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DIVISION COURTS.

OFFICERS AND SUITORS.

A Word to New and Old Subscribers.

In consequence of the accession of new subscribers to the *Law Journal*, it seems necessary to reiterate the object and scope of this division of the Editorial department. Under the above heading there is set down from time to time matters having reference to Clerks and Bailiffs—also, information for persons suing and being sued in the Division Courts, with a view of making the *Law Journal* practically useful to all.

The officers of these Courts have varied and responsible duties to perform—duties growing in importance yearly: they are often so situated that it is impossible for them to procure advice on an emergency, and consequently they are usually compelled to act on their own unaided judgments.

To assist that important and numerous body has been our constant aim from the first, and the many testimonies we have received assure us these labors have been appreciated.

Our continued and best efforts will be still at the disposal of our friends.

While on the subject we have to express our regret that comparatively few decided cases have been forwarded to us from the Division Courts, (from some counties we have received none at all) and that officers having large Courts and large experience have given little aid to render this department more extensively useful, which they might do by a regular correspondence. We would again urge upon officers to forward to us every decision of importance in their Courts which has been committed to writing—and from those who are capable of preparing them, notes of important *viva voce* decisions of the Judges. From all we should be glad to receive communications, which shall be answered by ourselves or placed in the *Journal* to be answered by officers of experience.

In all these particulars officers should take some trouble to add to the usefulness of columns devoted entirely to them. We would also say that some additional exertion on their part to promote the circulation of the *Journal*, is due to us. Officers who have not yet taken the *Journal* we must suppose are careless about informing themselves; for now at least, and we speak with knowledge, they can all afford to take the *Journal*.

With regard to suitors we can only repeat that if they wish to use the Law Courts with advantage, they must in some way inform themselves, or they will stand a chance of suffering in pocket. Many raise a cry against the Law and its ministers when they have only themselves to blame. The *Law Journal* has already saved the public much in time and money by affording them plain information respecting their rights, and how they are best secured.

In fine, we would remark that in this department, as heretofore, all technicality will be avoided, so far as is possible, and plain familiar language will be employed. Thoroughly acquainted with the class for whom we write, and occasionally in direct connection with them, we shall speak in the way our experience suggests, as being most likely to assist, and to save time and money to officers and suitors.

The addition to the editorial staff will in no way affect this department. The writer will continue, as heretofore, to "cater" for Division Court supporters, and the past must be his guarantee for the future.

CLERKS.

Court Books and Contingent Expenses.

In the June number we offered some remarks respecting the protection of Court books and Court papers in the offices of the Division Court Clerks in Upper Canada. We then asked for information from officers, which up to this time has not been responded to. We must have data, reliable data, to strengthen our position, and we have appealed to those who ought on every account to furnish it. Our present intention is to wait till September before we return to the subject, and we trust in the mean time to have abundant material laid before us.

We have now to speak of what concerns Clerks directly, and incidentally the suitors of the Courts. In every Court a number of books are required to be kept according to a given form—namely, a Procedure book, Cash book, Fee Fund book, and other books necessary to correctness and safety in the business of the Court. These books, are very expensive, particularly the Procedure book, requiring to be in part printed and strongly bound in order to preserve it, containing as it does the whole history of every case entered in the Court, and constituting the sole record of its judgments. The Fee Fund book is the only book provided by the Government. We are not aware whether any application has been made to the Inspector-General's department, in order to ascertain whether the payments for other books would be allowed for as disbursements on account of the Court; but if there be any discretion, we certainly think they ought to be paid for.

Now Clerks are paid by fees for services rendered, but they receive nothing from suitors to compensate them for these books, and as they are not the property of the Clerks they should certainly be provided for them either by fees from suitors or by the Government—we think by the latter. Our present

object is to elicit information on this point, so as at an early day to resume and thoroughly discuss the subject. We are impressed with the belief that it is a great hardship, nay more, that it is positively unjust to compel Clerks to pay for public books—books which, if they resigned or were removed, they dare not take away with them—out of their private means; and their position is anomalous, for no other officers in the public service, that we are aware of, are subject to this tax.

We wish to hear from Clerks on this as well as on the subject before referred to.

BAILIFFS.

In the previous number we published reports of certain meetings of the Division Court Bailiffs, at which resolutions were adopted touching their present inadequate remuneration. We purpose now examining the tariff settled as just in the views of the officers who assembled at Hamilton:—

"1st. That the sum of 6d. per mile be allowed for all services of process issued out of the office of the Division Court."

We agree to this, and think the charge only reasonable. It is urged that there should be a marked distinction between the costs in the Inferior Courts and in the Superior. Our answer is, there should not be in the matter of mileage, which involves the same amount of labour, the same outlay for personal expenses, the same wear and tear of horse, &c., whether the amount in question be great or small. It must be remembered that a bailiff may have to go once or twice to a defendant's house without being able to find him, and in many cases does so, for which he can charge nothing—the mileage being claimable only on service made. The same principle that would apply to the County Courts as compared to the Courts of Queen's Bench and Common Pleas would apply to the Division Courts. And what do we find in reference to County Courts? By an act of last session the Judges were authorized to frame a table of fees for the County Courts officers, and what was done? Why, *the fees* to the sheriff *for mileage on service of Process, &c., in the County Courts, it was determined and ordered should be the same as in the Superior Courts.*

The principle was a sound one and capable of general application.

In settling this table of fees the Judges associated with them Judge Gowan, (Co. Simcoe) and had thus the assistance of a gentleman practically acquainted with the subject in hand in all its details. We regard the recognition by the Judges of the sheriffs' right to the same fees in County and Superior Courts as conclusive evidence of the justice of the bailiffs' claim for the increase on mileage asked for.

"2ndly. That the sum requiring personal service be extended to £10."

We agree that there should be an alteration as to strict personal services, and would even go beyond £10, but it would not be taking the right ground to urge it on account of Bailiffs. It is required for the protection of the creditor. The point, however, is one of general procedure, and in that view we purpose taking it up, and on broad grounds are prepared to sustain the proposition.

"3rdly. That 1s. be allowed for all summonses requiring personal service on the defendant, and 9d. for non-personal."

Not too much, in our judgment, but it should cover the following:

The 4th item for attendance to swear to service.

The 5th item, 2s. 6d., for enforcing executions under £10, and 5s. for all over that sum is a fair charge.

"6thly. That the bailiff be allowed mileage on all writs, whether money made or not."

We decidedly object to this charge. There are cases certainly of hardship where it might fairly enough be allowed, but to establish the right to it would, if it did not directly lead to abuse and fraud, at least give rise to suspicions injurious to officers, and be as it were a premium for a lazy and inefficient discharge of duty. While we wish to advocate the just claims of bailiffs, our position requires us to oppose any objectionable claim. This is one we strongly oppose as fraught with evil. It would be a perfect bugbear to creditors requiring to use these Courts.

"7thly. That the sum of 3d. be allowed for every case called in open Court."

A similar fee is allowed in the English County Courts; but on the whole we prefer the 7th resolution of the bailiffs of the county of Brant, that 20s. be allowed to the bailiff for his services on the Court day. It is inconvenient multiplying a number of small charges, giving needless trouble alike to clerk and bailiff; besides the service performed is a general one, and should be paid out of the general fee fund.

"8thly. That 5 per cent be allowed on all monies collected under Execution."

There can be no possible objection to this charge, it is fair and reasonable—no more indeed than is paid to an ordinary debt collector, who incurs no responsibility, whereas the bailiff is under bonds for the efficient discharge of his duties, and is held strictly accountable for all errors and omissions. What we said under the first head would apply in most particulars to this head also.

"9thly. That a proper remuneration be allowed where the bailiff has to remove property seized under execution or attachment."

Such an allowance is necessary—without it the disbursements might eat up all the bailiff's fees.

It should be the same as in the case of sheriff's "necessary disbursements in case of removal of property" seized, &c.

"10thly. That for advertising each sale the bailiff be allowed the sum of 2s. 6d."

The officer is required to draw and put up notices of sale in the three most conspicuous places in the township, and the charge for it appears moderate.

The language in the proposed table requires some emendation. It may be open to question as it stands in respect to some of the items; and there is an incorrectness in terms which should be looked to before it is finally submitted for action.

The question, and the main question is, are bailiff's properly remunerated for their labour and responsibility? With a knowledge of their duties, and consequently being able to speak positively, we say they are not. The office is a most responsible one, requiring intelligence, education, and great personal activity. To secure men of this stamp, you must hold out the inducement of a reasonable reward. The old tariff was fixed when a labourer's wages was from 2s. 6d. to 3s. 9d. per day: now it is about double that rate, and the necessaries of life have also nearly doubled in value. The price of a good horse was formerly about £15: now the same description of animal would cost from £30 to £35; and a horse, after being two years worked by a bailiff in full business, is only fit to hobble round a farm.

The Division Courts are growing in importance every year, and bailiffs are the very bone and sinew of their efficiency; with a half-paid set of bailiffs the business will be carelessly and inefficiently performed; pay them fairly and you hold out the inducements of a permament paying office, and thereby secure to the public men whose interest it is to serve them well.

The "Manual on the Duties of Bailiffs in the Division Courts," is necessarily crowded out this time to make room for the foregoing.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

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

(Hilary Term, 20 Vic.)

George Moberly v. Thomas Baines and Thomas Shortis.

Promise to pay in consideration of forbearance to or discharge of third party—Proof of forbearance or discharge—Forbearance to exercise a doubtful right—How far a good consideration.

(15 Q. B. R. 25.)

C. had contracted with defendants to carry their lumber from Collingwood to Chicago, and had chartered the plaintiff's vessel for that purpose. C. being indebted to the plaintiff, gave him two orders on defendants amounting to £211 10s. 6d. Defendants did not accept the orders formally when presented, but retained them and gave the plaintiff a written authority to draw on them at ten days on the return of the vessel to Collingwood. The plaintiff drew accordingly, but defendants then told him that C. had been over-paid by them, and they refused to accept. It was shown that the plaintiff had threatened to detain the lumber on its arrival at Chicago if his claim was not paid, and was told by defendants that it would be satisfied out of the moneys coming to C. on the return of the vessel.

Held, that the plaintiff was entitled to recover from defendants, for that the evidence sufficiently showed a discharge of C. by the plaintiff, or a giving time to him until ten days after the return of the schooner, either of which would form a good consideration for defendants' promise.

Quære, whether plaintiff's forbearing to detain defendants' lumber as he had threatened would have been a sufficient consideration, it being unknown to the parties whether the law at Chicago would allow him such right, though our law clearly would not.

Bain v. Gooderham et al.

(15 Q. B. R. 33.)

Where flour is guaranteed to inspect of a particular grade, such as "No. 1, Superfine," it must inspect sweet of that grade. If it inspects as of the grade contracted for, but sour, the guarantee is broken.

Hewitt v. Corbett, Sheriff.

Assignment—Construction of—Return to Fi. Fa.

(15 Q. B. R. 39.)

By an assignment of all the assignor's "stock in trade, goods, wares, merchandise, groceries, household furniture, and moveable personal property in, upon, or belonging to his store, dwelling, warehouse, wharf and tenements in Ontario street, in the city of Kingston, or elsewhere (save and except and excluding the goods and chattels of the said J. F.," the assignor, "in the possession, control, or charge of David McWhirter, of Adolphustown only), and also all his stock in the Kingston Marine Railway Company."

Held, that shares in the Bay of Quinte Steamboat Company would not pass.

The Sheriff having, however, sold such shares under execution and received the money, could not return *nulla bona*, on the ground that they were not properly saleable under the writ.

Walker and The Municipality of Burford.

Survey—12 Vic., cap. 81. sec. 31—18 Vic., cap. 83, sec. 8—Levying rate.

The statute 12 Vic., cap. 35. sec. 31, provides for a survey of *concession lines* being made, on application to the Governor by the municipal council, which application need not be at the request of the landholders. The 18th Vic. cap. 83, sec. 8, provides for making a survey, and placing monuments to *mark the front and rear angles of lots*, on application to the Governor by the municipality, made at the request of one-half the resident landholders to be affected.

