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THE

UPPER CANADA LAW JOURNAL

AND

LOCAL COURTS' GAZETTE;

FROM JANUARY TO DECEMBER, 1858.

VOLUME IV.

EDITED BY

W. D. ARDAGH, ESQ.; AND ROBERT A. HARRISON, ESQ., B.C.L.,

BARRISTERS-AT-LAW.

TORONTO:

PRINTED AND PUBLISHED AT 17 & 19 KING STREET, BY MACLEAR & CO

1858.

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THE UPPER CANADA LAW JOURNAL

AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

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

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INDEX TO ENGLISH LAW REPORTS,

FROM 1813 TO 1856.

JUST PUBLISHED, BY T. & J. W. JOHNSON & CO.,

No. 197, Chestnut Street, Philadelphia.

A GENERAL INDEX to all the points direct or incidental decided by the Courts of *King's* and *Queen's Bench Common Pleas*, and *Nisi Prius*, of England, from 1813 to 1856, as reprinted, *without condensation* in the *English Common Law Reports*, in 83 vols. Edited by George W. Biddle and Richard C. Murtrie, Esqs., of Philadelphia. 2 vols. 8 vo. $[illegible]

References in this Index are made to the page and volume of the English Reports, as well as to Philadelphia Reprint making it equally valuable to those having either series. From its peculiar arrangement and admirable construction, it is decidedly the best and most accessible guide to the decisions of the English Law Courts.

We annex a specimen showing the plan and execution of the work:

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I. General Rules.

II. Parties to the Action.

It is sufficient on all occasions after parties have been first named, to describe them by the terms "said plaintiff" and "said defendant" Davison v. Savage i. 537; 6 Taun. 575. Stevenson v. Hunter, i. 675; 6 Taun, 406.

And see under this head. Titles, Action; Assumpsit; Bankruptcy; Bills of Exchange; Case; Chose in Action; Covenant; Executors; Husband and Wife Landlord and Tenant; Partnership; Replevin; Trespass; Trover.

III. Material Allegations.

Whole of material allegations must be proved. Reece v. Taylor, xxx. 530 N & M. 469.

Where more is stated as a cause of action than is necessary for the gist of the action plaintiff is not bound to prove the immaterial part. Bromfield v Jones x, 621; 4 B & C. 380. Eresham v. Posten, xii 721; 2 C & P. 540. Dukes v Gostling, xxvii, 786; 1 B N C, 588. Pitt v. Williams, xxix, 203; 2 A & P, 841.

And it is improper to take issue on such immaterial allegation. Arundel v. [illegible]man, ix. 101; 8 Taun. 169

Matter alleged by way of inducement to the substance of the matter, need not be alleged with such certainty as that which is substance Stoddart v. Palmer, vi 212; 4 D & R, 624. Churchill v. Hunt, xviii 2[illegible]3; 1 Chit. 480 Williams v. Wilcox, xxxv 603, 8 A & E 314. Brunskill v. Robertson xxxi, 9 A & E. 840.

And such matter of inducement need not be proved. Crosskeys Bridge v. Rawlings, xxxii, 41; 3 B N C, 71.

Matter of description must be proved as alleged Wells v. Girling. v. 853; [illegible] 21. Stoddart v. Palmer, xvi 212, 4 D & R, 624 Ricketts v. Salwey, xviii, 8; 1 Chit 101. Tresdale v. Clement, xvii, 329; 1 Chit. 603

An action for tort is maintainable though only part of the allegation is proved. Ricketts v. Salwey, xviii 69; 1 Chit. 104. Williamson v. Allen. xix, 140; Bing. 266. Clarkson v. Lawson, xix, 299. 6 Bing 587.

Plaintiff is not bound to allege a request except where the object of the request is to oblige another to do something Amory v. Broderick. xviii, 660; Chit. 329.

In trespass for driving against plaintiff's cart it is an immaterial allegation that he was riding in it Howard v Peete xviii, 658; 2 Chit. 315.

In assumpsit the day alleged for an oral promise is immaterial, even since the new rules. Arnold v. Arnold xxvii 47; 3 B N C, 81

Where the *terms of a contract* pleaded by way of defence are not material to the purpose for which contract is given in evidence, they need not be proved. [illegible]son v. Fallows xxxii 186; 3 B N C, 392.

Distinction between unnecessary and immaterial allegation. Draper v. Garratt, ix. 11; 2 B & C. 2.

Preliminary matters need not be averred. Sharpe v. Abbey. xv, 537; 5 Bing, 93

When allegations in pleadings are divisible. Tapley v. Wainwright xxvii 710; 5 B & Ad 395 Hare v Horton. xxvii, 502; 5 B & Ad 715. Hartley v. Burkitt, xxiii, 925; 5 B N C, 187. Cole v. Creswell, xxxix, 355; 11 A & E, 661 Green v Steer, xli 740; 1 Q B, 707.

If one plea be compounded of several distinct allegations, one of which is not itself a defence to the action, the establishing that one in proof will not support the plea Baillie v Kell, xxxiii, 900; 4 B N C, 638.

But when it is composed of several distinct allegations, either of which amounts to a justification, the proof of one is sufficient. Ibid

When is tender a material allegation. Marks v. Lahee, xxxii, 193; 3 B N C, 408. Jackson v. Allaway, xlvi. 842; 5 M & G, 942.

Matter which appears in the pleadings by necessary implication, need not be expressly averred. Galloway v. Jackson, xliii. 498; 3 M & G. 960. Jones v. Clarke, xliii 694; 3 A & B 194.

But such implication must be a necessary one. Galloway v. Jackson, xliii. 498 3 M & G, 960. Prentice v. Harrison, xlv. 852; 4 Q B 852. ;

The declaration against the drawer of a bill must allege a promise to pay. Henry v. Burbidge, xxxii 234; 3 B N C. 501.

In an action by landlord against sheriff under 8 Anne, cap. 14, for removing *goods taken in execution without paying* the rent, the allegation of removal is material. Smallman v Pollard. xlvi 1001.

In covenant by assignee of lessor for rent arrear, allegation that lessor was possessed for remainder of a term of 24 years, commencing, &c., is material and traversable Carvick v. Blagrave. v. 763; 1 B & B. 531.

Minimum of allegation is the maximum of proof required. Francis v. Steward, xlvii, 984; 5 Q B, 984, 986.

In error to reverse an outlawry, the material allegation is that defendant was abroad at the issuing of the exigent, and the averment that he so continued until outlawry pronounced need not be proved. Robertson v. Robertson, i, 165; 5 Taun, 209.

Tender not essential in action for not accepting goods. Boyd v. Lett, l, 221; 1 C B 222.

Averment of trespasses in other parts of the same close is immaterial. Wood v Wedgwood l, 271; 1 C B. 273.

Request is a condition precedent in bond to account on request. Davis v. Cary, lxix. 416; 15 Q B, 418.

Corruptly not essential in plea of simoniacal contract, if circumstances alleged show it. Goldham v Edwards, lxxxi 435; 16 C B. 437.

Mode by which nuisance causes injury is surplusage. Fay v Prentice, l, 827; 1 C B 828.

Allegation under per quod of mode of injury are material averments of fact, and not inference of law in case for illegally granting a scrutiny, and thus depriving plaintiff of his vote Price v Belcher, liv. 58, 3 C B, 58.

Where notice is material, averment of facts "which defendant well knew," is not equivalent to averment of notice. Colchester v Brooke, liii. 339; 7 Q B, 338

☞ Specimen Sheets sent by mail to all applicants.

HARRISON'S COMMON LAW AND COUNTY

COURTS PROCEDURE ACTS, 1856.

IT has been found that this work will much exceed the number of pages originally contemplated; the time for its delivery in complete form must therefore be delayed longer than at first expected. For the convenience of the Profession, it has been arranged that subscribers shall receive their copies in parts of about 100 pages each, *upon the terms of strict payment in advance.*

Part I, II, III, IV, V, and VI, containing the whole of the Common Law Procedure Act, 1856, NOW READY.

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January, 1857. n6-tf

LAW SOCIETY OF UPPER CANADA,

(Osgoode Hall.)

Mich. Term, 21st Victoria, 1857.

On Monday, the 16th November, in this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :—

Niel McLean Trew, Esquire,	Farquhar McGillivray, Esquire,
Gilbert Tice Bastedo, "	Daniel Macarow, "
James Agnew, "	Alex. Sutton Kirkpatrick, "
Robert MacFarlane, "	Alfred Driscoll, "
James Maclennan, "(with honors)	Edward Wm. Jas. Tinney, "

On Saturday, the 21st November, in this Term, the Honorable Robert Baldwin was re-elected Treasurer of this Society.

On the same day Jacob Farrand Pringle and George Boomer, Esquires, members of the Society of the degree of Barrister-at-Law were elected Masters of the Bench.

On Tuesday, the 24th day of November, in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows :—

University Class :

Mr. Alexander Robert Morris, B.A.,	Mr. James Fox Smith, B.A.,
" James Webster, Junior, B.A.,	Charles Ingersoll Bunson, B.A.

Senior Class.

Mr. Robert Swanton Appelbe,	Mr. Cornelius Danford Paul.

Junior Class :

Mr. James Robb,	Mr. George Slimmie Philip.
" James Shaw Sinclair,	" Frederic Henry Stayner,
" Edmund James Beatty,	" Samuel Barker,
" Thomas Deacon,	" James Cleland Hamilton.

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

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

For the Optime Class:

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

For the University Class:

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

For the Senior Class:

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

For the Junior Class:

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

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

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

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

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

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

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

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

ROBERT BALDWIN,
Treasurer.

Mich. Term, 21st Victoria, 1857.

STANDING RULES.

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

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

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

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

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

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

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

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

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

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

Legislative Council,
Toronto, 4th September, 1857.

EXTRACT from the Standing Orders of the Legislative Council.

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

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

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REMITTANCES.

December, 1857.—H. C., Storrington, $10; Ed. R. K. Selkirk $12; E. S., Wilton, $10; A. A. H. do., $5; G. A., Allanville, $5; J. P., Weston, $5; J. F. C., Southampton $5; A. F. S., Brampton, $5; W. D., Berlin, $10; C. A., Ottawa, $10; D. McC., Woodbridge, $12; T. W., Port Hope $10; J. A., Dunnville, $4; G. W. W., Toronto, $6; D. K., Preston, $4; P. D., Owen Sound, $9; G. S., St. Ann's, $4; R. Y., Stewarttown, $4; S. & McD., Goderich $5; R. S., Berlin $8; W. T., Erin, $5; D. G., Smithville, $4; T. R. R. S., Errol, $4; T. J. R., Euphrasia, $9.

FINANCIAL MATTERS.

Parties in arrears for the LAW JOURNAL will particularly oblige the Proprietors by remitting the amounts due to them immediately. The aggregate of the sums now outstanding and unpaid is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time very seriously affects the Proprietors of the Journal. We expect, therefore, that our friends will pay *prompt* attention to this notice.

DIARY FOR JANUARY.

1. Friday ..... Circumcision.
3. SUNDAY... *2nd Sunday after Trinity.*
4 Monday.... Co. Court Term commences, and Sittings of Heir & Devisee Com.
7. Thursday .. Toronto Winter Assizes.
9. Saturday .. County Court Term ends.
10. SUNDAY... *1st Sunday after Epiphany.* Trinity College Lent Term begins.
16. Saturday . Sittings Heir and Devisee Commission ends.
17. SUNDAY... *2nd Sunday after Epiphany.*
18. Monday..... Articles of Service and Affidavits for admission as Attorney in Hilary Term, to be left with Secretary of Law Society.
24. SUNDAY... *3rd Sunday after Epiphany.*
25. Tuesday.... Chancery—Last day for serving appointments for February Exam.
31. SUNDAY... *Septuagesima Sunday.* [Term.

"TO CORRESPONDENTS"—*See Last Page.*

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

We do not undertake to return rejected communications.

Matter for publication should be in the hands of the Editors at least *two* weeks prior to the number for which it is intended.

Editorial communications should be addressed to "*The Editors of the Law Journal, Toronto,*" or "*Barrie.*"

Advertisements, Business letters, and communications of a Financial nature should be addressed to "*Messrs. Maclear & Co., Publishers of the Law Journal, Toronto.*"

Letters enclosing money should be *registered*;—the words "Money Letter" written on an envelope are of no avail.

MR. ALEXANDER MORRISON *is appointed Travelling Agent for this Journal, and as such is authorized to obtain subscribers and advertisements.*

The Upper Canada Law Journal.

JANUARY, 1858.

OUR FOURTH YEAR.

WITH this number we enter on the fourth year of publication. Though we strive especially to please our more immediate patrons, and to serve their interests, we are not unmindful of the good opinion of the general public manifested by their organs—the lay press. We have to express our thanks to our brethren of the press for the kind and encouraging commendations bestowed upon us by them since our commencement.

We are by no means exclusive, either in thought, word or deed. It is our deliberate opinion that the good of the public is the good of the lawyers, and that the good of the lawyers is our good. These we take to be truisms. It is Utopian for any one to expect that the public ever can dispense with the services of the legal profession :—

> "For what bigot durst ever draw,
> By inward light, a deed in law?
> Or could hold forth by revelation
> An answer to a declaration?
> For those who meddle with their tools
> Will cut their fingers, if they're fools."

The prejudice against the legal profession is narrow-minded and ungenerous. Though possessing many benefits, like other professions it is subject to some abuses. No discriminating person should, however, confound the abuses of a system with its benefits, and attach that character to the whole which belongs only to some of its parts. For the greatest and most popular reforms of the present day the people are indebted to members of this much abused profession. This, too, done at a time when to all appearance there was self-immolation on the altar of the public good. The true course, after all, is to acknowledge and adhere to the principle that lawyers were made for society, and not society for lawyers.

It requires no profound penetration to learn that even the craving for cheap justice may be satisfied without loss to the profession. It has been proved by experience that in proportion as the costs of a suit abate, does the number of suits increase. It has also been proved that out of transactions wherein men entirely dispense with the services of lawyers, does the great bulk of litigation arise. If lawyers were employed to prepare all deeds, agreements and wills, there would be to the public at large a great saving of law costs. We do not write this from any selfish motive, but from conviction founded on experience. One third of the litigation of the Courts may be traced to the fact that lawyers are not called in until the mischief is done. Far easier would it be for a farmer to pay one pound to a professional man for his deed, than to pay ten shillings for it to a land agent, and afterwards to pay twenty pounds costs in having its meaning decided. The same may be said with still more truth with respect to wills: a desire on the part of a testator to save a few dollars in preparing his will, has in many cases caused the loss of his entire estate in endless law suits.

The longing for cheap justice stands on no better foundation. We firmly believe that if an action in one of the Superior Courts could be conducted to judgment for £5, instead of £15 as at present, there would be twenty suits for every one that is now brought. A very slender knowledge of arithmetic will declare the result to the inquisitive. The change, however, is not one to which we shall ever willingly subscribe. Cheap justice, in the common understanding of the term, is a great curse. It causes a litigious and quarrelsome spirit, a lawless and careless mien, an unsafe and rotten state of society. The wholesome dread of law expenses does more for the promotion of respect to law and the fostering of kindly feelings, than all the pains and penalties ever enacted in criminal statutes. Never shall we forget the saying of Priestley, that "the expense of the law is the price of liberty."

Our aim is to stand up for the legal profession as a body of gentlemen trained to serve their fellow men in a high and noble calling. Our mission is to inform lawyers that the more respectable they are as members of society, the more respected they will be by society at large. Our calling is to serve the lawyers by doing good to the public—to serve the public by doing good to the lawyers. Our attention, notwithstanding, shall be as much as ever directed

to the officers of the inferior tribunals, so as to make things easy for them in the performance of their duties. It is a matter of paramount importance that justice be soundly administered in the lowest as well as in the highest Courts of the land. This cannot be done if the officers—those through whom and by whom the stream of justice is permitted to flow—be unacquainted with their duties or heedless of their responsibilities. The position of a Bailiff in a Division Court is daily becoming one of honour as well as of emolument; that of Clerk has generally been both the one and the other. The Judge has his library of costly books to enable him to discharge the functions of his high trust. The lawyer also finds it necessary to be similarly provided for the work of his calling. Why then should not the Clerk and the Bailiff have their Manual of Instructions—their book of reference? We endeavour to provide it for them in the pages of this Journal, and can assure them that our desire is to be of good service to them. That we have been so, is well known. That we shall continue to be so, must depend upon the support we receive from that class of our subscribers.

We desire to see the names of a greater number of magistrates on our list than at present we find. Were this the case, we should devote a larger space for their information. It is notorious that the magistrates cannot afford to despise information such as we give, when tendered in a becoming manner. Often appointed—and we say it without disrespect—more because of political influence than of peculiar fitness, they stand in need of reliable advice. The letters we receive, and the inquires otherwise made of us, are quite ample to satisfy us upon these points. We hope shortly to commence in these columns "A Magistrate's Manual," and can assure those for whose benefit it is intended that it will be all that the name imports.

There is still another class of the community that does not patronise us in proportion to its wants—we mean Municipal Officers. We take every opportunity of making known decisions that concern them, and of giving hints that might be followed with advantage, but still do not receive in return that hearty and general support to which our efforts entitle us. Upon all occasions we are glad to solve doubtful points, when asked of us by those engaged in the administration of municipal affairs. It would be much better for this class of our people to take less for granted than it does. The endless number of by-laws which are set aside by the Courts, and the endless complications of every day affairs which in consequence result, ought to be a sufficient corroboration of our remarks.

It will be noticed that with this number our dimensions are enlarged. We now, without additional cost to our subscribers, offer one third more in each issue than we have hitherto been accustomed to do. This is an undertaking of some moment, when we view the tightness of the times and the difficulty of collecting money. We rely, however, upon being sustained in this step, and hope that, as we evince an increased desire to serve, we shall be met by an increased desire to support.

Each issue will, as announced in the December number, now contain thirty-two instead of twenty-four pages as heretofore, and, as will be seen, type smaller than hitherto used for the leading articles; thus doubly gaining in space, we are able to give our readers a much greater amount of reading matter.

The leading Articles will now be found commencing on the first page. Articles, Correspondence, and Queries in relation to the Division Court, will follow next in order. Then Treatises and Essays written expressly for the *Law Journal*, and Selections from the leading English and American Law Periodicals. Then Reports from the Superior and County Courts of Upper Canada, with Repertory, or short Notes of English Cases. General Correspondence and Book Reviews will be found in the last pages.

While carrying into execution these our promised improvements, we have much satisfaction in being able, as a still further proof of our desire to be useful to our supporters, to present them, with this number, a Legal Calendar for the year 1858, prepared expressly for the *Law Journal*.

SHALL WE HAVE A BANKRUPTCY LAW?

It is related of a certain debtor, that when friends sympathized with him at his embarrassments, he naively said—sympathize with my creditors for *they* are embarrassed. How true the story is we know little and care less. The moral conveyed by it even though fabulous, challenges our attention. To relieve the embarrassments of debtors on the one hand and creditors on the other, a law is required which in Canada does not exist, viz: a wise and comprehensive Bankruptcy Act.

It has been the wisdom of almost every country with any pretensions to civilization, in some shape or other to protect the unfortunate—whether debtors or creditors. Under the names of bankruptcy or of insolvency, we are made familiar with the ordinary modes of relief. Canada, however, has been singularly unfortunate in this description of legislation. First and foremost, with all the eager haste of a hot-headed thoughtless youth, she snatched intact the whole body of English Bankruptcy Law, deeply coated as it was with endless layers of expense. This was found to be too rich a dish—too complex a portion for her simple wants, and was accordingly dropped with feelings of remorse if not disgust. Naturally the nausea of the dose is ever present to her memory, and her former rashness is only

equalled by her present temerity. Nor is this to be wondered at, when we look upon merchants and legislators as men—an aggregation of that strangely fashioned being called "man." Man is the creature of impulse. Too often he acts and then reflects, whereas he should first reflect and then act. Here we have the secret of so many splendid failures—the wreck of so many castles in the air. *Heu tristis!* What a marvellous thing is this marvel of marvels, man! It is very generally agreed that a law for the protection of honest but unfortunate debtors is necessary. It is also agreed that the law is necessary as well for the protection of unfortunate creditors as of unfortunate debtors. To these propositions we have the concurrent testimony of the civilized world since the days of Rome. And is it to be believed that in Canada with the proposition admitted, with the principle recognized, we are unable to put it into practice? What a commentary upon our weakness! What a heralding of our shame! We conceive the present apparent apathy to be grounded upon inexcusable fear. It is dread which holds men tongue-tied and lethargic, who otherwise would set their minds in motion to frame the machinery necessary to put into practice a generally if not universally recognised principle of good.

