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☑ Additional comments / Commentaires supplémentaires: Continuous pagination.

DIARY FOR MARCH.

1. Wed... *Ash Wednesday. St. David.*
5. SUN ... *1st Sunday in Lent.* [for County Court.
6. Mon ... Recorder's Court sits. Last day for notice of trial
12. SUN ... *2nd Sunday in Lent.* [for York & Peel.
14. Tues... Qr. S. & Co. Ct. sit in each Co. Last day for ser.
16. Thur... Sittings Court of Error and Appeal.
17. Frid.... *St. Patrick.*
19 SUN ... *3rd Sunday in Lent.*
24. Frid.... Declare for York and Peel.
25. Sat .... *Lady Day. Annunciation V. M.*
26. SUN ... *4th Sunday in Lent.*

NOTICE.

Owing to the delay that has unavoidably taken place in the issue of the January number and of this number of Law Journal *and* Local Courts' Gazette, *the time within which payments must be made to secure the benefits of cash payments is extended to 1st April next.*

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

MARCH, 1865.

EXTRADITION OF CRIMINALS.

Jurists are divided upon the question, how far a sovereign state is, independently of treaty obligations, bound to deliver up persons charged with crime committed in another state, upon the demand of the foreign state.

Some writers maintain the doctrine, that according to the law and usage of nations, every sovereign state is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime was committed.

Others, maintain that the extradition of persons accused of crime, independently of treaties, is not a matter of obligation but of comity, and they refer to the fact of the existence of so many special treaties respecting this matter, as conclusive evidence that there is no general usage among nations, constituting a perfect obligation and having the force of law, properly so called (see Wheaton's International Law, 6 Edn., p. 176).

The opinions expressed by eminent jurists in the English House of Lords, respecting the extraditon treaty with France, is strong to show that the law of England does not recognize the obligation of the British Government to surrender fugitives accused of crime committed in foreign countries, in the absence of a treaty or statute providing for and authorizing the same (per Macaulay, C. J., in *Regina* v. *Tubbee*, 1 U. C. Pr. R. 102, 103).

Such also is the doctrine which, at an early period, was maintained by the Government of the United States, and has since been confirmed by judicial authority in the American Courts of Justice, both State and Federal (see Wheaton's International Law, 177).

This being so, the necessity of a treaty on the subject between the Governments of Great Britain and the United States, was felt at a very early date. The first treaty between these two great powers, was made on 19th November, 1794, commonly called "Jay's Treaty" and related only to criminals accused of murder and felony, but as it has long since been superseded it is unnecessary to say more about it. The next was that commonly called the Ashburton Treaty, or Treaty of Washington, signed at Washington on 9th August, 1842, by Lord Ashburton on behalf of the British Government, and Daniel Webster on behalf of the Government of the United States. The ratifications were exchanged at London on 13th October following. It relates to many subjects, besides the giving up of fugitive criminals from justice, but with the latter only are we at present concerned.

The tenth article reads as follows: "It is agreed that Her Britannic Majesty and the United States, shall upon mutual requisitions by them, their ministers, officers or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed, and the respective judges and other magistrates of the two governments, shall have power, jurisdiction and authority upon complaint made under oath, to issue a warrant for the apprehension

of person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered, and if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery, shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

It is provided by the eleventh article of the treaty, that the tenth article shall continue in force until one or other of the parties shall signify its wish to terminate it, and no longer.

No sooner was this treaty ratified than it was deemed necessary for each of the contracting parties to have legislation, for the purpose of carrying into complete effect the agreement, as to the render of fugitive criminals from justice.

The English Legislature, on the 22nd August, 1843, passed the 6 & 7 Vic., cap. 76, intituled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders. It first recites the tenth article of the treaty. It next recites the expediency that provision should be made for carrying the agreement into effect, and then provides:

"That in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within territories of Her Majesty, it shall be lawful for one of Her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice according to the provisions of the said treaty; and thereupon it shall be lawful for any justice of the peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed it shall be lawful for such justice of the peace or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid."

It enacts "that in every such case, copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

"And further, that upon the certificate of such justice of the peace, or other person having power to commit as aforesaid, that such supposed offender has been so committed to gaol, it shall be lawful for one of Her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to order the person so committed to be delivered to such person or persons as shall be authorized in the name of the said United States to receive the person so committed, and to convey such person to the territories of the said United States, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly, and it shall be lawful for the person or persons authorized as aforesaid to hold such person in custody, and take him or her to the territories of the said United States, pursuant to the said treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered as aforesaid, it shall be lawful to retake such person, in the same manner as any person accused of any crime against the laws of that part of Her Majesty's Dominions to which he or she shall so escape may be retaken upon an escape."

Next it enacts, "that where any person who shall have been committed under this Act, to remain until delivered up pursuant to requisition as aforesaid, shall not be delivered up pursuant thereto, and conveyed out of Her Majesty's dominions within two calendar months after such Committal, over and above the time actually required to convey the

prisoner from the gaol to which he or she was committed by the readiest way out of Her Majesty's dominions, it shall in every such case be lawful for any of Her Majesty's Judges in that part of Her Majesty's Dominions in which such supposed offender shall be in custody, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to some or one of Her Majesty's Principal Secretaries of State, or in Ireland to the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's Colonies or possessions abroad for the Officer administering the Government of any such Colony or possession, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such Judge or Judges why such discharge ought not to be ordered."

Section five enacts, "that if, by any law or ordinance to be hereafter made by the local Legislature of any British Colony or possession abroad, provision shall be made for carrying into complete effect within such Colony or possession the objects of this present Act, by the substitution of some other enactment in lieu thereof, then it shall be competent to Her Majesty, with the advice of Her Privy Council, (if to Her Majesty in Council it shall seem meet, but not otherwise,) to suspend the operation, within any such Colony or possession, of this present Act so long as such substituted enactment shall continue in force there, and no longer."

In 1849 our Colonial Legislature passed an Act entitled, "An Act for *better* giving effect *within* this Province, to the Treaty," &c. It recites the tenth article of the Treaty, and further, "that certain provisions" of the 6 & 7 Vic. cap. 76, "have been found inconvenient in practice in this Province," and "more especially that provision which requires that before any such offender as aforesaid shall be arrested, a warrant shall issue under the hand and seal of the person administering the government, to signify that such requisition as aforesaid hath been made by the authority of the United States," &c., "inasmuch as by the delay occasioned by compliance with the said provision, an offender may have time afforded him for eluding pursuit."

It then enacted, "that it shall be lawful for any of the judges of any of Her Majesty's superior courts in this Province, or for any of Her Majesty's justices of the peace in the same, and they are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any of such States, any of the the crimes enumerated or provided for by the said treaty, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or such justice of the Peace, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed therein, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Governor or Lieutenant-Governor of this Province, or to the person administering the government of the same for the time being, that a warrant may issue, upon the requisition of the proper authorities of the said United States or of any of such States, for the surrender of such person, according to the stipulations of the said Treaty; and it shall be the duty of the said judge or of the said Justice of the Peace to issue his warrant for the commitment of the person so charged to the proper Gaol, there to remain until such surrender shall be made, or until such person shall be discharged according to law."

It then in effect enacted sections 2, 3 and 4, of the English Act, with this addition, that section 2 of our Act sanctioned a requisition from the United States, "or any of such States."

The Queen afterwards with the advice of Her Privy Council, suspended the operation of the 6 & 7 Vic. cap. 76, within the Colony of Canada, so long as our substituted enactment (12 Vic. cap. 19) should continue in force and no longer.

This was the state of our law till December 5th, 1859, when the 12 Vic., cap. 19, was carried into the Consolidated Statutes, as chapter 19 of Canada. It being declared that the "Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said acts, and parts of acts repealed, and for which the Consolidated Statutes are substituted" (cap. 29, sec. 8); it was deemed unnecessary to procure a further order from the Queen in Council, still suspending the operation of the 6 & 7 Vic. cap. 76. So the law continued till 1861, when, in order to give still better effect to the treaty, it was deemed expedient by the Legislature to allow only certain magistrates, qualified because of their position and knowledge of law, to act in carrying out the provisions of the treaty, so as to avoid if possible

the consequences of the blunders of ignorant or incompetent magistrates. Accordingly, sections 1, 2 and 3 of the Consolidated Statute, chapter 89, were repealed and new provisions substituted, framed with the view we have mentioned. The right of any one of the States of the Union to make requisition ceased by the same act to be sanctioned. There were other alterations in language subservient to the design of the act of little consequence, and which we have not space at present to notice. The latter act in due course, and as a matter of precaution, received the sanction of the Queen in Council, at a Court holden at Balmoral on October 11, 1861.

Thus we have in general terms presented to our readers the tenth article of the Ashburton Treaty, and our legislation in reference thereto down to the present time.

We now propose to examine the language of the article of the Treaty itself by the light of adjudged cases.

The treaty is a contract between two sovereign states. Like other contracts, it must be so construed that effect be given to it, and to every word of it, with a view to the carrying out the object of the parties. That object is to punish crime; and subordinate thereto to apprehend, try and punish fugitive criminals. Crime is local, and, in general, can only be punished in the country where committed. Criminals endeavour to evade the punishment due to crime, and so at times flee from the jurisdiction that has the power to punish, into the territory of some adjacent power. The mutual obligation of the treaty is the surrender of such fugitives. But this cannot be done without machinery, and the machinery cannot be put in motion without expense. Hence we find in the treaty, besides the general obligation to deliver fugitives from criminal justice, stipulations in regard to the machinery to be used, and provisions for the payment of all expenses attending the same.

The article of the treaty therefore may be considered in a three fold aspect. 1. The obligation. 2. The machinery; and 3. The expense.

1.—The Obligation.

The two nations agree that, upon "mutual requisitions by them or their ministers, officers or authorities, respectively made"—that is, on a requisition made by the one government, or by its ministers or officers properly authorised, upon the other—the government upon whom the demand is thus made shall deliver up to justice, &c. In other words, on a demand made by the authority of either government on the other, the fugitive shall be delivered up. This is the exact stipulation entered into when plainly interpreted. It is a compact between two nations, in respect to a matter of national concern—the punishment of criminal offenders *against their laws*. The duty or obligation entered into is the duty or obligation of the respective nations; and each is bound to see that it is fulfilled, and each is responsible to the other in case of a violation. When the *casus fœderis* occurs, the requisition or demand must be made by the one nation upon the other: (*In re Kane*, 14 Howard, 103.) The treaty should be construed in a fair and liberal spirit. There should be no laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms for carrying it into effect. We are to regard its avowed object—the allowing of each country to bring to trial all persons charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender: (per Hagerty, J., in *re Burley*, 1 U. C. L. J. N. S. 50.)

The treaty is silent as to the form of the requisition, and equally silent as to the time when it should be made. The requisition may, it is apprehended, be in the form of a letter from the Secretary of State, or other accredited officer of the government, requiring the surrender; and may, it is apprehended, so far as we are concerned, be made either before or after proceedings commenced against the fugitive in our country. The English statute 6 & 7 Vic. cap. 76, s. 1, provides that "*in case* requisition shall at any time be made, &c., *it shall be lawful* for one of her Majesty's principal Secretaries of State to signify that such requisition *has* been made, and to require all justices, &c., *and thereupon* it shall be lawful for any justice, &c." Reading this, one would suppose that, before the justice can act, there must be first the requisition from the foreign government, and then the warrant from the Secretary of State to all magistrates, &c. This act is still in force in New Brunswick; and in the case of the Chesapeake, it was there held that these warrants should precede the jurisdiction of the local magistrate; but in

Upper Canada they are not conditions precedent to the jurisdiction of the magistrate: (*In re Anderson*, 11 U. C. C. P. 1. *In re Burley*, ante.) Our legislature, as we have shown, in 1849, expressly declared that the requisition or warrant of the Governor General should not be a condition precedent. The delay in obtaining the requisition or warrant might be so great as to afford the accused certain means of escape. Our legislature intended to remedy this evil, and the act they passed has done so. (per Richards, C. J., in *re Burley*.)

The delivery is to be of "*all* persons, &c." implying subjects of both nations (*In re Burley*), as well slaves as freemen: (*In re Anderson*). In the former case it was contended that a natural born subject of her Majesty, accused of having committed crime in the United States, was not within the treaty; but the judges considered the point too clear for argument, and unanimously held that British subjects committing crime in the United States are within the treaty. In the latter case it was said that, to treat slaves as "chattels," and therefore excluded from the treaty, would have the effect of encouraging slaves to rob and to murder, and to make Canada their asylum—a result which could never have been contemplated, and too dreadful to be seriously argued. The language "all persons," is too plain to be mistaken. The words should receive a liberal interpretation, and hitherto have done so.

But the delivery is to be of all persons "who, being charged, &c." The meaning of the word "charged" is by no means clearly ascertained. Technically it may be said to mean "charged by information;" but its common acceptation is that of being accused, and in the latter sense it seems to be used. But the treaty does not contemplate persons being surrendered upon mere suspicion, and it is well that it does not, for there are so many inducements to procure extradition of individuals, upon pretence of crime, falling within the treaty, so as to restore them to foreign jurisdiction for other purposes, that a treaty less guarded than the one under consideration might lead to oppression: (per Sullivan, J., in *re Kermott*, 1 U. C. Cham. R. 256.) Whatever power a magistrate may have to detain upon evidence amounting to mere suspicion, for the purpose of other testimony being imported into the case, it is clear that a judge before whom the prisoner is brought for his discharge on habeas corpus has no such power. (*Ib.*) The treaty has been held to apply to persons *convicted* of crime in the United States and fleeing to Canada: (*In re Asher Werner*, 1 U. C. L. J. N.S. p. 16.) So far as the technical complaint is concerned, it need not be laid in the United States before being laid here.

