Technical and Bibliographic Notes / Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☑ Bound with other material/ Relié avec d'autres documents
- ☑ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☑ Quality of print varies/ Qualité inégale de l'impression
- ☑ Continuous pagination/ Pagination continue
- ☐ Includes index(es)/ Comprend un (des) index

  Title on header taken from:/ Le titre de l'en-tête provient:

- ☐ Title page of issue/ Page de titre de la livraison
- ☐ Caption of issue/ Titre de départ de la livraison
- ☐ Masthead/ Générique (périodiques) de la livraison

☐ Additional comments:/ Commentaires supplémentaires:

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
								✓			

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—Something has been done towards improving the remuneration to Clerks, but they are still, we contend, miserably paid; not, perhaps, that the fees are much under the mark in cases which are provided for, but there many duties to be performed for which no payment or fee is allowed. It may be that Clerks in the populous Divisions, where there is a very large business done, receive on the whole something like a fair return; but look to the labour a large business brings, and look, above all, to the heavy responsibility, pecuniary and otherwise, that the officer is under. In the smaller Divisions, Clerks are not half paid, and unless their position is properly known, nothing will be done for their relief.

We maintain that Clerks should be paid out of the fee fund for every service connected therewith, and for every service not properly chargeable against parties, and that the disbursements for printing and stationery for the benefit of the fee fund, should not come out of the pockets of private individuals.

How, we are asked, are Clerks to make their position known with a view to relief? Let a joint representation be made in the proper quarter—if deemed advisable—but let every Clerk take this independent course also. Let him *claim* the attention of his representative in Parliament, and for half an hour exhibit his books and accounts, and, in a word, prove to him by tangible evidences the amount of unpaid labour performed, and then, when the question comes up in Parliament, he will have gained information to enable him to act at once in favour of Clerks, for we are very much mistaken if any sensible man of business could not be thoroughly convinced in half an hour that Division Court Clerks are not paid in proportion to the labour and responsibility of the office.

In asking the attention of the Member for the locality, Clerks will not be soliciting a *favour*.—They are rather conferring one, by placing the M.P. in possession of facts which call for action on a principle of common justice by which Members should be guided in the performance of their legislative duties.

Men occupying the arduous and responsible position of Clerks, with thousands of pounds in money, public and private, passing through their hands—men of education and ability, should be paid somewhat better than messengers and runners in the public service, and we believe that, with few exceptions, they are not as well paid.

SUITORS.

Evidence—Sale of goods supplied to third party, &c.—Where goods are supplied to a third person at the defendant's request, not merely must the delivery of the goods be shown, but the request must be clearly proved to entitle the plaintiff to a verdict, or circumstances must be shown from which a request may be inferred.

A master is liable for goods sold to his servant within the scope of his employment, and a request will be implied. Thus, if a servant has been permitted by his master to purchase goods on credit, the latter is answerable even for goods bought by that servant without his master's particular authority; but a master is not responsible for goods ordered by his servant in his name, but without his authority, unless he was in the habit of paying for goods so ordered; if in one instance the master has employed the servant to buy on credit, he will be liable for any goods which the servant subsequently buys on credit until the credit is distinctly withdrawn; though he has given the servant money to pay for the goods in some instances. Whether the servant is invested with a special or general authority, the master is not bound, if the servant's act or contract do not fall within the general province or scope of his powers, and be wholly unconnected with the business entrusted to his direction; a domestic servant, therefore, could not bind his master by purchasing goods unconnected with domestic use, if not in fact authorized to do so.

Contracts with Corporations.—The contracts of Corporations, School Trustees, Township Councils, &c., must in general be under Corporate Seal; but for general purposes not affecting the interests or title of the Corporation, a Corporation may act through the medium of a servant or agent, although he possesses no authority under seal. And when goods, for example, are sold and delivered, or where the acts done are of daily necessity to the Corporation or are too insignificant to be worth the trouble of affixing the Corporate Seal, no seal is necessary.

Delivery to a Wife.—Generally speaking, proof of the order by and delivery of goods to a wife, *if living with her husband*, will support an action against the husband for the price. The liability of a husband for his wife's engagements during marriage rests solely on the idea that they were formed by his authority, and if his assent do not appear by express evidence or by proof of circumstances from which it may be reasonably inferred he is not liable.