Rome, however, was not built in a day. The English bankruptcy law, which by the way is not perfection, is not the product of a session. For three centuries have her wise men thought and thought deeply, and her legislature reasoned and reasoned anxiously to bring into being the existing law. The sweet and loving attribute of mercy reigns supreme over the English Law of Debtor and Creditor. While fraud is justly punished, misfortune is kindly treated. A tribunal there exists, which while relieving the unfortunate but honest debtor, is mindful of the interests of the perplexed and perhaps equally honest creditor. The trader who commits "an act of bankruptcy" makes an assignment of his effects—a *cessio bonorum* to assignees for the benefit of creditors, and is permitted to start afresh in the battle of life instead of being chained down broken-hearted and desponding with the mill-stone of indebtedness around his neck. The "trader" did we say—yes the trader, but why the privilege is withheld from other debtors is a point by no means clear to us. None save traders can in England become bankrupts; whereas any person, trader or not, may become an insolvent. The difference between bankruptcy and insolvency is this—the bankrupt is discharged from the demands of his creditors so that future acquired property is not liable for previously contracted debts, but the future acquired property of insolvents is liable to be seized and sold for such engagements. The distinction between the two, was thus stated by the English Bankruptcy Commissioners of 1840:—

The immediate object of the Bankrupt law is the immediate distribution of the effects of traders who cannot meet their engagements—in ordinary consequence the release of such traders from all future liability of their persons and after acquired property.

The object of the law for the relief of insolvent debtors is the personal discharge of honest debtors—prolonged imprisonment by way of punishment for the dishonest and fraudulent—and a fair distribution of their present effects and future acquired property among their creditors.

Thus it appears that insolvency is not bankruptcy—that while the one is only a partial, the other is a complete relief A law of insolvency we possess—a law of bankruptcy we want. Even were our legislature to preserve the distinction, though to some extent disapproving of it, we would not quarrel with them for doing so. "Better have half a loaf than no bread" is the common and truthful adage.

We are pained to see that this necessary safety valve of trade is wanting in this country. Its non-existence is the cause of much loss to our Province. Hundreds of well-deserving traders and otherwise estimable citizens are compelled "to cross the lines" because our laws are not sufficient to protect them. Many persons indeed go to the United States of America, whose absence is to us rather a gain than a loss; but we cannot shut our eyes to the fact that the expatriation of the enterprising though unsuccessful trader is a decided and actual loss to our country. He finding our laws void of mercy is driven in self-defence to remove himself beyond their reach. Many such to our own knowledge have been and are thus circumstanced. How many more there will be, owing to the prevailing commercial distress, *Providence alone can tell!*

We do not advocate the indiscriminate release from debt of all who are unable to meet their obligations. We do not propose to encourage mad speculation and insane extravagance. We do not desire to abet refined robbery or gentlemanly swindling. But we do advocate an abatement of that ferocious trait of our laws which makes a debtor however honest—however well-meaning—the slave of his creditor. It is a characteristic of our laws, wholly at variance with the genuine and true spirit of English liberty. It is at least a defect in our laws, quite inconsistent we are sure with our feelings as men or as merchants. We write in the interest of humanity, when we affirm that the trader who untainted with fraud, and free from the charge of recklessness, is unable to meet his engagements but willing to assign all his assets to pay his debts, should be discharged in respect of future acquired property. But all—here is the pinch—*all*—ALL his assets. There must be some Court to see that profession and practice agree.

Failures with a "full hand" are not to be allowed; but we assert without fear of contradiction that, as the law now stands in Upper Canada, they *are* allowed; at least, a debtor, though largely embarrassed, may select any one or more of his creditors to the exclusion of all others, and to the "select few" pay their demands in full to the impoverishment of all others not so lucky. These few are "friends." It may be that the form of an assignment will be gone through, but even in this case there is no absence of the "select few." In public they sympathize amazingly with "the poor man." In private they are cheek my jowl with him as the merry laugh peal after peal arises over the good old wine. Oh, that the bulk of the creditors could get one peep behind the curtains in cases such as this! But no, that cannot be allowed. They have been "taken in" in a sense which means "done for." It is a knowledge that such is our law and that such things may be done under its eyes that causes creditors to wish to become parties to deeds of assignment;—too often artful man traps. Creditors must either "come in" before a fixed day, or forever lose the hope of even 2s. 6d. in the £. Here is a bankruptcy law with a vengeance! The debtor himself is the Judge of the Bankruptcy Court. His "friends" are the jurors. The fate of creditors when dragged through the ordeal of such a tribunal can be better imagined than described. Those who "come in" are "taken in," those who "do not come in" are robbed. The former lose from one-half to two-thirds of their demands—the latter lose all! The law which permits such outrages upon common honesty is emphatically worse than no law. On the one side it subjects the honest debtor to merciless and irretrievable ruin! On the other it exalts the knavish debtor to all the comforts of the elysium of independence. The knave succeeds, while the honest man who will not act the knave, is beggared because he will *not* become a knave. This state of things it may be said is really too atrocious to exist long. Why does it exist one single day? Because those who are most affected—who writhe under its stings will not cry out for help. We say, and say it unhesitatingly, that if the merchants of Canada want a bankruptcy law they must ask for it; and when asking must express what they *do* want—so that legislators may fashion it according to order. That we have had *a* distasteful bankruptcy law is no reason why we should now be without any law. That we have had *a* bad bankruptcy law is no proof that all bankruptcy laws are bad. That *some* legislators have failed to produce a desirable law is no argument that all legislators will in like manner fail. Let our new legislature try their hands at the work—and let the materials be furnished to them in the shape of the suggestions of those most conversant with the subject.

The excellence of a bankruptcy law may be said to consist of speed, so far as consistent with equity—economy, so far as consistent with justice. A law which will come up to this standard must be good; so the nearer the approach to the standard the better. Better far on a winter's day to approach the generous heat of a blazing fire, than to stand freezing in the distance because we may not be able to place our very hands upon and around the furnace.

It is a disgrace to our common origin as Englishmen, Irishmen, Scotchmen or Frenchman, (for in France there is the *Faculté*) that we are unable to frame a most desirable and necessary measure of law reform. The bankruptcy laws of England and of Scotland we believe in many points diverge. Of the two, that of Scotland is described to us as being the more rational and economical. Such too is the opinion of Mr. Lloyd, who recently read an interesting paper on the subject before the "National Association for the Promotion of Social Science," at Birmingham. His paper is valuable for the importance, and without doubt truthfulness of its statistics. He tells us that in the years 1850 to 1853, there were in England 29,885 estates administered by assignments, and 3,325 by the bankruptcy Court—in other words that for every bankruptcy there were nine failures through which the parties were carried by private arrangement. This is, we take it, a vote of want of confidence by English merchants in the English Bankruptcy law. The reason assigned is the expense which is said to average 50 per cent. on the assets. If this be true there is no difficulty in comprehending the fact that, the Bankruptcy Court is shunned by English creditors. In Scotland, on the contrary, resort to the Court is the rule, and private arrangement is the exception. The difference is attributed by Mr. Lloyd to the circumstance that, in Scotland the control of the creditors is exercised in many matters which in England they have no voice; and that while in England the expenses are 50 per cent. on assets, in Scotland they are not much more than one-seventh of that amount or 8 per cent. on assets. Facts like these are very suggestive, and to us indicative of the place to which we ought to apply for light on this dark and perplexing question. There must be men in Canada, practically acquainted with the working of the Scotch Bankruptcy law. Let them make public the fruits of their experience. Let them at least acquaint us of their residence among us and express their willingness if called upon to make themselves useful in this the land of their adoption. The evidence of such men ought to be taken before, and recorded by a Committee of Parliament, and when added to testimony gathered from other quarters, be made use of by our represenattives. We feel that there is a want of nerve

or else most slothful inaction upon this question, which, in our opinion, is second to none now agitated for the promotion of the good of this colony.

It may be asked of us whether with regard to Upper Canada, we would advise one Court and that to be stationed in Toronto at the seat of the Superior Courts, or several, one in each County or Union for judicial purposes throughout the Province. We recommend the latter; but with this qualification, that there be a Court of Review or Control to exercise appellate jurisdiction, which Court ought to hold its sittings in Toronto. We shall strenuously oppose the idea of giving the latter jurisdiction to the Court of Chancery. In fact no sane man would we presume be found sufficiently daring to make the proposition. A Court of Review might be made to consist of the Chief Justice of Upper Canada, the Chancellor and the Chief Justice of the Common Pleas, similar to the Court of Impeachment established under the County Courts Amendment Act of last session. Who then are, subject to the control of this Court, to discharge the duties of Bankruptcy Judges in the Counties? Certainly not the County Judges, unless two be appointed to each County. There is no County in Upper Canada in which the Judge is not tasked to the utmost, in the performance of his multifarious and onerous duties. In some Counties the labour is, as we know, at the present time, for one man, almost more than human. Were there a Senior and Junior Judge in each County, to the latter might be assigned the duties of Bankruptcy Judge. Some say that a system for the registration of voters must be shortly established. Should this be done, to make it at all effectual there must be revising barristers, and to them might be assigned the Bankruptcy duties. These, however, are matters of detail quite subordinate to the main question—the necessity for the establishment of a System of Bankrupt law. The machinery for its administration is either at hand or can be readily and cheaply created—both in Upper and Lower Canada.

LICENSE OF COUNSEL.

We give elsewhere an article from the *Law Times* of 21st November last, on "The License of the Bar," with a letter from "A Barrister of the Western Circuit" upon the same subject.

The Judges in the Court of Common Pleas, it used to be said, do not exercise quite the same control over Sergeants as the Judges of the other Courts exert over Counsel practising before them. The equality of *brotherhood*, however, does not appear to have been recognized by Mr. Justice Erle in *terms*, and there certainly was little *brotherly feeling* exhibited by the Bench towards Mr. Sergeant Thomas.

With respect to the merits we think Erle, J., acted very harshly in suggesting to brother Thomas his aptness for a prosecution for misdemeanor. The case as reported certainly did not call for *that*, and brother Thomas seems to have borne the pleasant suggestion with incomparable *meekness*. But having said so much we must add that we entirely agree with the learned Judge in thinking that the "privilege of Counsel" is often most cruelly and disgracefully abused.

Our knowledge of what passes in the English Courts is limited to the information we glean from the Public Press. We cannot speak with any degree of confidence of the present practice at home, but in our own Courts we must unwillingly admit that Counsel exercise too great license, both in their mode of cross-examination and comments upon evidence; and the Judges (of the Local Courts at least) do not generally give that protection to witnesses which they ought to have. True, the demeanor of a respectable witness is so great a protection to him that the *prudent* Counsel feels he cannot treat him with insolence or severity without the risk of prejudicing the cause of his client, but this is only one view of the case. The honest witness is entitled to protection on his own account, and it should not be withheld.

We are far from desiring that one atom of the *liberty* of the bar be surrendered. The true rights of the bar should be fearlessly maintained. They are necessary to liberty, and we trust will never be surrendered through feelings of timidity or unworthy motives. A Counsel is not the mere advocate or agent of his client, but a minister of justice, and as such, while acting with all becoming deference towards the Bench, should not forget what is due to his own conscientious convictions and the cause of truth and right. He should be prepared to vindicate his profession whatever the consequence may be to himself.

What should the advocate aspire to be? We answer in the words of the able author of *The Advocate*:* he should "aspire to be the Christian gentleman." What are the limits of the advocate's duty? We adopt those laid down by Coleridge: "He has a right—it is his bounden duty—to do everything which his client might honestly do, and to do it with all the effect which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right to do that for his client which his client *in foro conscientiæ* has no right to do for himself."

An advocate who brow-beats witnesses "with intent to

* "The Advocate: his Training, Practice, Rights, and Duties; by E. W. Cox, Esq., Barrister-at-Law." This book should be in the hands of every professional man. It is a most valuable work, written in an eminently practical style. Experience, learning, and right feeling are discernible in every page. We cannot too strongly recommend it to the aspirant and the expert.

perplex the honest, and not with purpose to confound the perjurer and wring the truth from the liar;" who abuses the privileges of his position by aspersing the character or position of individuals, though not at issue in the cause, falls very far short of the idea of a Christian gentleman, and is not acting within the limits of an advocate's duty. Such an one may indeed acquire reputation as a rough-tongued bully—a ready tool, prompt to hire out his passions and his words to any suitor whose malevolent feelings find gratification in the abuse of the opposite party and his witnesses. Such a man it is possible may even pass for a very respectable member of society. His conduct as an advocate may be palliated by the public on the erroneous supposition that *in* Court he does no more than professional rules require of him, that *out of Court* he is all right. We assert that nothing which is repugnant to reason and morality is consonant with professional rules. If ever such a doctrine as "that a man with a gown on his back and a band round his neck may do for a fee what without these appendages he would think it wicked and infamous to do for an Empire" receive legal sanction, the bar will become a nuisance, and its privileges should be manacled or swept away.

We believe that a more high-minded and honourable bar than ours does not exist in any country in the world, and we have so expressed ourselves on a previous occasion. But that fidelity which the Counsel owes to his client renders him peculiarly liable in the excess of zeal to exceed the proper limits of advocacy; and we fear that the contagion of evil example at home has not been unfelt amongst us.

The only legitimate purpose of a cross-examination is "to ascertain the very truth—to trace an error, if it exist—to try the memory of the witness, if it be trustworthy." All this may be done without insult or unnecessary torture, without placing witnesses, as it were, on the dissecting table as subjects for the delicate knives and probes of legal anatomists It must be admitted that the privilege of Counsel in examining witnesses is sometimes cruelly abused, both towards male and female witnesses in our Courts. Examining Counsel should never forget that they are, or ought to be, gentlemen; and sex, age, and character should be respected, and never causelessly assaulted or even sneered at.

There is one point in the very able letter of "A Barrister of the Western Circuit" which has peculiar significance as applied to Upper Canada, where both branches of the profession are exercised by the same individual Where usually the advocate is also the attorney for the party, and learns the facts of the case directly from his client. "The very essence," says the writer, "of the relationship that exists between Counsel and attorney consists in this that the former knows only what he learns from the latter respecting the facts of a case, and consequently for their truth the attorney *is* responsible, but the Counsel *is not and cannot be.*" He thus concludes, "I repeat once more, it will be a sad day for the freedom of the English bar if a Counsel must actually know from his own sources of information the truth of a charge against a man's character before he puts it; but I assert with equal warmth that it behoves every attorney to look well to the truth of the instructions he prepares, for on him rests the moral and ought to rest the legal responsibility."

This brings forcibly before us the importance of a separation of the two branches of the profesaion. We will not now discuss this question, but cannot forbear saying that we have ever regarded the junction of barrister and attorney in the same person as a meretricious union, and think that the honour and usefulness of the bar, which the public have the highest interest in maintaining, would be best upheld and perpetuated by confining the attorney and barrister each to his own peculiar and appropriate duties.

One word more and we have done. The affair to which we have drawn attention is one that it would be impossible to omit from the pages of a legal journal. Observations on so important a subject as the "license of the bar" falling from a Judge of Mr. Justice Earle's high character and position, we felt bound to lay before our readers, with the comments they elicited. We have expressed ourselves to the effect that the Judge went *too* far in the particular case; but we can easily imagine an honourable mind excited by even the semblance of injustice and cruelty finding too full an utterance.

The rights and independence of the bar are dear to us, and we hope never to see them tamely surrendered. *An independent bar is essential in every truly free country as much so as an independent Press. If either become licentious, and abuse their high privileges to the torture and injury of their fellows, they will most assuredly be forging fetters for themselves.*

MANDAMUS UNDER THE COMMON LAW PROCEDURE ACT, 1856.

IT is enacted that the plaintiff in any action in either of the Superior Courts, except Replevin or Ejectment, may endorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus; and the plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced in such action, or *separately*, a writ of mandamus commanding the defendant to *fulfil any duty in the fulfilment of which the plaintiff is personally interested.* (Sec. 275.)

This section, which upon the face of it would appear to indicate an intention to revolutionize common law procedure, is in substance and for every material purpose in words a transcript of sec. 68 of the English Common Law Procedure Act, 1854. There was for a long time at Westminster Hall much speculation as to the actual meaning and probable effect of the English enactment. For one year and eight months the section was without judicial interpretation; when at length, on 26th April, 1856, in the Court of Queen's Bench, *Benson* v. *Paull* (2 Jur. N. S. 425; 27 L. T. Rep. 68; 6 El. & Bl. 273) was decided.

This was an action upon an agreement for a lease, in which plaintiff might have sued for damages, though he did not, but simply confined his claim to a mandamus for specific performance. As the writ may be claimed "in the declaration either together with any other demand . . . . . *or* separately," no objection was made upon this point. A demurrer was put in to the declaration, upon the ground that the Act does not extend to cases in which it is sought to enforce the performance of a mere personal contract.

So far the Court was with the demurrer. The judgment of Crompton, J., viewed in reference to a subsequent decision presently to be noticed, is less exceptionable than that of Lord Campbell and more explicit than that of Wightman, J. It is thus given in the Law Times Reports. "Looking at the words of the section themselves, it could hardly have been intended to include every case of personal contract. It was intended to refer to that class of cases in which the interest of the party was of such a public nature that the only remedy was by mandamus in this Court. The present is a case of *pure* personal contract, and not within the meaning of the section as I construe it." To the same effect is the report in the Jurist, that the section only applies to that class of cases "in which there is a duty of a public nature or a duty created by Act of Parliament, in the fulfilment of which some other party has a personal interest." Lord Campbell, while delivering himself of similar views, hazarded an expression which was disapproved of by many of the profession at the time, but which he has since recalled. He said, "I am of opinion that this section is confined to cases in which writ of mandamus might be applied for before the passing of this Act, in which cases the provisions facilitate the remedy." The effect of this construction, if correct, would have been to render a provision professing to be an enlargement of common law jurisdiction simply "*vox et præterea nihil.*" But in *Norris* v. *The Irish Land Company*, (30 L. T. Rep. 132, 6 W. R. 55, noticed also in the Jurist of Nov. 21, 1857,) Lord Campbell said, "I am reported—I have no doubt accurately—to have said, in *Benson* v. *Paull*, that the writ of mandamus could only be claimed under the Statute (Common Law Procedure Act) in cases in which this Court would issue the prerogative writ; but upon consideration I am not prepared to say that that is *the exact limit.*" Now what, we would like to know, is "the exact limit?" The Courts seem to be very timid in laying down any rule upon the subject. There is so much doubt among the profession because there is no rule, that the clause is little used. We are not aware of a single case in Upper Canada in which the writ has been claimed. There are no reported decisions either of the Exchequer or Common Pleas in England to help us in our need The only decisions are the two we have mentioned, and excepting Lord Campbell's *obiter dictum* in the first, the two, we think, are quite reconcileable, and afford materials for the extraction of a guiding principle.