It is clear, from the provisions contained in our act, that the proceedings for arrest may be commenced in this province: (per Draper, C. J., in *re Anderson*, 11 U. C. C. P. 53; and in *re Burley*.) The treaty is intended to attach only on those whose crimes as well as flight have taken place since the treaty: (per Baron Platt, in *Regina* v. *Clinton*, Law Times, Nov. 1, 1845.)

The treaty is restricted in its terms to seven specified crimes, thus, "who being charged with the crime of murder, assault to commit murder, piracy, arson, robbery, forgery, or utterance of forged paper, &c." Murder is an offence against the laws of every civilized community, and equally known to the laws of all. The assault to commit murder is also made criminal by the laws of most civilized nations. Piracy, as used in the treaty, has been held by a majority of the judges of the Queen's Bench in England to mean municipal piracy, and not piracy on the high seas, which, being an offence against the laws of nations, may be tried in any country: (*Reg.* v. *Tivnan*, 10 L.T. N.S. 500.) Arson is a crime well known to the laws of both countries at the time the treaty was made, and equally punishable by the laws of both countries. The same may be said of robbery, forgery, and the utterance of forged paper. But neither the treaty nor the statutes passed under it are to be taken as founded on a presumption that the criminal or civil laws prevailing in the territories of the two contracting parties would be found in all respects identically the same. In arson and in forgery, for instance, it is likely there may be points of difference as regards the description of property, and of the written securities, which it is the object of the law in the several countries to protect: (per Robinson, C. J., in *re Anderson*, 20 U. C. Q. B. 171.)

The particular crime must be shewn to have been committed within the "jurisdiction" of the country demanding the surrender. The word "jurisdiction" may mean either "territory" or "judicial authority." We incline to

the opinion that it means simply territory; and such was the recent decision of Mr. Justice Smith, in the case of the St. Alban's raiders, still pending in Lower Canada. Such also was the opinion expressed by Chief Justice Cockburn, in *Reg.* v. *Tivnan*, 10 L. T. N.S. 500, though his learned brethren, Crompton, J., Blackburn, J., and Shee, J., inclined to a contrary opinion, and introduced the word "exclusive" before the word "jurisdiction," as used in the treaty. The main question, however, as already mentioned, decided by them, is that piracy *jure gentium* is not within the treaty; a decision which confirmed the views of Mr. Justice Ritchie, of New Brunswick, as expressed in the case of the Chesapeake, and which has since been approved by the learned Commissioner who decided *In re Bennett*, 11 L.T. N.S. 488. Notwithstanding such eminent authority, we are by no means satisfied that Chief Justice Cockburn was wrong, and shall look for further discussion on the meaning of the word "piracy," as used in the treaty, before the interpretation of it by the majority of the judges of the Queen's Bench is accepted as correct by both parties to the treaty.

The word piracy appears to be used in its widest sense. Municipal piracy is, we believe, an offence unknown in England. One would think that the offence intended was one not only known to both countries, but common to both countries. Had the contrary been intended, we should have expected to find piracy by municipal law in some way distinguished from piracy as understood by the law of nations. It is said, and with truth, that the mischief which the extradition treaty was intended to prevent was that of persons committing crimes within the territory of one nation and escaping out of that jurisdiction with impunity. That such was the primary object of the treaty there can be no doubt, but that it was the only one is a subject of great doubt; but it is impossible not to see that the mischief is not limited to such cases. It may be that an offence may be cognisable in two countries, as in the case of murder committed by one British subject upon another, in the United States, in which case the offence might be tried in Britain by the municipal law of that country. Yet it would be highly inconvenient that he should be tried in Britain, because criminals may escape punishment not only by going beyond the territory and reach of the laws of that country in which the crime is committed, but also by failure of evidence in the country where tried, and the difficulty of adducing sufficient evidence, except in the country where the crime has been committed. If the language of the statute is large enough to embrace both these kinds of mischief, it is highly expedient to restrict it to one only (per Cockburn, C. J., in *Reg.* v. *Tivnan*, 10 L. T. N.S. 500.)

Much stress was laid by Mr. Justice Crompton upon the words "shall seek an asylum," as used in the treaty. He said, an asylum means a place where the criminal is safe from prosecution or pursuit—not a place where he may be tried and convicted. But the treaty uses the words "shall seek an asylum;" in other words, shall flee to *in the hope* of finding an asylum. It does not follow that because *he thinks* the particular country to which he may flee an asylum, that he will independently of treaties *necessarily* find it so. He may be mistaken. Besides the treaty does not stop with the words "shall seek an asylum," but proceeds, "or shall *be found within* the territories of the other." Whether he seeks an asylum there or not, if after the commission of the crime he is found there he shall be liable to be surrendered. It seems to us that the construction placed upon the treaty by the majority of the judges was needlessly narrow, and it yet remains to be seen whether it will be accepted by the highest courts of the United States as their construction of the act

2.—The Machinery.

The crime is one thing; the evidence to prove it is an entirely different thing. While we accept the law of the foreign country to establish the crime, yet the facts which go to establish the crime, as defined by the foreign law, must be proved by such rules of evidence as prevail in our own country. Here we find nothing more nor less than the distinction between the *lex loci* and the *lex fori*—the former relating to the principal fact, the crime—the latter relating to the minor facts or means of proof. This we take to be the meaning of the proviso in the treaty, "that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and committal for trial if the offence had been there com

mitted." The legal sufficiency of the evidence of criminality is to be determined by the justice. It has been argued that both the passages in the treaty, in which the sufficiency of the evidence is spoken of, have reference to the laws of this province, not merely as regards the nature of the proof that may be received, but also to the law of this province as regards the particular offence; but the court of Queen's Bench declined to adopt such an argument: (*In re Anderson*, 20 U. C. Q. B. 169.) So far as regards the means of proof, there is no doubt our law must govern. Thus, if the law of the foreign state should admit a confession extorted from a slave by violence, such evidence, when produced here, would be rejected. So if the law of the foreign state should allow evidence of a freeman, not under oath, to be admitted against a slave charged with having committed a crime against a freeman, no justice would act on such evidence here. (*Ib.*)

The treaty specifies no particular magistrates. It declares that "the respective judges and *other* magistrates of the two countries shall have power, &c. There is a great difference between magistrates in England and magistrates here. In the former, for the most part, magistrates are gentlemen of leizure and of education. In this country there is less leizure and less education among magistrates than in England. But even in England it is now proposed by the Lord Chancellor to cancel the commissions of amateur justices, and allow stipendiary or skilled magistrates only to act. The necessity for such a step in this country is tenfold what it is in England. The appreciation of this necessity induced our legislature, as already mentioned, in 1861, to restrict the power of acting in aid of the Ashburton treaty to Judges of the Superior Courts, Judges of County Courts, Recorders, Police Magistrates, Stipendiary Magistrates, Inspectors and Superintendents of Police. While the circle is diminished, the efficiency of the treaty is really the better secured. In other words, what we lose in quantity we make up in quality.

The jurisdiction of the judges, &c., is conferred in these words, "shall have power, jurisdiction and authority, upon complaint made under oath," &c. The jurisdiction is made to depend on a complaint made under oath. That complaint, as we have already had occasion to explain, may, in the first instance, be made here. When made, the power, &c., is to issue a warrant "for the apprehension of the fugitive or person so charged," to the end "that the evidence of criminality may be heard and considered." Grave doubts are by many entertained as to the power of the magistrate under this treaty to hear evidence for the defence. The words "evidence of "*criminality*" have by some been supposed to exclude exculpatory evidence as evidence in excuse. The practice is by no means uniform either here or in the United States or in England. The more prudent course adopted, owing to the prevailing doubts on the point, has been to receive evidence for the defence. This course has at length received the sanction of the Chief Justice of our Common Pleas, though the Chief Justice of Upper Canada is apparently studiously silent on the point.

The language of the Chief Justice of Common Pleas (*In re Burley*, 1 U. C. L. J. N S. 46) is as follows:—"As to receiving evidence on behalf of prisoners, against whom charges are made as fugitive offenders, I do not see why the same course should not be pursued as in the ordinary examination of persons charged with offences committed in this Province. In Wise's Supplement to Burns' Justice, edition of 1852, it is recommended that such evidence be taken, if offered. The observations of various judges are therein referred to as recommending it, and the opinion of the present Chief Justice of England, when at the bar, in favor of that course, is given. One ground on which he based his recommendation was, that the Imperial act then in force, relative to duties of justices of the peace out of sessions, similar to our Provincial statute of Canada, cap. 102, sec. 30, directed the magistrate to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same in writing. The words of our statute (24 Vic. cap. 6) are, 'to examine upon oath any person or persons touching the truth of such charge.' This language would, in my judgment, authorize the examination of the prisoner's witnesses as much as that used in the section quoted from the Consolidated Statute of Canada, chapter 102."

The preliminary investigation takes place here. The trial is to be had abroad. Our judges sit as it were ministerially in aid of the foreign tribunal, which is the proper and only one to try disputed questions of fact, or infe-

rences from facts. Unless it can be said there is nothing for a jury—the facts being undisputed, and the only thing in dispute being the law, the prisoner should be committed: (per Draper, C. J., *In re Anderson*, 11 U. C. C. P. 60.) If the judge were, as an ordinary magistrate, investigating a case of our own, and would commit for trial here, he should commit for that in the foreign country: (per Ritchie, J., in the case of the Chesapeake.)

The judge, &c., having heard and considered the evidence, must determine if it be "sufficient to sustain the charge." We have no right to assume that he will not be fairly tried in the United States, nor can we be influenced by any consideration of what may be properly or improperly done with him after the trial. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction. If that confidence be shaken so as to weaken the efficiency of the treaty, the remedy is to abrogate it: (per Robinson, C. J., in *re Anderson*, 20 U. C. Q. B. 173; per Hagarty, J., in *re Burley*, p. 50; see also Vattel, c. 2, c. 6, s. 76.)

The word "sufficient," as here used, means sufficient not only in point of law, but in point of fact; or, in other words, sufficient to put the party accused on his trial for the offence of which he is accused.

The judge of the sufficiency is the judge who heard the evidence, and apparently he alone. From his decision as to the sufficiency or insufficiency of the evidence no appeal is given. He exercises a statutory power, and the statute which creates the power provides for no review of his decision on the evidence, except by the government, to whom he is required to certify the evidence, or a copy of it. Can there be an appeal from his decision to any intermediate tribunal not mentioned in the treaty or statutes passed to give effect to it? The late Mr. Justice Sullivan (*In re Kermott*, 1 U. C. Cham. Rep. 253) assumed that there was such an appeal on habeas corpus to a judge in Chambers, and discharged the prisoner. The late Sir James B. Macaulay, (*In re Tubbee*, 1 U. C. Pr. Rep. 98) expressed strong views in favor of such an appeal, though the prisoner before him was discharged on wholly different grounds. The late Sir John B. Robinson, in Anderson's case, 20 U.C. Q.B. 166, though expressing great doubts as to any such power, did in fact entertain an appeal from the decision of a magistrate on a question as to the sufficiency of evidence. Chief Justice Draper, in Anderson's case, as reported in 11 U. C. C. P. 59, said there is some difficulty in affirming that this court can review the decision of a judge or justice under the treaty. In the same case, at p. 67, Mr. Justice Hagarty was more decided, and said, "I do not understand that either of the Superior Courts can assume the task of examining the depositions, and judge them sufficient to sustain the charge." To the same effect is the language of Mr. Justice Ritchie, in the case of the Chesapeake. So Mr. Justice Crompton, in *Reg. v. Tivnan*, 10 L. T. N. S. 501, said, "all I think we have to consider is whether there was *any* evidence on which the magistrate could reasonably, in the exercise of his discretion, commit these prisoners to gaol for the purpose of being delivered up to the United States authorities. * * * We are not the proper parties to judge of the evidence, but we have the power of saying that there is *no* evidence before him on which he ought legally to come to the conclusion to commit them to gaol. * * * It is not for us to weigh the effect of evidence which is for the magistrate, &c." So far, the weight of authority is decidedly against the power to review the decision of the magistrate on the evidence, and such we should unhesitatingly declare to be the law as now established, were it not for the recently expressed opinion of Chief Justice Richards (*In re Burley*, 1 U. C. L. J. N.S. 46). The opinion of that learned judge is entitled to great weight, and the expression of it in the case to which we have just referred leaves the decided cases on this point in any thing but a satisfactory state.

The magistrates having found the evidence sufficient to commit the party for trial, is, according to the treaty, "to certify the *same*," and, according to our act, "to certify a copy of the same," to the proper executive authority, that a warrant may issue for the surrender of the fugitive. There must of course be a commitment by the magistrate of the fugitive. The warrant of commitment, if only till "discharged by due course of law," without saying "until surrendered, &c.," would be bad: (*In re Anderson*, 11 U. C. C. P. 1.) It need not set out the evidence (*In re Burley*); and for the reasons that we have already mentioned, need not recite a prior charge in the

foreign country, or the warrant of the Governor General here: (*Ib.*) A form of warrant is given in the schedule to the English statute 8 & 9 Vic. cap. 120; but as that act is apparently not in force here, the form which it gives ought not to be too closely followed. In case the person committed be not conveyed out of the province within two months after commitment (over and above the time required to convey the prisoner from the gaol to which he has been committed, by the nearest way out of the province), any of the judges of the superior courts having power to grant a habeas corpus, upon application made to him or them by or on behalf of the person committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to the Provincial Secretary, may order the person so committed to be discharged out of custody, unless sufficient cause be shown why such discharge should not be ordered. This is in effect the same as sec. 4 of the Imperial Statute 6 & 7 Vic. c. 76, from which it is apparently taken. The act of Congress of the United States, passed on 12th August, 1848, contains a like provision: (Con. Stat. Can. c. 89, s. 4.)