Cohabitation is strong presumptive evidence of the husband's assent to agreement made by the wife

for the supply of goods for herself, or her husband's household, during that period. If *necessaries* are supplied, the assent of the husband may be fairly presumed, but mere proof of the husband's cohabitation with his wife would not probably be held sufficient to render him liable upon her contract for goods, not necessaries, suitable to the husband's circumstances and station in life. If a man cohabit with a woman, and allow her to pass as his wife without being maried to her, he is liable for goods furnished to her even by a tradesman who knew the parties were not married.

Where the husband expressly warns the tradesman or storekeeper not to trust his wife, he cannot, unless he has wrongfully turned her out, be charged with the goods subsequently provided. If a husband and wife have parted by consent, unless the former makes her an adequate allowance, he remains liable for necessaries supplied to her.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 143.)

Course of Proceedings (continued.)—The right of reply is taken away from both the prosecutor and defendant—that is, each party is limited to one address to the Bench. As the whole burden of proof is considered to lie with the party prosecuting, who is to substantiate his charge, it is usual and proper for the prosecutor or his attorney, in the first instance, to state briefly the nature and subject of the complaint, and then to call his witnesses. When the prosecutor's case is closed, the defendant, or his attorney, can address the Court and afterwards call his witnesses.

Witnesses' Oath or Affirmation.—The prosecutor or complainant, if he has more than one witness, will call each in such order as may be most convenient and best calculated to present the facts in an orderly shape to the Bench—and the same with the defendant; each witness, as called, should be sworn or make affirmation before he is examined; and as the mode of administering the oath varies according to the peculiar religious belief professed by the witness, Magistrates should always satisfy themselves on this point, either by questions put to the witness or other persons. It need scarcely be observed that the object in view, in putting the witness under the solemn obligation of an oath, is not only to impress him with the moral and religious duty of speaking the truth, but to render him liable, in case he should give false testimony, to the punishment awarded by law to a person who commits *perjury*. If, therefore, a Magistrate should be wilfully deceived by a witness as to his religious belief, and the witness should thus be improperly sworn, and so as not to bind his conscience, it will not the less prevent his being convicted of perjury, in case he should be proved to have given false testimony.[1]

The *Christian's* oath is upon the New Testament; the *Jew's* upon the Old Testament.

The form of oath is repeated by the Magistrate or Magistrate's Clerk to the witness, who, in ordinary cases, kisses the book to signify his assent; others swear with uplifted hand merely. The following forms will answer:—

Ordinary Oath.

The evidence you shall give to this Court, touching the offence charged in this information, (*or*, complaint) shall be the truth, the whole truth, and nothing but the truth.—So help you God.

Oath with uplifted hand.

The evidence you shall give to this Court, touching the offence charged in this information, (*or* complaint) shall be the truth, the whole truth, and nothing but the truth, and this to do you swear in the presence of the ever living God, and as you shall answer to God at the great day of Judgment.—So help you God.

Quakers, Menonists, Tunkers and Moravians are allowed to take affirmation instead of an oath, and such affirmation has all the effect, as to punishment for perjury, as an oath.[2]

Affirmation of Quaker or other person allowed by law to affirm.

I, ———, do solemnly, sincerely and truly declare, that I am one of the society of people called Quakers (*or* as the case may be.)

This the Clerk causes the witness to repeat after him and then administers the affirmation as follows, the witness by word or otherwise signifying his assent at the conclusion:—

The evidence you shall give to this Court, touching the offence charged in this information, (*or* complaint) shall be the truth, the whole truth, and nothing but the truth, and this to do you solemnly, sincerely, and truly declare and affirm.

It may sometimes happen that a witness produced cannot speak the English language, and it becomes necessary to employ an interpreter;—when this happens, the interpreter should be first sworn according to the following form:—

You shall well and truly interpret between the Court, the parties in this cause, and the witnesses produced.—So help you God.

Then, when the witness is brought forward, the Magistrates, or their Clerk, repeat over slowly the form of oath to witness, which is translated by the interpreter, and the examination proceeds through him.

[1] Stone, 96.

[2] 49 Geo. III., cap. 6; 10 Geo. IV., cap. 1, (U.C.); 13 & 14 Vic., cap. 19 (C.)

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

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 143.