An application was made under the first act, without any request of the landholders, to mark out concession lines, and under it the survey provided for in the second act was afterwards made, to *define the boundaries of lots*: *Held*, that such survey was illegal.

The rate to pay for a survey made under these acts, must be levied not upon the assessed value of the land, but in proportion to the quantity held by the respective proprietors.

(15 Q. B. R. 82.)

J. Duggan moved last term to quash by-law No. 61 of the township of Burford, passed on the 13th Sept., 1856.

1st. Because the inhabitants of the 13th and 14th concessions of Burford made no application to the municipality, such as the statute 18 Vic., cap. 83, sec. 8, required in such a case.

2nd. Because no application was made by the municipality to the government according to the statute, as stated in the by-law.

3rd. Because monuments have not been placed at the front and rear angles of the lots in two concessions, as stated in the by-law.

4th. Because the sums levied to pay the expenses were not raised according to the statute: that is, not on the proprietors of land in *proportion to their respective quantities of land* in the two concessions, but on the assessed value of the land, thereby subjecting the persons assessed to a rate on the value of their buildings and improvements, and not on their land alone.

The by-law recited that there had been disputes about the boundaries of the 13th and 14th concessions of Burford; that with a view to settle them the municipal council had applied to the government, under the statutes 12 Vic., cap. 35, sec. 31, and 18 Vic., cap. 83, to have a survey made, and monuments placed and marked: that the survey had been made, and boundaries established: that the municipal council had caused an estimate to be made of the expense incurred, in order that the same might be levied on the proprietors *in proportion* to the quantity of land held by them respectively in the said concessions, and had ascertained it to amount to £62 10s.; and then the by-law enacted, that there should be raised, levied, &c., "*from the proprietors of land in the said 13th and 14th concessions of Burford, in proportion to the quantity of land held by them in the said concessions,* in the same manner as any sum required for any other purpose authorised by law may be levied, such a rate or sum of money (in addition to all other taxes rated on said property for the current year) as in the whole shall be equal to and defray the expense of such survey, and the establishment of such boundaries, amounting as aforesaid to £62 10s." And in the next clause it was enacted that the £62 10s. should be *raised by means of a special rate of three-sevenths of a penny in the pound on the assessed value* of the lands in the said 13th and 14th concessions of Burford.

It was sworn in affidavits filed by the applicant, who owned land in the 13th concession of Burford, that this by-law was then in full force and unrepealed; that he was informed by the township clerk that there was no record in the minutes of any application having been made to the Governor-General by the municipal council, as recited in the by-law: that in November, 1856, he searched for the monuments and boundaries which the by-law stated to have been planted, "*and could find no such monuments,*" and from information he had received from other persons in a position to know, he believed that none such had ever yet been planted. In answer affidavits were filed, showing that the municipal council did pass a resolution on the 9th of October, 1852, for petitioning the Governor-General to "appoint Mr. William Wonham to *survey the 13th and 14th concession lines, as also the West Town line:* that Wonham was in consequence duly appointed to make the survey, and finished it in *December*, 1855, and reported the same to the municipal council and to the commissioner of crown lands on the 21st of January, 1856; and that in April, 1856, the commissioner of crown lands certified to the municipal council that the survey had been examined and found satisfactory, and made an order that the expenses should be paid.

There were also affidavits of two persons who assisted in the survey, and who swore that the survey was made and the monuments planted under the direction of Mr. Wonham.

M. C. Cameron showed cause.

The statutes referred to are noticed in the judgment.

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

It is explained that there was a misapprehension, which led to the statement that no application had been made by the council to the Governor-General. But it does appear that the application which they did make was not preceded by any application from the inhabitants, which it need not have been if it is to be looked upon as an application made under 12 Vic. cap. 35, sec. 31, but which does seem to be necessary in regard to applications made under 18 Vic., cap. 83, sec. 8.

But what appears rather strange is, that this application was made in 1852, long *before that act* was passed, and required only the concession lines to be surveyed and marked as provided for by 12 Vic., cap. 35: but under it a survey has been made since the passing of 18 Vic., cap. 83, and monuments planted (if any were) to mark *the boundaries of lots;* as if it were upon an application made under that act, and not under 12 Vic., cap. 35, that the work was done.

We do not think this by-law can be sustained: for, first, the by-law recites, that an application was made under the statutes 12 Vic., cap. 35, and 18 Vic., cap. 83, to have the concessions surveyed, and monuments placed *according to the acts.*

Now the municipal council made only one application, which was in October, 1852, and that could not possibly have been made under the authority of 18 Vic. (1855.) So far as regards the placing monuments to mark the *angles of lots in these concessions,* the application did *not ask for it,* and could not legally have done so, at least not so as to make the proprietors liable for the expense if the lots have been marked by monuments, which we infer from the by-law.

And if the application could have been made under 18 Vic., it would clearly have required, by the terms of that act, to be preceded by a request from one half the resident landholders.

In fact an application legally made to the government for one purpose, and under one of the statutes, has been improperly made use of and acted upon, as if it had been made for *another purpose* and at a later time, under another statute.

It is only the later statute which could have authorised it at all, and the provisions of that act have not been followed and could not have been, because then (in October, 1852) there was no such act.

2nd. There can be no doubt that under either act it is only stone or other durable monuments that should be planted. We need not act upon that ground, however, as the other ground is clear; but it is true that while the applicant swears he can find no monuments, it is only stated in answer that monuments were placed, without saying of what kind. This is unsatisfactory.

3rd. Then as to the levying the rate: the 31st section of 12 Vic., cap. 35, requires that the survey shall be certified by the Commissioner of Crown Lands; but the commissioner has only certified to such a survey as the resolution called for, viz., surveying and marking the *concession lines,* not the marking the front angles of lots; and the by-law speaks of a survey made under *both the acts,* which, if it means anything, must mean that the angles of the lots were marked by permanent monuments; and if so, then the by-law authorised money to be raised for paying the expense of that operation. Whether the lots were in fact marked by boundaries is no where stated. In that respect the case is obscure. I only infer it from the recital in the by-law of the statute of 18 Vic., cap. 83.

The objection mainly relied upon against the manner of levying the rate is, that it makes the proprietors liable, not in respect of the quantity of land owned by them in either of the concessions, but according to the assessed value of such land, which would include buildings.

The council answer that they have followed the statute, and so they have literally (that is, the 12 Vic., cap. 35, sec. 31) in one respect and to a certain extent, in providing "that the amount shall be levied on the proprietors in proportion to the quantity of land held by them respectively in the said concessions, and in the same manner as any sum required for any other purposes authorised by law may be levied." But they provide in another clause for levying a rate of three-sevenths of a penny in the pound *upon the assessed value of the land in the said 13th and 14th concessions.*

The 30th and 31st clauses seem rather inconsistent as regards this point, unless we take "*in the same manner*" in the 30th clause, to mean only as to the process of collecting, and not the principle of imposing the rate; and I think we must so interpret it to avoid the repugnancy.

And at any rate the statute clearly says that the sum to be levied on the proprietors is to be in proportion to the *quantity* of land held by them respectively, and this is departed from in the manner of levying this rate.

It is sworn that part of this concession forms a village, in which valuable houses are built on small lots, and the effect of a rate on the *assessed value of the land*, if it includes buildings, as I suppose it must, would be to make the proprietor of one-fourth of an acre with a house on it to pay more perhaps than the owner of 100 acres. If that would be fair, still it is not making them contribute according to their respective quantities of land.

We see difficulties in the way of such an assessment as the statute seems to require, but we cannot help that.

We are of opinion that the rule for quashing the by-law must be made absolute, with costs.

Rule absolute.

In re Tiernan and The Municipality of Nepean.

School trustees—Cost of defence—Rate—Separate schools.

A rate may be levied to reimburse school trustees for the costs of defending a groundless action brought against them.

Where such charge was incurred before the establishment of a separate Roman Catholic school: *Held*, that the supporters of that school were not exempt from the rate.

(15 Q. B. R. 87.)

Fellowes, Q. C., obtained a rule on the Municipality of Nepean to show cause why their by-law No. 74, passed on the 23rd of October, should not be quashed.

First—Because the assessment, or amount directed by it to be levied, is not legal, not being authorsed by any statute.

Second—Because part, viz., £45, of the amount authorised to be levied, is for paying certain costs of defence of an action brought by one Ann Tiernan against the trustees of common school section No. 13, in which the defence failed; and it is not shown by the by-law that the school trustees endeavoured to obtain the amount from Ann Tiernan.

Third—Because this £45 was not expended or to be expended for any purpose for which the school trustees are authorised by law to levy money, but was levied in order to pay costs for which the trustees were liable to the attorney they employed.

Fourth—Because it is not shown that the by-law was passed with the assent of a majority of the freeholders or householders in the school section as required by law.

Fifth—Because it is not shown that the by-law was passed at the request of the trustees under that part of the 13 and 14 Vic., cap. 48, which enables them to levy an additional rate to pay teacher's salary, and other expenses of the common schools, &c.

Sixth—Because the by-law authorizes £75, which includes the above £45, to be levied on the subscribers to or members of the Roman Catholic separate school established in section 13, which is contrary to law, and especially to the statute 18 Vic., cap. 131, sec. 12.

Ann Tiernan, in 1854, brought an action in this court against the school trustees of this section, to recover from them an arrear of wages which she claimed to be due to her as a school teacher.

At the trial, she obtained a verdict, notwithstanding the defence pleaded, that by the statute 13 & 14 Vic., cap. 48, and 16 Vic., cap. 185, sec. 15, there could be no action sustained in a court of law upon such a claim, the party being confined to the remedy given by those acts.

The verdict was moved against as being contrary to law, and a new trial was granted without costs, in Michaelmas Term, 1856.(*a*)

No attempt was made by Ann Tiernan to proceed further in the action, as it was clear she could not recover; and the defendants, the school trustees, being satisfied that they would not be able to obtain any costs from her, thought it useless to to increase them by forcing the case again to trial.

They applied in a formal manner under their corporate seal to the municipality of Nepean, to levy a rate in order to reimburse them in their costs, and on that application this by-law was passed.

Richards showed cause. *Nanton* supported the rule.

Robinson, C.J.—The questions are, first, whether the amount of these costs could legally be levied under the school acts; secondly, whether the by-law could legally direct the money to be levied on all the ratepayers.

The Roman Catholics had a separate school established there in August, 1855, and they claim to be in consequence exempt under the statute from contributing to any rate of this kind for general school purposes.

The Municipality, on the other hand, considered that as the action was brought in 1854, and was pending in 1855, when the Roman Catholics obtained their separate school, it was their duty to make this a charge upon them as well as other ratepayers.

Upon the first point, whether the costs of the trustees in defending themselves against the action of Ann Tiernan could properly be reimbursed by a rate levied for that purpose, I think it could, for that it comes fairly under the terms "expenses of the school" and "for common school purposes," used in the school act 13 & 14 Vic., cap. 48. Law expenses, however unavoidably incurred by the trustees in execution of their trust, do not seem to be specially provided for in any of the acts; but considering the burdensome duties thrown upon the trustees, and the importance of their being faithfully discharged, it can never have been intended by the legislature to leave them to bear out of their own means the charge of defending themselves against actions brought against them without good ground, for any alleged cause of action connected with their conduct in their office.

They are not by law liable to any action by a teacher for his wages, for the act of parliament protects them, but all they could do was to set up that protection when the action was improperly brought, and they did so and with success. The cost they were put to, it seems to me, may reasonably be classed as an expense attending that part of the common school system with which they were charged, as much as if a groundless action were brought against them upon some contract of theirs for building or repairing a school-house, which they had faithfully observed. As to the trustees being left to obtain payment of their costs from the party who had sued them, we must presume, till the contrary is shown, that the trustees have done nothing wrong in that respect. It is sworn that Ann Tiernan is not in circumstances to pay, and at any rate, we could not hold that they were under any legal necessity to wait upon their chance of obtaining the costs from her.

Then the remaining objection is as to the rate being general, that is, upon all the ratepayers, without giving to the Roman Catholic inhabitants who support a separate school, the benefit of the exemption which the statute 18 Vic., capr 131, sec. 12, secures to them.