It is not said expressly in the treaty, nor except by inference in any of the statutes under it, *where* the surrender is to be made. It is provided by sec. 4 of 24 Vic. c. 6, that "the person or persons authorized as aforesaid (i.e. authorized in the name and on behalf of the United States to receive), may hold such person in custody and take him to the territories of the said United States, pursuant to the said treaty; and if the person so accused escapes out of any custody to which he stands committed, or to which he has been delivered as aforesaid, such person may be retaken in the same manner as any person accused of any crime against the laws of this province may be retaken upon an escape." Such is the language of sec. 8 of the Imperial Statute already quoted.

The clear intendment of the enactment is, that the delivery shall take place to the United States messenger within our territory; for it provides for the conveyance of the fugitive in the charge of that messenger to the territories of the United States, which means to the frontier, and also provides for an escape within our territory whilst in the like custody. The third section of the Act of Congress of the United States, passed 12th August, 184[illegible], is to the same effect. This being so, both powers agree as to the interpretation of the Treaty, so far as this point is concerned.

3.—Expenses.

The extradition under the Treaty is deemed for the benefit of the party requiring the surrender. In truth it is for the benefit of both countries that criminals should be punished, but the assumption of the treaty is just what we have mentioned. This being so it is considered only fair that "the expense of apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive." By making the requisition the party making it assumes the responsibility of paying the expenses of apprehending as well as delivering the fugitive (per Richards, C. J., in *re Burley*). The ordinary expenses, including fees to counsel, would seem to be intended (7 opinion Attorney General U. S. 612).

Effect of Surrender.

The surrender is made for trial on a particular charge expressed in the treaty, and for that only. The foreign government can only try the fugitive on the charge for which he is surrendered (per Richards, C. J., in *re Burley*, p. 45). What is to become of him afterwards is not so easily determined. Sir John B. Robinson, in the case of Anderson the escaped slave, said, "We are not to be influenced by the consideration (a very painful one in all such cases) that the prisoner, even if he be wholly acquitted of the offence imputed to him, *must* remain a slave in a foreign country" (20 U. C. Q. B. 173). But notwithstanding the dictum of a judge so eminent, we venture to affirm that the surrender being for a special purpose, and for that purpose only, the fugitive, when that purpose is attained, should be free to return to his asylum. The surrender is made of a person accused of crime to be tried on that accusation. If not guilty of the charge of which accused and for which surrendered he should not be, it seems to us, be retained on a different charge, or because of any municipal law or lien. The latter we do not recognize, and but for the treaty we are not bound to recognize the former. So it is apprehended an arrest of the fugitive in the foreign country on civil process of any kind for an offence not within the

Treaty, or in truth for any offence other than that for which surrendered, before an opportunity to him to return to his asylum, would be illegal. Otherwise surrenders might be obtained ostensibly for crimes specified, but really for civil procedure and civil jurisdiction, or ostensibly for a crime mentioned in the Treaty and really for one not so mentioned, and thus a trick practised upon the power surrendering. If the accused, though acquitted of the offence for which he is surrendered be guilty of other offences, and these be specified in the Treaty, there is nothing to prevent his second extradition on the new charge or charges.

ORDERS OF THE COURT OF CHANCERY.

We publish hereunder the orders of the Court of Chancery, promulgated February 6, 1865.

They effect several important changes in Equity practice, which will be appreciated by the practitioners in that Court. The orders came into force on the twentieth day of last month. They are as follows:—

1.—Pleadings and all other proceedings in a cause may be written or printed, or partly written and partly printed.

2.—When wholly printed, dates and sums occurring therein are to be expressed by figures instead of words.

3.—All such pleadings and other proceedings are to be so written or printed neatly and legibly on good paper, of the size and form heretofore in use; and if printed, the same are to be printed with pica type, and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this Order; and the Registrar is to refuse to file the same.

4.—Office copies of bills are not to be certified by the Registrar or Deputy Registrar, but shall be authenticated by the stamp of the office, and the usual signature of the Registrar or Deputy Registrar at the foot of the bill.

5.—The service of any bill within the jurisdiction of the Court is to be of no validity if not made within twelve weeks after the filing of the bill: and the service of an amended bill upon parties added by amendment, is to be of no validity if not made within twelve weeks after such amendment; and the service of any bill without the jurisdiction of the Court is to be of no validity, if not made within a period consisting of twelve weeks, added to the time limited by the General Orders for the answer of defendants served without the jurisdiction, such time to be computed from the filing of the bill as to parties made defendants by the original bill, and from the amendment of the bill as to parties added as defendants by amendment; but service may be allowed by a Judge when made after the periods above limited, upon its being made to appear to his satisfaction that due diligence has been used in effecting such service.

6.—A defendant is to admit in his answer such of the allegations contained in the plaintiff's bill as are to the knowledge of such defendant true, or the truth of which he can readily ascertain, or as he has reason to believe and does believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made.

7.—Plaintiffs are to admit in their replication such facts alleged by the answer as are to the knowledge of the plaintiffs or any or either of them true; or the truth of which they or he can readily ascertain, or as they or he have or has reason to believe, and do or doth believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made.

8.—The replication may hereafter be in the following form:—

I admit, &c, and I join issue with the answers of the defendants, C. D., &c, except in so far as I have herein made admissions in regard to allegations contained in such answers, and I will hear the cause upon bill and answer against the defendants, E. F, &c., and *pro confesso* against the defendants G. H., &c., as the case may be.

9.—Such admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the bill or answer to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions; and it shall not be necessary or proper, in any answer or replication, to allege ignorance of any fact stated in the bill or answer, or any other reason for not admitting any fact therein alleged.

10.—Such admissions may be in the following form:

I admit, or for the purposes of this suit I admit, the truth of the allegations contained in the plaintiff's bill, or of the answer of the defendant C D, or the allegations contained in the —— paragraph of, —— or so much of the allegations contained in the —— as commence with the words, "————," and ends with the words, "————," or I admit, &c., save and except that I say, (stating qualifications of admission, if any)

11.—When it becomes necessary to adduce evidence, or to incur expense otherwise, in order to establish or prove facts, which, in the judgment of the Court, upon the hearing of the cause, ought to have been admitted, it shall be competent to the court to make such

order in respect to the costs occasioned by the proof of such facts, as under all the circumstances shall appear to be just.

12.—Office copies of answers, affidavits and other proceedings are dispensed with; and where service is required true copies, instead of office copies, are to be served; but this Order is not to apply to bills or decrees, of which office copies are by the practice of the Court required to be served.

13.—Not more than four copies of any pleading or other proceeding are to be allowed to any party, in a cause or matter, exclusive of the draft, but inclusive of copies to file, copies to serve, copies for briefs, and any other copies that may be required or made in the progress of the cause.

14.—If more than three copies, exclusive of the draft, are required of any pleading or other proceeding, and the party chooses to have the pleading or proceeding printed for the purposes of the suit or matter, he is in lieu of all charges for copies, to be allowed thirty (30) cents per folio of the pleading or proceeding, and his reasonable disbursements of procuring the same to be printed.

15.—Every defendant, appearing by a different solicitor, is entitled to demand from the plaintiff two copies of any printed bill, paying for each copy two cents per folio.

16.—After replication is filed, any party may call on the other by notice to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the Judge certifies that the neglect or refusal to admit was reasonable; and no costs of proving any document are to be allowed, unless such notice is given, except in cases where the omission to give the notice was in the opinion of the Taxing Officer a saving of expense.

17.—The notice may be in the following form:—

In Chancery.

Between A. B., ...*Plaintiff*,

and

C. D., ...*Defendant*.

Take notice, that the plaintiff (or defendant) proposes to adduce in evidence the documents hereunder specified, and that the same may be inspected by the defendant, (or plaintiff,) his solicitor or agent, at ——, &c., on ——, &c., between the hours of ——, &c.; and the defendant (or plaintiff) is hereby required, within four days from the said day, inclusive, to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such documents as are stated to have been served, sent or delivered, were so served, sent or delivered, respectively; saving all just exceptions to the admitting of such documents as evidence in this cause.

Dated this —— day of —— 186 —

Yours, &c.

To S. ————, &c.

&c., &c., ——.

18.—The notice is to be served not less than two clear days before the day appointed for inspection.

19.—No order is to issue in cases within the first section of the 13th Order of June, 1853, for taking a bill *pro confesso;* but in lieu thereof the plaintiff is to file the usual affidavit of service of the bill, and a præcipe requiring the Registrar or Deputy Registrar to note that the defendant is in default for want of answer, and that the bill is to be taken *pro confesso* against him. This præcipe may be filed at any time within six calendar months after service of the bill. If the defendant is in default for want of answer, the Registrar or Deputy Registrar is to enter a note in the registry of pleadings, as required by the præcipe, in the same manner as pleadings are entered therein, and the entry is to have the same effect as an Order for taking the bill *pro confesso:* the fee payable to the Registrar or Deputy Registrar thereon is to be fifty cents.

20.—No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered by the Registrar unless the entry thereof shall be directed by the Court or a judge; but this provision is not to be construed as applying to Decrees or Decretal Orders, or to Final Orders for sale or foreclosure.

21.—Where a defendant is entitled to give a notice to dismiss, it is not to be a sufficient answer to the motion for the plaintiff, after being served with the notice, to take out and serve an order for amending the bill, or to file a replication, or to undertake to speed the cause; but it shall be necessary for the plaintiff to shew that he has prosecuted his suit with due diligence, or that under all the circumstances the bill should not be dismissed.

22.—No notice to settle minutes or pass a Decree or Order is to be given unless by direction of the Registrar.

23.—Where a notice is given to settle minutes, or to pass a Decree or a decretal or other order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes, or pass the Decree or Order, or may, in his discretion, order the party giving the notice to pay to the other the costs of his attendance; or if a party served asks for delay, the Registrar may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise.

24.—In a redemption suit, if the plaintiff does not redeem the defendants, or such of

them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the bill being dismissed, the plaintiff may be declared foreclosed, and directions may be given, either by the Decree or by subsequent Orders, as to the relative rights and liabilities of the defendants as amongst themselves, and such proceedings are in such case to be thereupon had, and with the same effect, as in a foreclosure suit.

25.—In suits for foreclosure or redemption, where a reference is directed to ascertain incumbrances, it shall not be necessary to reserve further directions, but the decree directing such reference may direct that the times at which payment is to be made, or foreclosure or redemption is to take place, shall be, as to incumbrancers, or persons entitled to redeem, at the periods allowed by the practice of the Court; and such times shall be named and appointed by the Master or Accountant in his report; and such appointment shall have the same effect, and be acted on as if the times had been fixed according to the present practice by or under a decree on further directions; and any party entitled to and desiring a sale, is to make the deposit therefor within one week after the confirmation of the report; whereupon the Registrar is upon præcipe to draw up an order to the same effect as the decree now made in such cases on further directions; and such order shall have the same effect, and be followed by the same proceedings as when a sale is ordered by a decree of the Court.

26.—Where a Decree or Decretal or other Order is not passed and entered within one calendar month from the day judgment is pronounced, the time allowed for re-hearing the cause, or varying or discharging the Order under the first General Order of the 10th of January, 1863, shall begin to run at the expiration of such calendar month.

27.—Petitions for re-hearing, certificates of Counsel thereon, and orders to set down for re-hearing, are abolished.

28.—In lieu thereof the party entitled to a re-hearing is to file a præcipe, and serve notice as heretofore.

29.—If a party seeks to vary part only of a Decree or Order, he may, in the notice of re-hearing, state the part of the Decree or Order which he seeks to vary.

30.—It shall not be necessary to procure a Judge's fiat to a petition appointing a time and place for the hearing thereof, but in lieu of such fiat there is to be indorsed on the petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing, as shall appear just.

31.—Orders *nisi* are abolished, and in lieu thereof notice is to be given of the motion for an order absolute.

32.—The Accountant is to take and dispose of such references of account and other matters as shall from time to time be made to him by any Decree or Order.

33.—The Accountant is, in regard to matters referred to him, to have the same powers as the Master in Ordinary to issue warrants, make appointments, and settle and sign reports and certificates, and is to have all other powers and privileges of the Master; and the reports, certificates, and other acts of the Accountant, are to have the same effect, and be subject to the same Orders and Rules as those of the Master.

34.—The Accountant is to be entitled to take and receive for his own use, the same fees for all warrants, reports, certificates, and other matters as are allowed to the Local Masters.

35.—The Master in Ordinary, with the assent of the Accountant and either of the parties to the reference, may transfer to the Accountant any reference, or any part of a reference made, or which may hereafter be made, to such Master; and the certificate or report of the Accountant in such case is to have the same effect, to all intents and purposes, as a certificate, report, or separate report, (as the case may be,) of the Master; and where part only of a reference is so transferred, the Accountant, after signing the certificate or report, is to deliver the same to the Master, with the evidence taken and the papers used by and before him, in the matter of such reference.

36.—It shall be the duty of parties to raise before the Master, Accountant, or Local Master, in respect of any matter presented in his office for his decision, all points which may afterwards be raised upon appeal, and in case an appeal is allowed on any ground not distinctly taken before the Master, the Court may, in its discretion, order the appellant to pay the costs of the appeal.