Norris v. *The Irish Land Company* was an action for refusing to register the name of the plaintiff as administrator of John Sadlier, deceased, in the book of shareholders of the Irish Land Company. The declaration alleged that the company was incorporated by royal charter, which required that a deed of settlement should be executed and that the names of the members should be registered from time to time; and that a deed of settlement was afterwards executed, by the provisions of which the directors were required to enter into a book of shareholders the names of the members of the company. The declaration then set forth the title of the plaintiff as administrator, and after alleging *a breach of duty in the refusal of the company to register the plaintiff's name*, and laying special damage as resulting therefrom, claimed a writ of mandamus commanding the company to register the same. There was a demurrer to so much of the declaration as claimed the writ of mandamus. Here, it will be observed, there was not only a breach of duty alleged in which the plaintiff was "personally interested," but a duty of a *public and general nature*. The contract was not "personal" in the sense of the decision of *Benson* v. *Paull;* that is to say, it was not a contract by the defendants to enter the name of John Sadlier or of his representative in the book of shareholders, but a contract to enter the names of *all* shareholders, of whom the representative John Sadlier asserted himself to be *one*. Hence the breach was of a "public" more than a "personal" duty; in other words, there was a breach of a public duty on the part of a public company resulting in the "personal grievance" of the plaintiff. The company was incorporated by a royal charter, which required that a deed of settlement should be executed, and that the deed of settlement, when executed, should contain a provision for registering the names of the

members. "What, therefore," (as remarked by Coleridge, J.,) "as respects the registration of the members, is done under the deed of settlement, is done under the charter; and this is a matter of a public nature."

It is not clear but that, irrespective of the Common Law Procedure Act, a mandamus might have been had in this case—see *Reg.* v. *The Derbyshire Railway Co.*, 23 L. J., Q. B. 333; but see also *Rex* v. *The Bank of England*, 2 B. & Al. 620; *Rex* v. *The London Assurance Co.*, 5 Ib. 899. Under that Act, however, the writ was granted without hesitation. The case is not so remarkable as being a decision under the Common Law Procedure Act, as containing not only a recantation by Lord Campbell, but expressions of opinion by his brethren on the bench condemnatory of the opinion recanted. Coleridge, J., said: "There is nothing in our decision on this occasion at variance with the doctrine of *Benson* v. *Paull*, in which, if I had been a member of the Court on that occasion, I should have concurred. But I should not have concurred in some of the expressions then used by some of the members of the Court, because I can hardly think it was not intended to extend the application of the writ to some cases more of a private nature than those to which the prerogative writ of mandamus is applicable." Wightman, J., said, "I also am disposed to think that the section may not necessarily be confined to cases in which the prerogative writ would apply; but it certainly is not so extensive as to include every case in which a Court of Equity might decree a specific performance."

The Judges, it appears, are desirous to establish "a happy medium" between their former contracted jurisdiction on this important head of jurisprudence and the very extensive jurisdiction exercisable by Courts of Equity. It may be that common law machinery is not adequate for greater strides than the English Court of Queen's Bench is prepared to take. Be this as it may, the Common Law Commissioners never contemplated any "half measures." After pointing out a mode of simplifying procedure by mandamus, the Commissioners proceeded: "The proceedings thus simplified may be applied to *every* case in which specific performance of a contract or duty is to be enforced; and for the reasons which we have already expressed we think it ought to be so applied, and that Courts of Law ought to have power to grant specific performance, and to enforce the specific delivery of goods, *in every case in which that relief has hitherto been granted in Courts of Equity.*" (2d Report of the Common Law Commissioners.)

So much for the law as it *ought* to be; now for the law as it *is*. The following points may, we think, be stated upon a perusal of the section and the two decided cases:—

First: The writ can only be had to enforce the fulfilment of a *duty*.

Second: The duty must be one to some extent of *a public nature*.

Third: It must *not* be one arising out of the non-performance of a *mere personal contract*.

Fourth: Under any circumstances, the duty must be one in the fulfilment of which the plaintiff is *personally interested*.

CHANCERY PROCEDURE.

THE letter of "A City Solicitor," which occupied so much space in our December issue, has, as we expected and are glad to make known, fairly aroused the smouldering embers of dissatisfaction so prevalent in the profession. We grudge not the space required for the insertion of dozens of letters similar to those which are to be found in other columns. It is ominous that instead of there being one member of the profession willing to dispute the stand taken by "A City Solicitor," there are three who have readily come forward to support it. We have every wish to see the matter viewed in all its lights, and shall be most happy to hear both sides of the question—if there be two, as to which we must confess we entertain some doubt.

MARRIAGE WITH A DECEASED WIFE'S SISTER.

It has been recently decided in England that a marriage by a British subject domiciled in England, with a deceased wife's sister is void, though celebrated in a country where such a marriage is not invalid. The offspring claiming rights in English Courts were held to be bastards: (*Brook* v. *Brook*, 30 L. T. Rep. 183, Cresswell, J., in aid of V. C. Stuart.) It is said that the case will be carried to the House of Lords.

U. C. REPORTS.

We have to renew our thanks to the Reporters of the Queen's Bench and Chancery for the supplies of advance sheets of their reports; of which, however, owing to other pressure upon our space, we have been obliged to make a very limited use.

In this number we publish a report of a case recently decided by His Honor the Judge of the County of Wentworth. It is a case in which the G. W. Railway Company appealed against the assessment of their property by the City of Hamilton. The case is an interesting one, and the judgment well worthy of study. The whole turned upon the construction of the word "Roadway," as to what property (such as wharves, station-houses, saloons, &c.,) is embraced by that term. As the questions raised are of general interest, we recommend the case to the attention of the Municipalities.

DIVISION COURTS.

OFFICERS AND SUITORS.

SUGGESTED IMPROVEMENTS IN THE DIVISION COURTS LAW.

The subjoined letter from a practising lawyer deserves more than a passing notice. It is well written, and the writer exhibits an earnest desire for the improvement of the Inferior Courts, "the tribunals of the poor man," which does much credit to him as an unselfish lawyer—as one bent on benefiting the humble suitor, even if the effect should be to withhold some dollars from the class to which he belongs.

We cannot altogether accord with him, being of opinion that the changes he advocates, however excellent in theory, would be unsuited to the Division Courts under the present system.

It is true that in the Superior Courts execution may be very speedily obtained when default is made; but we must remember that proceedings in the Division Courts are not conducted by professional agents, and that for the safety of the public it is necessary that every judgment in these Courts should be given by the Judge, who sees the regularity of the proceedings, which are to form the groundwork of the judgment.

If the clerks were allowed to enter judgments, similar to judgments by default in the Superior courts, there would be no end to the applications to set them aside. And there would be considerable difficulty in bringing such cases properly before the Judge on affidavit, without professional assistance. And as the Judge only makes periodical visits to each Division, the proceedings would necessarily be dilatory.

True, inconvenience is sometimes felt in the way Mr. Martin speaks of; we believe, however, it is but partially experienced, and may in a great measure be obviated by judicious administration.

For remedy, Mr. Martin proposes, as we understand him, that defendants should be required to give a brief notice of defence in every case intended to be defended, and in the absence of such notice, judgment should go by default, as in the Superior courts. The objection to that is this—that uneducated persons, and they form the great majority of defendants, cannot be made to understand, even with printed warnings, the necessity for a preliminary notice of defence. It is even so in the case of set-off; and so well was this understood that the Legislature, in the D. C. Ex. Act expressly empowered Judges to adjourn cases to let in defences of that nature where a necessary notice has not been given. To require, therefore, a written plea in *every* case would, we fear, cause much difficulty and no little confusion. A similar requirement was urged under the Eng. Co. Court system, and in part adopted, but in these courts there is a small fee *taxable* for professional assistance; and if the successful party could in our courts tax such a fee, less could be urged against the proposition; but so long as individuals, however just their cause and successful the result on trial may be, are not allowed a reasonable sum towards reimbursing them the amount expended for legal advice and assistance, so long will they try to dispense with such assistance—though it sometimes happens that the vulgar adage "don't lose a sheep for a pennyworth of tar," would have been best observed. If the law were otherwise, persons having a defence would at once go to a lawyer, who would put them in the proper position to defend with effect.

Unless the law, therefore, were altered in the particular to which we refer, we can see no safe way to the requirement of pleas in every case.

The evil of which our correspondent speaks in cities and populous Divisions, is not an evil necessarily incident to the system, but arises, we would say, from other causes. We have frequently seen 300 or 400 cases, with an average number of defences, disposed of in a day, and that without hurry or confusion, every defended case having due consideration given to it.

Experience does much in the business of a Division Court. The more formal part may be accomplished with great rapidity by order and discipline, and the more rapidly it is gone through with, the more time there will be for the disposal of contentious cases. In the great majority of cases of this description, we see no difficulty in the Judge, who is or ought to be a good lawyer and an experienced man, giving a sound momentary decision. In cases of difficulty he is empowered by a clause in the Statute to send a written decision to the Clerk after a more mature examination than could be had at the sittings. Whenever the law is administered in a Division Court "in a manner that is a perfect mockery of justice," we say, without hesitation, the fault is with the Judge.

In the latter part of the letter we understand the writer as desiring to see plaintiffs enabled to sue for any amount in the Division Courts where the suit is preceded by attachment, and the defendant has lands. This opens a broad question of policy; and in the main we agree with Mr. Martin, that *lands* should be accessible to judgment creditors *for small amounts as well as large.*

In conclusion, we would observe that it will always be a source of pleasure to us to see in our pages well considered suggestions, whether we agree with them or not. Light is always to be gained by debating questions when a proper spirit is brought to bear upon the consideration of them.

To the Editors of the Law Journal.

GENTLEMEN:—As I perceive that you devote a great deal of space and labor in order to promote the well-working of the Division Court system, as at present established in this Province, I beg to forward to you the following suggestions for publication with the view of having the same considered in Parliament at its next session.

By the laws of this Province, if a person is served with a Writ of Summons issued out of the Superior Courts, or any County Court specially endorsed, where the cause of action is for an ascertained amount, as the amount of an account for goods sold and delivered, or a promissory note, bond or mortgage, or any other fixed amount, judgment may be signed at the expiration of ten days after service and execution issued at the expiration of eighteen days after the service without the intervention of a Judge of the Court, though the amount should be £10,000 and at the cost of some £3 or £4 only, whereas in the Division Courts for the like cause of action, the amount be only 10s., a defendant has ten days' notice by the Writ, and then though he do not deny the debt, the plaintiff has to come with his witnesses many miles, and many in number sometimes to attend the Court, and then finds that the defendant does not appear to defend, or it may be that not hearing of any defence he comes without witnesses, as in the absence of the defendant the Judges usually give judgment on the evidence

of the plaintiff only, and then he finds that the defendant is ready to defend, and the Plaintiff is forced to pay the costs of a non-suit or adjournment, many times amounting to three times as much as the debt.

Another evil growing out of this especially in cities and large and populous divisions is this: the Judge from the multitude of suits, is forced to hurry over those that are really defended and important, almost without the possibility of consideration, and often in a manner that is a perfect mockery of Justice.

Now I think as cheap law and speedy execution is the maxim of the day, that by the adoption of the system of Special Endorsement in force in the Superior Courts, those evils might be removed, and the defendant can be allowed to defend by a short plea stating "that he defends the action" under which any evidence might be given that can now be given without notice; neither is it necessary that the Fee Fund should be thereby seriously diminished, as reasonable fees should be fixed on the entry of each judgment by the Clerk.

The law of Attachment seems also open to improvement, as by the Common Law Procedure Act of 1856, sec. 44, applied to County Courts, the plaintiff, his servant or agent, has to make affidavit that the defendant is indebted to the plaintiff in a sum exceeding twenty-five pounds, obviously as stated in Mr. Harrison's note on that section, with reference to the Division Court Act 13 & 14 Vic. cap. 53, s. 64, which gives power of attachment for any sum not exceeding twenty-five pounds and not less than twenty shillings; but by the Div. Court Act, *personal* property only can be seized and it requires some two months to obtain judgment and have the same transferred into the County Court, when and when only, and provided the amount exceeds ten pounds the land can be seized, during which time the defendant has every opportunity and inducement to make away with it. It is a well known fact that persons are often indebted in a great number of small amounts; besides, the remedy seems simple (as the Legislature seem very properly to be averse to allow the Division Courts to interfere with lands) namely, by allowing the County Court as in matters of tort to attach where there are lands for sums not less than ten pounds. Trusting that you will give these suggestions a place in your columns at your earliest convenience, I remain,

Yours respectfully,

JOHN R. MARTIN.

FIRE-PROOF SAFES FOR THE BOOKS AND PAPERS OF THE DIVISION COURTS.

The following practical and evidenily well considered communication of Mr. Klotz will be read with interest. In the present state of the discussion we are not disposed to interfere with observations of our own, hoping that others practically acquainted with the subject in hand may, like Mr. Eyre and Mr. Klotz, communicate their views:

To the Editors of the Law Journal.

Preston, December, 1857.

GENTLEMEN,

The very interesting communication of Thomas Eyre, Esq., in your Journal for December, 1857, has no doubt again directed the attention of many of your readers to the subject of providing fire-proof safes for the different Division Court offices; and since you solicit suggestions on this subject, I take the liberty to offer some.

The scheme proposed by Mr. Eyre may, in many instances, meets with no serious objections on the part of plaintiffs, while it is evident that in other cases it will.

A plaintiff that puts in suit a promissory note or other valuable document, may probably not object to pay a small fee for its safe keeping; while he would not feel inclined to do so for a mere book account, a copy of which he could easily obtain from his ledger, even if the one delivered to the clerk of the Court be destroyed; hence, since there is an intrinsic value in a promissory note, a bond, an agreement, or other document under signature of the defendant, by which *alone* plaintiff can prove his claim, there is no such value contained in a book account; the former he cannot produce in duplicate, since only one is in existence, while of the latter he may make a dozen copies at less expense than the proposed tariff for its safe keeping.

Again it is well known that not on all suits entered for service, a service is effected, and that if defendant cannot be found, it is customary for plaintiff to withdraw the suit, paying costs for entering the same. If, for instance, a plaintiff had entered a large number of small book accounts (as is often the case with publishers of a newspaper), and about one-fourth of the summons are returned, "*defendant cannot be found,*" the plaintiff would have paid a fee for the safe keeping of a paper (*i.e.* the book account), in which there is no intrinsic value. Had the plaintiff, however, entered certain documents under the signature of defendant, as above mentioned, there would then have been some ground to charge a fee for its safe keeping, even if defendant could not be found.

But after judgment has been obtained on a suit, the comparative value between a book account and a document under signature of defendant materially changes from their respective positions before judgment is rendered. To either claim the Judge certifies by his signature, and the judgment is entered by the clerk in the procedure book, which is *prima facie* evidence of plaintiff's claim against defendant, whether it was a book account, a note of hand, or other instrument, and then a book account of £5 has the same intrinsic value as a note of hand for £5.

Moreover, I have invariably found that in general it is more difficult for plaintiffs to obtain judgment for the *full* amount claimed by a book account than by note of hand or other paper under signature of defendant. Firstly—It frequently happens that the names or place of residence of defendants are incorrectly given; the party that charged the articles sold did spell the name of the purchaser wrong, hence the incorrect information; and this information is sometimes so misleading that the bailiff is totally unable to find the real party (this I know is not only done by country merchants and tradesmen, but also by important houses in cities); the summons is consequently either not served at all, or upon a wrong party, and in either case no judgment will be rendered. This difficulty is overcome where the suit is under an instrument signed by defendant. Secondly—The sum claimed by book account is more frequently subject to deduction either by a contra account or by striking off disputed items for want of proof; a deduction by contra account against a note of hand is not so often made, and items cannot be disputed in a note of hand, except it be in the indorsements.

From these few remarks, to which several others might be added, it will appear that the safe keeping of a book account is not of so great importance as that of a promissory note or similar paper, and that therefore the plaintiff has good reason to object to paying a tax for the safe keeping of a book account, *at the time of entering the same for suit.*

If, therefore, the plan to tax plaintiffs for the safe keeping of the records would be considered the proper one, then I would beg to suggest that this tax be only exacted from them on suits where "money is made;" and deducted when amount of claim is paid over to him. The return which the clerk would have to make, he could easily compile from his cash book.

But viewing the matter of taxing plaintiffs in point of justice, I am of opinion that the plaintiffs should not be taxed at all. The plaintiff, before he received payment of his just claim, as awarded to him by the judgment of the Court, is subject to considerable loss of time and trouble in attending Court and otherwise, for which he receives *no* recompense, in fact sometimes he has to earn his money twice before he gets it. True, he is entitled to charge interest; but where is the

business man that would not by far rather take the cash when his claim matures, than the privilege of charging interest at 6 per cent? To all the loss and trouble he is put by the negligence of the defendant, it is the defendant that forces him to place his papers into the hands of the clerk of a Division Court, and therefore I am of opinion that the defendant is more liable to and should be taxed for the safe keeping of the same.

Another remark made by Mr. Eyre is, "That it appears to him that the several plaintiffs are more interested in the safe keeping of the records of the proceedings in a suit than are the defendants." From this opinion, without any qualification attached to the same, I beg to differ. The plaintiff, while the suit is pending and until it is paid by the defendant, has no doubt a greater interest in the safe keeping of the records than the defendant: but after the suit is paid over to the plaintiff, his interest in the records ceases; he has got his money, and if all the records of the suit paid to him are burnt or otherwise destroyed, he loses nothing by it. Different, however, it is with the defendant after he has paid the suit; the records then become of interest to him, they are evidence in his favour before any Court and without any further proof, even if he have lost all his receipts. Many an account has been brought into Court, taken from old records, by which alone the defendant has been able to prove his case, expose the plaintiff, and defeat him. If, in addition to these remarks, it is taken into consideration that after two or three months next succeeding the sittings of a Court, there are generally *less unsatisfied* judgments of that sitting remaining in Court than there are suits discharged; that every additional sitting adds to the number of discharged suits, while the number of undischarged suits from time to time remaining in any Division Court does by no means increase in the same ratio. I am therefore of opinion that the defendants as a body have an equal if not a greater interest in the safe keeping of the records than the plaintiffs.

If then, on the one hand, it is shown that the defendants have at least as great an interest in the safe keeping of the records as plaintiffs; and, on the other hand, that it would be more just to tax defendants instead of plaintiffs for such safe keeping, I see no reason why the defendants should not be taxed for the safe keeping of the records as well as for all other costs.

With respect to a safe provided by the County Municipality, as proposed by Mr. Eyre, a very nice question would arise after the money has been refunded to the Council, as proposed. —Who would then be the owner of the safe? Would not that safe belong to the different plaintiffs that *directly* paid for it? Could the Government ever in justice or equity claim it and dispose of it? But if the Government would provide the safes, then as a matter of course the safes would be their property and be held *in trust* by the Clerks.

The fee fund, although it has shown a large overplus, and will in all probability continue to do so under the present system, will nevertheless not be able at once to pay for the purchase of about 212 or more safes to supply every Division Court office, which would require about £7500. I would therefore suggest to raise the "Entering Fee" payable to the fee fund on all suits, say by one-fourth of the present tariff, and in the course of three years the sum required would be raised

The proportion which the "Entering fee" bears to the whole amount paid into the fee fund by clerks of Division Courts stands as 3 to 8 or as 2 to 5.* The average amount paid into the fee fund on 1000 suits is £125—of which from £45 to £50 are paid for "Entering fee." Increasing this fee by one-fourth will in three years bring from £33 to £37, for a Court that does a yearly business of 1000 suits; those Courts doing a smaller business would not require so expensive a safe, while those exceeding 1000 or 1500 suits would be entitled to a safe of about £40 or £50 value. By adopting this plan the plaintiff, in the first instance, would pay by way of deposit, the additional rate intended for the payment of the safes, as well as he would pay the fee proposed in Mr. Eyre's scheme; but the money would eventually be refunded to him after the defendant paid the amount of judgment and costs; and this, in my humble opinion, would be a more just and equitable way of taxing for the safe keeping of the records and the purchase of safes.

Should the Government feel disposed to carry out this suggestion made by me, a question might arise, viz., from what source in the meantime to take the sum of, say £7500 required to supply all the Division Courts with safes? And since this question may cause some difficulty in carrying out my plan, I also venture to suggest a way to overcome that difficulty. Let those clerks that have no safes be first provided, and after the fee fund has sufficient surplus, then either pay those clerks that have suitable safes for their offices provided out of their private means, the value of the same, with interest, from the date the first safes were provided by Government; or if they have no suitable safes, then provide them with such as are suitable, and allow them interest for the use of their private safes up to that time. By these means all the clerks would soon be provided with safes, and the object be attained. The Judges of the different counties will be best able to decide who of their respective clerks should first be provided with a safe, and at what price, after the Government has established a certain standard for them.