Duties in Court.—It is within the province of each Judge to regulate, subject to the express provisions of the Act of Parliament and Rules, the form and mode of conducting business in open Court before him. But uniformity in the business of these Courts is greatly to be desired, and unless otherwise directed by the Judge, Bailiffs may with propriety follow the subjoined directions for their guidance.

There is no reason why business should not be conducted in the Division Court with as much regard to order and propriety as in the Superior Courts.

"The speedy despatch of business," observed the Judge of the County of Simcoe in a "paper" issued for the information of the officers of his Courts, "is an important element in the Constitution of Courts of Summary Jurisdiction—to secure it, business must be gone through on an uniform and regular system; where two or three hundred cases appear on the Cause-List, even half a minute *lost* in every case will protract a Court for hours—to the great inconvenience of parties whose causes are entered low on the List—which a proper economy of time would save, to be used in the more important business of hearing disputed causes.

"The ordinary routine business must be accomplished in the shortest possible time, and by proper attention on the part of the officers this may be speedily done. I would not have any indecent haste exhibited, nor should there, on the other hand, be *be a single moment lost which discipline can save.* The public are disposed to form their opinion of an officer's efficiency mainly from what is seen of him in the public discharge of his duties; and next in value to competence seems public confidence in the officer's ability. "Take pains, therefore," (Judge Gowan adds) "to prepare yourself for the business of the sittings, and you will be able to create a favorable impression on the public, and will have attended to my wishes and order."

On the day named for holding the Court, the Bailiff should see that all necessary preparations have been made in the place appointed, making the most of such conveniences as there are for the suitable accommodation of the Court and the public;[1] and he should be careful to be punctual himself in attendance at the proper hour. Should the Judge be prevented from attending at the hour appointed, the Bailiff, as well as all others concerned, should remain and be at once prepared to go on with business when the Judge makes his appearance. According to the 7th section of the D. C. Act it is provided that if the Judge does not arrive before eight o'clock in the afternoon of the day appointed for the Court, that the Court shall adjourn to the following day, and so on from day to day until the Judge shall arrive to open the Court or give direction concerning it. After the Judge has taken his seat and given orders for opening the Court, the Bailiff, being at his post, opens the Court by proclamation to the following effect:—

Proclamation on Opening Court.

Hear ye! Hear ye! All persons who have anything to do at this ——— Division Court for the County of ———, now here holden, let them draw near and give their attendance, and they shall be heard.—God save the Queen!

After the Court has been opened, it is usual and convenient in the first place to swear the Bailiff as to the due execution of the confession taken before him, and this he should be prepared promptly to attend to when called on by the Judge; he should also be prepared with his book or his list in which the services are noted, so as to be able at once to refer to any case, and offer such explanations as to the time or mode of service as may be required of him.

---

[1] The following observations from the *Law Journal*, Vol. I, page 101, are very much to the point:—

"It is necessary under existing circumstances for officers to resort to every expedient, in remote Divisions, to give the room occupied for a Court anything like a respectable appearance, and to suit the arrangements to the objects in hand—the holding a Court in a decent and orderly manner, with as much comfort as possible to suitors, witnesses and officers. The economy which denies the means of supplying suitable convenience to an Inferior Court, while it extends it to Superior Courts, is not based on any correct principle; it is not economy; it is indefensible parsimony. We hope before long to see the matter of accommodation for the D. C.'s taken up by the Legislature; in the meantime officers must do the best they can towards convenient accommodation. In two or three of the Courts in the County of Simcoe, a moveable railing of a cheap description is put up in the room used, and really serves an excellent purpose. We will not attempt to set down the 'specification,' but perhaps one of the Bailiffs of these Courts might in our columns give a hint to his brother Bailiffs elsewhere that might be useful."

In Judge Gowan's instructions to officers is the following direction:—

"The following order of things in the Court-room arrangement should, when practicable, be observed: The Judge's seat to be so placed that he can be heard, when speaking in an ordinary tone, by the suitors assembled. The Clerk's place close to the Judge's seat, so that the books and papers may be arranged conveniently at his hand out of the way of being taken up or interfered with by others. Directly facing the Judge, and sufficiently close to permit his readily hearing persons therefrom, a place should be enclosed wherein the parties and their witnesses may be free from pressure of the crowd, while their cause is being heard. The Bailiff's position should be close to the enclosure for parties. Should there be a Jury case, seats are to be placed for the Jury convenient to the Judge's seat—and whenever barristers or attornies attend on behalf of suitors, a place should be reserved for them from which they can conveniently confer with their clients."