37.—The Judges having observed in bills of costs which have come under their notice numerous items allowed by Local Masters upon taxation, which are not warranted by the tariff, it is ordered, that every Local Master do forthwith, after taxing a bill of costs, transmit the same by mail to Toronto, addressed, "To the Taxing Officer of the Court of Chancery, Toronto," and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same and is to allow in the bill the sum of one dollar as a fee to the Taxing Officer at Toronto, and the same, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master is to transmit with the bill to the Taxing Officer at Toronto.

the said sum of one dollar, and the postage stamps for the postage on the return of the bill to the Local Master.

38.—The Taxing Officer at Toronto, upon receiving the bill of costs, or as soon thereafter as his other engagements will permit, is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable; and he is to revise the taxation, either *ex parte*, or upon notice to the Toronto agent (if any) of the solicitor whose bill is in question, as in his discretion he may see fit; but notifying such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer, to make such notification proper. Such notification may be by appointment mailed to the address of the agent (if any). If upon such revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to re-transmit the bill so revised to the Local Master.

39.—No sum is to be inserted in the report of a Local Master as taxed and allowed for costs, until such revision by the Taxing Officer; but in a case of urgency, a writ of execution may issue to levy costs, or debt and costs, upon the order of a Judge, subject to the future revision by the Taxing Officer; and the party may without order issue at his own expense a separate execution for the debt before the revision takes place.

40.—The fee for a necessary common attendance, including præcipe, if any, shall be fifty cents.

41.—A fee of twenty cents is to be paid by parties for every search in the office of the Master in Ordinary, Accountant, or Local Master, but it is to be taxed only when the search was, in the opinion of the Taxing Officer, necessary or proper.

42.—The fee on settling minutes and on passing Decrees or Orders may be increased in the discretion of the Registrar, in special cases, to two dollars, where the solicitor attends personally on such settling or passing.

43.—For attendance in the Master's office and in the office of the Accountant upon a warrant or appointment to hear and determine, it shall be in the discretion of the Master, Accountant, and Local Master, to increase the fee for such attendance to any sum not exceeding two dollars per hour, where, in the judgment of the Master, or other officer aforesaid, the matters to be heard and determined are of such special nature as to have required previous preparation, and where the Master shall find that previous preparation has been bestowed thereupon, and that in his judgment such increased fee is reasonable and proper under the circumstances; but no such allowance is to be made for more than one day, unless the hearing is proceeded with *de die in diem* to the conclusion thereof; or unless such proceeding be prevented by a party other than the one claiming the increased allowance; and the increased allowance is not to be made unless the same is noted at the time in the book of the Master, or other Officer aforesaid.

44.—The fee on the attendance of a solicitor upon the examination of parties or witnesses, where the solicitor attends in person, and no counsel is employed, may in special cases be increased in the discretion of the Judge, or Officer, before whom the examination is had, to two dollars, and where the examination occupies more than one hour, then to two dollars for every additional hour which is so occupied, and during which the solicitor is present in attendance thereupon, provided the same is noted at the time in the Registrar's book, or in the book of the Master, or other Officer, as the case may be.

45.—In all Decrees, Orders, Reports and Certificates, sums are to be stated in dollars and cents.

46.—Service upon solicitors of pleadings, notices, orders, and other proceedings, is to be made between the hours of ten o'clock, A.M., and four o'clock, P.M., except on Saturdays, when it shall be made between the hours of ten o'clock, A.M., and two o'clock, P.M. If made after four o'clock, P.M., on any day except Saturday, the service is to be deemed as made on the following day, and if made after two o'clock on Saturday, the service is to be deemed as made on the following Monday.

47.—Every Deputy Registrar is forthwith, after the 30th of June and 31st of December, in every year, to make a return to the Registrar at Toronto, of the number of bills, answers and demurrers, filed with such Deputy Registrar during the preceding six months, and is to transmit with such return the amount of fees payable into "The Suitors' Fee Fund Account." The Registrar is forthwith to deposit to the credit of the said account the sums so received, and is on the 31st day of January, and 31st day of July, in each year, to lay before the court a statement of the condition of the said account, and the names of the Deputy Registrars (if any) who are in arrear thereto.

48.—The foregoing Orders are to take effect on the twentieth day of February instant, as to all suits then pending, as well as to those instituted on or after that date.

P. M. Vankoughnet, C.
J. G. Spragge, V. C.
O. Mowat, V. C.

INSOLVENT ACT—TARIFF OF FEES.

We are informed that the tariff of fees promulgated by the judges of the Superior Courts of Common Law and the Court of Chancery, under the Insolvent Act of 1864, has not been sent to the different County Court clerks in Upper Canada. This is not as it should be. One would imagine that the clerks, who are the taxing officers of bills of costs under the act, would be provided by the proper authorities with the means necessary for enabling them to perform their duties efficiently.

We now publish the tariff for the benefit of such as have it not, or who have not provided themselves with a copy of Mr. Edgar's work, which contains it:—

TARIFF.

Fees to solicitor or attorney, as between party and party, and also as between solicitor and client:

Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal	$2 00
Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words or under	0 20
Making other copies when required per fo.	0 10
When more than *five* copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors therein does not exceed twenty	0 20
When the number of creditors therein exceeds twenty, then for every folio of 100 words up to twenty, 20c., and for every folio over twenty	0 10
Every common affidavit of service of papers, including attendance	0 50
Every common attendance	0 50
Every special attendance on judge	2 00
For every hour after the first	1 00
To be increased by the judge in his discretion.	
Every special attendance at meetings of creditors, or before assignee, acting as arbitrator	1 00
Fee on writ of attachment against estate and effects of insolvent, including attendance	2 00
Fees on rule of Court or order of judge	1 00
Fee on sub. *ad test*, including attendances	1 00
Fee on sub. *duces tecum*, including attendance	1 25
And, if above 4 folios, then for each additional folio, over such 4 folios	0 10
Fee on every other writ	1 00
Every necessary letter	0 50
Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary cases, where no dispute	1 00
Costs of solicitor of petitioning creditor, for examining claims filed, up to appointment of assignee, for each claim so examined	0 50
Costs of assignee's solicitor for examining each claim, required by assignee to be examined	0 50
Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto	1 00
Preparing, engrossing, and procuring execution of bonds or other instruments of security	2 00
Mileage for the distance actually and necessarily travelled—per mile	0 10
Bill of Costs, engrossing, including copy for taxation, per folio	0 20
Copy for the opposite party	0 50
Taxation of Costs	0 50

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same, as for like proceedings, as in the tariffs of the Superior Courts.

COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

FEE FUND.

Every warrant issued against estate and effects of insolvent debtors	$1 00
Every other warrant or writ	0 30
Every summary rule, order, or fiat	0 30
Every meeting of creditors before judge	0 50
If more than an hour	1 00
If more than one on same day, $2.00, to be apportioned amongst all.	
Every affidavit administered before judge	0 20
Every certificate of proceedings by judge of County Court for a transmission to a Superior Court or a judge thereof	0 50
Every bankrupt's certificate	1 00
Every taxation of costs	0 15

FEES TO CLERKS.

Every Writ, or Rule, or Order	0 50
Filing every affidavit or proceeding	0 10
Swearing affidavit	0 20
Copies of all proceedings of which copy bespoken or required, per folio of 100 words	0 10
Every certificate	0 30
Taxing costs	0 50
Taxing costs and giving allocatur	0 65

For every sitting under commission, per day..... 1 00
If more than one on same day, $2.00 to be apportioned amongst all.
Fee for keeping record of proceedings in each case..... 1 00
For any list of debtors proved at first meeting, (if made) 0 50
For any list of debtors at second meeting. 0 50
Any search..... 0 20
A general search relating to the bankruptcy of one person or firm..... 0 50

SHERIFF.

Same as on corresponding proceedings in Superior Courts.

WITNESSES.

Same as in Superior Courts.

UPPER CANADA REPORTS.

COMMON PLEAS.

(Reported by S. J. VANKOUGHNET, Esq., M A., *Barrister-at-Law, and Reporter to the Court.)*

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF LAMBTON, IN A CAUSE IN THE FIRST DIVISION COURT OF THAT COUNTY, OF KEMP v. OWEN.

Action in Division Court for goods—Cause of action—When same arose—Writ of prohibition.

On an application for writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the judge of the county of Lambton.

Held, that where the defendant resided at G., at which place a bargain was made for the delivery of certain goods at W., and the bargain was fulfilled by such delivery and acceptance, that the cause of action arose partly at G. and partly at W., the judge of the county where W. is situate had no authority in respect of the cause of action.

S. Richards, Q. C., moved for and obtained a rule on the judge of the county court of the county of Lambton, and upon Kemp the plaintiff in the suit in question, calling upon them to shew cause why a writ of prohibition should not be issued to prohibit the said judge from further proceeding in the said suit, on the ground that the said court had no jurisdiction in the said plaint or action to hear or determine the same; he referred to *Watt* v. *VanEvery*, 23 U. C. Q. B. 196. The facts were that the defendant resided at Goderich in the county of Huron; a verbal bargain was made at Goderich between the plaintiff and the defendant for the delivery by the plaintiff of a certain quantity of coal oil at a certain price to the defendant at Wyoming in the county of Lambton. Nothing appears as to the time and place of payment. The oil was delivered at Wyoming, and this action is for the price of it, or for the balance of it.

Harrison shewed cause. The bargain being verbal, there was no enforceable contract until the delivery and acceptance of the oil at Wyoming, and there also the money was payable for it, as nothing had been agreed upon as to the time or place of payment. *Aris* v. *Orchard*, 6 H. & N. 160.

The judge enquired into the particular objections which were raised at the trial before him, and upon the same facts which are now before the court he determined that the cause of action did arise within the county of Lambton, and therefore this court will not re-try a matter which has been already tried and decided upon in the court below; *Newcomb* v. *De Roos*, 6 Jur. N. S. 68; many other authorities were also cited, most of which are to be found in the decisions already mentioned.

S. Richards contra, referred to *Jackson* v. *Beaumont*, 11 Ex. D. 300, as shewing that the defendant not acquiescing in the judge's decision, but protesting against it, and the judge having no authority in fact, the defendant is not now precluded from this writ, which is one of right. *Wilde* v. *Sheridan*, 16 Jur. 426; *Bonsey* v. *Wordsworth*, 18 C. B. 325.

ADAM WILSON, J.— We think that the verbal bargain made at Goderich, effectuated by the delivery and acceptance of the goods at Wyoming, establishes very clearly, according to the authorities, that the cause of action did not arise, that is, did not wholly arise at Wyoming, but partly at Goderich and partly at Wyoming, and therefore the judge of the county of Lambton, in which Wyoming is situated, had not and has not authority in respect of the cause of action; and as it appears the defendant resides at Goderich beyond the county of Lambton, so he has not authority to try the cause in respect of the defendant's residence.

The case in 6 H. & N. 160, does not apply here, for in this case the verbal contract made at Goderich was the contract acted upon and carried into effect at Wyoming, so that it would have been necessary on the trial to prove what it was took place at Goderich, while, in the case referred to, the verbal bargain was abandoned and a new one was entered into when it came to be carried into effect by the addition of a new and important term to it. We think the rule must be made absolute.

Rule absolute.

ELECTION CASES

(Reported by R. A. HARRISON, Esq., *Barrister-at-Law.)*

THE QUEEN ON THE RELATION OF McLEAN v. WATSON.

Mayor—Contract—Disqualification—Two Relations for same cause at instance of different parties—Collusion.

Where defendant at the time of his election to the office of mayor for the town of Goderich, was shown to be a party, as surety, to a bond given to the Corporation for the due performance of his duties by one of its officers, defendant was held to be disqualified from holding the office of mayor.

The judge before whom the case was heard, being of this opinion, declined to withhold his judgment, upon the allegation that there was a prior relation at the instance of a different relator against same defendant for same cause pending before a County judge, which relation, it was sworn, was collusive, and intended to protect defendant in the enjoyment of the office, contrary to law.

[Common Law Chambers, February 24th, 1865.]

The relator complained that James Watson, of the town of Goderich, in the county of Huron, and Province of Canada, Esquire, had not been duly elected, and had unjustly usurped the office of mayor of and for the said town of Goderich, in the county of Huron aforesaid, under the pretence of an election held on the fourth and fifth

days of January, one thousand eight hundred and sixty-four, at the town of Goderich aforesaid, in the said county of Huron, and declaring that he the said relator had an interest in the said election as a voter, shewed the following causes why the said election of the said James Watson to the office of mayor should be declared invalid and void:

First—That the said election was not conducted according to law in this: That the polls in the wards of St. David and St. Andrew, in the said town, were not kept open from ten o'clock in the forenoon until four of the clock in the afternoon during the said fourth and fifth days of January aforesaid; but on the contrary, that the poll in the said ward of St. David was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, until the hour of half-past twelve of the clock in the afternoon, on the fourth and fifth days of January aforesaid; and that the poll in the said ward of St. Andrew was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, to the hour of half-past twelve of the clock in the afternoon, on the fifth day of January aforesaid, and that during said time no access was or could be had to either of the said polls in either of the said two wards by any voter during the said last-mentioned time.

Second—That the said James Watson was not, at the time of his election, qualified to be a member of the council of the said corporation, because at the said time he was disqualified as having an interest in a contract with the said corporation in this: that one Charles Fletcher, of the said town of Goderich, was before and at the time of the said pretended election of the said James Watson as mayor, treasurer of the Municipal Corporation of the said town of Goderich; and that the said James Watson was, before the said election of mayor and for a long time thereafter, surety for the due performance of the duties of treasurer of the said Municipal Corporation of the town of Goderich by the said Charles Fletcher, by bond duly executed by the said James Watson to the said Municipal Corporation of the said town of Goderich, dated the fourth day of August, in the year of our Lord one thousand eight hundred and fifty-eight, and which bond was, at the said time mentioned, in full force, virtue, and effect.

