, an essential, in our opinion, to every well reported decision, where many are reported together. With the *Legal Intelligencer* published in Philadelphia, which is now in its fifteenth volume, and the *Legal Journal* published in Pittsburgh, which is now in its sixth volume, the legal profession in Pennsylvania have good reason to be satisfied and proud.

THE UNITED STATES INSURANCE GAZETTE for August is received, and as usual is replete with matter useful to underwriters, and all others interested in the business of Insurance. It is much to be prized for its judicious selections from the Insurance laws of the different States of the Union—selections which might with advantage be studied by the legislators of Canada.

APPOINTMENTS TO OFFICE, &C.

SPECIAL COMMISSIONERS.

The Honorable ROBERT EASTON BURNS, one of the Judges of the Court of Queen's Bench, and the Honorable JOAN GODFREY SPRAGGE, one of the Judges of the Court of Chancery, and JAMES ROBERT GOWAN, Judge of the County Court of the County of Simcoe, under the provisions of the 14th sect. of the Act 22 Vic. cap. 93, for the purposes mentioned in the said Act.—(Gazetted August 31, 1858.)

SHERIFFS.

WILLIAM GLASS, Esquire, to be Sheriff of the County of Middlesex.—(Gazetted August 28, 1858.)

REGISTRARS.

JAMES FERGUSON, Esquire, to be Registrar of the County of Middlesex.—(Gazetted August 28, 1858.)

CORONERS.

WALTER BOYD and DANIEL D. CAMPBELL, Esquires, to be Associate Coroners for the County of Perth.—(Gazetted August 21, 1858.)

RETURNING OFFICERS.

LORENZO D. RAYMOND, Esquire, to be Returning Officer for the Village of Welland.—(Gazetted August 21, 1858.)

TO CORRESPONDENTS.

Otto Klotz.—Sigma.—M. McP., under Division Courts.
W. A. Wallis.—Alexander Scott, under General Correspondence.
A Student, London, too late for this number.—C. P. McG., Thorold, after date.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto. 11th June 1858.

HIS Excellency the Governor General in Council, having had under consideration on the 22nd ultimo, the Departmental Circular of the Customs Department, dated 29th April 1853, by which importers of goods, in every case, are allowed to deduct the discount actually made for cash, or that which, according to the custom of Trade, is allowed for cash, has been pleased to rescind the same, and to direct that no such deductions be allowed hereafter, and that the duties be collected upon the amount of the invoice without regard to such discount; And notice is hereby given that such Order applies to goods, then in bond, as well as goods imported since the passing of the Order in question.

By Command, R. S. M. BOUCHETTE,

Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons and more have formed themselves into a Horticultural Society, in the County of Hastings, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vic., cap. 32, and have subscribed a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required, to the Minister of Agriculture.

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The Belleville Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,

Minister of Agr.

Bureau of Agriculture and Statistics.

Toronto, dated this 8th day of Feb., 1858.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, October 30, 1857.

NOTICE IS HEREBY GIVEN, That His Excellency the Administrator of the Government in Council has been pleased, under the authority vested in him, to direct an order that, in lieu of the Tolls now charged on the passage of the following articles through the Ottawa Canals, the Tolls hereinafter stated shall be hereafter collected, viz:

IRON ORE, passing through all or any portion of the Ottawa Canals, to be charged with a toll of *Three Pence* per ton, which being paid shall pass the same free through the Welland Canal.

RAIL-ROAD IRON, to be charged *One Shilling* per ton, including Lachine Section, St. Ann's Lock and Ordinance Canals, and having paid such toll, to be entitled to pass free through the Welland Canal, and if having previously paid tolls through the Cham'ly Canal, such last mentioned tolls to be refunded at the Canal Office at Montreal.

The toll on BARREL STAVES to be *Eight Pence* on the Ordnance Canals, and *Four Pence* on the St. Ann's Lock and Lachine Section, making the total toll per thousand, to and from Kingston and Montreal. the same as by the St. Lawrence route, viz: *One Shilling* per thousand.

By command,

R. S. M. BOUCHETTE

Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons, and more have organized and formed themselves into a Horticultural Society for the Village of Fergus, in the County of Wellington in Upper Canada, by signing a declaration in the form in Schedule A, annexed to the Act 20 Vic., cap. 32, and have subscribe a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration, written and signed as by law required, to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of the said Society, as "The Fergus Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,

Minister of Agr.

Bureau of Agriculture and Statistics.

Toronto, dated this 8th day of Feb., 1858.

NOTICE.

PROVINCIAL SECRETARY'S OFFICE,
14th January, 1858.

TO MASTERS OR OWNERS OF STEAM VESSELS.