The summonses are taken up in their order by the Clerk, who names the parties in the suit, and the Bailiff calls each party twice, taking care to pronounce the names distinctly and audibly. The Bailiff should then inform the Court of the result in brief and uniform language, thus—*Neither party answers. Plaintiff present—defendant does not answer. Plaintiff does not answer—defendant present*; or, *both parties present*—as the case may be. The Bailiff should also see that the parties and their witness get to the place assigned to them, and hand the Testament to persons about to be sworn, and see that he complies with the usual formalities by retaining the book in his right hand while the Clerk is administering the oath, and that he afterwards kisses it; much trouble may be saved by attention to this trifling matter. The usual and best plan is for the Bailiff also to hold the book with the witness.

In the trial of disputed cases a Bailiff should be on the watch to see where his services may be necessary; thus, on hearing from parties the names of their witnesses, he will call them—will be ready with good temper, and at the same time with firmness, promptly to repress angry altercations between the parties—improper interruptions and disorderly conduct in every shape; and when a cause is closed will prevent any interruption to the further business of the Court by at once removing the parties in the case, to make room for those next in succession. A knowledge of this part of the Bailiff's duty will be best acquired by observation and practice, and in its exercise will need both discretion and good temper on the part of the officer.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

THE QUEEN EX REL. WALLIS V. BOSTWICK.

[In Chambers.]

"Motion for a writ summons in the nature of a *quo warranto*, at the instance of the relator, James Wallis, against George Bostwick, &c., to show by what authority he, the said George Bostwick, claims to be Councillor for the said village of Yorkville, and why the said George Bostwick should not be removed therefrom, and why the said relator should not be declared duly elected, and be admitted to the said office."

Edward Fitzgerald for relator.

Barratt showed cause.

Statement of objections:—

1. That the relator was returned only upon a majority of one vote, and that the five following persons who voted for him were not duly qualified, viz.: William E. Braman, John F. Mossman, General Johnson, Patrick Bundy, Daniel B. Stetson,—who were none of them natural born or naturalized subjects, but aliens, born in the United States of America.

2. That Daniel B. Stetson was further disqualified, not being resident in the village of Yorkville at the time of the election.

12 Vic., cap. 197; 18 Vic., cap. 6; 12 Vic., cap. 27, secs. 4, 9 & 43; 16 Vic. cap. 182, sec. 26; 16 Vic. cap. 181, sec. 27.

In support of these objections,

Thomas Atkinson swears, that he voted at the election for four candidates (not for Bostwick); that since the election he enquired respecting Braman and Mossman, and was told that they are aliens who have not been naturalized; that he had enquired of themselves whether they had been born in the States, and was told by Braman that he was born in Massachusetts, and by Mossman that he was born in Pennsylvania, but to the best of deponent's knowledge they have neither of them been naturalized; that he has been informed and believes that the other three, Johnson, Bundy and Stetson, are aliens, and have not been naturalized.

John Edmonds makes oath, that since the election he has enquired respecting Johnson, Bundy and Stetson, and has been told that they are aliens—not naturalized; and that he has asked themselves of the fact, and was told by Johnson that he was born in Kentucky—by Bundy that he was born in Virginia—and by Stetson that he was born in Vermont, and that to the best of his knowledge they have never been naturalized; further, that he has been informed and believes that Braman and Mossman are aliens and not naturalized; and that Stetson was not, at the time of holding the election, resident in Yorkville, but was then and had been for some time before residing in or near Caroline street in the city of Toronto.

Wallis, the relator, makes affidavit to the same effect.

On the part of Bostwick,

Andrew Braman, brother of the voter, makes oath, that "their grandfather was in his lifetime a British subject."

Bundy, the voter, makes oath, that in 1851 he voted at an election of a member of the House of Assembly for the county of York, and on that occasion took the oath of allegiance, which was administered to him by the Deputy Returning Officer, and that he has ever since resided in this Province.

Johnson, the voter, makes an affidavit to the same effect as regards himself.