Third—That the said James Watson was not, at the time of his election, qualified to be a member of the council of the said corporation, because at said time he was disqualified as having an interest in a contract with the corporation in this: that he the said James Watson, before and at the time of the said election, for a valuable consideration, held a shop-license from the Municipal Corporation of the said town of Goderich, for the sale of spirituous and other liquors, which said license was still in force, uncancelled and unrevoked.

James Shaw Sinclair made oath, that he was present at the nomination of candidates for the office of mayor of the town of Goderich, for the year one thousand eight hundred and sixty-four, which nomination took place on the twenty-first day of December, 1863. That James Watson attended at said nomination, and consented to his being nominated as a candidate, and addressed the electors in his own behalf. That the said James Watson exerted his influence on his own behalf during the fourth and fifth days of January, being the polling-days at said election. That deponent was present at the public declaration of the election of him the said James Watson, held on the seventh day of January, 1864, and that the said James Watson publicly thanked his supporters and accepted the office of mayor of the said town, for the year one thousand eight hundred and sixty-four. That deponent was present at the first meeting of council for the said town of Goderich, held on the eighteenth day of January, 1864, at which time the said James Watson filed his declaration of office of mayor, and took his seat as such mayor, and took part in the business of the said council as the head thereof.

Mr. Sinclair also made oath that he had searched in the office of the town-clerk of the town of Goderich, and found a bond from James Watson, Esquire, mayor of the said town of Goderich for the year one thousand eight hundred and sixty-four (together with other obligors therein named), to the Municipal Corporation of the said town of Goderich aforesaid, for the due performance of the duties of the office of treasurer of the said town by one Charles Fletcher. That he, deponent, knew the handwriting of the said James Watson. That the signature, "James Watson," set and subscribed to the bond, was the proper handwriting of the said James Watson. [Annexed was a copy of the bond.] That the said Charles Fletcher had for several years occupied the office of treasurer of the said town of Goderich; that he did on the twenty-first day of December last, and on the fourth and fifth days of January instant, occupy the said office of treasurer of the said town, and fulfil the duties thereof That the said bond was in full force and effect from the day of the date thereof (being the fourth day of August, one thousand eight hundred and fifty-eight) up to and until after the said fourth and fifth days of January instant; and furthermore, until after the public declaration (as the law directs) of him the said James Watson as mayor of the said town of Goderich by the returning-officer of the said election, and that during all the said time the said bond of the said James Watson was in full force, virtue, and effect, according to the tenor thereof. That the said bond was accepted by the said Municipal Corporation of the said town, and held by them as a valid and subsisting security against the said James Watson, mayor of the said town of Goderich, elected on the fourth and fifth days of January, 1864, aforesaid, and the other obligors therein mentioned from the date thereof up to and until after the election and declaration of him the said James Watson as mayor aforesaid. That deponent was informed, and verily believed, the accounts of the said Charles Fletcher as such treasurer as aforesaid, had not been finally audited and settled between him as treasurer as aforesaid and the said Municipal Corporation of the town of Goderich, for the year one thousand eight hundred and sixty-three. That he, deponent, had caused search to be made in the office of the treasurer of the corporation of the said town of Goderich (he being the proper officer of

the said corporation to issue licences for the sale of spirituous liquors in shops and stores), and found that on the ninth day of March, in the year of our Lord one thousand eight hundred and sixty-three, a license to sell wine, beer, and other spirituous liquors by retail, was issued by the said town treasurer to the said James Watson, mayor of the said town of Goderich as aforesaid, and which said license was, as deponent was informed and verily believed, regularly issued by the said treasurer, as officer of the corporation aforesaid, to the said James Watson; and that the said James Watson paid therefor to the said treasurer, as such officer of the said corporation as aforesaid, the sum of thirty dollars currency of this Province, and that the paper annexed was a true copy of said license.

William Torrance Hays, made oath that at the election for the mayoralty of the town of Goderich aforesaid, on the fourth and fifth days of January, 1864, the poll in the ward of St. David, in the said town of Goderich, was not kept open from ten of the clock in the forenoon until four of the clock in the afternoon during the said fourth and fifth days of January aforesaid; but on the contrary, that the said poll was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, until the hour of half-past twelve of the clock in the afternoon on the fourth and fifth days of January aforesaid; and also that the poll in the ward of St. Andrew, in the said town of Goderich, was, as deponent was informed and verily believed, closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, to the hour of half-past twelve of the clock in the afternoon on the fifth day of January aforesaid, and that during the said time no access was or could be had to either of the said polls in the said two wards by any of the voters thereof.

M. B. Jackson shewed cause, and filed the affidavit of William Fisher Gooding, wherein it was sworn, that on the twenty-first day of January, 1864, he instructed his attorney to commence proceedings against the defendant James Watson, to remove him from the office of mayor of Goderich, to which office he was elected at the late municipal election for said town, held on the fourth and fifth days of January. That a writ of *quo warranto*, duly issued, and was served on said Watson in pursuance of my said instructions. That he, deponent, voted against said Watson at said election, and did all he could to prevent his election to said office. That he, deponent, commenced and was carrying on, and intended to carry on to final judgment, the said proceedings against said Watson on said writ of *quo warranto*. That never before nor since the said proceedings were commenced by deponent, had he spoken to said Watson on the subject of said proceedings. That deponent did not commence nor carry on said proceedings in collusion with said Watson, nor for the purpose of preventing others from taking proceedings against him; but on the contrary thereof, commenced and was carrying on proceedings *bona fide*, and intended to remove said Watson from said office if he, deponent, could legally do so.

James Watson, the defendant, made oath, that on Friday, the twenty-ninth of January, 1864, he was served with the writ of *quo warranto* in this case. That on Thursday, the twenty-first day of January, 1864, and before he was served with the last-mentioned writ of *quo warranto*, and before he had any knowledge whatever that such writ had issued, he was personally served with a different writ of *quo warranto* on the relation of William F. Gooding. That the grounds of objection in both said writs were identical, as is also the office out of which it is attempted by both processes to remove deponent. That he instructed his attorney to defend the suit on the relation of said Gooding That the same was returnable before the Judge of the County Court of the United Counties of Huron and Bruce, on the twenty-ninth day of January, 1864, and was, on the application of deponent's said attorney, enlarged until the tenth day of February, 1864, and then in other respects corroborated the affidavit of Gooding. That the poll in the ward of St. David was closed, as in the statement in this cause is set forth, without deponent's consent, but by and with the consent of the agent of John V. Detlor, who opposed deponent at said election. That the poll for St. Andrew's ward was closed on the second day of polling, and was then so closed at the instance and request of the agent of said Detlor, and by and with the consent of the agent of said John V. Detlor, who represented him at said poll for half an hour only, to wit, from one until half-past one, and after that time there were only two votes to be polled in said ward.

Other affidavits were filed on the part of defendant in corroboration of the foregoing, which it is unnecessary to state in detail.

Several affidavits were filed on the part of the relator, in answer to those of the defendant. The affidavits in answer were to the effect that the said so-called relation of Gooding was never intended to be a *bona fide* proceeding, but got up merely for the purpose of delaying and hindering this cause from being fairly and properly disposed of. That several of the strongest supporters of the said Watson openly admitted that such was their intention. That the proceedings in the said so-called relation were informal and otherwise defective, and that if the proceedings herein were to be stopped by reason of said relation, that a technical objection would be urged at the last moment, and defeat the object of the said so-called relation. That the object of said relation was to defeat this cause. That said proceedings were commenced and carried on for the very purpose of preventing said Watson from being removed from said office.

M. B. Jackson argued that this being the second writ issued against defendant for the same cause, it ought not to be proceeded with, or, if proceeded with at all, should be made returnable before the County Judge before whom the first proceeding was pending. (Con. Stat. U. C. cap. 128, sub. secs. 3, 4.) That it was positively sworn Gooding's relation was *bona fide* and not collusive. That to allow both relations to proceed would not only be contrary to law but most oppressive to defendant; and on the merits he argued the statute as to closing or not closing the poll is directory only, and cannot affect the validity of the election in the absence of a sug-

gestion that voters were thereby deprived of their votes. He also argued that defendant was not shown to be interested in a contract or contracts within the meaning of the statute. (Con. Stat. U. C. cap. 54, sec. 73.)

Robert A. Harrison, in support of the summons, argued that the pendency of the prior relation was no answer to this writ, but, if anything, a reason for moving to set it aside (*Smith* v. *Fisher*, 11 U. C. C. P. 161); that defendant having appeared, was bound to answer on the merits; that the prior relation, if open to defendant, was shown to be collusive, and so of no effect as against the present relation (*Kelly q. t.* v. *Cowan*, 18 U. C. Q. B. 104); that before the statute there might be several informations at the instance of several relators (*The King* v. *Slythe*, 6 B. & C. 244; *The King* v. *Bond*, 2 T. R. 770; *The King* v. *Eve et al*, 5 A. & E. 780); that the statute is a substitute for the former proceeding by information, and only requires the several writs to be made before the same Judge where issued at the instance of one and the same relator; that the proper remedy is to stay the proceedings, if in the same court, in all causes except one (*The King* v. *Cousins*, 7 A. & E. 285; *The Queen* v. *Alderson*, 11 A. & E. 3). But if in different courts or before different judges all may proceed, and at all events the present relator being really in earnest, ought not to be stopped. (*Reg.* v. *Alderson*, 11 A. & E. 3.) On the merits, he contended the cases were decisive. As to closing the poll before the hour appointed by statute, he referred to Con. Stat. U. C. cap. 54, secs. 101, 108, sec. 97, sub-sec. 7. The word "shall" is imperative, not directory (Con. Stat. U. C. cap. 2, sec. 18, sub-sec. 2). *Hall* v. *Hill*, 22 U. C. Q. B. 578; *Reg. ex rel. Arnott* v. *Marchant*, 2 U. C. Cham. R. 189; *Reg. ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 89; *In re Charles* v. *Lewis*, 2 U. C. Cham. R. 171; *Reg. ex rel. Horne* v. *Clark*, 6 U. C. L. J. 114; *Reg ex rel. Smith* v. *Brouse*, 1 U. C. Pr. R. 180. As to the disqualification by reason of the bond, he referred to *Reg. ex rel. Coleman* v. *O'Hare*, 2 U. C. Pr. R. 18; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; *Mayor of Clifton* v. *Silly*, 7 El. & B. 97; *Mayor of Cambridge* v. *Dennis*, 1 E. B. & E. 660; *Reg. ex rel. Moore* v. *Miller*, 11 U. C. Q. B. 465; *Reg. ex rel. Lutz* v. *Williamson*, 1 U. C. Pr. R. 94. As to the disqualification by reason of the license, which for a valuable consideration he contended was a contract, and referred to *Reg.* v. *Francis*, 18 Q. B. 526; *Reg. ex rel. Stock* v. *Davis*, 3 U. C. L. J. 128; *Reg.* v. *York*, 2 Q. B. 847; *Reeves* v. *The City of Toronto*, 21 U. C. Q. B. 157; *Simpson* v. *Ready*, 11 M. & W. 344; *Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60.

Morrison, J.—I am quite satisfied that the defendant was, at the time of the election, disqualified upon the ground of the existence of the bond to the corporation, to which he was a party. This, without reference to the other grounds taken against the election, is, in my opinion, sufficient to make void the election so far as defendant is concerned. Being of this opinion, I do not think I should withhold my judgment by reason of the alleged pendency of the relation at the instance of Mr. Gooding, and I shall therefore hold and adjudge that the defendant has usurped the office of mayor for the town of Goderich, under pretence of the election held on the fourth and fifth days of the month of January last, and order the issue of a writ for his removal from the said office.

Order accordingly.

Reg. ex rel Doran v. Haggart

Con. Stat. U. C. cap. 54, sec. 135—Offices of Mayor and Reeve not to be held by one and the same person.

Held, that the mayor of a town not withdrawn from the jurisdiction of the county or united counties within which situated, though the head of the council and chief executive officer of the corporation, is not a member of the council within the meaning of section 135 of the Municipal Institutions Act, so as to be eligible, if chosen, to hold the office of reeve, in other words, that the offices of mayor and reeve cannot in such case be holden by one and the same person.

[Chambers, March 1, 1864.]