We think that exemption does not extend to rates necessary to be levied for meeting charges incurred before the separate school was established.

(*a*) Tiernan v. School Trustees of Nepean, 14 U. C. R. 15.

In framing a system so complicated as that established by the Common School Acts, it is impossible to foresee and provide for all possible circumstances. The statutes are not explicit on this particular point of indemnifying the school trustees (as trustees in other cases are indemnified) against legal charges thrown upon them in the discharge of their duty, where they had not exposed themselves to such charges by any misconduct on their part, but we think it comes fairly under the general provision respecting expenses.

In the case of Stark v. Montague et al. (14 U. C. R. 473) we had this general question before us, and we then took the same view of this question. There is no ground, we think, for any of the other objections taken.

BURNS, J.—It appears to me the rule for quashing the by-law should be discharged. At present I think the trustees had power to assess, or call upon the municipal council to assess, the school division for the costs they are put to in defending a suit unjustly brought against them. If the trustees were obliged to advance the necessary funds to carry on the defence out of their own pockets, and trust to be reimbursed by process of law against the person who brought such a suit, I am afraid few would be willing to accept a trust which imposed such a liability. The trustees are a corporation, and in this instance were sued as such, and there is nothing improper in their being, I mean as a corporation, placed in funds to meet the demands which the defence of a lawsuit rendered necessary. Corporations cannot, any more than individuals, carry on the defence of lawsuits without the means to do so; and it cannot be expected that the individual members who compose the governing body of the corporation are to pay in the first instance from their own means, and trust to chance or a new set of trustees to provide the means to reimburse them at a subsequent period. There can be no question that it was legal for the governing body to provide the means of discharging their liability, without waiting to see if the costs could be made from Ann Tiernan.

The chief ground of complaint is, that the complainant and others set themselves off as a separate school, being Roman Catholics, and therefore that they should not be assessed to pay these expenses. They, it appears, did give notice to the Reeve, under the 4th section of 18 Vic., cap. 131, but the suit, the expenses of the defence of which the by-law is to provide for, was commenced before their separation. The 12th section of the same act provides that whoever shall belong to a separate school, and a supporter of it, shall be exempted from the payment of all rates imposed for the support of common schools, and of common school libraries, for the year next following after the first of February in any year, provided they give notice before the first of February to the clerk of the municpality. Two things are provided for, and nothing more, that they shall be exempted from contributing to, and even those only upon giving notice that they belong to and support a separate school. I incline to think they would not, even if they gave notice to the clerk of the municipality of their supporting a separate school, be exempted from the payment of their share of the expenses of the defence of a lawsuit incurred before the separation, but in this case it does not appear that the relator has taken the necessary step to prevent his being rated the same as other proprietors or tenants. It appears to be absolutely necessary that he should show he is a supprrter of a separate school, for a separate school may have been asked for, and yet the person may not be a supporter of it. I do not mean to say, if that had been shown, that the applicant would in this case have been excused contributing to the expenses, but I take it that showing he is a supporter of a separate school, and that he notified the clerk of the fact, are preliminary steps to asking that the by-law shall be quashed. The rule should, I think, be discharged with costs.

McLEAN, J., concurred.

Rule discharged.

CARSCALLEN v. MOODIE (SHERIFF) AND DAFOE, (DEPUTY SHERIFF.)

Bill of sale—Execution—Time allowed for filing—Priority—Change of possession—Land and chattels assigned together—12 Vic., cap. 74, 13 & 14 Vic., cap. 62.

An execution coming in before the filing of an assignment which requires to be filed, is entitled to prevail, though a reasonable time for filing may not have elapsed since the execution of the assignment.

Where the land and buildings on which chattels are, are conveyed by the same deed as the chattels, the assignee, though held to be in possession of the land by virtue of his deed, is not to be looked upon as having taken possession of the chattels also, so as to dispense with filing the assignment; he must either actually take possession of the buildings, or the assignor must go out.

C. owning a mill, with the machinery in it, assigning the whole property, both real and personal, including the lumber, stock in trade, &c., on the premises, to the plaintiff, in trust for himself and other creditors. The deed was registered in the registry office on the day of execution, *but was not filed in the county court*, when, *on the day after its execution*, the sheriff seized the machinery, &c., under a *fi. fa.* against goods, nor was it afterwards filed. The assignor did not leave the mill, but continued to work it with his men for the benefit of the assignee.

Held 1. That there was not such an actual and continued change of possession as to dispense with filing the assignment, and

2. That for want of such filing the *fi. fa.* must prevail.

(15 Q. B. R. 92.)

TRESPASS *quare clausum fregit*, and seizing goods and chattels of the plaintiff, and converting them, &c., and tearing down and removing and converting fixtures.

Pleas—1. Not guilty.

2. As to taking the goods, that they were not the plaintiff's goods.

3. That the *fixtures*, goods and chattels, &c., were not the fixtures, goods and chattels of the plaintiff.

4. That the close and building mentioned in the declaration were not the property of the plaintiff.

5. Justification under a *fi. fa.* against the goods of one Cadwell, at the suit of R. and R. S. Patterson, upon a judgment in the Common Pleas, and entering upon the close and in the building to seize goods of Cadwell, which were then there.

The plaintiff took issue on the first four pleas, and replied *de injuria* to the fifth plea.

At the trial, at Belleville, before *Robinson, C.J.*, it appeared that one Cadwell, having become involved in debt, on the 30th of October, 1855, made an assignment by deed of certain real estate in and near Belleville, to the plaintiff Carscallen and one Hancock, reciting that it was for the purpose of securing his debt to them of £800, and for the benefit of his other creditors, whose names, with the debts due to them, were mentioned in a schedule annexed to the deed.

And by the same deed he assigned to Carscallen and Hancock all the goods and chattels, stock in trade, plank road stock, and steam-boat stock set forth in another schedule attached to the deed. The whole was assigned upon trust to be sold, and the proceeds applied, first, in reimbursing all expenses attending the trust; next, to paying to Carscallen and Hancock the debt of £800 due to them in full, and to divide the residue rateably among the creditors mentioned in the schedule, "who may think proper to avail themselves of the same," any surplus to be paid over to the assignor.

On the 4th of January, 1856, Hancock released to the plaintiff Carscallen all his interest under the assignment.

The debts in the schedule exceeded in all £4000, one of them to H. Bull & Co. being set down at £2,400, and in the schedule Messrs. Patterson were set down as creditors to the amount of £150.

In the other schedule of goods and chattels assigned, among other things, were set down one planing machine, one small ditto, one shingle machine, one rip-saw and frame, one tenoning machine, three circular saws, one circular wood-saw, one sticker, one boring machine, and a turning lathe.

Cadwell had been the owner in fee of land included in this assignment, on which a large building was erected that had been put up as a steam grist-mill. The assignment was drawn up in proper form by an attorney, who proved its execution, and that it was correctly dated.

It was registered in the *county register* (on account of the lands which were conveyed by it) on the 30th of October, at forty-five minutes past one one o'clock p.m., but it never had been filed with the county clerk under the statutes 12 Vic., cap. 74, and 13 & 14 Vic., cap. 62.

On the 31st of October, the next day after the assignment, a *fi. fa.* against Cadwell, at the suit of Messrs. Patterson, came at seven o'clock a. m. to the sheriff, and at nine o'clock the next day the deputy sheriff went to the premises occupied by Cadwell to execute it. It was proved that this execution was upon a judgment obtained on a verdict given against Cadwell at the assizes, which opened on the very day the assignment was executed.

Under the *fi. fa.* the sheriff seized lumber and other loose property in and about the mill, which property had belonged to Cadwell, but was included in the assignment to Carscallen; he seized also the machines of various kinds which were put up and in use in the mill, treating them as chattels.

The property thus seized was claimed by Carscallen under the assignment, but the sheriff went on and sold; and this action was brought in consequence. The action of Messrs. Patterson against Cadwell, which stood for trial at the assizes at the time this assignment was executed, was brought upon an account, which Cadwell contested, and chiefly on account of a shingle machine which the Pattersons had sold him, and which formed an item of the account, Cadwell contending that it turned out to be a useless machine, good for nothing, owing to its being made on an erroneous principle. The Pattersons on the contrary, who were machinists in large business, affirmed that the shingle machine had been made after a plan for which one Avis had obtained a patent; that they were making one for the patentee, when Cadwell seeing it in hand, and approving of the principle, ordered one to be made for himself like it. If therefore it turned out to be all constructed in principle, the Pattersons contended that they were not responsible, having merely made it upon Cadwell's own order given by him in reliance upon his own judgment.

There was a good deal in the evidence to show that Cadwell was determined, if he could, to defeat the Messrs. Pattersons in their attempt to recover, and to bring them and Bull, his largest creditors, to his own terms by putting his property out of his hands. He was proved to have said to one of the persons in his employment that though the Pattersons had beaten him in the action, "he would beat them on their execution"; and altogether there was much in Cadwell's conduct to show that his chief object was to defeat the Messrs. Pattersons' execution.

On the other hand, there seemed no reason to doubt that Cadwell was indebted to Carscallen and Hancock, and that they were liable as endorsers upon his notes which the banks had discounted to a large amount. The exact amount of debt or of liability as endorsers was not made out clearly, but it was proved that there were judgments and executions against Carscallen as endorser of the notes.

The learned Chief Justice left it to the jury to determine upon the *bona fides* of the assignment, telling them that there seemed to be no room for doubt that when Cadwell made the assignment he did owe Carscallen and Hancock, and probably as much as the £800 named, including what they were liable for but had not yet paid on the notes; that Cadwell was at liberty, at any time before an execution came into the sheriff's hands, to assign his goods to Carscallen in payment of his debt, or to secure it; and that if he really desired to do that, and to leave his other creditors (including the Messrs. Patterson) to recover such dividend as his property would produce when rateably divided among them, there was nothing illegal or improper in such a course, though it might prejudice the Messrs. Patterson, whose action was then pending.

He told them also, that as regarded Carscallen there was nothing wrong in his desiring to get his debt paid or secured in preference to others, so far as the law would allow, but that if that were not really the purpose for which he took the assignment, and if he were fraudulently colluding with Cadwell to defeat Patterson's execution, upon any secret understanding between them that the assignment was not to be acted upon in good faith according to its provisions, but was merely a contrivance to cover the goods for Cadwell's benefit, then they ought to give their verdict for the defendants, because in such case the assignment was made for a purpose which the law does not allow, and should be treated as fraudulent and void. He told the jury further, that if they did not come to the conclusion that the assignment was made upon such a fraudulent understanding as he had mentioned, but that, so far at least as Carscallen knew or intended, it was a real *bona fide* transaction, then there were several things further to be considered in the case.

1st. Under the facts proved, could it be said that the assignment to Carscallen was accompanied by an immediate delivery of the chattels assigned, and was it followed by an actual and continued change of possession of the things assigned?

2nd. If this could not be found to be the case, then was not the assignment void under the chattel mortgage acts?

3rd. If the execution was entitled to prevail over the assignment on account of the non-registry of the latter, still it was to be considered whether some of the things seized were not affixed to the freehold, in such a manner that they could not legally be seized under a *fi. fa.* against goods; for if so, the defendants' justification as to such part of the goods would fail.

The jury found for the plaintiff £250 damages.

M. Vankoughnet obtained a rule *nisi* for a new trial on the law and evidence, and for misdirection. He cited Steward v. Lombe, 1 B. & B. 506; Taylor v. Whittemore, 10 U.C.R. 440; Hellawell v. Eastwood, 6 Ex. 295; Trappes v. Harter, 2 Cr. & M. 153; Boydell v. McMichael, ib. 182; Fisher v. Dixon, 12 Cl. & Fin. 312.

Henderson showed cause, and cited Richardson v. Rannoy, 2 C. P. 460; Ackland v. Paynter, 8 Price 95; Winn v. Ingilby, 5 B. & Al. 625; Place v. Fagg, 4 M. & R. 277; Oates v. Cameron, 7 U. C. R. 228.