I remain, Gentlemen, yours respectfully,
OTTO KLOTZ.

* This proportion I have calculated from about 2000 suits.

J. T. (DERRY WEST) AND P. D. (OWEN SOUND).—We are not able to make room for your communications in this number; they will appear next month.

ANSWERS TO QUERIES.

T. L. fills a page of foolscap in asking questions that might be set down in three or four lines. Correspondents *must learn to be brief. The questions are shortly these:—*

If by mistake the day of sittings is omitted in the copy of summons served, but the defendant nevertheless appears at the Court and defends the case, can he sue the Clerk and his sureties for the neglect of the former, in omitting the day of sittings?

As the object of service is to notify the defendant of the nature of the claim against him, and the day when he is required to answer it, and as in the case put the defendant had all the opportunity for defence, and did appear and defend, he cannot have been injured by the omission; and by appearance he must be held to have waived the irregularity. We are of opinion that an action against the clerk and sureties cannot be maintained. There is neither *loss* nor legal *injury*.

T. B.—We think you take the correct view in charging 9d. each for the fifteen persons summoned as *jurors*. The argument that the persons summoned are not jurors "till sworn" is unsound. They are taken from the roll *as jurors*, summoned *as jurors*, and called *as jurors*. They are, when sworn, *the* jury in the particular case.

The language of the schedule to the Act is "making out summons to jury, for each juryman, 6d;" and by the 35th section of the D. C Act "not less than fifteen" jurors must be summoned. Under the old Act there was a fixed fee. The schedule to the Act of 1855 was designed to *increase* the Clerks fees, which it would certainly not have the effect of doing unless construed according to your views.

J.—We have not heard of any proposed meeting by the Commissioners under the section of the D. C. Ex. Act. No doubt some additional rules are now necessary, and several "new points under the Act of 1855 require to be settled."

London, 30th November, 1857.

GENTLEMEN,—I take the liberty of troubling you with the following questions, and beg your answer, having sought for information from several professional men, who differ in their opinion:—

1. Does an execution allowed to run 30 days and returned "goods seized," hold the goods after being so returned?

2. If an *alias* execution be issued on an execution that has been returned "goods seized," does it hold the goods notwithstanding an execution may have issued from the Superior Court before the date of the *alias* but after the date of the first execution?

3. If an execution be returned "goods seized," and an *alias* be issued within the 30 days, does the *alias* hold the goods from the date of the first execution, and so on, if the execution be renewed every 30 days? T. B.

The questions are of considerable difficulty, and we are are not in a position to speak positively, for we have no decisions in point to aid us to a conclusion. We may best answer the questions by giving our own views in respect to the force of executions from the Division Courts.

We are of opinion that if goods be seized under an execution at any time before the return day, and steps be taken towards a sale, that such sale may be *completed* after the return day. In other words, within a reasonable time after the thirty days have expired.

When an execution has been once returned its efficacy is gone as a general rule, and other executions coming in would, we think, hold the property. The better opinion seems to be that where goods have been seized but cannot be sold for want of buyers, and the execution is so returned into Court, that a warrant in the nature of *ven. ex.* may issue, which would be the regular continuation of the first execution, and the property would consequently be held from the time of seizure.

Alias executions cannot be connected with the original execution, so as to hold property from the first seizure. "Goods seized" would be an invalid return.

The advisable practice seems to be this—If goods have been seized within the thirty days, to proceed with despatch, and sell afterwards under the execution.—If goods have been offered for sale without effect, to return the fact and obtain a new writ in the nature of a *ven. ex.*, but much difficulty will be saved by the bailiff promptly acting on the execution. T. B. asks a fourth question, which concerns himself mainly, and has not been inserted. Our reply is, take the *cash* if voluntarily paid to you, but the payment is not claimable as of right.

COMMITMENT ON JUDGMENT SUMMONS.

Notes of English Cases, for the information of Suitors—(continued).

The following report of a case before the Judge of the Shoreditch Co. Court exhibits circumstances under which a committal was at once made:

BUCHANAN *v.* ASHTON.

This was a judgment summons issued by the plaintiff. His Honor was informed that the defendant had admitted he was in receipt of an income of £50 a year; that his Honor had ordered defendant to pay 10s. a month; and that this was the seventh judgment summons that had been issued against him.

The defendant, to prevent a commitment, had, under the direction of his Honor, signed an authority to the trustee under his father's will, to pay out of his (defendant's) weekly income 2s 6d a week and upon signing it Mr. Buchanan abandoned the summons. Notwithstanding this forbearance, the defendant went to the trustee the day before the instalment became due, and requested him not to pay it, and he had not paid anything since. Under these circumstances his Honor was asked to commit the defendant for the full period of forty days.

His Honor declined to commit the defendant for the full term, but ordered him to be committed for twenty-one days.

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

(*For the Law Journal.*—By V——.)

[CONTINUED FROM PAGE 214, VOL. 3]

It is possible that some question may be raised on the construction of the 6th section of the D. C. Ex. Act. If in any case of seizure where there is not sufficient to satisfy both the landlord and the execution creditor, and the latter should insist on his priority over the landlord, the safest course for the bailiff will be to sue out an interpleader summons, calling upon the landlord and the judgment creditor to come into Court, that the question between them may be adjudicated upon by the Judge, and an order be made as to the disposal of the amount levied.

"For every additional distress for rent" made under the circumstances before spoken of, the bailiff will be entitled to have as the costs of the distress the fees allowed by an Act of the Parliament of Upper Canada, 1 Vic. chap. 16, instead of the usual fees allowed in the Division Courts.

The fees allowed by that Act are as follows:

SCHEDULE OF COSTS AND CHARGES ON DISTRESSES FOR SMALL RENTS AND PENALTIES.

Levying distresses under ten pounds, five shillings.

Man keeping possession, per diem, three shillings and ninepence.

Appraisement, whether by one appraiser or more, fourpence in the pound on the value of the goods.

If any printed advertisements, not to exceed in all five shillings.

Catalogues, sale, and commission, and delivery of goods, one shilling in the pound on the net produce of the sale.

And no person "shall make any charge whatsoever for any act, matter, or thing mentioned in the said schedule, unless such act shall have been really done:" (1 Vic. cap. 16, s. 1.)

THE PRACTICE ON PROCEEDINGS BY WAY OF INTERPLEADER.

When an adverse claim is made to the proceeds or value of goods, there is no practical difficulty caused by delay in waiting for an adjudication upon interpleader; but where the claim is made to property taken in execution or attached, particularly if it be of a perishable nature, there is often much difficulty as well as hardship in the matter.

The issuing an interpleader summons does not justify the bailiff in giving up the possession of the property, for the question of ownership has to be determined at the

hearing by the Judge, and should the bailiff withdraw from possession, the goods may not be forthcoming to answer the judgment given upon the interpleader.

The course pursued on interpleaders from the Superior Courts to avoid expenses, however beneficial to all concerned, it is believed would not be warranted in the Division Courts.

The costs of retaining possession, it may be for one or two months until the interpleader is decided in the Division Court, may eat up a large part of the value of the goods seized; and it is therefore most desirable that some arrangement should be made between the claimant and execution creditor, by which the expense of keeping may be saved. When this cannot be accomplished, it is usual for the bailiff to hand over the goods to the claimant, taking a bond with sufficient securities from him, that the goods will be forthcoming whenever demanded, or the value thereof paid. But this practice is not without objection, for the bailiff is liable for the forthcoming of the goods at the required time, and in taking securities, assumes the whole responsibility. If the security turn out to be worthless, it would be no excuse for the non-production of the goods. The bailiff will be perfectly safe only where the value of the goods seized and probable costs of the interpleader are deposited in Court to await the result of the interpleader issue.

LICENSE OF COUNSEL.

(*From "The Law Times."*)

Mr. Justice Erle, has publicly rebuked what we feel to be, and shall ever call, *the license* of the Bar—not its liberty;

During the trial of a case Mr. Serjeant Thomas asked a witness if he was in difficulties. This being answered indignantly in the negative,

Erle, J., said he really thought it an abuse of the power of a counsel to put such a question without foundation, and he thought a counsel who did so deserved ill of the public.

Thomas, Serjt. said he was only following his instructions.

Erle, J. said he should like to know who instructed him.

Thomas, Serjt. said it was very difficult to conduct a case.

Erle, J. said the freedom of question allowed to the Bar is a public nuisance, and the barrister who made such an imputation ought to be prosecuted. It was a most important right.

Thomas, Serjt, said, it was a most important thing to do one's duty, and difficult not to answer the court.

Erle, J. said, when he thought a question has relation to the truth he was most anxious it should be put; but to cast hap-hazard imputations at the suggestion of a person who might have no scruples as to what he did was a degree of mischief that made him wish a party should be prosecuted. He begged leave to say that in his experience he had seen counsel so abuse their privilege that he had cordially wished a power could be instituted that they might be prosecuted for a misdemeanor. If the imputation was a correct one, of course he was wrong in this instance, but he did not see any sign of ground for the imputation.

Thomas, Serjt. said, that he always abstained from putting a question that would give pain or occupy time, and the barrister who resorted to such a course would find it told against him, and he himself would rather cease from appearing in court if he were capable of acting in the manner which had been suggested.

We are conscious of the difficulty in which counsel is often placed in this respect. He is instructed by his brief that a witness is discreditable, and should be cross-examined on certain stated facts. What is he to do? He has no means of ascertaining the truth before he puts the question. Is he then, *never* to put a question tending to discredit a witness? But if it be his duty to do so in *some* cases, how can he possibly distinguish between the cases in which he ought to do so, and those where he ought not to do so?

We write with experience, having many times felt the perplexity. In such cases the course adopted was to consult the Attorney, and obtain his assurance that he believed the imputation to be well founded, and his reason for so believing, and to refuse to put the question unless he adduced some substantial grounds for his belief—something more than mere hearsay from his prejudiced and perhaps unscrupulous client. By adopting this rule, counsel would rarely be led into serious error.

The random hits at private character, which so often disgrace our courts of justice, cannot be too strongly condemned. A witness is called upon to perform a public duty, always unpleasant, often painful, and is entitled to protection in the doing of it. Another rule is this—counsel should never suffer himself to be made the medium for *merely annoying* a witness, by reference to irrelevant matters, which, even if true, do not in fact render his testimony the less credible. To the Solicitors also we must address a word of caution. They too often introduce into their briefs suggestions for which they have *no* substantial *authentic* foundation, and thus counsel are misled, as was Mr Serjeant Thomas. We have seen briefs containing instructions for counsel which the Attorney would not have dared to act upon with his own lips—just as we have seen a client endeavour to make his Attorney do and say for him what he was not brazen enough to say and do for himself.

This should not be. The Attorney should feel that *he* is speaking in his brief, and be cautious accordingly. *He* is responsible for all that appears there.

We have received the following from a correspondent, who suggests that the right course would be, to make the Attorney responsible for his instructions; and perhaps that would be the right remedy for a great wrong:

TO THE EDITOR OF THE LAW TIMES.

Sir,—A case in the Queen's Bench Nisi Prius Court, reported in the *Times* of yesterday (Friday, the 29th inst.), suggests a question of the gravest importance alike to the public and to both branches of the Profession, viz., to what extent the license of counsel ought to be carried in the course of cross-examination, and what amount of discretion ought to be allowed him in the conduct of a cause? In the case to which I refer (the name of which, however, is not given in the *Times'* report) Mr. Serjeant Thomas, in the course of cross-examining a witness, asked him if he were not in difficulties. The witness indignantly denied the imputation, on which Mr. Justice Erle interposed, and in every strong language reprimanded Mr. Serjeant Thomas, declaring that such license as the learned serjeant had taken had become a public nuisance, and that the barrister who so acted deserved to be prosecuted. Mr. Serjeant Thomas answered, he had only acted according to his instructions. "Then by whom are you instructed?" inquired Mr. Justice Erle. To this point-blank question the serjeant does not appear to have given a direct answer, but contented himself by remarking that it was very difficult to conduct a case under such circumstances; and after a little more not very edifying "sparring" between the judge and his "brother Thomas," the former again took occasion to remark that he had frequently seen, in his own experience as a judge counsel so conduct themselves in their cross-examinations as to make him wish they could be prosecuted and punished.

Now, an observation like this, falling from a judge of Mr. Justice Erle's high character and position, cannot pass unnoticed, like the charges so frequently brought against the Bar by annoymous writers in the public press. For the sake of the social *status* and reputation of the whole Profession, the matter merits a full inquiry.

First, then, I would ask, whence does a counsel derive the materials on which he founds his line of cross-examination? and, secondly, what discretion ought to be extended to him in using those materials? The first question is easily answered —the counsel derives his materials for cross-examination from the attorney who instructs him. He cannot be, and certainly ought not to be, as we have always contended, acquainted with the facts of his case from his own personal knowledge. The very esence of the relationship that exists between counsel and attorney consists in this—that the former knows only what he learns from the latter respecting the facts of a case, and consequently for their truth the attorney *is* responsible, but the counsel *is not, and cannot be.*

It is no doubt a monstrous thing for a respectable witness—say a merchant of high station and character in the City of London—to be asked whether he is not in a state of insolvency when there is not the slightest foundation for such an accusation; and we would not screen the attorney, who so prostitutes his honourable calling instructing counsel to put such a question where there is no foundation for it, from any punishment, however severe and disgraceful. But we do say the counsel is not responsible for acting strictly according to the instructions of the attorney, provided they are not inconsistent with the ordinary principles of morality and honour. And this brings me to the consideration of the second question —What discretion ought to be allowed counsel in using the materials given him for cross-examination? I answer, a discretion that having first endeavoured, by inquiry of the attorney to ascertain whether the alleged facts on which he founds his instructions, to counsel, to discredit a witness on cross-examination are to the best of his knowledge true, and not mere vague surmises, does not then shrink from putting such questions, however high the station of the witness, or however damning the nature of the inquiries. Recent events have but too plainly shown that it is not a high position in commerce, or a place in the Legislature, that exempts men from such questions being put, and properly put, to them. But before the counsel does put a question, which in itself almost ruins the witness's reputation, let him well weigh the power he wields, and pause before he uses the deadly weapon placed in his hands. If, however, after inquiry, he is told by the attorney that there is sufficient foundation for the charge, then, I say, let him strike home, no matter whether judges frown or men in high positions exclaim against insolence of counsel. I repeat once more, it will be a sad day for the freedom of the English Bar if a counsel must actually know, from his own sources of information, the truth of charge against a man's character before he puts it; but I assert with equal warmth, that it behoves every attorney to look well to the truth of the instructions he prepares, for on him rests the moral, and ought to rest the legal, responsibility.

I am, Sir, yours, &c.

A BARRISTER OF THE WESTERN CIRCUIT.

Temple, Nov. 20.

U. C. REPORTS.

QUEEN'S BENCH.

(Hilary Term, 20th Victoria.)

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

TERRY v. THE MUNICIPALITY OF THE TOWNSHIP OF HALDIMAND.

By law—Shop licences to sell liquors—Power of Municipalities—16 *Vic., ch.* 194, *sec.* 3. *sub-sec.* 2.

A by-law directing the clerk of the municipality to grant licenses to sell spirituous liquors for the year to two parties named, and that no such license should be issued to any other persons—*Held*, good.

Where the operation of a by-law is spent, it will not be quashed.

Read obtained a rule *nisi* on defendants, to shew cause why by-law 114, passed by the municipality, also by-law 129, both limiting the number of licenses to be issued to shop-keepers to sell spirituous liquors, should not be quashed, wholly or in part, as illegal, on the ground that they grant exclusive priveleges to certain persons named therein, by ordering that no such licenses shall be issued to any person for the period stated in the by-law, except to certain persons named in each by-law respectively

By-law 114 was passed on the 1st of March, 1856. It enacted that it should be the duty of the clerk of the municipality to grant licenses to sell spirituous liquors during the year 1856, to William Taylor, of the village of Grafton, to be sold in his store only. Also to grant a license as aforesaid to the firm of Campbell & Pym, in the township of Haldimand, to be sold in their store only, in Campbell-Town, near Grafton. And that no license should be issued by the clerk to any person or persons whatever, for the purpose before stated, save and except to those persons, as thereinbefore provided; and it repealed so much of a former by-law (82) as was inconsistent with this by law.

By-law 129 was passed on the 28th of July, 1857. It made it the duty of the clerk (by the same form of words as in the other by-law) to grant licenses to sell spirituous liquors, during 1857, to William Taylor, of Grafton, and to the firm of Campbell and Pym, in Campbell-Town, under the same restrictions; and in the same form of words it prohibited the clerk from granting a license to any other person whomsoever. This latter by-law further enacted, that if any person should offend against this law, or any part thereof, he should upon conviction, or confession thereof, before a justice of the peace, forfeit and pay for each offence a sum of not less than £5, with costs, &c., and in default should be committed to the county gaol for not less than 10 days, or more than 20. And it repealed so much of by-law 82 as was inconsistent with this by-law.

Henry Terry, the applicant was a merchant in Haldimand. He swore that on the 20th of December, 1856, he was convicted before two justices of the peace for an alleged offence against the by-law 114, in selling liquor without a license; and a fine, with costs, levied upon his goods; and that on the 11th of April, 1857, he was convicted before three justices of the peace for an offence against by-law 129; and he annexed a copy of the conviction, which showed that £4 fine was imposed, and 17s. 9d. costs, which he said had not yet been levied. This conviction stated the offence to be against the by-law 129, and the statute in that behalf. He swore that one of the convicting justices on both occasions was the reeve of the township.

The clerk of the municipality swore, that the only applications for licenses in 1856, were from Taylor, Campbell and Pym, and Henry Terry; and for 1857, the first two only, and not Terry.

The by-law No. 82 referred to was passed on the 11th of February, 1854. It related to licenses to be issued to persons for selling spirituous liquors by *retail*, other than tavern-keepers. The other two by-laws, it will be observed, were not so confined to licenses for retailing, but extended to all selling of spirituous liquors.

This by-law 82 provided that after the 1st of March (1854) no person should sell in Haldimand spirituous liquors by retail, except in taverns, &c., unless licensed under that by-law. It made it lawful for the clerk, thereafter, on payment of £7 10s. to issue licenses to retail spirits, wine, &c., in any place in Haldimand to be mentioned in the license, other than in taverns, &c., *to such persons as should apply for the same in writing*, which license should be in force to the last day of February after its being issued. In another clause it provided that the clerk, on payment of £7 10s., should *issue* a license to the persons applying, in the order in which they should be applied for.

This by-law contained provisions also for regulating the conduct of persons selling, and providing for the punishment of those offending against tt.

In answer to this application the Reeve, John Wilson, made affidavit, that Terry, the applicant, kept a store in a village called Vernonville, which was composed of his store, a blacksmith's shop, in which the post office was kept, a shoe-maker's shop, and a small grocery; that he had a license to sell liquor, which expired in February, 1856; that the giving a license to Terry had given great dissatisfaction in the neighbourhood, and that petitions were produced, numerously signed by inhabitants of Ward No 3 in which Terry's shop was situated, earnestly entreating the municipality not to license Terry, or any one else, to retail liquor in

that neighbourhood. These were presented in February, 1856, and February, 1857. That there were *four* licensed taverns in Haldimand, and only six stores in the township, besides Terry's, of which four were in Grafton; that neither Terry nor any other person, except those mentioned in the by-law, applied for license this year, (1857); and the only places where it was at all necessary there should be shops for retailing liquors in Haldimand, were those named in the by-law.

J. D. Armour shewed cause.

Coyne and The Municipality of Dunwich 3 U. C. R. 448; Barclay and The Municipality of Darlington, 12 U. C. R. 86; Greystock and The Municipality of Otonabee, 12 U. C. R. 458; 16 Vic. cap. 184, s. 3; 13 & 14 Vic. cap. 65; 12 Vic., cap. 81, sec. 116, were cited.