The relator complained that John Haggart, of the town of Perth, esquire, mayor of the said town of Perth, had not been duly elected, and had unjustly usurped the office of reeve of and for the said town of Perth, one of the municipal corporations, situate within and composing part of the municipal corporation of the united counties of Lanark and Renfrew, and not withdrawn from the jurisdiction of the council of the said united counties in which it lies, under pretence of an election, held on Monday, the 18th day of January, 1864, at the said town of Perth, in the county of Lanark; and declared that he the said relator had an interest in the said election as one of the councillors for the east ward of the said town of Perth, and *ex officio* a voter at and upon an election of reeve of and for the said town of Perth; and showed the following causes why the election of the said John Haggart to the said office should be declared invalid and void: First, that the said election was contrary to law, and was void in this, that before and at the time thereof the said John Haggart was, and thence hitherto hath been and still is, mayor of the said town of Perth, having theretofore been lawfully elected to be mayor of the said town; and having accepted the said office of mayor, and exercised the functions thereof, the said John Haggart, not having been at any time elected to be a councillor for any of the three wards into which the said town of Perth then was and still is divided, was not an eligible person to be elected to be reeve of and for the said town of Perth, nor in any manner entitled to fill or hold such office of reeve. Second, that before and at the time of the said pretended election to be reeve, the said John Haggart, as mayor of the said town of Perth, and by law head of the corporation thereof, was actually presiding as such mayor at a session of the council thereof, and, being such mayor, was not at the same time eligible for election as reeve of the same corporation, nor in any manner entitled to hold or exercise the functions of both offices of and for the same corporation. Third, that the said John Haggart was not duly or legally elected or returned as such reeve of the said corporation, in this, that the said John Haggart never was a councillor for any of the wards of the said town of Perth, nor was he ever in any manner a member of the council thereof, except in so far only as his election by the ratepayers of the said town to the said office of

mayor may constitute him a member of the council thereof. Fourth, that the said John Haggart has accepted the said office of reeve, and has been and still is attempting to hold and exercise the functions of both the said offices of mayor and reeve of and for the same corporation of the said town of Perth, contrary to law. Fifth, that the said John Haggart was not duly or legally elected or returned as such reeve as aforesaid, in this, that he the said John Haggart, as mayor, presided over and conducted the said election of reeve, and was his own returning officer, so far as such last mentioned election was concerned.

The relator made oath, that the town of Perth, in the county of Lanark aforesaid, was not withdrawn from the jurisdiction of the council of the united counties of Lanark and Renfrew, in which the said town lies, and of which it forms a part; that the said town is divided into three wards, each of which annually elects three councillors, to form, with the mayor of the town, the municipal council of the corporation thereof; that at the annual municipal election in and for the said town of Perth, held on the 4th and 5th days of January, 1864, and for that year, John Haggart, of the said town of Perth, esquire, was duly elected to be mayor of the said town of Perth for the said year 1864, the said John Haggart having been duly nominated as one of the candidates for that office, according to the statute, on Monday, the 21st day of December, 1863, previously; that on the 18th day of the said month of January, 1864, the said John Haggart accepted the said office of mayor, and made and filed his declaration of office as such, and took his seat as mayor in the council of the corporation of said town; that the said John Haggart has since hitherto held the said office of mayor of the said town, and exercises the functions thereof; that at the same municipal election for the said town for the said year 1864, held on the said 4th and 5th days of January, 1864, the following persons were duly elected as councillors for the respective wards of the said town, namely, for the west ward Duncan Kippen, John Hart and Robert Douglas, for the centre ward Warren Botsford, William O'Brien and Robert Allan, and for the east ward George Cox, Robert Elliott and the relator; that on the said 18th day of January, 1864, the new council of the said town met, and all the said councillors, without exception, accepted their respective offices as councillors, and made and filed the declaration of office as such, as required by law; that at such meeting of the said new council, on the said 18th day of January, 1864, after the said declaration of office had been so made and filed by the said mayor and councillors, the election of a reeve and deputy reeve to represent the said town of Perth for the said present year 1864, in the council of the corporation of the said united counties of Lanark and Renfrew, was then commenced and proceeded with; that thereupon John Hart moved, and Duncan Kippen seconded, that John Haggart, the said mayor, be elected reeve of and for the said town for the said present year 1864; that the following councillors, namely, Duncan Kippen, John Hart, Warren Botsford and Robert Allan, and the said mayor, John Haggart himself, voted for the said motion that the mayor be elected reeve as aforesaid, and all the remaining councillors, namely, Robert Douglas, William O'Brien, George Cox, Robert Elliott and the relator voted against the same; that a tie having thereby been produced on the said election of reeve, the said mayor John Haggart, claiming to be the highest-assessed member of the said council on the assessment roll of the said town of Perth, then gave a second and casting vote in favor of himself, and then declared himself elected as reeve of the said town for the said year 1864 accordingly; that when the said mayor was so proposed for election as reeve as aforesaid, and before any of the said votes were taken, deponent, as one of the said councillors, stated and objected, in the presence and hearing of all the said councillors, and of the said mayor himself, that he the said mayor was not eligible for the said office of reeve, and that it would be illegal for him to take or hold the same; that the said John Haggart presided as mayor during the whole of the said session of council, including the said election of reeve, and was in fact his own returning officer on the said election of reeve; that on the 26th day of January, 1864, the said John Haggart made and signed the declaration of office as such reeve of the said town of Perth, and thereafter took his seat as such reeve in the council of the corporation of the said united counties of Lanark and Renfrew accordingly; that the said John Haggart held both the said offices of mayor and reeve of and for the said year 1864, and claims and insists on the right to exercise the functions of both offices.

R. A. Harrison, for the relator, cited Con. Stat. U C. cap.54, secs. 101, 102, 116, 120. 135, 144 & 145; *Reg. ex rel. Pollard* v. *Prosser*, 2 U. C. Prac. R. 330; Statute 24 Vic. cap. 37.

——— shewed cause.

John Wilson, J.—The mayor of a town is chosen by the electors, at the annual election holden on the first Monday in January (Con. Stat. U. C. cap. 54, sec. 101). His qualification is the same as that of an alderman in cities, and of a councillor in towns (*Ib.* sec. 102; see also *Reg. ex rel. Bender* v. *Preston*, 7 U. C. L. J. 100). He is deemed the head of the council, and the head and chief executive officer of the corporation (*Ib.* sec. 120), but is not, in my opinion, a member of the council within the meaning of section 135 of the act, so as to be eligible for the office of reeve. It is by section 144 of the act provided, that in case of the death or absence of the head of a town council (viz, the mayor), the reeve, &c., shall preside. So by section 145 it is provided that in the absence of the head of the council (the mayor), and, in the case of a town, in the absence also of the reeve, and also of the deputy reeve if there be one, the council may from among themselves appoint a presiding officer. These enactments are quite inconsistent with the idea that the offices of mayor and reeve may be held by one and the same person, and strengthen the interpretation which I have placed upon section 135 of the act. I therefore adjudge that the defendant hath usurped and doth still usurp the office of reeve for the town of Perth, and that he be removed therefrom.

Order accordingly.

COMMON LAW CHAMBERS.

(*Reported by* Robert A. Harrison, *Barrister-at-Law*)

Lee et al., Judgment Creditors v. Gorrie, Judgment Debtor, and The Edinburgh Life Assurance Company, Garnishees.

Con. Stat. U. C., cap. 22, sec. 284—Garnishee proceedings—What a debt due or accruing due—Discretionary power—Construction of deed of assignment for benefit of creditors.

Where the judgment debtor, subsequent to the making of a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at its value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage made by him on real estate, and held by the garnishees, and the garnishees accepted the surrender, but on terms different to those proposed, it was *held*, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor.

Quære, has not a judge a discretion in the case of an attachable debt to decline under special circumstances to make an order to pay over the amount where such an order would be inequitable, or have a tendency to give one creditor a preference over others, after the making by the judgment debtor of a general assignment in favor of his creditors without preference or priority?

Quære, are the words "all bills, bonds, rates, securities, accounts, books, book debts, and documents securing money," contained in a general assignment for the benefit of creditors, sufficient to pass a policy at the time existing on life of the assignor, and held by him for his own benefit.

[Chambers, November 12, 1864.]

On 5th November last the judgment creditors, upon the usual affidavit, obtained from Chief Justice Richards an order attaching all debts due and owing or accruing due from the above-named garnishees to the above-named judgment debtor, to answer a judgment recovered by the judgment creditor against the judgment debtor on 17th November, 1861, in the Court of Queen's Bench for Upper Canada; and by the same order the judgment debtor and the garnishees were called upon to shew cause why the garnishees should not pay the judgment creditors the debt alleged to be due from them to the judgment debtor, or so much thereof as would be sufficient to satisfy the judgment debt.

Blain shewed cause for the judgment debtor.

He filed an affidavit made by the judgment debtor, wherein it was sworn that sometime in 1858, he applied to and obtained from the Edinburgh Life Association a policy on his life for £1000; that by the terms of the said policy he was at liberty to apply all bonuses accruing due on the said policy in reductions of any premiums that might fall due and become payable to the said company by him; that any person who insures his life in the said company becomes a member thereof, and entitled to apply thereto for such loans as he may require; that being a member of the said company he applied to and obtained a loan of one thousand pounds on a mortgage executed by him in favor of the said company, in which said mortgage there was, to the best of his knowledge and belief, a clause to the effect that the said company should apply all moneys due or accruing due under the said policy in payment of the amount due or accruing due on the said mortgage to the said company; that he obtained one George Leslie to become his surety to the said company for the due payment of the interest on the sum so borrowed, and he did become such surety, knowing that the said company could apply the said bonuses in reduction of the rent due on the mortgage; that it was also agreed between himself and the said company, and was covenanted in the said policy to the best of his recollection and belief, that in his option the bonuses accruing due on the policy should be applied in payment of the premiums due or accruing on the said policy; that on one occasion the said company did apply the bonuses due to him on account of his indebtedness to them; that being unable to pay the premium on the said policy he offered to surrender the same to the company, provided they would apply the amount which should be found due to him on account of the said mortgage; that his offer was brought before the board of directors of the said company, and the company resolved to allow him a certain sum for the surrender, which sum, together with certain bonuses due to him on the said policy, form the amount sought to be attached in these proceedings; that before the said bonuses or the said sum allowed for the surrender accrued due to him on on the said policy or by virtue thereof, he had made default in the payment of the amount secured by the mortgage, and there was, when the above sums accrued due to him, the amount secured by the said mortgage due and payable to the said company; that the terms of his surrender to the said company are set forth in the following letter—

Toronto, Oct. 1, 1864.

David Higgins, Esq.

Dear Sir,—I beg to apprise you that from utter inability to pay the premium due on 6th instant, on the life policy from your Company, No. 6898, for one thousand pounds sterling, I have resolved to abandon the same to the Company for its value, to be placed to my credit on the principal debt and interest due, and to that end I hereby surrender the same, which accompanies this communication. Of my crops this year I have not reaped the seed, except in barley, and of that not enough to pay for the labour expended. Under all the circumstances, and as I have paid the Company a very large amount in the shape of premiums and interest upon these policies, which is now an absolute profit (the risk having ceased) except the bonus, I trust the Company will act liberally in the premises. I am ready to execute a formal surrender.

Truly yours, W. M. Gorrie.

That he was not now the owner of the land upon which the said mortgage was executed, but the same was owned by one Thomas Gordon, assignee for the benefit of his creditors; that on November 17, 1863, he executed an assignment to the said Gordon, assigning all his property and effects to him, for the benefit of his creditors generally; that deponent handed the said letter, with the policy, to Mr. Higgins, secretary for the Company, and he said he would bring the matter before the Board; that deponent called subsequently and saw the said Higgins, and he informed deponent that the Company had accepted his surrender.

No one shewed cause for the garnishees.

Thomas Wells in reply, filed an affidavit of Mr. David Higgins, who swore that he was the secretary to the Toronto Local Board of the Edinburgh Life Assurance Company above named,

and as such secretary had the general management of the Toronto office, and was acquainted with all the particulars in connection with the policy and mortgage referred to by Mr. Gorrie in his affidavit filed on the application; that it was not correct, as stated in said affidavit, that said Gorrie executed a mortgage to the said Company for a thousand pounds, but it was given to the Honorable John Hillyard Cameron, and by him assigned to the said Company, the garnishees, the sum being only eight hundred and twenty-five pounds sterling, and not a thousand pounds, as stated by said Gorrie; that the said Leslie, mentioned in the fourth paragraph of said affidavit, did not execute the bond whereby he became bound for the payment of the interest by said Gorrie on such mortgage to the said the Edinburgh Life Assurance Company, but the same was given to said John Hillyard Cameron as security for him for his interest, and the said policy was issued by the said Company to Gorrie long before the execution of the said mortgage and bond by Gorrie and Leslie respectively to said Cameron; that at the last meeting of the Board of Directors of said Company in Toronto, on Friday last, they accepted the surrender of said policy by said Gorrie, but not in the terms of his application as contained in said letter of his referred to in his affidavit, and they ordered the surrender value thereof to be paid him; that after the meeting of said Board, said Gowie came to him at his office, and he then informed him the Board had agreed to accept his surrender in the terms mentioned in the preceding paragraph of this affidavit.

Richards, C. J.—The assignment from Gorrie to Gordon of his property for the benefit of his creditors is dated 17th November, 1863. In addition to specific property assigned, it transfers "all bills, bonds, notes, securities, accounts, books, book debts, and documents securing money," belonging to Gorrie, and also "all books of account relating to his business transactions."

I am not prepared at present to decide that the policy of insurance referred to would pass by the words used, which I have quoted, but if it were of any value it ought as much as any other property or effects to have been assigned.

From the papers produced before me, and from what took place at the argument, I have no doubt the insurance company held the mortgage of the judgment debtor, whether given to them by him direct, or to Mr. Cameron, and by him assigned to the company.

There is no doubt that it is to the debt and interest secured by this mortgage Mr. Gorrie refers in his letter to the company of 11th October, professing to surrender the policy to them at its value, "to be placed at his credit on the principal debt and interest."

It is equally free from doubt that the company accepted the surrender and agreed to allow Mr. Gorrie the amount in dispute; but the secretary of the company states that the company did not accept it on the *terms* mentioned in Mr. Gorrie's letter, "that the sum was to be paid to Mr. Gorrie," and he so informed him.

It is not stated that Mr. Gorrie agreed to such a change in the appropriation of the money, or in any manner assented to it, and as the appropriation made by him was more in accordance with what the law at the time approved on the application of an insolvent's property, to pay all of his debts equally, and not the debt of one particular creditor, I ought to aid that mode of applying it, rather than order it to be given to the judgment creditor.