NOTICE IS HEREBY GIVEN, That on and after the opening of Navigation in the Spring of the present year, a strict compliance with the requirements of the several Acts relating to the inspection of Steam Vessels will be insisted on, and all penalties for any infraction thereof rigidly enforced. By Command,

E. A. MEREDITH,
Asst. Secretary.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Town and Township of Niagara, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds, to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the said Society as "The Niagara Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the City of Hamilton, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of of the said Society as "The Hamilton Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more. have organized and formed themselves into a Horticultural Society for the City of Kingston, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture:

Therefore, I, the Minister of Agriculture, hereby give notice of the said Society as "The City of Kingston Agricultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics.
27th January: 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Village of Elora, in the County of Wellington, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. cap, 32, and have subscribed a sum exceeding Ten pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as the "Elora Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 10th March, 1858.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Parishes of St. Joachim, Ste. Anne and St Fereol, in the County of Montmorency, in Lower Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. Cap. 32, and have subscribed a sum of not less than Ten pounds to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The St. Joachim Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 9th March, 1858.

OPINIONS OF THE PRESS.

The Upper Canada Law Journal. Toronto: Maclear & Co. A very useful and excellent periodical.—*Goderich Times.* August 13, 1858.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer,* Philadelphia, August 6, 1858.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July* 7, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution Laws and Legal Tribunals of Canada," are well worthy of a careful perusal. This work should be found in the office of every merchant and trader in the Province, being, in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.—June* 8, 1858,

The Upper Canada Law Journal and Local Courts Gazette, for June. Toronto.—Maclear & Co., Publishers, Messrs. ARDAGH and HARRISON, Editors.

This is a most excellent publication. The present number contains very able original articles on the following topics—'The work of Legislation,' 'Consolidation of the Laws of Upper Canada,' and 'Law Reforms of the Session—General Review (continued). The reports of important cases tried in the Local Courts, are full and very interesting. Altogether this magazine is conducted with much ability, and it richly deserves to be widely patronized.—*Thorold Gazette.—June* 9, 1858.

THE UPPER CANADA LAW JOURNAL for May is full of is interesting articles—instructive alike to the profession and the general public. The editorials, as usual, evince the sound knowledge and legal experience of the writers under whose management the journal is now published,—and the opening one, on the "Power of a Colonial Parliament to Imprison for Contempt," embraces an amount of interesting record from opinions of high authorities, upon which the author is led to conclude that the power to commit for contempt cannot justly be exercised by the Provincial Parliament. The other principal articles are—"Remuneration to Witnesses in Criminal Cases," "Law Reforms of the Session—General Review;" "University of Toronto—Law Faculty;" "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," &c. An original essay on the latter subject is to be commenced in the next issue, and continued monthly till completed, and it is promised that the aim of the writer will be to narrate—not to discuss. His materials are, we are informed, the best that can be had, consisting of several French and English, Manuscripts now out of print. To this may be added all the information that can be from *Edits, Arrets,* and *Ordonnances* of the French Government and of the Province of Quebec together with the *Ordonnances* and Acts of Parliament of the Provinces of Upper and Lower Canada. No pains are to be spared, either in research or compilation, that can be made tributary to the object of the writer. The period embraced will be nearly three centuries—that is, from the settlement of Canada by the French to the present day. This is a subject so fruitful in details of a most interesting character, that if the promises referred to are carried out—(as we have every reason to expect they will, from the deservedly high reputation of the editors)—the *Law Journal* will considerably increase its popularity as a reliable record. —*Colonist May,* 14*th.* 1858.

This is a very useful monthly, containing reports of important law causes, and general information connected with the administration of justice in Upper Canada. Although more particularly intended for the profession, yet every man of business may learn much from it that may be of real advantage to him. It has hitherto been published in Barrie, but will henceforth be in Toronto. We rejoice to see that Robert A. Harrison, Esq., B. C. L., is to be connected with the journal. He is a young gentleman that has already highly distinguished himself in his profession, and with literary talents of no ordinary kind, he will prove to be of great advantage to the Law Journal.—*Brampton Times.*

We are pleased to notice that this able monthly is, for the future, to be edited and published in Toronto, and that Robert A. Harrison, Esq., B.C.L., is become a joint Editor. His accession to the editorial staff must prove to the profession to whom he is now so well known as the author of so many works in general use, no small gain. With Mr. Harrison is associated W. D. Ardagh, Esq., who has for some time been favorably known as an Editor of the *Journal.* Notwithstanding the public caution of the *Journal* in Barrie, it has under the management of the Hon. James Patton acquired a very wide and extended circulation. Now that it is to be published in Toronto, it is reasonable to expect that its circulation will be increased. It is a paper which should be in the hands of every Judge, Lawyer, Coroner, Magistrate, Clerk, and Bailiff in Upper Canada. We hope, however, that the conductors will see fit to widen the list of their exchanges and so increase the circle of their usefulness.