Robinson, C. J.—I have no doubt the jury meant to determine by their verdict that the assignment was made honestly and on good faith as between Cadwell and the assignees, whatever might have been the ruling motive in Cadwell's mind in connection with the claim which the Messrs. Patterson were urging against him. The amount of the verdict leaves no doubt, I think, that they did not confine the damages to such of the articles only as it was contended were fixed in the freehold, and so at any rate not subject to seizure under the writ.

(To be concluded in our next.)

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by C. E. English, Esquire, B.A.*)*

The Queen on the relation of John Payne Gibbs and Wm. Dixon v. Turner Branighan and Owan Nolan.

Where it was sworn that intending voters for an unsuccessful candidate were obstructed in approaching the polling place by a crowd controlled by one of the successful candidates, and neither the fact of the obstruction nor the control was unequivocally denied by that candidate, the election was set aside as to him, with costs.

Richards, J.—The relator in this matter complains of the election of the defendants as Councillors for the Ward of St. Andrews, in the city of Hamilton, on the same ground as the election of Brown and Devany was moved against, they having been elected as Aldermen for the same Ward. It was understood the affidavits filed in either case might be used in both, and the only difference as far as affects the final decision

between this matter and the decision made in the other case as to the costs.

The matter now to be considered is whether the defendant Branighan ought to be ordered to pay the costs. There were statements made in the affidavits filed by the relators as to the crowd acting in concert to exclude relator's votes from the poll as the result of a settled plan. In reference to this matter as affecting defendant Branighan, Mr. Davidson in his affidavit mentions that Branighan stated that he, Brown, Devany and Nolan, the other defendant, were running in connection with one another; that they had matured their plans for the said election; that the crowd were to return the next morning, and that all their voters were to be present at the opening of the poll the next morning, and that it would occupy the whole of the hours appointed for taking votes to receive and record their votes; that to his own knowledge the crowd remained and continued to obstruct the passage of the voters of the relators from the opening of the poll on the morning of the first day of said election until after the relators had entered their protest against the election in the afternoon of the second day.

In another affidavit he states that during the said conversation defendant Branighan offered that if relator Gibbs and those running in connection with him would consent to throw aside relator Dixon, who was running on the same interest, no further obstructions would be placed in the way of the said Gibbs, Davis and Hamilton by the said crowd, and that from such conversation he believed the crowd were under the control of defendants and Brown and Devany.

The only answer given by defendant Branighan is as follows: "I positively deny that any obstruction, either wilful or otherwise, was made through any agency employed by myself either directly or indirectly, to prevent, deter or delay the voting at said election for the relators or others, nor was I at the time of said election, nor have I since been aware of any arrangements or agreement between my supporters or others favourable to my election, for the purpose of causing such obstruction, detention or delay at such election as aforesaid."

In reading over the affidavits referred to by the defendants as sustaining their defence, it seems to me as if they wished to make a case of obstruction of the voting, so that time was consumed whereby the electors could not all poll their votes, whilst the case for the relators is pressed principally on the ground that their voters were nearly all prevented from going forward to the polls at all, and that that in connection with the slow mode in which the votes were taken when they did come to the poll had the effect of making the election an unfair one.

Now, does the defendandant Branighan mean to deny that he had control of the crowd as charged in the affidavit of Mr. Davidson? Does he mean to deny that that crowd obstructed the approach to the poll of relators' voters? He denies that any obstruction was either directly or indirectly made by him to prevent, deter or delay the *voting* at the said election: does this mean a denial of preventing, deterring or delaying the voters of relators' approaching the polling place?

If the affidavit of Branighan was intended really to answer the conversation referred to specifically by Mr. Davidson, it is unfortunate it is not drawn so as to either deny the conversation or the influences to be drawn from that conversation unequivocally—or if he admitted the conversation he might explain what he meant, and show that Mr. Davidson drew a wrong inference from it. His denial of knowledge of arrangements or combinations refers to such obstructions, detentions or delays, that is of *polling*.

On the whole then it appears to me that defendant Branighan having been specifically referred to by Mr. Davidson in his affidavit, and charged with admitting and stating that which would show direct participation in the violent acts complained of, he has failed to answer that charge satisfactorily, and that as to him the election must be set aside with costs—as to the other defendants, without costs. I am very much inclined to think that the circumstances would perhaps warrant the imposition of costs against all the defendants, but am not so clear on the subject as to feel justified in doing so except as to Branighan.

THE QUEEN EX REL. STOCK v. WILLIAM DAVIS.

An administrator, though assessed in his own name for real estate belonging to deceased, is not entitled to qualify upon such real estate. A lessee of a Municipal Council is disqualified from sitting in such Council: so a person who has contracted for a lease, though the contract be executed only by himself and not by the corporation.

(Feb. 17, 1857.)

RICHARDS, J.—In Hilary Term *Nanton* moved for a writ of Summons in the nature of a *Quo Warranto*, calling on the defendant to show why he exercised the office of Councillor of St. Lawrence Ward, in the city of Toronto; this rule was granted; on the 16th of February *M. C. Cameron* filed an appearance for the defendant, and on the next day the matter was heard before me in Chambers.

It appears from the statement of the relator that the defendant was chosen a Councillor for St. Lawrence Ward in the city of Toronto at the election held on the 5th and 6th January last, which election he contends should be declared void for the following causes:—

1st. That the defendant was not at the time of his election qualified to be elected either as a freeholder or householder, seized or possessed of real property within the city held in his own right or of that of his wife, as proprietor or tenant, which was rated in his name either as a freeholder to the amount of £20 per annum or upwards, or as a householder to the amount of £40 per annum or upward, except as claiming possession of certain property owned by one William Paquin, deceasod, and for which the defendant is rated in his own name, although holding possession of the same as administrator of the estate of Paquin, and as *tenant* of the corporation of the said city, as I understood, for other property: that the property on which he relied to qualify him was not held to his own use, but was held by him as administrator of the effects of the said Paquin.

2nd. That he was disqualified to be elected to the said office, inasmuch as by a Lease dated 1st May, 1852, from the corporation of the city, he leased from the city certain premises for the term of 42 years from the 1st January of that year, and thereby entered into a certain contract with the corporation which was in full force at the time of the election.

3rd. That he was also disqualified to be elected, as he did by an *agreement in writing* dated the 30th September, 1856, contract and agree to lease from the said city corporation cer-

tain premises on Colborne street in the said city, being lots numbers 9 and 10 on the said street; and he agreed to lease the said lots under the conditions mentioned in a certain printed paper attached thereto; and that the said agreement was in full force at the time of the election.

The relator by his affidavit states that he believes the grounds of objection to the election of the defendant mentioned in the relation are just and well founded at the time of moving for the summons. The relator filed another affidavit, in which, amongst other things, he stated that on the 30th January, 1857, he searched in the office of Charles Daly, Esq., clerk of the council for the said city, and was shown an *entry* in a book kept for that purpose in the said office, purporting to be the defendant's oath of qualification as councillor for St. Lawrence Ward, which was dated 19th January, 1847; that the only property mentioned therein as qualifying him for the said office, is a certain freehold estate, to wit, land, dwelling-house and premises, on Boulton street, in St. Andrew's Ward.

That he is informed and believes that Davis is not possessed of the said property and real estate, either in his own right or that of his wife, but that he holds the same as administrator of the estate and effects of one William Paquin, deceased, who at the time of his death was seized in fee of the said property, and that the said property is not now nor was ever the property of the said Davis.

That on the same day he searched in the office of the city Chamberlain and was shown a Lease from the corporation of the said city to the defendant of certain land and premises situate in East Market Square in the said city for the term of 42 years from 1st January, 1842, renewable for 21 years lease dated 1st May, 1842.

That he was also shown an agreement in writing dated 30th September, 1856, and signed by the defendant, and purporting to be an agreement on his part to lease from the corporation lots 9 and 10 on Colborne street in the said city, subject to certain conditions for building thereon, &c., more fully set forth in a printed paper attached to the said agreement, signed by defendant; that he was informed by the Chamberlain that the last mentioned Lease had not yet been executed, but that the corporation would look to the said defendant for the rent of the last mentioned premises under the agreement.

That he is advised and believes that neither the lease nor agreement have been annulled, released or discharged so as to affect the defendant's interest therein, or his liability to the corporation. That he is also advised and verily believes that the defendant is not qualified for the said office on account of his being a contractor with the corporation under the said lease and agreement.

Mr. Cameron on the hearing contended there was no sufficient evidence to sustain the allegations in the information; that as administrator Davis could not hold or claim to hold the real estate of Paquin—there is no evidence to show but that he may have bought it from deceased or from his heirs since; that as to the first objection there is no sufficient *prima facie* case made out.

2nd. That it does not appear from the affidavit that Davis ever *signed* any lease, or that under it he is to pay any rent, or that he thereby contracts to do anything.

3. That as to the third objection the terms of the written agreement are not shown; that it does not appear that the corporation ever sealed it, or are bound by it—nor that it is a binding agreement on the defendant, or that there is any rent payable under it, or a contract to do any thing.

Mr. Crombie, contra, contends a *prima facie* case is presented by the affidavits and the relation; that enough is there shown to call upon defendant to answer, and if he does not do so then it will be presumed against him; that he has the means peculiarly within his power of showing his qualification if he owns or leases the property, and that as to the lease or agreement with the corporation—if there is nothing in them to constitute a legal contract so as to disqualify him—he can show it. That if there is any doubt on the subject he suggests I should call for further affidavits. *Mr. Cameron* objects to this and contends that the Judge should only call for further affidavits when the matter is made doubtful by the defendant's affidavits. *Mr. Cameron* referred to Draper's Rule 135 and 136—to Rule No. 2, 2 Cham. Reports, 88.

Mr. Crombie referred to Draper's Rules, p. 157, Rule No. 18.

JUDGMENT:

There is no doubt the statement and affidavits accompanying the relation do not state the facts relied upon as particularly as they might and perhaps ought, but I am not prepared to say that every fact stated in a relation of this sort requires to be proved with the same kind of evidence as would be necessary at *Nisi Prius*.

It may often be impossible to produce original documents in applications for writs of *Quo Warranto*, and all that should be required is to make out a *prima facie* case, and if that is not denied on the other side it may be treated as a declaration or other pleading, the facts stated in which are not denied.

As to the first ground I think the evidence unanswered may warrant the conclusion that the defendant is not the owner in fee or tenant of the premises stated to have been owned by Paquin at the time of his decease—the affidavit shows that Paquin died seized, and the relator states that he is advised and believes he holds the property as administrator of Paquin; he concludes by stating that the property is not now nor ever was the property of Davis. It is true that as administrator he would not have any right to take possession of the real estate, but as it appears he had some connection with the personalty, he may have supposed he would be required to manage the real estate also, and if it was assessed in his name he perhaps considered that would qualify him for the office, although he held it in trust. The information and affidavit sufficiently inform him as to the points on which he is called upon to answer, and he declines to do so; I therefore think on this ground the relator may claim to have the election set aside.

As to the second ground, a lease for years is defined in Bacon's Abridgment to be "a contract made between lessor and lessee for the possession and profit of lands, &c., on the one side and a recompense for rent or income on the other." The terms of the lease are not mentioned in the relation or affidavit, and it was objected that it did not appear that the defendant had executed the lease. In the relation it is stated that the defendant "did by an indenture of lease dated 1st of

May, 1842, lease from the corporation of the city certain premises situated in the said city for the term of 42 years from 1st January, 1842, and that under and by virtue of the said lease he entered into a contract with the city. He verifies this statement by his affidavit attached to the relation.

In his other affidavit he merely states he was shown the lease in the office of the city Chamberlain. There is nothing to show that the defendant ever entered into possession of the premises under the lease further than the relator's statement, verified by his oath as already quoted; and that the said lease and the contract thereby entered into by the defendant were at the time of the election in full force and effect. If a lease be executed by the grantor only and reserve a rent, I take it for granted that a covenant to pay would arise from the proviso, if the lessee went into possession under the lease and enjoyed, although he may not have signed the lease.

Taking the statement of the relator and the affidavit filed with it, they show, in the absence of anything to the contrary, that at the time of the election there was a subsisting lease.