Robinson, C. J.—The applicant, as to one of his objections, relies on the judgments in the cases of Barclay and The Municipality of Darlington (12 U. C. R. 85) and Greystock and The Municipality of Otonabee (12 U. C. R. 458); but we do not think they can be pressed so far as to support this application.

It was tavern licenses that were in question there, not shop licenses The Municipality had in those cases granted only one tavern license for the whole township, which gave a strict monopoly to one person, and excluded all competition, so that the one person licensed could exact whatever he pleased for the liquor he retailed. We thought that manifestly unreasonable and objectionable; and besides, the power given to them to limit the number of *inns* and *shops* in a township, &c., was not fairly exercised by allowing only one inn and one shop; and what further weighed with the court in these cases was, that it was not till after the municipality had found that they could not obtain the assent of as the inhabitants to a total prohibition, by a proceeding such as the 4th section of the act 16 Vic., ch. 184, required that they restored to the very unusual measure of licensing one inn only in a township, and that not in a situation which shewed that the object was the convenient accommodation of the public.

We held that we could not but look upon that as a contrivance by the Municipal Council to do that indirectly which they could not do directly, and in the manner required by the legislature: that it was not a *bona fide* exercise of the discretion of limiting the number of licensed taverns, with a view to a reasonable and convenient accommodation, and, as far as could be managed, the equal accommodation of the inhabitants of the township; but that it was in reality a prohibitory measure as o its general effect and tendency, and was intended to evade the legislative enactment, which gave to the inhabitants of the township a direct vote upon the question of prohibiton.

The circumstances of this case are different. This by-law allows the licensing of *two* shops to retail liquors in a township, in which there are four licensed taverns besides. Then there is a competition allowed. The privilege is not confined to one person, but is literally given to a *number of persons*, though to be sure the smallest number possible, if there are to be more than one.

The two shops are also in the business part of the township, to which we may suppose the inhabitants would at any rate chiefly resort for such things as they may have occasion to buy.

Moreover, there have been, it seems, no other appplications for shop licenses, except for one of the years in question, on the part of the person moving to quash this by-law; and as it is alleged, and not denied, that he has been twice convicted of retailing liquors without license, he does not stand in a particularly favourable position in making this application,

The inhabitants generally seem satisfied with having but the two shops licensed. We could not properly, perhaps, give much weight to the circumstance of so many persons having petitioned the municipality not to license the applicant again on account of the mischief which it had produced in his neighbourhood, because we cannot appreciate the influence which such a petition ought to have so well as the Council could, to whom the petitioners are known. We only know, generally, that it is no difficult thing to get up petitions on either side of almost any question.

The point in this application which has seemed to us to require most consideration, is the fact of the Council having in the by-laws taken upon themselves to name the parties who alone shall be licensed, which accounts reasonably enough for no one else having applied.

It is singular how the Council have rushed from one extreme to another. By the by-law No 82 they allowed every one to have a license who chose to ask for it, and to pay the sum of £7 10s., without allowing any opportunity for considering the character of the applicant, or the convenience of the inhabitants in regard to locality. But the by-law now in force only two certain persons are to have the privil_e. It seems an objectionable mode of determining who shall be the two persons, by naming them beforehand in the by-law; but we do not think we can pronounce it to be illegal. The legislature, by the clause referred to, (section 3 of 16 Vic, ch. 184,) allows the municipality to limit the *number of persons* to be licensed, but makes no provision for selecting the persons. Who then is to make the selection? This clause is all that we have to look to respecting this matter, It does not give any power to the clerk to choose any of the applicants at his pleasure. It would have been indiscreet to enact that the two who applied first should get the license, and the act does say so. Since the statute has been silent, and since some one must determine who shall have the license when the number is limited, we cannot deny to the Council the authority to select; and if they could do it by resolution, or by verbal direction to their clerk, they can do the same thing in a formal manner by by-law.

It seems objectionable that the municipal councillors, who are selected by the popular vote, should have this kind of discretion to select; but that is a matter for the legislature to guard against, and if they are to do it at all the same influence might be brought to bear, and the same effect produced, whether they make the selection in one way or another. It does not seem a wise provision for the legislature to have made, for several reasons, but that can be easily remedied if upon experience it is found injurious. The words in the third clause, "or for limiting the *number* of persons to whom, and the *houses* or *places* for which, such licenses shall be granted," seem, we think, to intend that the municipality are to *select* the persons, as well as to limit the number, for having limited the *number* of persons they are to limit the houses or places to be licensed. Here they have done it by naming the persons who were actually keeping the shops which they had resolved to license. They might have enacted that two shops only should be licensed, and then have specified the shops, without specifying the individuals. That would have been a literal compliance with the act, but we cannot, we think, hold the other to be illegal.

We are of opinion that the 116th clause of 12 Vic., ch. 81, does not apply to inn-keepers and shop-keepers, respecting whom the legislature have made special provisions; and besides it is not under that act, but under 16 Vic., ch. 184, that these by-laws have been passed.

The first by-law, No. 114, we should at any rate not have quashed, for its operation is spent; and we do not quash that which is now in force, No. 129, for the reasons we have stated. But we cannot but think that the mode of selecting the persons does require to be better provided for by an act of the legislature, for to allow any who come first to obtain the license would seem injudicious, and to name them in the by-law appears inconvenient, if not objectionable, for it might be that the person named might not desire the license, or might leave the house, or leave the country. It would seem more rsasonable that all who chose should have been left to apply, and leave the municipality to make their selection for them. Instead of that they have passed a by-law limiting the number in effect to two, which is one part of the authority committed to them, and limiting the places, which is another part of the authority to be exercised by them; namely, to the shops of Campbell and Pym, near Grafton, and to the shop of William Taylor, in Grafton. We cannot say that it is not in substance carrying out the statute, though we think it would have been better if they had in terms limited the number of licenses only, and leaving it open to any person to apply, had afterwards selected the two from the number of applicants.

Rule discharged.

COMMON PLEAS.

(*Reported by* E. C. JONES, ESQ., *Barrister at-Law.*)

O'BRIEN ET AL. v. THE VILLAGE OF TRENTON.

A man laying out village lots on his lands with streets to bound the lots, and selling according to such a plan *Held* bound by this dedication of the streets unless the fact of such dedication be rebutted by other evidence.

Trespass *qu cl. frey.* in the village of Trenton—that is to say, a certain close abutting on the south on the north shore of the Bay of Quintè, on the east, on the westerly side of the river Trent, on the north, on the southerly side of Dundas Street, in the said village of Trenton, and on the west on a line drawn parallel and in continuation of the westerly side of Front Street, in the said village of Trenton as now established produced to said bay shore.

Pleas—1st, Not guilty by statute 4 & 5 Vic., ch. 54, sec. 5. 2nd, A public highway across the said close, wherefore defendants being the governing corporation of the said village, and having occasion to repair and use the said road did, &c. The plaintiff denied the right of way.

The trial took place at Belleville, in October last, before the Chief Justice of Upper Canada. The trespass was proved: the plaintiffs had wood on the *locus in quo* in 1855, and the defendants gave them notice to remove it. They did remove it, and the defendants' officers and servants levelled and made a street from Dundas Street to the waters of the bay, and the street was used some time. Then plaintiffs put up a fence obstructing it, and in April or May, 1856, the defendants had this fence removed. There was then put in the patent for thirty-four acres, containing the *locus in quo*, dated the 1st March, 1805, to John Bleeker in fee, and subsequent documents shewing the plaintiffs to be lessees.

It appeared that John Bleeker and George Bleeker, were sons of the grantee of the crown, and after his death became joint owners of the property granted to him. That John had the management, and that he employed Greely to survey and lay out the village lots referred to in the conveyances. He admitted that Front Street was laid out according to his directions, west of the river, on the north side of Dundas Street, but denied that he had extended it south of Dundas Street to the bay of Quintè and denied that he had employed or authorised Greely to make a plan. It appeared, however, that he and his brother George had joined in a conveyance to one Jacob W Myers, dated the 3rd January, 1822, described as situated in the township of Murray, being part of village lot No. 1, village lot No. 5, and the broken front of village lot No. 5, on the river Trent, containing three-fourths of an acre, and thirty-two perches of land. "No. 1, beginning *at the Bay of Quinte, southwesterly side of Front Street*, thence *along the same* N. 48 degrees W. one chain; then S. 42 W. 1 chain; then S. 48 E. 1 chain and fifteen links, more or less, to the bay aforesaid; then along the same north-easterly to the place of beginning." According to this description Front Street extended to the Bay of Quintè, and the point of beginning at the bay would correspond with the protraction of Front Street from the north side of Dundas Street, as Front Street was at first laid out 33 feet wide, though it has since been made 40 feet wide. On the 20th of June, 1832, Jacob W. Myers conveyed to William Robertson the premises he had acquired by the deed of 3rd of January, 1822, with precisely the same description.

The map drawn by Greely and referred to in a deed of the 20th March, 1821, through which the plaintiff claimed, was not produced at the trial. It had been in the possession of William Robertson, and was said to have been produced at the trial of a cause of Doe Murphy v. McGuire, by Robertson himself, at Cobourg, in 1829, since which it could not be traced. Robertson swore he had searched for it, but could not find it. The evidence with regard to it was conflicting. Some witnesses denying, and some very distinctly asserting, that on the map Front Street was delineated and marked as extending on the south side of Dundas Street down to the bay. The learned Chief Justice directed the jury, that a man laying out a village on his land, with streets to bound the lots laid out, is bound by this dedication of the streets, if he sell the lots according to such plan; and he left it to them to say on the evidence given as to Greely's plan, and the reference to it in the deed, and the description contained in such deeds, whether this street was not so dedicated, remarking that if so, the conveyance of the whole land in the deed to Ripsom would not have the effect of extinguishing the right of way.

The jury found for the plaintiff, damages 1s.

Walbridge, in Michaelmas Term, obtained a rule *nisi* for a new trial, on the grounds that the verdict was against law and evidence, and the weight of evidence, and against the judge's charge, pointing out the grounds of the application in the rule

Jellett shewed cause, contending the evidence of dedication was wholly insufficient, and therefore the verdict was right.

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

I think there should be a new trial on payment of costs. There is a public right in question, and it is enough to say that while the decision of the jury was not in accordance with the impression of the learned Chief Justice who tried the cause, it is not, after a careful examination of the evidence, entirely satisfactory to us. That Greely's plan, whatever it did contain, was the plan on which certain village lots were laid out by the then proprietors of the tract of land is beyond dispute, and the testimony of one of these proprietors, though not very clear, and perhaps not very consistent, is so far in accordance with his own deed to Ripsom. In my mind the weight of the parol evidence is in favour of the conclusion that on this plan Front Street was protracted to the bay, and this conclusion is very strongly fortified by the description in the deeds of 3rd January, 1822, and 20th of June, 1832.

But the facts were not sufficiently elicited, and enough appears to convince us that a fuller investigation is necessary in order to bring the question of dedication properly before a jury. The fact that a street was laid out on the plan, and that one lot at all events was conveyed with a description bounding it on that street, may be rebutted by the ownership of the street and the lot so described becoming vested in the same person, and by a total absence at any time of user as a highway. All inference of dedication in fact may be rebutted, though an intention to dedicate may have existed, or the intention may be shewn to have been attended with or followed by such acts as would remove any reasonable doubt that a dedication was really made.

HILL v. MUNICIPALITY OF TECUMSETH.

School act—Motion to quash by-law.

Where a great length of time has been elapsed before motion made, the court refused to quash a by-law altering school sections, it being on its face legal and having been acted upon

On the 6th February, 1856, *McMichael*, obtained a rule *nisi* to quash in whole or part, by-law No 36 of this municipality on the following grounds: 1st, That it was not submitted to a meeting of the freeholders or householders of the township, or at any meeting of the school sections of the township duly called for that purpose. 2nd, That the freeholders and householders in the school sections affected by the by-law, have not assented to such alteration at any meeting called for the purpose of obtaining their assent. 3rd, That there was no request of the majority of the freeholders or householders expressed at a public meeting called by the trustees for that purpose. 4th, That union school sections in said township are disunited and abolished without any request made or expressed by the majority of the householders and freeholders in such union sections. 5th, That the parties affected by such alterations were not duly notified of the proposed by-law. The rule was served on the 26th of May last.

A copy of the by-law was applied for, and obtained from the township clerk on the 15th December, 1855: it is intituled "By-law No. 36, to provide for the better arrangement of school sections in the township of Tecumseth, in the county of Simcoe," and was passed on the 19th December, 1854. It enacts that on and after the 25th of December, 1854, the school sections shall be composed of the following lots, and part lots, concessions, and part concessions, in accordance with the following description. It then sets out fourteen school sections mentioned, what lots, or part of lots, and in what concessions respectively each section is to consist of, appoints places for holding the first meetings for the election of school trustees in each school section, and repeals all former by-laws, orders, &c.. constituting school sections except as "to No. 14, heretofore known as school section No. 17, which shall be in no otherwise affected by this by-law than by the addi-

tion hereinbefore made." By some words used in the by-law it appears there had been previously eighteen school sections in the township, and this fact is stated in the affidavits, which further set forth that five of these eighteen were union school sections connected respectively with the townships of Adjala, King, and West Gwillimbury, and were numbered 12, 13, 14, 15, and 16. It was also sworn that the by-law affected the former school section, No. 7, very materially, distributing the lots, etc., which were in that section, over three different school sections, occasioning great inconvenience to the inhabitants of the old section No. 7: that the by-law has abolished all the union school sections, and the parts of the township of Tecumseth of which they were composed have been distributed into other school sections, and all the former school sections have been more or less altered: that no public meeting of the freeholders or householders of the old section No 7, was called to consider the alteration, or any subject relating thereto, before the passing of the by-law. That (as believed) no requisition to call a meeting for any such purpose was made to the trustees of the old section No. 7, nor was any such request made to them: that (as believed) no opinion in favour of the changes made was expressed at any public meeting in any school section: that (as believed) on the 5th December, 1854, it was resolved at a meeting of the township council, that a meeting should be held of that body on the 19th of the same month, to alter the then existing sections, and union sections, and that all school trustees, reeves, and local superintendents of townships should be notified thereof. That this step *towards the alteration* of the school sections was taken without notice given to the trustees of the different school sections That Hill, then trustee of school section No. 7, was present at the meeting on the 19th December, 1854, that a petition on behalf of section No. 7, numerously signed, was presented against the alteration, and similar petitions from sections Nos. 6, 13, and 16, which latter were union school sections. That there were only one or two petitions in favour of the change. Nevertheless, the by-law was passed, though Hill made all the opposition in his power.

Cause was not shewn until the 2nd September (Trinity Term), 1856, affidavits were filed setting forth that under the by-law moved against, there were in the year 1855 six new school houses erected, costing from £100 to £250 each; that notices of appeal against the by-law (meaning evidently the rule *nisi*), was not served on the county clerk until the 27th of May, 1856 (the reeve was only served the preceding day): that many applications were made prior to the meeting of the council held on the 5th December, 1854, to have the school sections altered: that at a meeting of the council held on the 29th of August, 1854, it was ordered that notice be given that all persons desirous of having alterations made in their school sections, were requested to take proceedings and make application to the council at its meeting on the 7th November, 1854, on which day many parties attended, and expressed their desire to have alterations made, in consequence of which, it was then ordered that the final decision on school sections be laid over until the meeting on the 5th December, 1854, on which day the resolution already referred to in the affidavits in the support of the application, was adopted, and notices pursuant thereto were prepared, and given to a constable for service on the school trustees of the different school sections and union school sections in the township, and the trustees of the union school sections formed with portions of adjoining townships, residing in such adjoining townships, and also the reeve of such adjoining townships, and the local superintendents of schools therein, and in the township of Tecumseth. The constable swears he commenced serving the notices on the 8th December, and finished on the 12th, and served the complainant John Hill on the 9th December. (Note—Hill swears "that he had only been notified on the Saturday preceding the Tuesday on which the by-law was passed," which if Tuesday was the 19th December, would be on Saturday, the 16th December).

Connor, Q.C., on behalf of the municipality, urged that every party interested had ample notice: that the change made was within the spirit and meaning of the acts, and was sustained by the case of Ness v. The Township of Saltfleet, 13 Q. B., U. C., 408, and he urged that the tardiness of the application, and the long delay in serving it, prevented cause been shewn last term. He referred also to Grierson v. the Municipality of Ontario, 9 U. C. Q. B., 623.

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

I have not felt it necessary to go into the objections urged to this by-law, which are founded on matters extrinsic to it, such as the want of notice, the absence of public meetings, &c. The by-law on the face of it, is within the authority conferred by the 13th and 14 Vic., ch. 48, and the proviso to the 17th section of 16 Vic., ch 185. The court of Queen's Bench held in Sutherland v. The Municipal Council of East Nissouri (10 Q. B., U. C., 626), that they had no authority given by the statute to quash a by-law on an application of a similar nature to the present, except for something illegal on the face of it, or except, perhaps, when it is shewn to have been passed under circumstances which by the express terms of the statute make it illegal. It may admit of argument, taking the strongest view of the facts relied upon by the applicant, whether this by-law could not be sustained. But if we have the authority, we have also a discretion to exercise in such cases, under the particular circumstances appearing, as was held in Grierson v. Municipality of Ontario.

Here the applicant was aware, by notice, of the enactment of the council and its object and purpose. He was present when the bye-law was passed on the 19th of December, 1854. During the year 1855, until near its close, he did not even apply for a copy of the by-law. The motion for a rule *nisi* was no. made until nearly fourteen months after it was passed, and the service of the rule *nisi* was delayed until just seventeen months after the by-law has been in operation. During all this time the common school sections have all been regulated by the by-law complained of; two annual elections of school trustees have taken place, and considerable sums of money have been expended in building school houses in some of the sections created by it. We think the delay a sufficient answer to an application for the exercise of our summary jurisdiction. If the by-law does not in itself confer legal authority for any particular act done or to be done, which parties interested resist, or is in itself totally unauthorized, our refusal to interfere now will not prevent their raising the question whether or not being quashed, it affords the municipality a protection, or whether the 12th Vic., ch. 81, sec. 155, prevents an action for any thing done under a by-law, so long as it has not been judicially declared illegal or void. But when it is sought to obtain the prompt remedy given by the act, the application should be promptly made, *vigilantibus non dormientibus, &c.*, in a maxim properly applicable in a case of this description.

The rule must be discharged.

See Lafferty v. Municipal Council of Wentworth, 8 U. C. Q. B., 232; Hodgson v. Municipality of York and Peel, 13 U. C. Q. B., 268

CHANCERY.

(*Reported by* ALEXANDER GRANT, ESQ., *Barrister-at-Law.*)

SILCOX v. SELLS.

Dormant equities.

The statute 18 Vic., ch 124 applies only to cases where the cause of suit arose before the passing of the Chancery Act, (1857).

The locatee of lands of the crown, in 1842 contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific performance of the contract, the patent from the crown having been issued in 1830. The court dismissed the bill with costs.

The plaintiffs in this case claimed as the real representatives of one *Archibald Phillips*, and alleged that in the year 1824 the defendant being the locatee of the crown lot No. 18, north, on the north branch of the Talbot road, in the township of Southwold, sold to their ancestor the north 50 acres thereof, for the sum of £30, which was paid by him to the defendant, who then, by an instrument in writing, subscribed by him, bearing date the 24th day of April, 1824, agreed to convey the said 50 acres to the said *Archibald Phillips* by a good and sufficient deed, twenty days after the defendant obtained the patent from the crown of the said lot, No. 18: that the defendant had ever since continued in possession of the whole of the lands, the 50 acres agreed to be sold to *Phillips* being still wild and in a state of nature: that

defendant had in 1830 procured letters parent to issue in his name for the said lot, by reason of which, the bill insisted, the defendant became trustee of the 50 acres for *Phillips*, or his representatives. The prayer was for specific performance of the contract.

The defendant by his answer admitted the principal facts stated in the bill, but relied upon the statute intitled "An Act to amend the law as to Dormant Equities," as a defence to the suit.

Evidence was taken, before the court, tending to shew that since the death of *Phillips*, and after the plaintiff had attained twenty-one, *Selts* had made admissions of the agreement to sell and receipt of the consideration.