If the acceptance of the surrender or abandonment of the policy by the company is not in the terms contained in Mr. Gorrie's letter, then there has been no proper acceptance of it, and no money to be attached. If the company have accepted the surrender, they have no right to impose terms to which Mr. Gorrie did not assent.

Looking at the facts as they are presented to me, I do not think that the amount sought to be attached can be attached. Even if it were a debt that could be attached, I should, if it be a matter in which I have the right to exercise a discretion, decline under the circumstances of the case to aid the judgment creditors.

Summons discharged.

CHANCERY REPORTS.

(Reported by Alex. Grant Esq, *Barrister at Law, Reporter to the Court.)*

Weir v. Weir.

Alimony—Cohabitation.

The right of a wife is to reside with her husband, in his home or in the joint home of both: where, therefore, it appeared that the husband resided with his children, (by a former wife), and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shewn on the part of the husband towards his wife, made a decree for alimony in her favour; and that, although it was shewn that during such time the husband had been in the habit of visiting and remaining with his wife.

This was a suit for alimony, under the circumstances stated in the head note, and came on for the examination of witnesses and hearing before his Lordship the Chancellor at the sittings of the Court at Ottawa, in October last.

Radenhurst for the plaintiff.

McLennan for the defendant.

Vankoughnet, C.—This case is somewhat a singular one. The plaintiff sues her husband for alimony on the main and indeed only ground on which the right to it here can rest, that the defendant will not receive her into his own house and home, or does not receive her there under such conditions, as enables her or makes it her duty to remain there with him. The facts are shortly these. The plaintiff and defendant were married some five or six years ago. The defendant then, and ever since, has had his home at a place called Spencerville, on the line of the Ottawa and Prescott Railway, and a few miles in rear of Prescott. At the time of his marriage he was a widower, with a family by his former wife, some of whom had reached man's estate, and the others were in near approach to it. To his family, his marriage was most distasteful. His sons and daughters lived with him at what was known as the homestead—the home referred to—and, from the evidence given by some of them before me, they appear to have resolved from the first that the plaintiff should neither enter nor live in their father's house. It does not appear that the defendant himself was unwilling to

receive her there, but, overborne by his children of the former marriage, he seems to have acquiesced in their objections, and not to have exercised either his parental authority or his rights as *magister domi* to secure for his wife a place in his home. The result has been that for years he has been supporting and maintaining her at hotels, occasionally visiting her and having with her the intercourse which marital relations justify. In answer to the plaintiff's appeal for a fixed alimony this intercourse is set up in bar, and it is said that it amounts to, and answers all the obligations which are understood by, cohabitation, and which marital rights demand. On a motion before me to dismiss the bill for want of prosecution (*interim* alimony having been granted), and again at the hearing of the cause, I stated emphatically my opinion that cohabitation did not mean simply the intercourse of the parties, and the more especially when that was accidental and occasional, as in this case, and that it means the living together of the man and woman as husband and wife in the home of the former, or in their joint home, wherever that might be, and that it never could be tolerated that a man, a husband, might dwell in his own ascertained home and compel his wife to live in an inn or boarding-house, or other place, visiting her as he pleased, and be at liberty to say that she was thus in full possession of her conjugal rights, and that he was doing his duty by her. Fancy for a moment what the state of society might be if such a monstrous doctrine were admitted? A man living, perhaps, in luxury, in his own house, stopping short of that crime which might entitle his wife to a divorce absolutely, and yet leaving her to live at a place of public entertainment, not only without his society and the privacy and comfort of that home for which every married woman bargains when she casts in her lot with him she weds, but exposed to an acquaintance with any and every one who may in such a place intrude himself upon her. Forsaken, deserted and alone, under such circumstances, can any man dare to say she enjoys those rights which the married state confers upon her? In a suit in the ecclesiastical courts in England, for the restitution of conjugal rights, the common sentence of the court is, "That the husband receive his wife home as his wife, and treat her with conjugal affection." It is argued here that because the wife has, in the different places in which the defendant has procured her an abode, received him as her husband, and had sexual intercourse with him, she has submitted to her condition and debarred herself from complaining. I think not. She has shewn but a desire to maintain her marital connection with her husband, to yield to him as such, to afford him no cause of complaint, and to prove to him her desire to continue to him the duties of a wife at any sacrifice. This the courts in England could not have enforced upon her any more than upon him: for while they can enforce co-habitation they cannot compel intercourse. I do not think that her submission in this respect can be urged against her plaint, or treated as any condonation of the wrong which her husband does her in not taking her to his home. It is also alleged that the defendant is quite willing to receive her into his house, but how? While there is proof that he once himself brought her there, and that he again told her she was welcome to come; what we find was, on the occasion he did bring her there, and would probably be again her treatment if she ventured a visit, the eldest son of the defendant, a young man of 21 years of age, tells us—he says, when his father and the plaintiff arrived in a carriage in the yard adjacent to the house, he, the son, took the horse by the head, turned him round, and led him, and the carriage, with the plaintiff and defendant in it, out of the premises. In fact he turned them out again; he would not let the plaintiff enter; and he swears that neither he nor his brothers and sisters will have her there. In fact, as I understand him, she has only to enter to be ejected. The defendant submits to this action of his children. Is the plaintiff bound to do so? I think not. If the defendant cannot protect her in his own house, she is justified in keeping out of it, and compelling the defendant to make to her a proper allowance to support her elsewhere. She is willing to go to him. It is his duty to receive her, and to maintain her in his house free from assault, and from the insults of others, even though they be his own children. If his parental authority be not sufficient to re-train them, then his duty is to remove them out of his wife's way. His first duty is to her, to cleave to her, leaving all others beside; and if he is not prepared to do this, then he subjects himself to the only penalty which this court can inflict, as it does now, namely, an order to pay to her a fitting sum (to be settled by the Master) for her permanent maintenance, by way of alimony.

I have delayed judgment in this case in the hope that the parties might come to some arrangement among themselves; though I confess, from what I heard in evidence, and what I saw myself in the case of the defendant's gross mi-conduct, I had but faint hopes of his doing anything that was proper.

GENERAL CORRESPONDENCE.

County Courts—Pleas to the jurisdiction—Interlocutory judgment.

To the Editors of the Law Journal.

Gentlemen,—You will oblige your many subscribers in this place by inserting the following "judgment" in a case argued here.

A. brought an action against B. for trespass to land in the township of B. Defendant pleads—1. Not guilty. 2. Not possessed. 3. Leave and licence, accompanying the 2nd plea with the affidavit required by section 20 of the County Courts' Act. Plaintiff signed judgment and gave notice of assessment. Defendant made application to have interlocutory judgment and subsequent proceedings set aside.

It came on for argument before the judge in chambers, and the following "judgment"

was given in writing:—"I think the judge "can do nothing as to the issue. No such "issue could be properly raised."

"Judgment should not be signed. Any "order of the court on the judgment would "be objectionable. Any step under this "proceeding would be useless."

"A question of title to land cannot be "tried; *a fortiori* it cannot be disposed of "without a trial. Interlocutory judgment "set aside. Silent as to costs."

Yours truly,

Goderich, Dec. 24, 1864. Lex.

County Judge granting order in Superior Court cause—Stamps.

To the Editors of the Law Journal.

Gentlemen,—Where a statute gives authority to a County Court judge to issue an order in the Superior Court, for instance, that an attachment should issue, is this a Superior or County Court order, and what character of stamps would it require, and for what amount.

Yours truly,

A Subscriber.

Brantford, Feb. 15, 1865.

[Every case must depend upon the statute authorising the proceeding under it. If the proceeding be a step in a cause pending in a superior court, we think that the stamps there required would be necessary. In the case put by our correspondent we have no doubt but that the same stamps are necessary whether the order for a writ of attachment is issued by a superior or a county court judge.—Eds. L. J.]

Profession of the Law—A learned profession—Necessity of keeping it so—Suggested remedies.

To the Editors of the U. C. Law Journal.

Gentlemen.—It is with pleasure that I notice a communication in your last number from the pen of "A Barrister," relative to the adoption of some efficient scheme, by which the profession of the law may be raised to a higher standard, and the influx into its ranks restrained within legitimate bounds. Not that I, more than yourselves, think favourably of *all* the plans mooted in his letter; but that I believe him to have drawn the attention of the Benchers to a most important question, and one which craves their immediate and careful consideration.

It cannot but occasion serious alarm to every reflecting practitioner when he considers the unparalleled rapidity with which lawyers have multiplied within the past few years, and the number of aspirants who are now entering, and preparing to enter, the profession. Scores of young men present themselves for the primary examination in every term, and are "passed." It is impossible to estimate the injury which the country and the profession sustain in thus allowing practitioners to multiply.

The profession of law is already crowded with eager and needy practitioners, who, lacking the ability to take an honourable position among their compeers, are driven to the necessity of eking out a scanty subsistence by means of petty chicanery—lending their assistance to designing clients for the purpose of frustrating the ends of justice. In this way, men who in other spheres of life would be useful to society—as agriculturists or mechanics—are, by the force of circumstances, rendered a reproach to themselves and of serious injury to the community in which they dwell.

The Provincial anxiety must necessarily be to have the profession of the law practised by able and respectable men, men of learning, men of virtue; men whom the study of law has so imbued with respect for its sacred character and maxims, as instinctively to shrink from the commission of wrong. The influence of solicitors on the Province is immense; it is through them that litigation, for the most part, is commenced; it is into their hands that clients are constantly entrusting their property, reputation, and dearest interests in life, depending upon their integrity, learning and judgment, for the proper administration of their affairs.

Contemplating the profession in this light, and regarding it as a high and honourable calling, it cannot be doubted that it is for the interest of the public and the profession, that it should be practised by learned and reputable men. Law is the great safeguard of the people, their most powerful protector, their inflexible friend: blot it out, or impede its free course of justice and you wrest from their grasp the keystone of their liberties, the pledge given them for the strict observance of their rights.

This nas been well expressed by the poet in the following lines :—

"If there be any land, as fame reports,
Where *Common Laws* restrain the prince and subject,
A happy land, where circulating pow'r
Flow through each member of the embodied state;
Sure, not unconscious of the mighty blessing,
Her grateful *sons* shine bright with every virtue;
Untainted with the lust of innovation—
Sure all unite to hold her league of rule
Unbroken as the sacred chain of nature
That links the jarring elements in peace."

Assuming, then, that such ought to be the character of every respectable barrister, these questions naturally present themselves. Do the lawyers of Upper Canada, as a body, bear that character? Are the Benchers of the Law Society pursuing that course, in reference to the qualifications of a barrister, calculated to lead to this desirable result? If not, what measures should they adopt?

With the first query your correspondent has nothing to do; upon the others, with your permission, a few comments will be offered, and in doing so, some of "A Barrister's" suggestions will be collaterally referred to.

Acquainted as we are with the frailties of our nature, and knowing how far short of perfection all human rules must fall, it would be folly in us to expect, whatever the regulations of the Law Society might be, that they would in all cases secure the desired ends. But that a great step towards improvement would be the raising of the standard of examinations, cannot, I think, be for a moment questioned by those who have any knowledge of what these examinations now are. Take, for example, the primary, and let us examine the amount of learning requisite to "*pass*." On looking at ., we find two books of Horace, and three of Geometry—absolutely *nothing* else. You may be wholly ignorant of English Grammar, know nothing of history, may never have seen an Algebra, or not know how to work a question in simple interest; your geographical information may be so general that you are in doubt whether Canada is north or south of the equator; your acquaintance with the great authors who have adorned the literature of our country may be so extensive as not even to know their names; yet, if you are able to translate four lines of Horace, answer a few simple questions upon the parsing, and can go through one proposition in Geometry, (it may be by rote) you will be admitted as a member of the Law Society, and duly enrolled as a student of the laws.

In the name of common sense is not this a farce! Is it not high time that such an examination should undergo regeneration? My firm conviction is, that this examination will be found the great bait alluring so many to the study of law. It is supposed to be an easy life, an honourable profession, and, more than all, very easily obtained. It is regarded by most ignorant young men, not as a mountain, steep and toilsome in its ascent, whose top alone is crowned with verdure; but as a valley, filled with fruit, through which every careless wayfarer may pass and regale himself at pleasure. By them it is not looked upon as a science containing the sparks of all the sciences in the world; but as one whose characteristics are those of subtlety and impudence. So long as this impression pervades the public mind, it is easy to understand why so many rush unthinkingly into the profession of law.

It has, I understand, been contemplated by the Benchers to compel all articled clerks to serve five years without reward for their services, and "A Barrister" proposes, as an improvement, that lawyers should form themselves into clubs, and agree to take in no clerks without a heavy fee; that the fees on all examinations should be doubled and in some cases trebled. These schemes appear to me very bad, and while productive of great evils, would not remedy those at present existing. It would only open a wide door to the sons of the wealthy, while the hard-reading sons of the poor would be excluded from the profession. The barrister's gown would be conferred on those who could pay for it; the honour would not be the result of patient, persevering study; and, in the course of time, we should look back with regret, and marvel at the intellectual giants who had given birth to a race of pigmies. This policy would be suicidal.