Then as to the third point, it is stated the defendant did by an agreement in writing, dated 30th September, 1856, contract and agree to lease from the city certain lots on Colborne street, subject to certain conditions mentioned in the printed paper attached thereto. In the affidavit filed with the relation he states he was shown an agreement in writing dated 30th September, 1856, and *signed by the defendant*, purporting to be an agreement to lease from the corporation of the city premises on Colborne street, by which he agreed to lease the said lots, subject to certain conditions for building thereon, as more fully set forth in a printed paper attached to the agreement.

It was urged that it was not shown that this paper was sealed with the seal of the corporation, and therefore that it would not be a binding agreement on the defendant: whether the agreement shown to have been signed by the defendant was entered into under such circumstances as would make it binding on him, whether sealed with the seal of the corporation or not, is not shown,—but it appears to me sufficient to make out that the defendant actually entered into an agreement with the corporation. If he thinks it will be a sufficient answer in proceeding to show that the agreement is not binding, he should state the facts from which he wishes the Court or Judge to draw that inference. The first step to make a binding agreement relative to land was taken by him; he signed an agreement in writing binding himself to comply with certain conditions if he went into possession under this agreement: I apprehend the corporation could compel a specific performance of that agreement, even if they had not affixed their corporate seal to it; and if he complied with those conditions, would not the corporation be restrained from dispossessing him until he had at least been paid for the improvements made under stipulations contained probably in their own by-laws?

The mischief intended to be guarded against by the Legislature would not be prevented, if for the reason suggested persons in the position of the defendant in relation to this agreement, were not declared disqualified. Suppose the corporation were to have the question brought up whether the defendant's agreement was binding on them, how could the defendant give an unbiassed vote?

On this last point I have no doubt but that I ought to decide against the defendant.

The section stating the disqualification is the 25th of 16 Vic., cap. 181, being in substitution of the 132 sec. of 12 Vic., cap. 81; it provides, in relation to this matter, that no person having by himself or partner any interest or share in any contract with or on behalf of the city in which he shall reside, shall be qualified to be elected Alderman or Councillor for the same or for any ward therein. This provision is in effect the same as is made in the imperial statute 5 & 6 Wm. IV., cap. 76, sec. 28—and under that section it has been held that a lease from the corporation is a *contract* within the meaning of the act. The Queen v. York, 2 Q. B. 846, is in point, and is equally an authority to show that the term contract should be construed in its ordinary legal signification, and not be limited to such as partake of the nature of employments, as contracts for works, or the furnishing of supplies. In England, however, the Legislature declared that this provision shall not extend to leases by imperial statute 3 & 4 Vic., cap. 108. It is also provided there that when questions relative to matters in which members of the city council may be interested shall come up, that such members shall not vote. The Legislature here have not yet thought proper to alter the law on the subject in this country, and we must decide according to the law as it is.

On the whole I think there is enough shown to declare the defendant's seat vacant on all the grounds, particularly on the last one, but as the two first taken are not so clear. If the relator wishes I will order this matter to stand over until the first day of May next, with leave to him to file further affidavits on all the points, provided he serves the defendant's attorney one week before that day with copies of any affidavits he may wish to file and use. The matter stands over to Friday 1st May next—18th May. The relator does not wish to file further affidavits, and my judgment will be and is in his favour on the grounds already stated.

STOCK v. CRAWFORD.

Affidavit—Writ of Trial.

On applications for writs of Trial, the affidavit must either show what the pleas in the cause are, or applicant must produce a copy of the pleadings.

(June 23, 1857.)

This was an application for a summons for a writ of Trial on an affidavit by the plaintiff's attorney, to the following effect:

1st. That the action is brought on a promissory note.

2nd. That the amount is ascertained by the signature of the defendant.

3rd. That the venue is laid in the county of Wentworth.

4th. That issue has been joined, and that the trial of this cause will, in his opinion, involve no difficult question of fact or law.

RICHARDS, J., refused the summons, on the ground that the affidavit should either have stated what the pleas are, or the applicant have produced a copy of the pleadings.

Summons refused.

Muirhead v. McCracken.

Writ of Trial.

Where an action is brought on two claims, one ascertained by the signature of the defendant and the other not, a writ of Trial may be granted if the claim on the unascertained account be under £25.

(June 22, 1857.)

This was an application for an order for writ of Trial to issue on an affidavit by the plaintiff's attorney to the following effect:

1st. That the action was brought to recover the amount of a promissory note for £22, and for the amount of £8 16s. 5d. for goods sold and delivered.

2nd. That the only pleas pleaded are "*non fecit*," and "*nunquam indebitatus.*"

3rd. That issue has been joined.

4th. That the venue is laid in the county of Wentworth.

5th. That in his opinion the Trial of this cause will involve no difficult question of fact or law.

The defendant objected that this action does not come within the provisions of the statute, the amount for which it is brought being of a mixed nature, part ascertained by the signature of the defendant and part a mere matter of account—also, the whole amount exceeds £25.

Richards, J.—Though this application does not come within the letter of the statute 8th Vic., cap. 13, sec. 51, yet from analogy to decisions made under the act regulating the jurisdiction of the county court with which this section corresponds, I think the order may go, the claim on the unsettled account being under £25.

Order granted.

Taylor v. McNiel et al.

Writ of Trial—Affidavit—Enlargement—Practice.

Preliminary or formal objections to affidavits filed on an application for a writ of Trial which has been enlarged until the last day for obtaining such writ, should not in general be allowed to prevail after such enlargement. A party will not be precluded from taking his case down by writ of Trial, by the defendants merely pleading a plea which might involve difficult questions, unless he show that it is seriously intended to rely on such pleas.

(June 29, 1857.)

This action was brought on three promissory notes, and the plaintiff several days ago took out a summons for a writ of Trial to issue on the usual grounds.

The defendants' agent having enlarged this summons several times, but not having yet heard from his principal, objected:—

1st. That the affidavit is made by one Sampson, and does not show any connection between him and the management of this suit as attorney or otherwise.

2nd. That a plea of "*Plene administravit*" has been pleaded, and that under it very difficult questions may arise.

M. C. Cameron replied to the first objection that it was only necessary that his lordship should be satisfied, and whatever affidavit would satisfy him is sufficient, the rule above referred to only applying to affidavits of merits.

Hagarty, J.—I think the first objection might have been fatal. As a general rule, in my opinion, such affidavits should be made by some one shown to be connected with the cause; but on this last day for obtaining a writ of Trial I hardly think I should yield to it, after defendant, for his own convenience, had obtained an enlargement without making any objections.

As to the 2nd objection, I think the mere presence on the Record of such a plea as *plene administravit*, without any affidavit, either that it is seriously to be urged at the trial, or that any difficulty will arise on it, is not sufficient to prevent the order for a writ of Trial. If it were otherwise a defendant could always prevent such a writ by pleading some apparently intricate defence, without any intention of offering any evidence on it.

I will make the order giving the defendant leave to apply on the merits, if he has any, to rescind my order.

Order granted.

Shaw v. Davis.

Practice—Writ of Trial.

A judge will not grant an order for a writ of Trial to issue in cases where the defendant swears that he believes difficult questions will arise on the trial, and when the nature of the pleas pleaded admit of such being the case.

(June 23, 1857.)

This was an application for an order for a writ of Trial to issue (a summons having been previously obtained) on the usual grounds—action being on a promissory note.

The defendant put in an affidavit of his attorney stating that the plea pleaded is a plea of Fraud, and that in his opinion the trial of this cause will involve difficult questions of fact or law, as to admissibility of evidence, and as to the circumstances under which the note declared on was given.

Richards, J.—I think the defendant has as good an opportunity of judging of the nature of the questions this trial will involve as the plaintiff, and as the plea of Fraud seems to admit the possibility of difficult questions arising; and it is stated that there is a *bona fide* intention of sustaining the pleas by evidence. I cannot grant the order.

Summons discharged: costs to be costs in the cause.

Ball et al v. Cowdley.

Practice—Service of Summons—Enlargement.

Service of a summons on Saturday after 3 o'clock p.m. returnable on Monday following is not good service, as being in effect service of a summons on the day on which it is returnable, which is unreasonable.

(June 29, 1857.)

Carrall took out a summons for a writ of Trial in this cause on Saturday last, returnable to-day (Monday.)

The defendant by his agent appeared, and objects that the summons was served on him on Saturday after 3 o'clock p.m. and therefore by the new rules must be reckoned as if served to-day, (*i.e.* Monday following), and therefore contended that the service was irregular.

Carrall replied: There is no rule requiring anything more than reasonable notice, and I submit that the defendant had reasonable notice in this case; moreover it has been decided that such irregularities are not fatal, but only a ground for an enlargement, and as the practice has lately been introduced in such cases to make the summons absolute for a writ of Trial to issue, reserving leave to the defendant to move to rescind it on the merits. I submit that I am entitled to my order in either case.

Hagarty, J.—This practice, I think, only applies to cases when the service of the summons and other proceedings are quite regular; I know of no practice of the Court making the service of a summons on the day on which it is returnable a valid service, and as this is the last day for granting the order an enlargement would be of no use to you. I will therefore discharge the summons without costs.

Summons discharged.

CASE v. BENSON AND RAYMOND, AND CASE ET AL v. BENSON AND RAYMOND.

Practice—Cognovit—Attorney—Attestation.

Neglect to explain the nature of a Cognovit to the defendants by an attorney clearly and expressly chosen by them, will not vitiate the confession, properly attested. Defendants sending for an attorney, named by the plaintiff or his attorney, will be deemed to have adopted his as their attorney within the meaning of our rule of Court No. 26.

(July 1, 1857.)

HAGARTY, J.—These are applications almost identical in their nature made last Term to Practice Court, and enlarged to Chambers by consent.

The motion in each was to set aside a Cognovit judgment, and all proceedings thereon, with costs, on the grounds that the Cognovit was not executed before an attorney named by or attending at the request of defendants or for them, and that defendants were not before executing this Cognovit informed of its nature and effect, of which they were ignorant; that they were induced to sign it by misrepresentations of the plaintiff; that *Mr. Merrill*, the attorney who attested it, acted at the request of and in collusion with the plaintiff, and not at the defendants' request; or why they should not be set aside as to defendant Raymond. The applications rest on the affidavits of defendant Raymond and Mr. Merrill.

Many affidavits are filed in reply, including two made by Mr. Merrill for the plaintiff, and affidavits made by defendant Benson strongly supporting the plaintiff's case.

Without entering into the details of the numerous affidavits filed, I will say that I am quite satisfied that no fraud or imposition whatever was practised on defendant Raymond or the other defendant; that they both knew perfectly well what they were doing, and that no case is made out to impeach the confessions on the ground of amount, even had such an objection been urged in the rule to show cause.

The case rests entirely on one rule of Court No. 26, requiring the presence of an attorney expressly named on behalf of the defendant, and attending at his request.

No objection is urged to the form of the attestations here; our rule follows the English practice, and I wish to decide it as if the imperial statute 1 and 2 Vic., cap. 110, sec. 9, were re-enacted here.

The facts in these cases are, that *Mr. Fitzgerald*, as attorney for plaintiff's, proposed chattel mortgages from these defendants to the plaintiffs, and also the two confessions in question for the same debts respectively; that when defendants were after executing the mortgages, Mr. Fitzgerald informed them that they usually have an attorney present to act for them, and named Mr. Merrill as the only attorney in Picton who could then be obtained, and that after several attempts to get him he was at last obtained, one of the Messrs. Case at defendants' request going for him. Mr. Merrill says that he did not explain the nature or effect of the Cognovits to defendants, supposing that all the parties fully understood the transaction; that he did not read them over to defendants, nor did any one else; that he did not know the amount; that from the conduct and appearance of the parties, and from other facts he believes there was collusion between all or some of the parties for the purpose of wronging defendants' creditors. In subsequent affidavits filed against the motion, Mr. Merrill states that Mr. Fitzgerald stated to him in presence of all the parties that defendants wished him to witness their signature to those Cognovits; that he has no particular recollection of what took place; that he did not act in collusion with the plaintiff or any one else, and observed nothing different from the usual manner of executing Cognovits; that both defendants knew perfectly well what they were signing; that he acted as their attorney and for no one else; that when signed Mr. Fitzgerald told defendants his (Merrill's) charges for attending to witness was 10s. in each case, defendant Benson said he had no money with him, and asked other defendant for it; Raymond said he had not so much with him. The defendants promised to leave the money with Fitzgerald for Merrill, and afterwards Fitzgerald paid the amounts to him as coming from defendants—(this is clearly proved in Fitzgerald's affidavits); and that Raymond has since told him (Merrill) that he never had stated or sworn that Merrill colluded with plaintiff. Mr. Fitzgerald's affidavits are very full as to Merrill being sent for by defendants, he having first named him. As to the nature of the confession being fully explained by him to defendants and strongly leading to the clear belief that both defendants adopted Merrill as their attorney, and undertook to pay him as such—defendant Benson fully proves the same facts. Both the Cases file affidavits as to the good faith of the transaction; as to Raymond's perfect knowledge of what he was doing, F. H. Case proves going for Merrill at defendant's request. Other persons, from conversations had with Raymond, show that he knew that he had executed a confession. Mr. Fitzgerald swears distinctly that he in Merrill's presence told defendants the amount of the Cognovits and when they became due: other affidavits state the same facts.