It is a great mistake to suppose that Judges, Lawyers, Division Court Clerks, or Bailiffs are the sole persons interested in the administration of justice. The public at large have a deep interest in, and feel a lively sympathy with the sentiments of a writer who propounds measures of law reform calculated to advance the public good. No discussion however well attended upon subjects of legal interest, can be satisfactorily carried on by the lay press.

The public require to be informed not only as to the existence of an abuse which needs a remedy, but as to the nature of the remedy required. For such information the more proper and more prudent course is to turn to the columns of a newspaper conducted by men whose whole lives and training peculiarly befit them for the expression of sound views. The number of the *Journal* before us which is that for August is replete with legal lore. The Editorial Department bears marked evidence of knowledge and ability.—*Toronto Times.*

Somewhere it has been said that to know a people thoroughly, it is necessary to study their laws—to ascertain how life and property are protected. This ably conducted Journal tells us how the laws enacted by government are administered in Upper Canada. It tells us—what everybody knows—that law is expensive, and it adds that cheap justice is a curse, the expense of the law being the price of liberty. Both assertions are certainly truisms, yet a litigious and quarrelsome spirit is not invariably the result of that combativeness which belongs to such men as those who, under any circumstances, and at whatever cost, will assert their rights. It is not our purpose to review the *Journal,* but to praise it; seeing that praise is deserved. The articles are well written, the reports of cases are interesting, and the general information is such, that the *Journal* ought not only to be read, but studied by the members of the bar, the magistracy, the learned professions generally, and by the merchant.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

We have to return our thanks to the conductors (or publishers, we do not know which,) of this valuable publication for the present January number, together with an ample index for, and list of cases reported and cited in the second volume of these reports for the year 1856.

The ability with which this highly important and useful periodical is conducted by W. D. Ardagh and Robert A. Harrison, B. C. L., Esquires, Barristers at Law, reflects the greatest credit upon these gentlemen, and shews that the esteem in which they are held by their professional confreres and the public, is deservedly merited and nothing more than they are entitled to. We have much pleasure in earnestly recommending the members of the bar for this section of the Province to support the Upper Canada Law Journal, by their subscriptions.—taking leave to assure them that it is well worthy of it, and that they will find it a valuable acquisition to their libraries as a legal work of reference and high authority. It is printed and published by Messrs. Maclear, Thomas & Co., of 16 King Street East, Toronto, and the typographical portion is very creditable to that firm.—*Quebec Mercury.*

In its first number of the fourth volume this interesting and valuable publication comes to us highly improved in appearance, with a much wider range of editorial matter than formerly. The *Journal* has entered upon a broader career of utility, grappling with the higher branches of law, and lending the strength of a full, fresh intelligence, to the consideration of some very grave wants in our civil code. The necessity of an equable and efficient "Bankruptcy Law" is discussed in an able article, instruct with astute and profound thought, coupled with much clear, subtle, legal discrimination.

It is the intention of the Proprietors to institute in the pages of the *Journal* a "Magistrate's Manual:"—provided that that body meet the project in the proper spirit, and contribute an adequate subscription list to warrant the undertaking. To prosecute this contemplation, could not fail to be productive of incalculable advantage, as well to the community as to the Magistracy. We sincerely hope that this latter body will bestow a generous patronage, where so laudable an effort is made for their advantage.

The *Law Journal* is presided over by W. D. Ardagh, and R. A. Harrison, B. C. L., Barristers-at-Law. It is a periodical that can proudly compare with any legal publication on this Continent. We wish it every success. —*Catholic Citizen.*

This Journal which is published monthly, appears this week much improved in size, appearance and matter. It was formerly published in Barrie, but has for some numbers back been published in Toronto, and has acquired aid in the editorial staff by the addition of Mr. Harrison, who is well known in the profession from his numerous publications on legal subjects. Under the management of Mr. Ardagh and Mr. Harrison, this Journal promises fair to become an important publication, not merely to the legal profession, but to other important classes of the community, as particular attention is given to Municipal affairs, County Courts and Division Courts, Magistrates' duties also receive a considerable share of consideration. It will contain original treatises and essays on law subjects, written expressly for the *Journal,* besides reports from the Superior Courts of Common Law and the Court of Chancery. Proper selections will also be made from English periodicals. To the profession the reports from Chambers of decisions under the Common Law Procedure Acts, and the general practice, are of particular interest. These the *Journal* supplies, being formerly reported by Mr. F. Moore Benson, and latterly by Mr. C. E. English, M. A. We would advise all municipal officers, Division Courts officers, Magistrates, and particularly the profession, to patronize this publication, as it cannot be sustained without their aid. The subscription is only $4 a year in advance.—*Leader.*