Read for the plaintiffs.

A. Crooks for defendant, *Griffin*, v. *Griffin*, 1 Sch. & Lef. 352; *Jones* v. *Kearney*, 1 Dr. & War. 156; *Vaughan* v. *Vanderstegen*, 2 Drew. 182, were referred to.

ESTEN, V. C.—The act 18 Victoria, chapter 124, affects only cases arising before the passing of the Chancery Act. Cases of actual fraud are still governed by the strict rules of decision prevailing in England; in other cases the court is to have a discretionary authority. As to cases of actual fraud the law remains unaltered; as to all other cases the court has a discretionary authority, but the suit must be brought within twenty years from the time the title accrued without any exception on account of disability.

SPRAGGE, V. C.—The act seems to apply to real estate only, which it divides into two classes, the one where there has been actual and positive fraud, the other where there has not. It applies only to cases where the cause of suit arose before the passing of the Chancery Act. The 1st section applies to cases of actual fraud, and provides that no suit shall be brought for causes arising before 1837, unless there has been actual fraud. The 2nd clause applies to cases where there has been no actual fraud, and enables the court to deal with them as they may deem reasonable and just, if the suit be brought within twenty years, and the suit must be brought within twenty years notwithstanding disabilities. If the two classes of cases contemplated by the act had been—1st, questions arising out of claims upon real estate—2nd, other cases not arising out of claims upon real estate, the case would have been at least equally clear, for the cause of action arose before the passing of the Chancery Act, and it is not a case of actual or positive fraud. We see no ground for the position taken by plaintiff's counsel that the first class is confined to mortgages. And as to the position that the case was taken out of the statute by the alleged admissions made by the defendant within the last twenty years by analogy to the old rule in regard to debts, our opinion is, that the arising or accruing of the equitable claim, interest, or estate contemplated by the statute, is the original transaction out of which the equitable right arises, and not any subsequent admission or promise.

CHAMBERS.

(*Reported for the Law Journal, by* C. E. ENGLISH, ESQ.)

Quo Warranto.

REG. EX REL. BULGER v. SMITH, ET AL.

A Returning Officer cannot, after the close of the Poll, add his vote for a Candidate although he then for the first time discovers a tie between some of them.

A Returning Officer should literally observe the directions of the Statute as to keeping a Poll Book, and though his failing to do so, will not in all cases, vitiate the election of a party regular in every other respect.

(18th April, 1857.)

The particulars of the case sufficiently appear in the judgment.

ROBINSON, C. J. A Summons was granted on Feb. 7th, 1857, on the election of Daniel Bulger—to Robert R. Smith and William G. Warren, to shew by what authority the claims to exercise the office of Councillers for the United Townships of Wilberforce, Grattan, and Fraser, and asserting that Daniel Bulger and Duncan McDonell ought to have been declared duly elected and admitted thereto.

A Summons was also granted on the same day to Thomas B. Lett, Returning Officer, to answer, &c.

The statement is, that the election was held on the 5th and 6th January, 1857, at Musk Lake, in the Township of Wilberforce—that Daniel Bulger and Duncan McDonell were duly elected and ought to have been returned, and that the election of Robert R. Smith and William J. Warren should be declared invalid and void; and Daniel Bulger and Duncan McDonell be declared duly elected.

The objections are,—

1st. That the election was not conducted fairly, impartially, and according to Law by the Returning Officer, that before the election he stated that no Catholic should sit for Wilberforce.

2nd. That at the close of the Poll, on the second day, he declared that Smith, Reynold, Campbell, Bulger, the Relator and Warran had the greatest number of votes, and were duly elected; and yet did by return within eight days thereafter declare the said Smith, Reynolds, Campbell, McIntyre, and Warran to be the Councillors duly elected.

3rd. That in the meantime (*i. e.*, after his declaration at the close of the Poll on the second day, and before this latter return) he added his own vote in favor of McIntyre.

4th. That after deducting the vote of the Returning Officer given after the Poll was closed, and after Smith, Reynolds, Campbell, Bulger, and Warran were declared duly elected, he, Bulger, still had a majority of votes over Warran and McIntyre, yet the Returning Officer did notwithstanding this by his latter return declare Warran and McIntyre duly elected in preference to the relator Bulger.

5th. That Smith was not qualified being neither a householder nor freeholder in the said United Townships or any of them, nor resident therein, but in the Township of Bromley in the County of Renfrew. And although he was rated on the Roll for the year 1856 for £70, yet the land for which he is so rated was at the time of the election the property of the Crown.

6th. That the Returning Officer did not keep a proper Poll Book and did not write the names of the voters therein, but on the copy of the Collector's Roll, used by him as a Poll Book, added the names of the candidates opposite the voters' names, as shewn by the paper produced.

7th. That Smith and Warran are disqualified being superintendents appointed under a by-law of the United Townships for giving out Contracts and expending monies belonging to the United Townships for which service they receive 6s. 3d. per day when employed as fixed by a by-law.

8th. That although fourteen candidates only were proposed and seconded, yet the Returning Officer received votes for *fifteen*, that is to say, he received a vote for one Kelly who was neither a candidate nor was proposed or seconded.

9th. That Reynolds and Hickey, two of the candidates, were also at the same time, and at the same election, candidates for the office of Inspectors of Houses of Public Entertainment—and received votes as such.

10. That in other respects the election was void.

It appears from the evidence that the Returning Officer, instead of complying with the very plain directions of the 160th clause of 12 Vic., ch. 81, respecting the Poll Book to be prepared and kept by him, to save himself that trouble used instead of a poll book the copy of the Collector's Roll, with which he had been furnished for a different purpose, and he ruled upon each page of this copy five columns opposite to the name of each person assessed, and as no elector could vote for more than five of the fourteen candidates he entered opposite to the name of each assessed person who voted the name of the five persons for whom he voted, putting them in the five columns promiscuously.

Under that clumsy mode of proceeding he could not and did not observe the direction of the Statute to enter in separate columns the names of each of the persons proposed and seconded as candidates, but the same column contained the names of various candidates according to the five which the voters selected out of the fourteen candidates. If he had attached a sheet of paper to each leaf of the Roll he might have had 14 columns opposite to each name and so might have made something more like a proper substitute for a poll book. As it was all the votes which he had taken down and allowed when correctly reckoned showed Smith, Reynolds Campbell and Bulger to have a majority, and McIntyre and War-

ran to have 70 votes each, Bulger the lowest of the first four having 71 votes. But picking the votes, as he had to do, out of the several columns in which they were promiscuously entered, he made, as he admits, a mistake which it was more than likely he would do—and he appears to have corrected for Warran a vote which had been set down for Bulger, and this put Warran increasingly above Bulger, and made Bulger and McIntyre stand at 70 each when it was Warran and McIntyre who had in fact each 70 votes.

There was however a tie, and must have been whether that mistake had occurred or not. The only difficulty was that the tie was not between the same two parties, as the Returning Officer supposed it was. The Returning Officer was necessarily called upon to vote in either case, and being so called upon he voted for McIntyre; and thus exercised his choice in favour of a party who required a vote to make him one of the five.

Before the Returning Officer had voted, the Poll shewed, when correctly reckoned up, the following results:—Smith, Reynolds, Campbell and Bulger elected, and McIntyre and Warran a tie. According to the Returning Officers manner of reckoning, the result was:—Smith, Reynolds, Campbell, and Warran elected, and Bulger and McIntyre a tie.

He was right in supposing he was bound to vote,—for the Statute binds that the Returning Officer shall do so when the votes are even,—and being thus called upon he voted for McIntyre which as he supposed would place him above Bulger, whereas, in fact, it placed him above Warran.

He tells us in his affidavit that Warran is his brother-in-law, and that if he had been aware of the true state of the Poll he would have voted for him rather than McIntyre; in other words would have given greater weight to private than to public considerations in bestowing his vote.

We must look, however to what he did, and not to what he tells us he would have done—McIntyre was, in fact, his choice; and we certainly should not put the electors to the trouble of a new election merely to allow the Returning Officer to vote differently. If he was under an erroneous impression, the error was wholly his own, and arose from culpable negligence on his part.

So far as the main part of the case is concerned—that is the number of votes merely—it is plain from the evidence that Smith, Reynolds, Campbell, Bulger and McIntyre are the parties elected, and Warran having retired under a consciousness, I suppose that he had really no right to be returned, put an end to all question on that branch of the case.

Then as the other objections taken in the statement.

1st. As to Smith's want of property qualification:—There is nothing but the Relator's own Affidavit to shew the want of it, except that Smith seems himself to admit that he was only rated at £70, and that on land which was bought from the crown, but has no patent for not having yet paid for it,—he says he thinks he has complied with the Crown regulations as a purchaser; but he relies on the fact shewn by his affidavit and by the Collector's Roll that there were not in the three townships more than four persons qualified to be candidates in point of property, and these under the same circumstances as himself in regard to their titles—there being only 5 or 6 patents issued for lands in the three townships. The Statute 16 Vic., ch. 181, sec. 23, dispenses with the property qualification under that state of things; otherwise Smith would have been clearly without the necessary property qualification; being rated for only £70.

2nd. As to objections to Smith for non-residence, that rests wholly on Bulger's oath—and he does not assert the fact in precise terms, but says he was not then a resident of Wilberforce nor *of the Townships of Grattan and Fraser, he probably meant or* Fraser, but such is his affidavit—Smith could not well have been resident at the same time in two townships.

I think Smith's answer to that may be taken as sufficient, considering how the objection is made, and how supported. But indeed I do not find that the Statute 16 Vic., ch. 181, sec. 10, requires residence within the townships in the case of the candidates, as it does of the voters.

3rd. As to Smith's alleged disqualification from being a superintendent for giving out contracts and expending monies for the municipality—there is really no proof whatever on that point adduced by the relator, nothing but his own general affidavit to the truth of the statement written at the foot.

And if the facts are, as Smith states them to be, that such office of Superintendent is incident to the office of Councillor under the 123rd clause of 16 Vic., ch. 181, it would be no disqualification, though the Councillor may be remunerated for the service.

So I think Smith, Reynolds, Campbell, and McIntyre duly elected, no evidence is given to disqualify either of the last three. And the only question is whether Bulger should be seated in the place of Warran who disclaims.

The objection shewn by Smith's affidavit against Bulger is more decisive than any objections brought against himself, for he seems to have been a contractor for opening a road on an agreement to receive so much per mile, the contract been still executory while the election was going on, the work not done, and the price not yet paid.

This is a clear objection under 16 Vic., ch. 181, sec. 25; but then it comes out for the first time in Smith's affidavit in answer; Bulger has not been complained against, and has not been called on to answer. As to the allegation in Smith's affidavit that Bulger has not the necessary property qualification, the same circumstances that dispensed with that qualification as regards Smith under the present circumstances of the new townships must, of course, have the effect of dispensing with them as regards Bulger also.

My judgment in the case therefore is, that Daniel Bulger was duly elected and ought to have been returned together with Smith, Reynolds, Campbell and McIntyre, leaving Bulger's right to sit subject to be questioned on the alleged ground of his being a contractor by a proper proceeding to be adapted within the limited time.

With respect to Warran, his declaimer could not, under the circumstances, relieve him from paying costs; for it is shewn that he was voluntarily a candidate, present at the election, and was sworn into office. But this appears to me to be most clearly one of those cases in which the Returning Officer should be adjudged to pay the Relator's costs; for it was his culpable and entire disregard to the provisions of the Statute in regard to the Poll Book to be kept by him that occasioned the error he fell into. Being the clerk of the municipality he must have had ready access to the Statute under which he was daily acting, and he either did not *look at the 160th clause of 12 Vic., ch. 81, which regulates the* duty of Returning Officers at elections, or if he looked at it he paid no attention to it, for he did not prepare or keep any such Poll Book as he was directed to keep in the plainest and most intelligible language.

By his method of setting down the votes he could not without a very tedious and troublesome process pick *out from five different* columns the votes which had been given for the several candidates, and he was very liable to fall into errors as often as he attempted it. One consequence too would be that the persons interested in the election, and present at it, could not obtain that clear and ready information from time to time as to the state of the Poll, which might otherwise have been given to them; and at last the Returning Officer himself fell into an error, as he admits, in casting up the numbers, which had the effect of putting in his brother-in-law instead of another candidate who had really a greater number of votes as they were taken down by the Returning Officer. This error has given rise to the present proceedings, for it could not be expected that the candidate thus elected, by a palpable mistake of the Returning Officer, would not apply for redress. The giving his own vote too after the election was over, and the Poll closed, was a clearly illegal act, and would have vitiated McIntyre's election if Warran, who was equal to him in number of votes had not since disclaimed.

The judgment is that Smith, Reynolds, Campbell, Bulger, and McIntyre are *duly elected, and that the Returning Officer shal'* pay the Relator his costs.

GLADSTONE ET AL. v. BOUCHER LYAL, O. BOUCHER & MACDONELL.

Practice—Demurrer—Special Indorsement.

A *joint* and *several* liability need not be alleged under C. L. P. Act, 1856, the mere statement of the facts being sufficient. Objections which could have been taken by special demurrer only under the old practice—will not support a demurrer under the new, and demurrers on such grounds will be set aside as frivolous.

(24th October, 1857.)

This was an action on a promissory note and the declaration after setting out the note as made by defendants Boucher and Lyal payable to O. Boucher and endorsed by him to defendant Macdonell, concluded in these words, "and the said note was duly presented for payment and was dishonored whereof the defendants O. Boucher and Macdonell had due notice, but did not pay the same and the plaintiffs claim, five hundred pounds."

To this declaration defendant Lyal demurred as bad in substance on the ground that the defendants are sued *jointly* only and not *jointly and severally* as should have been done, at least the declaration does not allege a joint several liability nor does it correspond with the form given in 3 Vic. cap. 8, under which statute the action seems to be brought.

Jones for plaintiff, applied to set aside this demurrer as frivolous on the ground that the declaration states the character in which each of the defendants is sued, viz., whether as makers or endorsers, and thereby does as effectually shew a *several* and joint liability, as though it was expressly alleged, moreover the declaration sets out the *facts of the case* and this is all that is required by the C. L. P. Act, 1856, which expressly does away with the necessity of *alleging a promise*,—the court, under that statute, drawing all necessary inferences itself.

DRAPER, C.J. C.P.—Considering that this declaration could only have been objected to under the old statute by special demurrer and that *special demurrers* have been expressly done away with by the late statute, granted an order setting aside the demurrer as frivolous.

CRUMP v. CREW.

Change of Venue—Practice.

It is within the discretion of a Judge either to change or not to change the Venue on the ordinary grounds as he thinks will further the ends of justice.

Special grounds may be shewn why Venue should not be changed on the ordinary application.

(8th October, 1857.)

Jackson made the ordinary application in this case before plea pleaded, to change the Venue from Middlesex to Kent, on the ground, that the cause of action, if any, arose in Kent, and on the further ground, that all the witnesses reside in Kent.

McFarlane for plaintiff, replied that he delayed bringing this action for a long time at the request of the defendant expecting to pay the amount as he had promised. That the Fall Assizes in Kent were over and that he brought the action in Middlesex for the purpose of getting down to trial this Fall, which he could not have done had he laid his Venue in Kent. That one of plaintiff's witnesses lately removed to the United States and plaintiff swore that he did not believe that he would be able to find him and procure his attendance at the trial next Spring, should he be thrown over by the change of Venue.

Jackson, in reply, objected to these special grounds being heard, he applied under the Statute, and had complied with all its requirements and therefore urged that he was entitled to the order. He said the Statute points out a method by which plaintiff could bring back the Venue which he apprehended is the only method that could be pursued, viz., by undertaking to give material evidence in the County in which he brought his action.

HAGARTY, J.—After looking into the Statute considered it optional with the judge to grant or refuse the order and therefore in consideration of the special grounds shewn by the plaintiff especially *his swearing that he believes* he will not be able to procure the attendance of one of his witnesses next spring, granted an order that the Venue be retained in Middlesex as laid, the plaintiff giving an undertaking that he would pay to defendant his additional costs by bringing his witnesses to London instead of Chatham, whatever be the result of the trial.

BURTON & SADLEIR v. NOWLAN.

Practice—Change of Venue.

A plaintiff will not, in general be allowed to change his own Venue to a County in which he might have laid it in the first instance, nor will he in general, be allowed to change it in order to avoid the consequences of his own delay or laches.

(20th October, 1857.)

This was an action on a promissory note. The writ was issued on 22d September last, but owing to the defendant's repeatedly promising the plaintiffs to settle the matter it was not served until the 2d October following. The Venue was laid in the County of Wentworth but owing to the above delay, plaintiffs were not in time to get down to the assizes in that County and therefore applied to have the Venue changed to the County of Perth where the assizes were later than in Wentworth. They were willing to submit to any terms that might be imposed and shewed by affidavit that they would be in danger of losing their debt in case they were thrown over the then coming assizes. It was also sworn that the defendant had no merits and was only defending for time. They cited in support of this application, *Stroud* v. *Tilley*, 2 Strange 1162; *Rivet* v. *Cholmondley*, Ib., 1202; *Hallett* v. *Hallett*, 1 Wilson, 173; *Bruckshaw* v. *Hopkins*, Cowp. 409; *Fife* v. *Bousfield*, 2 Dowl. N. S. 705.

Carroll, for defendant, objected,

1st. That this application was too late, a declaration having been served in the cause.

2d. That plaintiffs could originally have laid their Venue in the County of Perth, and therefore were not entitled to change it after having made their election.

3d. That this was a mere attempt on the part of the plaintiffs to avoid the consequence of their own delay and laches and therefore could not be entertained.

DRAPER, C. J. C. P., granted an order discharging the summons but without costs, as the question was a new one.

MOORE v. THE GRAND TRUNK RAILWAY COMPANY.

Practice—Eight days to plead—Computation of time.

In computing the eight days allowed to plead by C. L. P. A., 1856, the first and last days are reckoned inclusive, unless the last day be a *dies non*.

The day of service of a declaration is reckoned as one of the eight days for pleading.

(1st October, 1857.)

The particulars of this case sufficiently appear in the judgment.

DRAPER, C. J. C. P.- This is an application to set aside an interluding judgment signed on Monday the 21st September. The declaration was filed on Saturday the 12th September, and served on that day with a notice to plead. The defendant insists that he has the whole of Monday to plead.

If Sunday being the last or eighth day is to be excluded because it is a *dies non*, then the defendant had all Monday to plead, and the judgment is irregular.

The 65th Sec. of the C. L. P. Act, 1856, expressly provides as to the defendant's appearing, that if the last of the ten days fall upon a Sunday, the following day shall be considered the last of the ten days. This provision is similar to the 26th Sec. of 12th Vic., ch. 63, which is nearly the same as the 11th sec. of the English Uniformity of Process Act. Neither the statute nor any Rule of Court makes express provision in case Saturday be the last day of the eight allowed for pleading, but our 146th New Rule excepting Sundays (among other days) from the days on which the offices of the clerks of the Crown are to be kept open—virtually amounts to the same thing, for it renders it impossible for the defendant to fill his plea on that day, and our 166th New Rule accordingly provides that when the Crown office is not to be open on the last day, that day is to be excluded from the computation.

I was referred to the cases of Vrooman v. Stewart, and Brooksbanks v. The Buffalo and Lake Huron R. R. Co., both decided in last Easter term. In the former, the interlocutory judgment was moved against as well as the assessment of damages, on the ground that the interlocutory judgment was signed too soon, and the notice of assessment was served too late. The declaration was filed on Monday 27th April, the judgment was signed on Tuesday 5th May. The notice of assessment was served on the 5th May, and

the assizes commenced on the 12th May. There was an affidavit of merits. The Court (McLean, J. in the Practice Court,) made the rule absolute without costs. The notice of assessment was certainly too short, but if the interlocutory judgment had been considered as signed too soon, I presume the defendant would have obtained his rule with costs, considering one proceeding regular and the other irregular, may have been the reason why no costs were granted to either party. In the other case, issue was joined and the notice of trial served on the 6th of May, the assizes beginning on the 12th May, and the rule was made absolute with costs. There were not eight days as required by the 146th sec. of C. L. P. A., unless both first and last days were inclusive. Neither of these cases therefore governs the present question. Vrooman *v.* Stuart, would have decided the question of the computation of the eight days—if the court had held the interlocutory judgment irregular, but it does not appear to me from the facts that such was the determination.