It is stated in Arch. Practice, vol. 2, page 892, edit'n 1856: "The attorney should inform the person of the nature and effect of the Warrant or Cognovit before the same is executed. If however there be no collusion with the plaintiff a neglect of the attorney's duty in this respect will not vitiate the instrument. If there be collusion then it would be void on the ground of fraud, and not for non-compliance with the act. It is not necessary that it should be read over to the defendants, except perhaps he is a marksman; nor is it necessary for the attorney to consult with his client in private before he signs, or that the attorney be cognizant of the facts under which the warrant is given." I have examined the cases cited to support these views. Haigh v. Frost, 7 Dowl. 743, (cited in next case); Taylor v. Nichols, 6 M. & W., 96; Jael v. Dickie, 5 D. & L., 1; Hibbert v. Barton, 10; M. & W. 678.

In Walton v. Chandler, 1 C. & B. 306, Findal, C. J., says, "the later cases lay it down that if there be a clear and express adoption by the defendant of the party for his attorney that will suffice, though such party may have been originally suggested by the plaintiffs' attorney." Gupper v. Bristow, 6 M. & W., 807, cited in the last case, is also to the point.

Mr. Justice Coleridge, in Haigh v. Frost, says, "It appears to me not to be absolutely necessary that the attorney should do his duty towards his client when he has been appointed as required by the statute, but that there may be a failure of his duty without rendering the warrant of attorney void—and as a

corollory from that proposition, I think that when the attorney is present it is not absolutely necessary that he should inform his client of the nature and effect of the warrant of attorney."

The language of the same very learned judge is not quite as strong, and might perhaps have a modified construction in a much later case—Powell v. Pickering, 18 Q. B. 789.

Joel v. Daiks, 5 D. & L. 1, is a very strong case in favour of supporting the plaintiffs' case here. Hall v. Dale, 8 Dowl. 599, is also much to the point.

I am of opinion that the facts disclosed in affidavits show that, in the words of Tindal, C. J., "there was a clear and express adoption by the defendants of the party as their attorney." Most of the English cases turn on the form of the attestations, which is not here in question.

I think that Mr. Merrill, or any other attorney so called in, would have acted much more prudently by fully explaining the whole matters to the defendants, and making them clearly adopt or refuse him as their attorney in express terms. I am somewhat surprised at the several affidavits filed on each side by Mr. Merrill; they certainly bear very different interpretations, and warrant almost opposite inferences.

On the whole I consider the defendant Raymond has failed to make out a case to set aside confessions formally attested as the law requires, and the nature of which I believe he fully understood; if he did not, it was by neglecting to avail himself of the advice of the professional gentlemen whom the law wisely provided to be present for his assistance.

It is a peculiar feature of the case that he admits he executed documents vesting all these properties in the plaintiffs, and to them he makes no objections whatever, but the confessions for the same debts to the same parties are thus strongly assailed.

As the rule charged fraud and collusion and asked for costs, I think it should be discharged with costs, to be paid by defendant Raymond.

Arnold v. Jenkins and Bradley.

Arrest—Judgment—Costs—Practice.

When one of two or more defendants is arrested for an amount greater than the verdict afterwards obtained, an order will be granted, under 49 Geo. III., disallowing this plaintiff his costs against him solely.

(July, 1857.)

Hagarty, J.—This is an application to deprive the plaintiff of costs, under statute 49 Geo. III., cap. 4.

The plaintiff arrested defendant Jenkins for £225, and recovered against both defendants £84 2s. 2d.

As to merits, I am clearly of opinion that the case is within the statute. The plaintiff chose to arrest Jenkins, as he says, without referring to his books containing the accounts between them, which were some 10 miles off when the affidavit was made. For about £25 of the amount sworn to, and not recovered, he may have had some probable cause, but for the balance I see no valid excuse.

The objection chiefly urged to this rule is, that the statute does not apply to a case in which only one defendant is held to bail, and that the effect might be that the action being against defendants as joint contractors, and they appear and plead together; the other defendant, who was not arrested, might thus be practically exonerated from costs, and the plaintiff loose them improperly as against him.

I am surprised to find that the point does not seem to have arisen heretofore under our statute, nor as far as I can learn under the similar rule of statute 43, Geo. III.

The apparent silence of English authorities on this head may be easily accounted for by a consideration of the nature both of their former and present laws of arrest.(*a*)

The 49 Geo. III. says, "In all actions wherein the defendant or defendants shall be arrested and held to bail, and wherein the plaintiff or plaintiffs shall not recover the amount, &c., &c., such defendants shall be entitled to costs of suit," &c., &c.

I cannot see why in a proper case a defendant, who comes clearly within the spirit and letter of this wholesome statute, should be deprived of the privilege thereby conferred upon him, by the fact of the plaintiff choosing to arrest him in a cause jointly with another defendant.

I foresee that a serious difficulty may arise as to the costs as against the defendant who was not arrested, and that the latter possibly may escape payment of costs; I make no division on that point.

If such an inconvenience arise it is wholly caused by the plaintiff's own act. The rule to show cause must be made absolute as moved, except that it is to be expressed as applicable throughout to defendant Israel Jenkins.

The legal operation of such rule can, if any difficulty arise, be disposed of hereafter.

Wengol v. Huff.

Practice—Writs of Trial—Signature of defendant.

Writ of Trial refused in actions to recover £75 for breach of contract to obtain a joint maker or endorser to a promissory note.

This was an action brought for the sum of £75 for breach of a contract, whereby the defendant engaged to procure a joint maker or endorser on a promissory for money lent and advanced by the plaintiff to the defendant.

The plaintiff applied for an order for a writ of Trial to issue.

The defendant objected that this is not the kind of action provided for by the statute, and that the amount is not ascertained by the signature of the defendant within meaning of the clause relative thereto.

Hagarty, J., discharged the summons: costs to be costs in the cause.

Thompson v. Welch.

Ejectment—Notice of Title—Irregularity.

In actions of Ejectment, irregularity or want of notice of claim of defendant to be served on appearance, will not entitle the plaintiff to an order to set aside the appearance and to enter judgment, unless the defendant refuse to amend his notice or to serve a proper notice.

(July 7, 1857.)

The plaintiff in this cause applied to have the appearance of the defendant filed in this cause struck out, and to be allowed to sign judgment against him on the ground that, this being an action of Ejectment, the notice of claim served was not *addressed* to the plaintiff pursuant to sec. 224 C.L.P. Act, 1856, or that the defendant be ordered to amend his notice.

(*a*) Har. C. L. P. Act, 1856, sec. 23, note *o*.

No one appearing to oppose this application,

HAGARTY, J., granted an order that the defendant be allowed on payment of costs of this application, to amend his notice within four days from service thereof, and in case of default the appearance to be set aside and plaintiff to be at liberty to sign judgment.(a)

LUMLEY v. ROGERS.

Writ of Trial—Practice.

An order for a writ of Trial will not in general be granted when there is a dispute as to the nature or legal effect of the instrument sued on. Nor will it be granted in any case when the defendant's attorney swears that he believes the Trial will involve difficult questions, and the nature of the action and pleadings, in the judge's opinion, admits of such being the case.

(June 24, 1857.)

Hector Cameron applied on behalf of the plaintiff for an order for a writ of Trial to issue in this cause on the usual grounds, stating in his affidavit that the action is brought on "a certain agreement or promissory note" for £242.

C. S. Patterson, contra, put in an affidavit to the following effect, among other things:

1st. That the plaintiff declared in his first count "as on a promissory note," and in the second count for money payable on common counts.

2nd. That the defendant has plead "*non fecit*" and "*nunquam indebitatus.*"

3rd. That he is instructed by the defendant that he never gave any promissory note to the plaintiff.

4th. That he is informed that the instrument alleged to be a promissory note is a letter from the defendant to the plaintiff and not a promissory note.

5. That he believes the trial of this cause will involve difficult questions of fact and law.

Mr. Cameron produced the instrument sued on, and admitted it to be the same as described in Mr. Patterson's affidavit and that it is the sole ground of action, but contended that it is tantamount to a promissory note.

RICHARDS, J.—I doubt that this instrument is a promissory note, as sued, and therefore must discharge this summons, especially since the defendant's attorney swears that he thinks the case will involve difficult questions of law and fact.

Summons discharged: costs to be costs in the cause.(b)

PRUGEN v. KERBY.

In applications for writs of Trial, when the parties are pressed for time, the judge will in general make the summons absolute on return, instead of enlarging it, reserving to defendant to move to rescind it.

(June 27, 1857.)

The usual summons for a writ of Trial was taken out in this cause yesterday, returnable to-day.

Jackson applied for the defendant, and asks for an enlargement for the purpose of advising with his principal.

The plaintiff objected to the enlargement, unless the defendant would consent to take short notice of trial if necessary, it being next to the last day for giving notice of trial.

Jackson objected to the imposition of terms, and insisted on an enlargement as a right.

RICHARDS, J., after consulting with some of his brother Judges, made the summons absolute, nothing appearing on the papers inconsistent with the application, but reserved leave to the defendant to move to rescind the order in case he shall have any valid objections to its having been granted.(a)

LEWIS v. BLACKWOOD.

Practice—Affidavits.

Entitling an affidavit in a cause—defendants *als.*—plaintiffs is irregular.

(June 27, 1857.)

Jackson took out a summons for a writ of Trial in this cause on the usual grounds.

The defendant objected and put in an affidavit in support of his objections, entitled "*Blackwood, defendant, als. Lewis, plaintiff.*"

Jackson objected to this affidavit being read on the ground that it was not entitled properly, as this mode of entitling papers had frequently been held irregular.

RICHARDS, J., on the authority of Richards v. Isaac, allowed the objection, and refused to hear the affidavit.

Summons made absolute.

SMITH v. MCGILL.

Oral examination—Affidavits—Practice.

Affidavits in support of applications for oral examinations as to debts, &c., under the 193rd sec. C. L. P. Act, should specify what efforts have been made to collect the judgment, and should show that it cannot be recovered in the ordinary way.

(June, 1857.)

This was the ordinary application to compel the defendant to attend before the Deputy Clerk of the Crown at London and submit to be orally examined as to his effects, &c., under 193rd section of C. L. P. Act, on an affidavit to the following effect:—

1st. That judgment had been obtained by the plaintiff for £2,250.

2nd. That the judgment is unsatisfied, except the amount of £364 19s. 6d. made by the sheriff under an execution in this cause.

3rd. That there still remains due on the said judgment £1,885 0s. 6d.

4th. That venue is laid in the county of Middlesex.

RICHARDS, J., refused to grant the summons on account of the insufficiency of this affidavit, which should have shown that the balance due cannot be obtained by execution or otherwise in the ordinary way, as for instance that the sheriff has returned "*nulla bona*," or something to the like effect, and should also have specified what efforts have been made, if any, to make the amount from defendant.(b)

COUNTY COURTS.

(In the County Court of the County of Essex—A. CHEWITT, Judge.)