Let the Law Society give the public to understand that learning is required at the hands of every one aspiring to the bar. Let the people *feel* that it is a profession requiring a high degree of literary attainment. If the Benchers wish to raise the profession, they must strike at the roots of the disease. If they wish to exclude the stupid and ignorant, they must make the course of study severe, and one requiring energy and perseverance to master. They must make the profession

a *learned* one not in *name* alone but *in deed*. For we remember how Milton, who was master of nearly all the polite learning of his own time, has truthfully written that "learning, like an eagle in his mighty youth, spreading its wings far and wide, nerves the mind to vigorous action, and, purging it of shallow prejudices, kindles in the student the pure love of truth and justice." We all have seen the Latin aphorism—

> "Ingenuas didicisse fideliter artes
> Emollit mores, nec sinit esse feros."

Let the Benchers, instead of only making two books of Horace and three of Geometry the test of admission into the Society, compel all candidates to undergo a severe written examination (at least equal to the third year's examination in the University of Toronto) in English, Ancient and Modern History, Classics, and Mathematics, selecting those text-books peculiarly adapted for training the mind, previous to entering upon their professional studies. Let graduates of colleges be compelled to submit themselves to the same ordeal, and to serve *five* years in an attorney's office instead of *three*. Let competent examiners be appointed, (probably some of the University professors could be engaged) and the number of marks necessary to be obtained placed high. Then, and not till then, may we hope to see the science of law restored to its pristine dignity, practised by men regarding it as a science, whose chief object is the upholding of justice and promoting the *componere lites*—the amicable settlement of litigious wranglings; and not *discordias alere*—the stirring up of malignant strifes. Then may we hope to see the profession filled with honourable men, looked up to by the people as men deserving of esteem, and desirous of promoting the welfare of the country.

Vox Populi.

February 21, 1865.

[We are pleased to find that the letter of our correspondent "A Barrister," which appeared in our January issue has awakened so much attention. He touched upon topics of vital interest to the future welfare and good government of the profession in Upper Canada. The evils which he pointed out are known to exist, but the difficulty is to find appropriate remedies. No doubt men of imperfect education ought not to be admitted, and if the rules now in force admit such, the rules should be at once amended. So far we agree with "Vox Populi," and shall be glad to receive suggestions from him and others in furtherance of the object in view, in the hope that at some early day those who have the power may be enabled to use it rightly and discreetly. It is said that in the multitude of counciliors there is wisdom—an adage of some application so far as the present discussion is concerned. —Eds. L. J.]

Law of away-going crops in Upper Canada.

To the Editors of the Law Journal.

March 2, 1865.

On the first of December last, A. rents a farm from B. for ten years, at a fixed rent, and immediate possession is given to A., who enters at once, and having been upon the farm a few days, the tax collector calls and demands the taxes for the past year, they not having been paid; and as A.'s lease provides that he (A.) is to pay all taxes due and to become due, A. of course had no other alternative than paying up. The off-going tenant, who was farming the place on shares with B. (his landlord), has left two fields sown last fall with wheat. Your opinion is requested as to whom this wheat belongs; is not A. entitled to the whole, there being nothing mentioned in his lease with B. as to any party entering to take the wheat off?

An old Subscriber.

[There is a notion prevalent that a tenant for a term of years has by the custom of the country the right to put in a fall crop during the last year of his tenancy, and after the expiration of his lease the right to go upon the land to reap it. In the absence of express stipulation in the lease the tenant, in our opinion, has no such right. If he quit the premises at the expiration of his lease, leaving a full crop in the ground, that crop under an ordinary lease as a part of the freehold passes to the landlord; and so if the landlord without reservation re-let the premises for a second term, the crops being at the time of the new lease in the ground, we apprehend the crop passes to the new tenant, as supposed by our correspondent: (See *Burrowes* v. *Cairnes*, 2 U. C. Q. B. 288; *Campbell* v. *Buchan*, 7 U. C. C. P. 70; *Gilmore* v. *Lockhart*, MS. R. & H. Dig., Lease I. 6.]—Eds. L.J.

Lessor and lessee—Case imperfectly stated—Refusal to answer.

To the Editors of the Law Journal.

Gentlemen,—Will you have the kindness to answer me the following question. If a lease of certain premises is made, say, for the term of six years, and the lessee has the privilege of taking the premises for the same time again, and supposing the lessee continues in possession of the premises for one year after the lease expires, would he be obliged to continue in possession for the full time of another six years; or, what amounts to the same thing, would he be liable for rent for any longer time than the one year, no new lease or agreement being made or asked for by the lessee? By answering the above question your will confer a great obligation on

Yours,

A Law Student.

[We have no objection to answer questions of general interest to our readers, but cannot undertake to advise upon cases of interest only to the particular inquirer. The above communication we class among the latter, and so must decline to answer it. Even if disposed to answer it, we could not do so upon the case as stated, without seeing the lease or a copy of it, supposing it to be in writing, and without knowing whether or not it is under seal. The case had better be properly stated and submitted to counsel, with a fee for his opinion.—Eds. L. J.]

Equitable Mortgage—Registration.

To the Editors of the Law Journal.

Gentlemen,—Sec. 44, cap. 89, C. S. U. C., provides that an "Equitable Mortgage must be registered before it can prevail against a second mortgage, &c."

Secs. 19 & 20 fully set forth the requisites of every Memorial to be registered.

I cannot understand how such a Memorial is to be made for the registration of an Equitable Mortgage—how an Equitable Mortgage can be registered.

An explanation will be of interest to many of your readers.

Yours, &c.,

Kingston, March, 3, 1865. A Student.

[We are as much at a loss to understand the meaning of the enactment to which our correspondent refers as our correspondent himself.

We have always understood that an Equitable Mortgage arises upon an agreement to mortgage accompanied with a deposit of title deeds, or simply upon a deposit of title deeds without any express agreement. This being so, it is difficult to understand how a Memorial of it can be so prepared as to contain:

1. The date of the instrument, when there is none.
2. The names and addresses of the witnesses to the instrument, when there is none.
3. The land contained in the instrument, when there is none.

We understand that the subject of the registration of equitable mortgages is now before the Court of Chancery, in the case of *Harrison* v. *Armour*.]—Eds. L. J.

JUDGMENTS.

QUEEN'S BENCH.

Present: Draper, C. J.; Hagarty, J.; Morrison, J.

March 6, 1865.

Robinson v. *Gordon*.—Rule discharged with costs.

In re Fennell and the Town of Guelph.—Rule absolute to quash (1) The 2nd clause of by-law No. 75; (2) The 4th clause of same by-law; (3) The 3rd clause of by-law No 80; (4) So much of by-law No. 84, as relates to poultry, eggs, cheese, grain, shingles, flour, wool, vegetables and fruit; (5) So much of 3rd clause of same by-law as relates to any persons not being hucksters or runners—with costs; and to discharge the rest of the rule.

Keating v. *Cassels*.—Judgment for defendant on special case.

Baird v. *Story*.—Judgment for defendant on demurrer.

Covert v. *Robinson*.—Rule discharged.

Hogan v. *Berrie*.—Rule discharged.

Spence v. *Hector*.—Verdict to be reduced by the amount of the interest, and discharged as to other points, without costs.

Thornton v. *Sandwich Plank Road Co*.—Verdict set aside, with leave to defendants to apply in chambers, within 14 days, to withdraw equitable plea, and to plead to whole declaration such pleas as judge may permit, or to plead to common counts, letting equitable plea stand. Leave to plaintiff to apply to amend, if advised. Costs to be costs in the cause.

McLean v. *Buffalo and Lake Huron R. Co*.—Rule discharged. Leave to appeal granted.

Webster v. *Harper et al.*—Rule discharged.

Mason v. *Morgan.*—Appeal dismissed with costs.

Barton v. *Town of Dundas.*—Rule discharged.

Ottawa Building Society v. *Scott*—Rule absolute to reduce verdict, with costs to defendant.

Leech v. *Leech.*—Judgment suspended till second day of next term, to enable parties to make partition according to the expressed opinion of the court.

Pearman v. *Heyland.*—New trial on payment of costs.

Coffin v. *Danard et al.*—Rule discharged.

Campbell v. *Delehanty et al.*—Rule absolute to set aside nonsuit, and enter verdict for plaintiff.

Hunt v *McArthur.*—Action against a magistrate for maliciously and without probable cause arresting defendant. The evidence proved a trespass, and leave was reserved to enter a nonsuit. Rule absolute.

Kaysen v. *Hall*—Rule absolute for new trial, without costs.

Knowles v. *Post*—The court refused rule, as they had no authority to interfere.

Paterson v. *Todd*—Rule discharged.

March 10, 1865.

Bunting v. *Gummerson.*—Rule discharged.

Thomas v. *Great Western Railway Co.*—Postea to plaintiff.

Green v. *Wright*—Judgment for defendant on demurrer.

Bletcher v. *Burns.*—Rule discharged.

Bletcher v. *Marsh.*—Rule discharged.

In the matter of McLay and Hammond.—Rule discharged.

COMMON PLEAS.

Present: Richards, C. J.; Adam Wilson, J; John Wilson, J.

March 6, 1865.

Henback v. *Robertson.*—Appeal allowed without costs, and rule made absolute in court below to enter a nonsuit John Wilson, J., *dissentiente.*

Franck v. *Carson.*—Rule discharged.

Spettigue v. *Great Western R. Co.*—Rule absolute to enter a nonsuit.

Miller v. *Thompson.*—Judgment for plaintiff on demurrer to plaintiff's declaration.

Featherstone v. *McDonald.*—Rule absolute to enter verdict for plaintiff.

Great Western Railway Co. v. *Bain.*—Rule discharged.

Nudell et al. v. *Williams et al.*—Rule discharged.

Squire qui tam v. *Wilson.*—Rule discharged. A Wilson, J, *dissentiente.*

Reynolds v. *The City of Toronto.*—Rule absolute to enter nonsuit.

Lowell v. *Todd.*—Rule absolute for new trial. Costs to abide the event.

Scott v *Reikie.*—Rule absolute for new trial on payment of costs.

White et al. v. *Baker.*—Judgment on demurrer for plaintiff.

Graham v. *Stewart.*—Rule absolute for new trial, without costs.

Harold v. *Stewart.*—Rule discharged. Adam Wilson, J., *dissentiente.*

McGuire v. *Shaw.*—Rule absolute for new trial. Costs to abide the event.

McNab v. *Stewart.*—Rule absolute for new trial as to east half of lot in question, if defendant consent before 10th April: otherwise rule absolute to set aside whole verdict on payment of costs.

Sloan v. *Whalen.*—Rule discharged with costs.

Gott v. *Ferris.*—Rule absolute for new trial on payment of costs.

Buchanan v. *Frank.*—Rule discharged with costs. *Held*, that Sheriffs are not entitled to poundage, unless money *actually levied*, although it may have been made under pressure of writ.

Baxter v. *Boyne*—Rule absolute for new trial. Nothing said as to costs, for statute makes them to abide event.

Nickle v. *Nickle.*—Rule absolute for new trial. Costs to abide the event.

The Queen v. *Ouilette.*—Conviction quashed.

Hicks v. *Godfrey*—Judgment for defendant, on the demurrer to the declaration.

In the matter of O'Neil and the Corporation of York and Peel.—Rule discharged with costs.

McLaughlin v. *McLaughlin.*—Rule discharged (court having no jurisdiction in case cannot give costs.) *Held*, that a judge in chambers has no power to direct the trial of an issue.

March 10, 1865.

Attorney General v. *Perry.*—Judgment for plaintiff.

Greaves v. *Hilliard.*—Rule absolute to enter nonsuit.

McKinley v. *Munsie*—Rule absolute to enter nonsuit. John Wilson, J., *dissentiente.*

Northern Railway Co. v. *Patton et al*—Rule absolute for new trial on payment of costs.

Date v. *Gore District Insurance Company.*—Rule discharged.

Wilkins v. *Row.*—Rule discharged.

Paterson v. *Bates.*—Rule discharged.

Twohy v. *Armstrong.*—Rule absolute for new trial on payment of costs, and rule for plaintiff on demurrer.

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Wm Thomas Kiely	London.
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Richard Murphy	Toronto.
John Murphy	Toronto.
John Breene	Mariposa.
Joseph Breene	Mariposa.

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Charles Carpenter	Hamilton.
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Alex Malcolm	Alliston
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Ellis Luther Derby	Napanee.
W Armstrong	Peterboro.
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A Lang	Barrie
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Cosby Storey	Newboro.
James Fecly	Norwood.
Duncan McDonald	Sarnia.
Pierre Poulin	Ste. Cecile.

APPOINTMENTS TO OFFICE.

JUDGES.

WILLIAM DAVIS ARDAGH, Esq., to be Deputy Judge of the County Court of the County of Simcoe. (Gazetted February 11, 1865.)

NOTARIES PUBLIC.

MICHAEL HAYES, of Toronto, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

WILLIAM LOUNT, of Barrie, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

THOMAS BABINGTON McMAHON, of Bradford, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

CHARLES ELDON EWING, of Wicklow, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

CORONERS.

NEIL FLEMING, Esq., M.D., Associate Coroner, United Counties of Huron and Bruce. (Gazetted Feb. 11, 1865.)

JOHN WILSON, Esq., M.D., Associate Coroner, County of Norfolk. (Gazetted February 18, 1865.)

THOMAS AISHTON, Esq., M.D., Associate Coroner, County of Lennox and Addington. (Gazetted February 18, 1865.)

THOMAS FREER, Esq., M.D., Associate Coroner, United Counties of Lanark and Renfrew. (Gazetted Feb. 25, 1865.)

REGISTRARS.

ALEXANDER McLEOD MACKENZIE, Esq., Registrar of the County of Glengarry. (Gazetted February 25, 1865.)

TO CORRESPONDENTS.

"Lex"—"A Subscriber"—"Vox Populi"—"An Old Subscriber"—"A Law Student"—"A Student"—under "General Correspondence."