Now, the first question is, whether Saturday the 12th September is to be considered as one of the eight days. The 112th Sec. of the Act says that "in cases in which the defendant is within the jurisdiction, the time for pleading in bar unless extended by the court, or a judge shall be eight days.

Our former Act, 2 Geo. IV., ch. 1, sec. 22, enacted that "The first and last days of all periods of time limited by this Act, or hereafter to be limited by any rules or orders of court for the regulation of practice be inclusive;" and that section is not repealed by the C. L. P. Act, 1856. Then our 166th new Rule, states that "In all cases in which any particular number of days not expressed to be clear days, is prescribed by the rules *of* practice of the court, the same shall be reckoned inclusively of the first and last days, unless the last day shall happen to fall on any day on which the Crown offices are not required to be open, in which case the time shall be reckoned exclusively of the last day." The corresponding English Rule of Hilary Term, 1853, No. 174 says, "Rules *or* practice of the courts."

In Rowbury *v.* Morgan, (9 Exch. 730) it was held that the Eng. R. G., No. 174, did not apply to the eight days, from the last day for appearance at the expiration of which the plaintiff might issue execution upon a judgment signed for want of appearance to a specially endorsed writ. Parke, B., distinguishes this case from the provision of the Act with regard to the time for pleading—observing that the signing judgment under that provision was an entirely new proceeding, and must be interpreted, to mean what it says, namely—to include Sunday although the last of the eight days—but that when the statute treats of pleading it treats of proceedings which fall within the ordinary and known practice of the Courts, and are to be governed by it, and consequently when eight days are given for pleading the time must be computed according to that practice. If this doctrine be correct, then the rule of Court which exclude Sunday from computation, when it is the last day, are operative: and if so, the same rule which provides that the days should be reckoned inclusively of the first and last days, (a rule in strict accordance with the practice as regulated by the 2 Geo. IV., ch. 1,) would apply also and the time for pleading would expire on the evening of Saturday the 19th September, and the judgment signed on Monday the 21st, would consequently be regular.

The application is rested on the ground of irregularity alone, and must therefore be discharged as, moved with costs.

Summons discharged with costs.

Ross et al *v.* Johnstone and Armsden.

Computation of time for appearance—Practice.

In computing, the *ten* days for appearing the day of service is reckoned *inclusive* not exclusive. so that if the writ be served on Saturday, judgment may be signed one week from the following Tuesday.

(1st October, 1857.)

The original process in this action was served on defendants on 12th September last, and judgment for want of appearance was signed on 22nd of the same month.

Defendant Armsden applied to set aside this judgment for irregularity, on the ground that it was signed one day two soon; the ten days in which an appearance should be entered, being reckoned exclusive of the day of service of the writ, under C. L. P. Act, 1856.

Draper, C. J. C. P.—The English statute, 2 Will. IV., ch. 39, sec. 11, enacted "That if any writ of summons shall be served or executed on any day in term or vacation, all necessary proceedings to judgment and execution may be had thereon without delay at *the expiration of eight days* from the service or execution thereof, on whatever day the last of such days may happen to fall whether in term or vacation: provided always that if the last of such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days." The form given by that Act was a command to the defendant "within eight days after the service of this writ on you inclusive of the day of such service you do cause an appearance to be entered, &c. The 16th sec. enacted that all such proceedings as are mentioned in the writ may be taken on default of defendant's appearance.

Our own Statute, 12 Vic., ch. 63, sec. 26, was a transscript of the above cited sec. 11. The 30th sec. was like sec. 26, and the form of the writ was the same as in England. The words of our C. L. P. Act, 1856, are "all such proceedings as are mentioned in any writ of summons or capias or notice or warning thereto or thereon issued, made or given by authority of this Act, may be had or taken in default of a defendant's appearance, or putting in special bail at *the expiration* of ten days from the service or execution thereof, &c." The form of the writ is the same as before except that ten days are given instead of eight. The defendant is commanded to appear within ten days after the service inclusive of the day of such service.

Our enactment combines the provisions of the 11th and 16th sections of the English Statute, 2 Will. IV., amplifying the terms of the 32nd sec. of the English C. L. P. Act of 1852.

Taking together the enactment of Sec. 63, and the form of writ as given in the Schedule, and comparing the language of 12 Vic., chap. 63, and of the English Act 2 Wil. IVth, and considering that the words in the writ, "inclusive of the day of such service," were held to have effect notwithstanding the words, "at the expiration of eight days from such service" so that the day of service was reckoned one of those eight days, I can see no reason for holding that the day of service should not be held as one of the of ten days under our present Statute.

I think, therefore, in the present case, that as the service was made on Saturday the 12th September, the time for appearing expired on Monday the 21st September, and that a judgment signed upon Tuesday the 22nd was regular.

Summons Discharged. (*a*)

Stewart *v.* Johnstone.

Change of Venue—Scire facias application—Practice.

An application on special grounds to change Venue should not be made before plea pleaded.

Venue will not be charged on account of a trifling additional expense which would be incurred by trying the cause where the Venue is laid.

(1st October, 1857.)

This was an action for goods sold and delivered,—the venue was laid in Essex.

Boulton for defendant, applied to change the venue to County of Simcoe, on the grounds:—

First.—That nearly all the articles of plaintiff's account were delivered to him at the Village of Killarney in the County of Simcoe, where he resides, and that he had a large contra account against plaintiff which he intended to set off, and which, he believed, will leave the balance in his favor, and that the articles of his (defendant's,) account were also delivered at Killarney.

Second.—That he would require five witnesses on the trial of this cause four of whom reside in Simcoe, and the fifth, one Francis Franck resides at Goderich, but is employed and generally to be found at Waddell's Mills on the border of the County of Simcoe, and therefore that the trial of this cause at Sandwich

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(*a*) See Kerr et al v. Bowie, Chambers, March 28th, 1857, III. U. C. L. J., 111. Robinson, C. J. Har. C. L. P. A. p. 592.

some hundred miles distant, would be attended with great expense and inconvenience to him.

Phillpotts, for plaintiff, objected,

First.—That this application is on special grounds, and therefore should have been made before plea pleaded.

Second.—That defendant lives some twenty miles from Barrie, the County Town of Simcoe, while the plaintiff resides at Detroit only three miles from Sandwich, the County Town of Essex.

Third—That plaintiff would require several witnesses who reside in the Cities of Detroit and Chicago, near to Sandwich, and that defendant's witness Francis Franck, had left Waddell's employment, and is sailing vessels on the lake, his home being at Goderich, so that the expense and inconvenience of a trial at Barrie would be as great to him as a trial at Sandwich would be to the defendant, if not greater.

DRAPER, C. J. C. P.—I think a sufficient case is not made out for changing, looking at all the affidavits, moreover, this is a special application, and defendant has not yet pleaded.

Summons discharged.

JARVIS v. DURAND.

Practice—Pleading several Pleas.

Several distinct and independent special grounds of defence may be pleaded by leave of a Judge under the C. L. P. Act, 1856, but defendant will not be allowed to traverse what is not specifically alleged in the declaration.

(2d October, 1857.)

This was an action brought by plaintiff as Sheriff of the United Counties of York and Peel, to recover of the defendant certain goods and chattels or their value, under the following circumstances. The declaration was as follows:—

1*st Count.*—That about 7th January last, a writ of *fieri facias* in the suit of *Bernard* v *Hamburger*, was put into the hands of the plaintiff, and that thereby "he became *entitled to the possession* of certain goods and chattels" in his Bailiwick, "belonging to the said Hamburger," viz., &c., and that the defendant disposed of the said goods, before he as Sheriff could seize them, and that defendant converted them to his own use and refused, and still refuses to give up the said goods or to account for the same or the proceeds thereof."

2*nd Count.*—That the defendant converted to his own use the plaintiff's goods," viz., &c., (the goods aforesaid,) "which said goods and chattels belonged to the plaintiff, as Sheriff of the United Counties of York and Peel, under and by a writ of *fieri facias* delivered to the plaintiff as such Sheriff against the goods and chattels of one Hamburger."

3*rd Count.*—Common count for money had and received.

The defendant applied to plead to this declaration, the following pleas.

To the 1st and 2nd counts of the declaration:

1st. Not Guilty.

2d. Leave and License.

3d. Plaintiff not possessed.

4th. Hamburger not possessed.

5th. "That the said Bernard Hamburger and one Charles Cook his partner, trading under the name of Cook & Hamburger, as wine merchants at the said time when, &c., were possessed as of *their own property, of the said goods and chattels in these counts* mentioned, (except the Meerschaum pipes), and that being so possessed they the said Cook & Hamburger with the consent and knowledge of the said plaintiff, sold and transferred all their right to the said goods and chattels to the said defendant, and that the said plaintiff in pursuance of said sale delivered possession of the said goods and chattels, (except the said pipes), to the defendant."

6th. "That on, to wit, the twenty-second day of December, 1856, one Henry G. Booth, by the consideration and judgment of the County Court of the United Counties of York and Peel recovered against the said Bernard Hamburger and one Charles Cook, his co-partner, trading under the name of Cook & Hamburger as wine merchants, a certain judgment for the sum of £58 14s. 8d. debt and costs, and thereupon *afterwards on the last-named day* and year, and before the said time, when, &c., for the satisfaction thereof, caused to be issued and placed in the hands of the said plaintiff as such Sheriff aforesaid, a certain writ of *fieri facias* whereby the said plaintiff as such sheriff was commanded to levy the said debt and costs of the goods of the said Cook and Hamburger which said writ of *fieri facias* last said, was delivered to the plaintiff as such Sheriff to be executed before the writ of execution in the first and second counts named, came into his hands. And the defendant avers that the plaintiff as such Sheriff afterwards and before the said time when, &c., and before the delivery to him of the writ of execution in the first and second counts named, seized and levied on the said goods and chattels, (except the said Meerschaum pipes,) in the said counts named as the goods and chattels of the said Cook & Hamburger, partners aforesaid. And afterwards, whilst he, the said plaintiff as such Sheriff, held the said goods under the levy last said, he, the plaintiff, as such Sheriff aforesaid by the consent of the said Cook & Hamburger, and of t e *defendant and said Booth, relinquished his levy thereon and* allowed the said goods and chattels (except said pipes), to be sold, transferred, and delivered to the defendant by the said Cook & Hamburger, in satisfaction and payment to the said Booth, of the last-named debt and costs whereupon the defendant took possession of the same goods and chattels which is the conversion com*plained of in the said counts.*"

7th. "That on, to wit, the fourteenth day of January, 1857, he, the defendant, by the consideration and judgment of the County Court of the United Counties of York and Peel, recovered against the said Bernard Hamburger and one Charles Cook, his co-partner trading under the name of Cook & Hamburger, as wine merchants a certain *judgment for the sum of £55, debt and costs, and* thereupon afterwards, on the last named day and year, and before the said time, when, &c., for the satisfaction thereof, he, the defendant caused to be issued and placed in the hands of the said plaintiff, as such Sheriff aforesaid, a certain other writ of *fieri facias*, whereby the said plaintiff, as such Sheriff, as aforesaid was commanded to levy the said debt and costs of the goods of the said Cook and Hamburger, which said writ of *fieri facias* last named, was delivered to the plaintiff as such Sheriff, to be executed on the last named day and year, and by virtue thereof, the said plaintiff, as such Sheriff afterwards on the last named day and year, levied on the goods and chattels in the said first and second counts named as partnership property for the benefit of the said defendant." "And the defendant avers that afterwards and whilst the said goods and chattels, (except the said Meerschaum pipes) were so levied on, and in the possession of the said plaintiff, as such Sheriff, to wit, on the twenty-third day of January, in the last named year, the said plaintiff voluntarily relinquished the said levy and possession of the said goods and chattels, and permitted the said defen*dant to take possession of the same for the satisfaction of the said* debt and execution in this plea named, which is the conversion complained of by the plaintiff in these counts."

8th. "That on, to wit, the twelfth day of January, 1857, the said Bernard Hamburger and one Charles Cook, his co-partner, trading under the name of Cook and Hamburger, were possessed of the said goods and chattels, (except the said Meerschaum pipes,) as co-partners, and being indebted unto one Henry G. Booth, in the sum of fifty pounds of money, sold and transferred all their right and title therein to the said Booth, for said sum of money by way of chattel mortgage, dated the last named day, which said chattel mortgage was subject to a certain proviso, that if the said Cook and Hamburger should pay to the said Booth, the said sum of money on or before the first day of March then next—then the same should be void."

"And the said defendant avers that at the said time when the writ in these counts named was placed in the said plaintiff's hands as such Sheriff, and up to the time when, &c., the said chattel mortgage was in full force and effect, unsatisfied and duly registered, and the said Booth in consideration that the defendant would pay the said debt due from Cook and Hamburger, to him, and with the consent of Cook and Hamburger, transferred all his right and title to the said goods and chattels, (except said pipes,) to the said defendant with the leave and license of said plaintiff, as such Sheriff, took possession of the said goods and chattels, *(except said pipes), which is the conversion complained of by the* said plaintiff, in said counts."

9th. "*And the defendant for a plea to so much of the said first* and second counts of the declaration, as relates to the said Meerschaum pipes therein named, says that the said Bernard Hamburger being possessed thereof as his property on, to wit, the fourteenth day of November, 1856, and before the said writ in the first and second counts named, came into the hands of the plaintiff as such sheriff, to be executed; sold and delivered the said Meerschaum pipes to the said defendant for a valuable consideration, to wit, the sum of one hundred and twenty-eight pounds and ten shillings, subject to a proviso that if the said last named sum of money should be paid to the defendant at certain specified periods of time, the said Meerschaum pipes should again become the property of said Bernard Hamburger, and that until said periods should expire the said defendant should hold the said pipes as a pledge and security, and have a lien thereon for said sum of money and be at liberty upon default, made to assume the control of said Meerschaum pipes, as his, the defendant's own property."

"And the defendant avers that the said Hamburger failed to pay the said sum of money or any part thereof, to him within said periods limited as aforesaid, and hath not as yet paid the sum or any part thereof. And the said defendant before the said writ in the first and second counts mentioned, came into the hands of the plaintiff, as stated in the first and second counts, assumed, enter, control, as his, the defendant's property of said pipes with the consent of said Hamburger, which is the conversion complained of in the said counts, in respect of said pipes."

10th. "Never indebted" to 3rd count.

DRAPER, C.J.C.P.—Defendant may be allowed to plead the first, second, fourth, sixth, seventh, eighth and ninth pleas to the first and second counts, and the last plea to the third count. I disallow the plea that plaintiff was not possessed because the plaintiff in his declaration, in the first count asserts only that he was *entitled to the possession*. But defendant may plead not possessed to the second count. I see no reason why the first and second counts should have been inserted; as at present advised, I should not have allowed both to stand.

Order accordingly.

COUNTY COURTS, U. C.

In the County Court of Wentworth.—A. LOGIE, Esq., Judge.

In the matter of the appeal of the Great Western Railway Company, from the decision of the Court of Revision of the City of Hamilton

(Hamilton 31st July, 1857.)

The Great Western Railway Company objected to the assessment of their property in St. Mary's Ward, in the City of Hamilton, on the grounds:

1st.—That all their property, including buildings necessary for carrying on the business they are authorized by their charter to carry on, should be assessed at the average value of the lands in the locality being comprehended under the term Roadway, used in the 21st section of the Act.

2nd.—That the mode of valuation was incorrect, the land being assessed by the foot street frontage, instead of by the acre.

3rd.—That they ought not to be assessed for the water frontage or wharfage, as they do not carry on the business of wharfingers, or derive any profit from vessels stopping at the wharf.

4th.—That the valuation made by the city assessor of the Roadway and other lands, is above the average of lands in the locality.

It was argued for the Company that the terms "Roadway" and "Railway" are synonymous, and that the term Railway has been held in various cases to include not only the land on which the rails are placed, but also the buildings and other conveniences required by the Company for carrying on their business. The cases of Cother *v.* Midland Railway Co., 17 Law Journal, N. S. 237; Inhabitants of Worcester *v.* Western Railway, 1 American Railway cases 350; Per Chewett, J., in U. C. Law J. for October 1856; and in written judgment delivered this year; also judgment of Wells, J., in Chatham Planet of July 8th, 1857, were cited.

For the city, it was contended that the term Roadway in the Act does not include buildings, and even if it do include buildings necessary for the working of the road, that the majority of the buildings assessed are not necessary for the working of the road, such as Roach's saloon, the locomotive and cars works warehouses, and buildings for storage, and that the buildings and land not necessary for the road, or without which it could not be worked, should be assessed at the full value.

LOGIE, Co. J.—In order to determine the questions raised on this appeal, it is necessary in the first place to ascertain the meaning of the term "Roadway" used in the Act. If the word have the same signification as "Railway," the cases cited and also the interpretation clause of the Railway Clauses Consolidation Act, which defines the word as used in that Act to mean "The railway and works by the special Act authorized to be constructed," would to some extent be authorities in favor of the view taken by the Company. But on the other hand, the case of the South Wales R. Co. *v.* Swansea Board of Health, is a direct authority against them, and in favor of the position assumed by the city. The case in the American Railway reports decides that the Railway with its buildings and appurtenances is a public easement, like State houses forts, gaols, court houses and the like, and is exempt from taxation on grounds of public policy, which is quite different from the questions raised in this appeal. In the case of Cother *v.* the Mid. R. Co., the question was as to the power of the Co. to take land necessary for the purposes of the road. In such a case a liberal construction of the Act was clearly necessary, otherwise the powers granted to the Company could not be fully carried out. But no such construction is *necessary* here, the object of this investigation being merely to ascertain the intention of the Legislature in framing the clause. In the case of the South Wales Railway Co. *v.* Swansea Board of Health, 4 Ellis and Blackburn, 189, a point similar to that now under consideration was raised. It was an appeal against a district rate, and the Company claimed that their buildings were included under the term "Railway" in a proviso which directed that land "used only as a canal, or towing path for the same, or *as a Railway* constructed under any Act of Parliament for any conveyance shall be assessed in respect of the same in the proportion of one fourth part only of the net annual value," and the Court held that the buildings were not included in the term "Railway," and that nothing came within the proviso except the line itself, the sidings and turntables on which the carriages actually go; and Mr. Justice Erle in his judgment says:—"I think all land supporting the actual railway, whether it be embankment or slope, is land used as railway, and when it is used for that purpose only is favoured within this Act; *but it does not follow that such supporting lands are within the exception if they be converted into sites for warehouses* or used for some other purpose, as then they would not be used for the purpose of a railway only. I think also that the sidings having rails on which the carriages go, and turntables are in every sense part of the Railway, and I do not think they cease to be so merely because a roof is put over them."

In our Statute the 21st section is "And be it enacted, that every Railway Company shall annually transmit to the Clerk of every Municipality in which any part of all the *road* is situated a statement describing the value of the real property of the Company *other than the roadway*, and also the actual value of the land *occupied by the road* in such municipality, according to the actual value of land in the locality," &c., &c. Here the property favored is the land "*Occupied by the road*" and in the English Statute referred to it is land "*used as Railway.*" Of the two forms of expression I think that used in the English Statute is the more comprehensive, and if under that form of expression the buildings of the Company are not included *a fortiori* they are not included under the less comprehensive expression. I am of opinion therefore, that the land mentioned in the Statute as Roadway or as land occupied by the road is only the land on which the rails are laid with embankments, slopes, sidings, turnables, &c., the station might perhaps be included particularly if built so as to cover the track of the railway, and the buildings used for covering the locomotives, but not the warehouses car and locomotive shops, saloon &c. The saloon although included in the station would not be exempt, not being roadway, and as coming within the principle decided in Purvis *v.* Traill, 3 Exch. 344; Clarendon *v.* St. James, &c., 10 C B. 806, and other cases where it was held that if a literary society which is by Statute exempted from taxation, leases or sublets a part of its premises, the part so sublet is not exempt from taxation, although the funds were applied to the objects of the institution.