MCMULLEN,..... *Plaintiff.*
ANSTEY,..... *Defendant.*
A. PRINCE,..... *Claimant.*

Interpleader—Consent under 1st and 6th sections of 7th Vic., cap. 20

(July 28, 1857.)

The Sheriff levied under plaintiff's execution, and on claim caused the plaintiff and claimant to Interplead. The points raised were:

If a chattel mortgage for £49 and interest, duly sealed before 1st of August, 1857, and registered, was invalid by reason of its securing a party against future liability against execution creditors, he being an endorser for £25, a part of the £49, the other £24 being previously due otherwise—and how the mortgagor's (supposed) infancy affected the claimant's security.

(a) Har. C. L. P. Act, 1856, sec. 224, note *a*.

(b) The sections of 8 Vic., cap. 13, which authorize writs of Trial and Inquiry (secs. 51-56) have been repealed by the C. C. P. Act, 1857.

(a) See note to Lumley v. Rogers.

(b) See note *b*. to section 193 of Har. C. L. P. Act.

JUDGMENT:

There is nothing clearly against it in any law or decision up to the passing of 20 Vic. cap. 3, in force on 1st of August next, which has the *appearance* of permitting this course for the *first time*, but nowhere *implies* that the law was previously otherwise, as its 3rd section only limits the time such security has to run, in the first instance to one year, renewable within 30 days of its expiration—providing more particularly than formerly as to its *bona fides*, so as to be valid as against creditors, subsequent purchasers and mortgagees in good faith.

Previous to the statute all this might have happened, and often did take place for *other* periods than *one year*—and this statute only restored it, providing carefully for the manner of doing it.

Many cases were decided before and after the former Acts on this subject, but the latest are in 5 C.P.R. 185 and 344, 5—*Ross v. Winans*, mortgage on land, and *Canuff v. Bogart*, chattel mortgage—both to secure from loss on *accommodation* paper not then due, in which there does not appear to be any objection to this course—though the chattel mortgage was considered *void* as against an execution creditor for not being registered, the mortgage not having been accompanied by an immediate delivery, followed by an actual and continued change of possession of the chattel in lieu of registry: otherwise it was conceded the security for the future liability would have been sound under the *then* statutes.

As to infancy, the execution creditor and the claimant are *pari passu*—in the same position. We cannot very well take defendant to be an infant to defeat the previous chattel mortgage, and in the same breath hold him to be of age to support the after judgment and execution—though it seems the claimant acted towards him as being of age by endorsing his note and taking his mortgage, and also at some time (not stated when) said or admitted he was an infant. But against this I take it, defendant by his own acts *so far*, has declared himself of age, i.e., by not pleading infancy to the execution creditor's action, and not denying the validity of claimants chattel mortgage by any legal or equitable proceeding.

In the present state of this case, if infancy (clearly established by other parties) could have any effect, though none can urge it but himself, it would be the making the claimant's liability *more present* than *future*—if that can have any more favorable effect upon the security, (though it appears to me to make no difference here) as defendant might not only fail to pay the note at maturity but plead infancy to any subsequent suit on it, leaving the claimant the only party certainly to the holder.

Order, that Sheriff withdraw and for no action, &c.; each party to bear his own costs.

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THE LAW JOURNAL.

JULY, 1857.

OUR NEW ARRANGEMENTS.

This number of the *Journal* is issued under the recent Editorial arrangements, and will be the last published in Barrie.

Hereafter the *Law Journal* will be printed and published for the Editors at Toronto by Messrs. Maclear & Co., the leading if not the first publishing house in Canada.

The *Journal* will appear punctually in the first week in each month, and will be mailed in Toronto to each subscriber's address on the day of publication.

We trust with the enlarged facilities we shall now have, to render the *Journal* more useful to all interested in the subjects it embraces.

It will now be a prominent object of the Editors to pay especial attention to the Practice of the Courts; and we hope to be of material use to the profession by keeping them informed as to decisions on matters of Practice. Such decisions are less regulated by general principles than the other branches of the Law. They are often arbitrary, and not less arbitrary than inflexible: on that account it is difficult to remember them, and much more so than rules of law traceable to some well known principle.

The recollection of the one, however, is not less important than the recollection of the other. Without a knowledge of the Practice a knowledge of the Law would be to many persons barren and useless.

Happily, owing to recent and extensive legislative changes, the Practice of the Superior Courts of Common Law and that of the County Courts, is now the same, and the machinery of these several Courts are very nearly alike. This will give additional and enlarged value to reports.

We will endeavour to keep the Profession well posted up in the cases decided here and at home.

The Practice of the Superior Courts will be MR. HARRISON'S more immediate concern.

MR. ARDAGH will continue to apply himself to local administration, and to subjects of a general character.

Occasional articles from gentlemen peculiarly fitted to discuss legal subjects with ability, will from time to time appear; indeed some of our present contributors have had large experience, and continue to be practically conversant with the matters upon which they write, and we hope to increase the number. We are willing to pay a liberal remuneration for accepted matter.

On a future occasion we shall have a word more for the profession; at present we can only briefly refer to improvements that in the end it is trusted will secure for the *Law Journal* the position it aims at, that of a "Professional Monitor."

THE ACTS OF LAST SESSION.

The last session of the Legislature is noted, not merely for the great number of bills introduced, but for the great number of bills which have become Law. Among the Acts passed there are some of very great interest to the legal profession, and others of vital importance to the social well being of the Province. At present our intention is not to do more than give a hasty summary of the Acts which more particularly concern the legal profession. This we are enabled to do, although all the acts of the session have not yet been published, owing to the very convenient and satisfactory manner in which the Acts, as printed, are arranged.

The Acts of Professional interest are those relating to Civil and those relating to Criminal Law.

Of those relating to civil law there are eleven, all of which must be of more or less concern to our professional readers. The Insolvent Debtors Extension Act of 1856, which caused so much alarm throughout the length and breadth of the land, is repealed—(cap. 1.) Many persons who looked forward to be freed from their debts—some, no doubt, honestly, but many most dishonestly—are deprived of the intended relief. The Acts regulating Bills of Sale and Mortgages of personal property are repealed, and with slight amendments re-enacted and consolidated—(cap. 3.) A radical change is made in the mode of the admission of attorneys to practice—(cap. 63.) Mere service under articles is now of little avail without actual capacity and knowledge, into which the Law Society is empowered to examine. Relief is afforded to persons succeeding to the real estate of persons dying intestate, notwithstanding the infancy or absence from the Province of co-heirs—(cap. 65.) It is our deliberate opinion that a greater measure of relief would be the restoration of the law of Primogeniture. Since the abolition of that law, each act having reference to the new state of things, is nought else than a fresh flounder in the quagmire of perplexity. Great improvements at Osgoode Hall, the seat of the Superior Courts, are authorized, to pay which an increased levy is enacted for law proceedings in those Courts—(cap. 65.)

We now turn to Practice and Procedure in civil cases. Proceedings at the suit of the Crown in Revenue cases are much simplified—(cap. 2.) The law as to Error and Appeal is also simplified, and the constitution of the Court altered—(cap. 5.) The Court is made to consist of the Judges of the several Courts of Queen's Bench, Chancery, and Common Pleas, "and of such other persons being barristers of the Upper Canada bar, and having held the office of Judge of some or one of the Superior Courts of Common Law or Equity in Upper Canada." The Government has, we see, recently availed itself of this provision and restored to the country the invaluable services of that able, learned, and much respected gentleman, Chief Justice Macaulay.

An attempt is made to increase the efficiency of the Court of Chancery by decentralizing the business of the Court, and making it necessary for the Judges to go on Circuit—(cap. 56.) For ourselves we expect nothing good out of Nazareth, but none shall be more pleased if it turn out that we are mistaken in this respect. The procedure of the Courts of Common Law of superior and inferior jurisdiction, is also slightly amended—cap. 57.) A laudable provision is made for the administration of justice in unorganized tracts of country, by the establishment of temporaryy judicial Districts, having local Courts—(cap. 60.) This completes our summary of the Acts relating to civil Law.

If we have cause to say that much has been done as to civil law, what shall we say of the acts

relative to criminal law? More numerous and more important acts upon this branch of the law were placed on the Statute Book last session than during any previous session within our memory. These Acts are not less than ten in number. The right of appeal given to persons convicted of treason, felony, or misdemeanor, is in principle an extension of the liberty of the subject—(cap. 61.) Though we cordially endorse the principles of the act, yet we frankly confess that some of its details, not now necessary to be mentioned, do not meet with our approbation. The act for the appointment of County Attornies to attend to the local administration of justice, we conceive to be a step in the right direction—(sec. 59.) We have more than once in the columns of this Journal advocated views closely identical with those contained in the provisions of this act. The acts which have as their object the removal of delays in the administration of criminal justice, are deserving of unmixed praise. The swearing of witnesses before grand juries, instead of in open Court, will greatly conduce to the speedy despatch of criminal business in those counties where a large amount of business comes before the Courts—(cap. 4.) So the act declaring that there shall be no postponement by traverse or otherwise, unless upon good cause, of trials for misdemeanors—(cap. 62.) By these acts the time not only of witnesses but of jurors, will be much economized. Of the same character as the preceding is the act which enables Magistrates in certain cases to dispose of charges of larceny in a summary manner—(cap. 2.) Provision is also made for the more speedy trial of juvenile offenders—(cap. 29.) And for such offenders there are to be Reformation prisons, in lieu of schools of infamy—our common gaols—(cap. 29.) There are certain offences which, though hitherto not criminal, are now made so. Thus, cruelty to animals—(cap. 31.); and forging foreign coin—(cap. 31.) So provision is made for the holding of inquests upon the origin of fires, when there is reasonable ground of suspicion—(cap. 36.)

We cannot, for want of space, now say more upon the subject of the Acts of last Session. There are several of them about which we could give much useful information, but are compelled to defer doing so until a future time.

ADMISSION OF ATTORNEYS.

An attorney is an agent authorised to conduct litigation in Courts of Justice. Besides being an agent in the common acceptation of the term, he is an officer of the Courts, having rights and privileges, and subject to duties and liabilities. An attorney at law represents a class, some of whom every man, woman and child may at some time or other find it necessary to employ—into whose ears are daily poured tales of distress and wrong, perhaps breathed to no other mortal—a class upon whose judgment and integrity depend the welfare of thousands, nay, the happiness of thousands of homes: in a word, a class whose duties are arduous, often painful—whose position is honourable, often unpleasant.

Many qualifications are essential to the due performance of these duties; there must be integrity and learning, judgment and honour.

There exists no tribunal empowered to endorse any man as upright, discreet and honourable, save that of the public; to this tribunal all men, no matter of what calling or profession, must appeal: but, however competent to deal with these very necessary qualifications in a good attorney, the tribunal of the public is wholly incapable of deciding upon a man's learning, and least of all learning so abstruse as that required in the profession of the law; for this a tribunal, likely to be competent, composed of lawyers of known standing and tried ability—the Law Society of Upper Canada—is constituted. The public, if obliged to take an attorney upon trust in every case, might by a sad, slow and expensive process, be driven to form an estimate by no means flattering, of his fitness. There is sometimes little time for inquiry, and often when inquiry is made, little confidence to be placed in the result. In this strait the Law Society comes to the relief of the public, by saying, we recommend this man to you as *learned*, because we have examined him and found him so, and we recommend him to you as *honest* and *honourable*, for if he were not we should deprive him of his right to practice. The man who desires to serve his fellow-men, either as a barrister or as attorney, or in both capacities, must now in Upper Canada first satisfy the Law Society as to "fitness and capacity. This is not as it has been: hitherto to

entitle a person to become an attorney, service under articles for three years if a graduate of a university, or for five years if not, was only the prerequisite. A change has been made. From the fact of the change we might presume a necessity for the change existed, (on a previous occasion we proved it.) It has at last been discovered that a man may serve for three or five years in an attorney's office without thereby becoming learned in the profession. Indeed there have been ways of satisfying the term of service other than by downright study and earnest application. With nothing to fear, no examination to pass, there has been in some cases shameful neglect of duty on the part of so called law students. Men there have been who, unmindful of the great scope and objects of the profession—unmindful, in fact, of their own best interests, as well as those of the public—palmed themselves upon their fellowmen as wise, learned and honest, whose only claims to be so considered were their impudence, effrontery, and unpardonable audacity. It has been well remarked that young men, in becoming attorneys, enter into a solemn contract with society at large that all men may employ them, not only advantageously but safely, without compromising interests which must be entrusted to them. After all the time spent by a student in an office is of itself a very insufficient test of efficiency. One person may learn as much in three, as another in twenty years. Time spent is not the test,—but time *well* spent by a person *naturally qualified*. We believe no individual, however assiduous, can acquire a knowledge of the law sufficient to enable him to practise it as a profession in less than three or five years. These periods have therefore, in our opinion, not been adopted without proper consideration, and ought not to be altered without a clear necessity.

It being the duty of the Law Society to present to the public men qualified to practise as attorneys, the power to examine as to capacity and fitness is very properly confided in that body. With them will rest the credit of giving to Canada a learned and dignified class of attorneys, or the responsibility of giving to it ignorant, vain, and hurtful pretenders. The powers of the Law Society to examine applicants for admission as attorneys, is conferred by an act of last session, entitled "An Act to amend the Law for the admission of Attorneys," (20 Vic. cap. 63); it was passed on the 10th June, 1857, and came into operation on the day when passed. Many of our young readers, we know, would have been better pleased had the day for the Act to take effect been delayed some months longer; but we must deal with the Act as we find it, now that all its provisions are in full operation. It not only consolidates the former Statutes, but contains many new and really useful provisions. We trace in it many clauses taken in whole or in part from the English Statute 6 and 7 Vic. cap. 73. The decisions in England under the latter Statute, and they are neither few nor far between, will be of great service in the construction of our new act. The first change that strikes the eye of the reader is that already noticed, which makes it necessary for articled clerks to appear before the Law Society to be examined as to fitness and capacity *before* admission (sec. 6.)

The persons entitled to apply for admission may be thus classified:

First—Persons who shall have been previous to or after the passing of the Act duly called to practise at the *bar* of any of Her Majesty's Superior Courts not having merely local jurisdiction in England, Scotland, or Ireland—persons lawfully sworn, admitted and enrolled *Attorneys* or *Solicitors* of Her Majesty's High Court of Chancery or Courts of Queen's Bench, Common Pleas, or Exchequer, in England or Ireland, or Writers to the Signet, or Solicitors in the Supreme Courts in Scotland, or Attorneys or Solicitors of any of Her Majestys Colonies wherein the Common Law of the land prevails; these not to include Attorneys of the Courts of the Duchy of Lancaster, or of the Counties Palatine, of Lancaster, or Durham, in England, or of the Court of Sheriffs substitute, or other inferior Court of Scotland, or of any other than the Supreme or Superior Courts of Judicature of Her Majesty's Colonies (sec. 5.)

Second—Persons who shall have taken or who shall take the degree of Bachelor of Arts or Master of Arts, Bachelor of Law or Doctor Laws, in either of the Universities of the United Kingdom of Great Britain or Ireland, or in either of the Universities of this Province (sec. 4.)

Third—All others not included in the foregoing who shall have complied with the Act (sec. 3.)

Different provisions are made for these different classes of persons, but there are certain regulations common to all; the following may be enumerated:

1. Service with a practising Attorney of Upper Canada under a written contract of service.

2. Attendance at the sittings of the Courts of Queen's Bench or Common Pleas of Upper Canada, pursuant to regulations to be made by the Law Society of Upper Canada.

3. Deposit with the Law Society of Upper Canada at least fourteen days before the first day of the Term in which admission is sought of the contract of service and any assignment thereof, together with an affidavit of the due execution thereof, and of due service thereunder, and a certificate of having attended the sittings of the Courts.

4. Examination as to fitness and capacity by the Law Society, which body is authorized "to inquire by such ways or means as they shall think proper."

5. Payment to the Law Society in deposit of articles and assignments, &c., of ten shillings, and for the examination of fitness and capacity, of ten pounds.

The only material difference as to the provisions made between the three classes of persons above enumerated is as to the period of service necessary. Persons of the first class are required to serve only for the term of one year; persons of the second, for three years; persons of the third, for five years.

There are a few peculiar regulations with respect to the first class that may also be mentioned: they must, at least two months previous to notice of intention to apply, advertise in the *Canada Gazette*. They must, if Barristers, produce and file certificates of having been called to the bar, or, if Attorneys or Solicitors, of their enrolment as such.—They must also, whether Barristers, Attorneys, or Solicitors, produce and file certificates to the effect that at the date thereof applicants were on the books of the Society that called them, or on the roll of Attorney or Solicitors of their respective Court or Courts, and that no application had been made against such person for misconduct. They must also, whether Barristers, Attorneys, or Solicitors, produce and file certificates, under the hands of two or more persons, of good moral character.—The two last descriptions of certificates must bear date within three months of the first day of the Term within which application is made (Sec. 5.) Persons who, during the recent Session of the Legislature, made application for special Acts of Parliament, upon proof of the fact, and service under articles for one year, may be admitted without the certificates otherwise made neceessary (Ib.)

These are the main features of the Act, which, containing as it does twenty-six sections, does not at present admit of a review in detail. It does not fully carry out all the improvements we have advocated in these pages, but on the whole is a marked improvement on the old law. We hail it as a statesmanlike measure—necessary not only to remove previous legislative inconsistencies, but to elevate the status of the Attorney as a branch of the legal profession. It remains with the Law Society of Upper Canada to carry out this wise and generous enactment, in order that we may at all times have men respectable and respected—men who shall render the law "lovely and dignified as the guardian of peace and order."

U. C. REPORTS.

By the obliging and disinterested attention of Mr. Robinson, the Reporter to the Court of Queen's Bench, we are enabled to lay before our readers several cases of importance. Those we had not room for full head notes are given of.

BOOK NOTICE.

The Lower Canada Jurist—Collection de decisions du Bas Canada. *Lovell, Montreal. Published monthly, 20s. per annum.*

We have received numbers 1, 2, 3, 4, and 7, (Nos. 5 and 6 we have not received) of this work, and hail with pleasure the appearance of a publication calculated to give some insight into the Law and Pratice in Lower Canada.

The design of the Lower Canada Jurist is thus explained by the Editors:—

"The want of any sufficient system of law reports is so "generally felt and acknowledged that the Editors think it "unnecessary to make any apology in offering the first number "of the Lower Canada Jurist to the public."

"The Jurist will consist of twenty-eight pages of letter-"press, published monthly, and will contain reports of all the "cases of interest decided in the Superior Court in Montreal, "and those in the Court of Queen's Bench on appeal from "Montreal, and any spare room will be filled up with some "work connected with the jurisprudence of the country, and "which will be paged separately from the reports."

We have read several of the cases; the work of the Editors so far as we can judge, is well and ably done. The statement of facts, &c., in each is at all events clear brief and well put.

We wish the undertaking every success, and trust it may meet the generous support it merits from the Lower Canada bar.

There are no less than twelve Editors, and we notice that each case bears the initials of the gentleman reporting it.

MONTHLY REPERTORY.

CHANCERY.

V.C.W. BETTS v. MENZIES. *June* 4.

Production of documents—Privileged communications—Co-defendants.

Communication between co-defendants in reference to the matters in question in the suit not entitled to prorection.

V.C.R. DARBEY v. WHITTAKER. *July* 9, 14.

Specific performance—Good will—Fixtures at a valuation to be made.

D. agrees with W. and another, in writing, to sell them a lease, trade and good will, subject to the rent and ordinary covenants, but free from all other incumbrances; also to sell the tenant's fixtures, furniture, and effects, at such sum as the same should be valued at by two persons named or their umpire, and all the stock of beer not exceeding a specified quantity, at the valuation of two licensed guagers or their umpire. And for the consideration aforesaid the purchasers agreed to accept an assignment without requiring evidence of title prior to the lease, and if either party neglected to perform the agreement he should pay to the other £150 as liquidated damages.

The defendants alleging misrepresentation refused to produce the lease under which the plaintiff held, and the forfeiture of the lease by change of a policy refused to complete.

Held, that all these objections were untenable; but specific performance refused on the ground that the clause as to fixtures and stock could not be enforced.

Semble, the Court will not decree payment of a valuation to be made, but will enforce a contract for purchase of a good will where it is annexed to the premises.

M.R. JONES v. WILLIAMS. *Ap.* 27, *May* 30.

Mortgagor and Mortgagee—Deposit—Priority—Notice.

A deposit of deeds relating to part of an estate with a representation that they comprise the whole does not create an equitable mortgage over the whole. Neglect to enquire may be sufficient to fix a purchaser with notice without any fraudulent motive in omitting the enquiry.

Q.B. GEE v. SMART. *June* 23, *July* 4.

Equitable plea—Covenant of husband to pay debt of wife—Exoneration of husband's estate.

To a declaration on a covenant in a deed to pay a sum of money the defendant pleaded by way of equitable defence that he and his wife being seized in fee in her right of certain lands mortgaged then by the deed in question to the plaintiff in fee as a security for the money in the declaration mentioned—which was advanced by the plaintiff to enable the defendant and his wife to pay off a loan previously contracted by the defendant at his wife's request, in order to pay a debt contracted by her before her marriage, and that the defendant had no other interest in the money so advanced; that the wife having since died intestate the plaintiff had as her heir at law become possessed of the equity of redemption in fee of the lands as he already held the legal estate in fee, and that the lands were of greater value than the money in the declaration mentioned.

Held, that the husband's estate ought to be exonerated, and that the plea was valid by way of equitable defence.

M.R. ROBERTS v. CROFT. *July* 2.

Equitable mortgage—Priority—Notice.

A prior equitable mortgage will not be postponed to a subsequent one, merely on the ground that the deeds first deposited did not include the conveyance to the depositor and showed no title in him.

EX. GELAN v. HALL. *May* 23.

Justice of the Peace—Power to remand to prison—Liability to suit for corruption in his office—Statute 11 *&* 12 *Vic., cap.* 43, *sec.* 16.

A Justice of the Peace has power under 11 and 12 Vic., cap. 43, sec. 16, to commit to the house of correction during a period of remand in a case where he could not issue a warrant, but a summons only.

A declaration stated that a defendant, a Justice of the Peace, convicted the plaintiff wrongfully, wilfully, and maliciously, without reasonable or probable cause, and that the plaintiff was thereby compelled to pay a sum of money, and that the conviction was afterwards quashed on appeal to the Quarter Sessions.

Held, that it disclosed a cause of action.

COMMON LAW.

EX. LARDUS v. MELROSE ET AL. *June* 12.

Joint stock companies (limited)—Promissory note—What notes are "in the name of the company"—Statute 19 *and* 20 *Vic., chap.* 157, *sec.* 43.

The following promissory note was made by persons authorised to bind a joint stock company, registered under 19 and 20 Vic., cap. 157:—

"London, December 31st, 1856. Three months after date we jointly promise to pay Mr. F. S., or order, £600 for value received in stock on account of the L. and B. J. and H. Company (limited.) Signed, J. M., H. W., J. H., directors; E.Q., secretary."

Held, that the note was binding on the company, and not on the persons who signed it individually.

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF BRUCE.

Judge of the Division Court, ROBERT COOPER, Esq.,—Goderich.

Third Division Court.—Clerk, Charles R. Barker,—Kincardine P. O.; *Bailiff*, R. H. Thornhill,—Kincardine P. O.; *Limits*—The townships of Huron, Kinloss, Kincardine and Bruce.

Eighth Division Court.—Clerk, J. Jamieson,—Brant P.O.; *Bailiff*, —— Benson, Brant P. O.; *Limits*—The townships of Brant, Carrick, Culross, Greenock, and that portion of the township of Elderslie south of and including the eighth concession.

Ninth Division Court.—Clerk, John Eastwood—Saugeen P. O.; *Bailiff*, Jas. Orr, —Saugeen P.O.; *Limits*—The townships of Arran, Saugeen, Amabla, and all Elderslie north of the eighth concession.

N B.—The Divisions are numbered with those in Huron.

† *Vide* observations *ante* page 196, Vol. I., on the utility and necessity of this Directory.