With regard to the mode of valuation of the property of the Company, I think that all the property used as roadway should be assessed in bulk by the acre, and not by the foot, because it is only in that way that the average value could be ascertained. The lots in the locality might be valued by the foot or by the lot, but the contents of each lot could be ascertained and averaged with any unsurveyed land in the vicinity which is assessed by the acre, but if assessed by the foot frontages they could not be averaged with an unsurveyed block of land, and the actual value according to the average of land in the locality could not be obtained. The land however not used as roadway, as for instance the land on Stuart street, between the street and the top of the slope, may be assessed in any way by which the value may be ascertained, due regard being had in such valuation to the depth of the land from the street.

I find it more difficult to determine whether or not the water frontage or wharfage should be assessed in the way the assessor has given it in, the following general rule however may be laid down in accordance with the principles which have guided me in de ermining what is Roadway, namely, that in cases where the Railway track is laid along the water frontage, and the wharf is used for the support of the rails instead of an embankment, there the wharf may be considered as roadway although vessels may load and unload there provided the Company do not derive any profit from the use of the wharf by vessels, or from the goods shipped or landed there. In case any such profit is derived from the wharf, or if it extend further into the water than is necessary for the roadway or a wharf is run out from what may be called the *wharf frontage* for the use of vessels, such unnecessary wharfage should be assessed, in the same way as property belonging to individuals would be assessed.

NOTE.—In addition to the cases above cited, reference may be made to *The South Wales R. Co.* v. *The Local Board of Cardiff*, 6 W. R. 58.—EDS. L. J.

CORRESPONDENCE.

To the Editors of the Law Journal.

GENTLEMEN,

Although "A City Solicitor" has, in the December number of the Journal, shown up many of the abuses of Chancery, he might easily have added to their number and virulence by supposing the mortgagor defendant to die pending the suit, leaving no will, and leaving infant children, the eldest of whom might be an infant *feme covert*, the youngest an infant *en ventre sa mere*; in which case, before the first could answer or anything be done, notwithstanding her husband is her natural guardian, still a special guardian must also be appointed, at the delay, annoyance and expense peculiar to Chancery practice: see *Colman* v. *Northcote*, 2 Hare, 147. And besides that, as to infant heirs, a reference to the master to see whether a sale or foreclosure would be most to their benefit, must be had, pursuant to *Saunderson* v *Caston*, 1 Grant R. 349, with the delay and expense there hinted at; if indeed such case is law and that course available, and not liable, if attempted, to lead to more expense and delay by its being, after litigation, ultimately set aside and the usual course adopted of giving the infants each—even the youngest—six months after it comes of age to move against the decree. That this is the only course which it is clearly safe to adopt, see *Eyre* v. *Countess of Shaftsbury*, 2 P. Wms. 102; *Goodier* v. *Ashton*, 18 Ves. 83; *Powell* v. *Powell*, Mad. & Geld. 53; *Mair* v. *Kerr*, 2 Grant R. 223, affirmed in appeal 26th February, 1852, but not yet reported (such is the efficiency and diligence of the Chancery reporter); and that the latter, whether theoretically the only course or not, at least practically is likely to be the only one, is clear when we come to consider that any one of the defendants who were judgment creditors, or even the mortgagor himself while alive, and beyond doubt any guardian of any infant who chose to be appointed such by the Court, could, and as it would be to their advantage most probably would, claim foreclosure instead of sale: see *Bethune* v. *Calcott*, 1 Grant R. 86, 87: in which event the latter would be, beyond dispute, the only mode; and thus, by simply supposing the ordinary contingency of the death of the defendant during the protracted litigation, the final closing of the suit supposed by your correspondent might be postponed twenty-two years or more beyond even the lengthy duration he has assigned to it.

I send you this to insert if you think fit, as I consider it not only the interest but the duty of every Chancery practitioner to assist to the utmost of his ability your correspondent in his efforts to free one of the most excellent theories of jurisprudence of the foreign abuses which degrade it, and to restore it to us in its pristine simplicity, vigor and usefulness.

December 8th, 1857. X. Y. Z.

To the Editors of the Law Journal.

GENTLEMEN,

As you and your able correspondent, "A City Solicitor," have commenced a good work by probing into the grievances of the Chancery system, I hope you will allow me to ask, through your Journal, of the Chancery reporter, why it is that the case of *Goodman* v. *Fitzsimons*, decided more than three years ago, has not yet been reported? And to ask any one who can give the information, if the decision in question has the effect of virtually repealing the clause as to costs in the County Courts Equity Act? An important question you will admit to A COUNTRY SOLICITOR.

December 11th, 1857.

To the Editors of the Law Journal.

GENTLEMEN,

In reading over the letter of "A City Solicitor," published in your December number, it struck me that in one respect he has underrated the pernicious effect of the present mode of Chancery procedure. At page 224, second column, he treats of the practice of adding parties in the Master's office, of whose claims plaintiff was ignorant, when he filed his bill and got his decree. The words there used are—"When served with these copies of decree, &c., each party has 14 days from service on him, to deliberate if he will move to discharge the order or move to add to the decree or vary it," &c.

Now a decision has lately taken place on the section of the Chancery rule alluded to by your correspondent, which has not been published, and which therefore had probably not come to his knowledge, else he would surely have strengthened his position by it. I happened to be in Court when it was pronounced; and no one could certainly infer that it would occur from the language of the rule. It will add materially to the list of delays of Chancery detailed by "A City Solicitor," and gives another illustration of the truth of the observation you and your correspondent use, viz., that in that Court there is a "constitutional hatred of all innovation." Whenever they can do it they studiously avoid "acting in unison with the spirit of recent legislation."

The facts of the case I allude to were these—

The defendant agreed to purchase from Government a lot of land, paid one-third, but was not able to pay the residue, and borrowed the amount from the plaintiff, giving him a mortgage on the lot as security for the loan. Plaintiff was also the assignee of a judgment against the defendant. The mortgage and judgment were both registered, and entitled plaintiff to foreclose the defendant's interest in the lot for default of payment, which, after writing to defendant, threatening to do so if not paid, and waiting a considerable time, he did, with considerable expense and delay to himself, as defendant was worth nothing but the land, and that was not worth enough to satisfy the mortgage and judgment. Now mark what follows —The defendant, when just about to be sued, goes to a relative of his and clandestinely agrees to sell or sells to him the

whole of his interest for a sum of money, no part of which is paid. The purchaser has full knowledge and notice of plaintiff's mortgage and judgment, and was even in treaty for the satisfaction of them in view to purchasing. He does not register his agreement or conveyance, and the fact of his purchase is by defendant and his relative concealed from plaintiff. He is led to believe that all intention of the relation to purchase has been abandoned, and in that belief the plaintiff foreclosed the defendant, as above mentioned. After he had done so, the relative for the first time notifies plaintiff of his purchase. The very strongest possible presumption (putting the doctrine of *lis pendens* entirely out of the question) existed that the relative was aware of all the proceedings in plaintiff's suit, and purposely lay back till the suit was ended. The plaintiff when notified of the claim, and seeing that the case came within the very words of the rule, served the relative with a copy of the decree and notice, in order thereby to make him a party to the suit; in which case even if made a party he would have a right by the rule to vary or add to the decree. This would do him under any circumstances complete justice, and is all he could possibly attain in any conceivable event; even if he were made a party in the first instance, as he would have been had plaintiff been able to discover the fact, because the purchase had been made with notice and subject to the plaintiff's claims. Still, though he never registered his conveyance or notified plaintiff of it, and although plaintiff was ignorant of his purchase, and it was impossible for him to discover it by any care or ingenuity, the Court held that even though it were within the words the case was not within the spirit, *i. e.* the intention of the rule. The plaintiff's application was dismissed with costs—no trifling matter. It was decreed that all he had done went for nothing, and that he must begin *de novo* a totally new suit against the relative.

Now supposing that the relative, who paid nothing when he heard the decree, in his turn went immediately and agreed to sell wholly on credit to some poor relative of his before plaintiff could get his bill ready and filed it, and all that to be kept secret as the first was, and when he is foreclosed the last purchaser to notify the plaintiff as the first purchasing relative did and so on *ad infinitum*;—it might be a matter of curious and instructive speculation to those who delight in metaphysical researches, to guess at what probable unascertainable period in the "illimitable perspective" the litigation on plaintiff's part will, in the range of chances, be ended by some accident (for it can by possibility last for ever), and when so ended, to calculate by how much worse off the plaintiff, supposing him to be furnished with a life sufficiently long, will be when he succeeds, taking into account all the useless, wanton, cruel costs he will have paid and could not possibly avoid incurring, than he would have been, if, like a sensible man, he had submitted quietly in the first instance to be wronged and defrauded, sooner than resort to the expensive luxury of obtaining justice through Chancery proceedings.

Hoping and believing that this case will be considered as adding another proof of the necessity for some legislative amelioration of the Court.

I remain, Gentlemen, your obedient Servant,

Dec. 23, 1857. COADJUTOR.

To the Editors of the Law Journal.

Southampton, Saugeen, Nov. 20th, 1857.

SIRS,—In consideration of the numerous contested municipal elections, many of them arising from the ignorance of returning officers with respect to their duties, powers, and responsibilities, your making some remarks thereon would, I am sure, give much satisfaction to some of your readers, especially as the municipal elections for the ensuing year are rapidly approaching. As, however, it may be now too late to make them available for the ensuing year, an answer to the following queries will much oblige me.

1st. Has a returning officer a *right* to refuse to allow a candidate to be nominated, or receive a vote for him whom he *knows* to be disqualified?

2d. If he has *not* such right, must he declare such candidate duly elected should he have a majority of votes?

3d. Would a returning officer be liable for costs, provided he allowed a disqualified candidate to run, and such candidate should get in, and afterwards be unseated, supposing such candidate were protested against before the election commenced?

Yours, &c., J. E.

[1. A returning officer complies with his duty in seeing that a candidate of a municipal election appears on the assessment roll as properly rated according to the requisites of the law; but we do not think such officer has any right to enquire further into the disqualification of the candidate, or to refuse his nomination. Such a proceeding on his part would be in effect to assume the duties of a Judge.

2. For the same reason, where a candidate, apparently qualified on a reference to the assessment roll, is elected by a majority of votes, the returning officer should declare him duly returned.

3. According to the recent decisions (see *Reg. ex. rel. Swan* v. *Rowat*, 13 U. C. Q. R. Rep. 340) the Judges have the power of withholding or awarding costs; they are usually awarded against the returning officer, or withheld from him in cases only of improper or illegal conduct on his part, and where he neglects or exceeds his duties.

In reference to the duties of returning officers at elections, we may refer to the language of Mr. Justice Burns in *Reg.* v. *Marchant*, 2 Cham. R. 192, "If a person who is nominated is not liable to serve, and claims an exemption for that reason, the returning officer would not only be justified in rejecting votes for such person, but I think it would be his duty to do so;" also to that of Mr. Justice Richards in the case of *Reg. ex rel. Swan* v. *Rowat*, 1 U. C. L. J. 111, "It is contended, however, that as it appears from the assessment roll that relator was rated as a person duly qualified, a *prima facie* qualification is made out, and the returning officer should have received votes for him. I think the proposition as a general one correct, and I do not wish that anything I may say in this case should induce returning officers to suppose that I consider that they have the authority to reject any resident of the township, who appears properly assessed and rated as a candidate. He should receive him as a candidate; and if he is returned, and his election be *contested*, and it appears on investigation that he is not duly qualified, his election will be set aside, and if after proper notice given of the want of qualification, the electors perversely voted for him, their votes would be held as thrown away, and the duly qualified person would be entitled to the seat. If a majority of the electors had voted for relator, and the returning officer had then refused to return him for want of qualification, and had declared the defendant duly elected, who thereupon took his seat, and discharged the duties of the office, I do not think the Court would permit the defendant to set up relator's want of qualification in answer to his claim to the office. But after he (the defendant) took upon himself the duties of the office, that might be made a ground for setting aside his election and ousting him from his office. The Court would not permit a returning officer, after receiving a candidate, afterwards to turn round when he had a majority of votes, and declare he was not duly qualified."]—EDS. L. J.

"Revenge" is informed that his communication cannot be inserted in this Journal, as it would in all probability subject us to an action for libel. If wronged as he says, he has, in our opinion, a remedy at law.—EDS. L. J.

MONTHLY REPERTORY.

COMMON LAW.

Q. B. ARTLBY *v.* COLEMAN. *November* 4.

Public Health Act—Negligence of Contractor—Liability.

A contractor employed by a local board to execute a work on a highway is not relieved by sec. 14 of the Public Health Act of 1848—(this section enacts that "no matter, &c. done by any officer or person acting under the directions of the local board shall, if the matter, &c. were done *bona fide* for the purpose of executing the Act, subject him personally to any action, liability, &c. whatever")—from liability for negligence in the execution of the work, whereby a third party suffers damage.

C. P. BENNETT *v.* HERRING. *November* 6.

Building lease—Assignment of reversion—Covenant to complete houses; to repair.

The reversion expectant on a building lease, in which was a covenant to complete two houses in carcasses within two months, and also a covenant to repair and a proviso for re-enry for breach of covenants, was assigned subsequently to the two months to the plaintiff

Quære, whether there was a breach of the first mentioned covenant of which the assignee of the reversion could take advantage. But held that, at all events, he could take advantage of the right of re-entry on breach of the covenant to repair.

EX. PRICE *v.* BURROA. *November* 13.

Evidence—Presumption—Admisson by silence—Evidence of payment.

In an action by the surety on a sheriff's bond against the principal for the recovery of money forfeited under the bond, and alleged to have been paid to the sheriff, the evidence of payment was: that an action having been brought upon the bond against both, they had defended the action by one attorney; that a compromise had been effected under the immediate authority of the surety; that the surety had sent a cheque for the agreed sum to the sheriff by post, and that he had subsequently verbally stated to the principal that he had paid the debt and costs in the action, to which the latter made no reply; and that eight or nine years had elapsed since the compromise.

Held, that there was evidence that the debt had been satisfied by the surety.

C. C. R. REGINA *v.* DRING AND WIFE. *November* 14.

Special verdict—Receiving with guilty knowledge—"Adopting" another's receipt.

Where in a joint indictment against a husband and wife for receiving goods with a guilty knowledge the verdict found specially that the wife did so receive, and that the husband "adopted the wife's receipt:" *Held*, that these latter words were not equivalent to a verdict of guilty against the husband.

REVIEW OF BOOKS.

THE CANADA DIRECTORY FOR 1857-58. *John Lovell, Montreal.*

We hail with pleasure the advent of this truly useful and public-spirited work. It is all that we expected; and our expectations, owing to our knowledge of the publisher, Mr. John Lovell, were neither few nor small. Well conceived and well executed, it reflects great credit on the publisher and the land of his adoption. This feeling is heightened when it is known that the type, which is neat and becoming, is of Canadian manufacture. Having carefully examined the book in all its details, we without hesitation recommend it as "A Directory for the man of business and a Guide-book for the man of pleasure, an Index for the emigrant and an instructor for the settler, a Gazetteer for the student and an Army list for the militia officer; while for the Statesman and others connected with official life it is a Statistical Chronicle of the progress of the country in all the departments of enterprise." Independently of its value to the lawyer as a man of business, at page 987, under the heading "Judiciary" there is much Provincial information of interest to him as a professional man. No lawyer should be without the Canada Directory. The price is $5, a sum very small for a work of such dimensions, the result of so much labour, and the fruit of so much expense. The next edition, it is said, will be issued in September, 1859.

THE REGISTRY LAWS AFFECTING LANDS IN UPPER CANADA; with an Analytical Index, showing them in combination, with Judicial Dicta and Index. By WILLIAM SLADDEN Esq, Parliamentary Agent. *H. Rowsell, Publisher, Toronto.* Price $2·50.

The cheapness of land in Upper Canada, compared with the States of Europe, added to the more general diffusion of wealth in this country, has made the buying or selling of land, a transaction in which every Upper Canadian engages. The desire for the acquisition of landed property is encouraged by the simplicity of our titles and consequent inexpensiveness of investigating them. But to combine security with simplicity, there has been, since 1795, established in Upper Canada a system of registration deservedly popular and generally appreciated. The whole system is now presented to the profession and the public in the compilation before us. The collection of many statutes and parts of statutes in one volume of convenient size is one recommendation of the work. A collection of judicial dicta *ipsissima verba*, intended to illustrate the Statutes, is another. A full and complete Index to the statutory provisions is a third; and the fourth is a carefully prepared index to the judicial dicta. Mr. Sladden has done his work well, and is entitled to the support of the profession. Beyond the pale of the profession, among land agents, notaries, registrars, and other public officers, he ought also to receive an extensive support. His book is of a class which is eminently useful and practical.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

JAMES CAHILL, of Hamilton, Esquire, Barrister and Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted 2nd January, 1858.)

RETURNING OFFICERS.

ALEXANDER DAVID FERRIER, Esquire, to be Returning Officer for the Village of Fergus, under the Act 20 Vict. Ch. 100.—(Gazetted Dec. 19, 1857.)

JOHN ALLCHIN, Esquire, Returning Officer for the Village of New Hamburg, in the County of Waterloo, under the Act 20 Vic. Ch. 105.—(Gazetted 2 January, 1858.)

CORONERS.

TIMOTHY THEOBALD COLEMAN, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce.—(Gazetted 5 Dec. 1857.)

JOHN DOHERTY, Esquire, to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted 5 Dec. 1857.)

PETER STUART, Esquire, to be an Associate Coroner for the United Counties of Stormont, Dundas and Glengary.—(Gazetted 5 Dec. 1857.)

TO CORRESPONDENTS.

ONE IN DOUBT.—There is no occasion for doubt. See *Sellas v. Snyder et al*, 10 U. C. Q. B. 209.

A COUNTRY SOLICITOR.—COADJUTOR.—X. Y. Z.—J. E.—Your communications are under "Correspondence."

JOHN R. MARTIN.—OTTO KLOTZ.—Under "Division Courts."

T. I.—T. B.—J.—T. B.—You will find answers under "Division Courts."

J. T. (Derry West).—P. D. (Owen Sound.)—Your communications will appear in our next.

D. O. No. 13. (13 *and* 14 *Vic., Cap.* 5.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 18th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL has been pleased, under the authority vested in him, to order that Unwrought Stone, now charged with a duty of fifteen *per centum, ad valorem*, as a non-enumerated article, be placed in the list of Goods paying a duty of two and a half *per centum, ad valorem*, from and after this date, and shall be rated accordingly.

By Command,

R. S. M. BOUCHETTE,

11—3 in. *Commissioner of Customs.*

D. O. No. 14, (16 *Viot. Cap.* 85.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 13th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL, has been pleased, by an Interpretative Order, bearing date the 10th of October, instant, to direct that Lithographic Printing Presses, Printing Ink, and Implements of all kinds, be admitted to entry free of duty, in accordance with the terms of the Act 18 Vic. Cap. 5, exempting Printing Presses, Materials, and Implements of all kinds from duty.

By Command,

October 20th, 1857. R. S. M. BOUCHETTE,

11—3 in. *Commissioner of Customs.*

CROWN LAND DEPARTMENT.

TORONTO, Oct. 13th, 1857.

NOTICE is hereby given that the Lands in the Township of Rolph in the County of Renfrew, U. C., will be open for sale on and after the 11th next month, on application to the Resident Agent, William Harris, Esq., at Admaston near Renfrew.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. Harris.

ANDREW RUSSELL,

11—6 in. Asst. Commissioner.

CROWN LAND DEPARTMENT.

TORONTO, 21st Oct. 1857.

NOTICE is hereby given that the Lands in the Township of Barrie in the County of Frontenac, U.C., will be open for Sale on and after the 17th of next month, on application to the Resident Agent, Allan McPherson, Esq., at Kingston.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. McPherson.

ANDREW RUSSELL,

11—6 in. Asst. Commissioner.