John Willson makes oath, that he was the Deputy Returning Officer on the occasion referred to in the two preceding affidavits, and administered the oath of allegiance to Warren and Bundy, who swore that they had, previous to that election, respectively resided in the Province for seven years. He verifies this by reference to his poll book.

Johnson swears, that he had his settled place of abode in Upper Canada on and before the 10th of February 1841, viz., ever since 1837; that in December, 1851, he being then over 16 years of age, took the oath of allegiance, and swears to having resided here for 7 years previously, before Willson, Deputy Returning Officer, as before stated.

G. Bostwick, besides supporting the impeached votes, objects to votes received for the relator and files these affidavits. (Wallis swears that none of these votes were challenged at the election.)

1st. As to *William Hilton*:

George White swears, that he is not a householder, but rents a cellar in Yorkville for curing meat, and lodges with Mr. Mountain, being a single man; is not a freeholder in Yorkville.

Oswald Foster, R. O., confirms this; says he was neither a freeholder nor householder.

2nd. As to *John Dawson*: that he occupies part of a house having no separate or distinct communication by a door with

the street—but must, to enter, go through the front door of the house in which one Kerr resides, or out of a back door leading into a garden or yard, common to Dawson and Kerr; and to get from thence to the street he must pass over land not belonging to the house in which he and Kerr are living; that Kerr occupies the lower part of the house and Dawson the upper; that Kerr uses both the front and back doors, and that to go out by the front door Dawson would have to go through a room occupied by Kerr.

Contra—John Dawson, that he rents a portion of a house in Yorkville, from one Morley—the upper part; that he passes out by a door at the foot of the stairs and at the back of the house, and can pass round by one side of the house over land which belongs to the house and which he leases, and then gets to the public street in the village; that Kerr is not in the habit of using the back door, and that he (Dawson) never uses the front door by which Kerr goes out.

Oswald Foster swears, that he was Returning Officer at this election, and was Clerk of the Municipality for 1855; that neither Wallis (relator) nor any one in his behalf, nor any other candidate, questioned the right to vote of any of the five objected to now as voters; and as to *Henry Cox*, voter for relator, one Edward Cox voted in name of Henry Cox—no Edward Cox being in the roll, and the house on which he voted being assessed as of Henry Cox.

Contra—Edward Cox swears, that he never authorized any one to call him Henry; that he voted as Edward, and if entered as Henry it was without his assent and against his directions; that he has at former elections for the village, voted, and always as Edward, and when Foster was Returning Officer.

As to *Robert Lawrence:* Oswald Foster swears, he was not the owner of any land in the village nor a householder, but he and his wife keep house for one Atkinson.

William Townley swears to the same effect: that he is landlord of the house with his brother James, and that it is leased to Atkinson, who alone pays the rent.

John Edmonds swears, that he was collector for 1855; that Lawrence now lives in a house in which John Atkinson lives in Yorkville; that Lawrence, at the time of collecting the assessment for 1855, was a householder in the village, and was assessed for the said house in which he then lived, and that Lawrence's name is entered on the Collector's Roll as so assessed; that he paid the taxes for it for that year; that he continued to reside in it with his family till about four months ago, when he left it and went to live in the same house with John Atkinson; was at the time of the election living in the village, and had been for 14 months next before.

He swore also, that he was a constable and acted at the election, and heard no objection to any of the 9 votes now impeached by Bostwick.

As to *Francis Keith:* Oswald Foster swears, that to the best of his belief he was neither a freeholder nor householder in Yorkville, having removed previous to the election.

William Townley swears, that Keith formerly occupied part of a house belonging to himself and his brother, and as under tenant of theirs, but had ceased to occupy it or any part of the house before the election and no one has occupied since he left; that he voted as tenant of part of this house, though he had removed his family to Toronto some time before the election.

Contra—John Atkinson swears, that he rents a house from Townley at £13 13s. a year rent; has lived in it from 1st of January, 1855, to this time; that in December, 1855, he let a part to Keith, who has ever since held such under lease; that Keith and his family never used the front door which he, deponent and his family, used, but passed out by a separate and distinct door at the foot of the stairway leading from their upper room, which was never used by deponent; that Keith has not removed, but his brother-in-law having left Toronto for a short time, Keith's family have gone to live with his wife till he returns, which he believes will be soon, and he believes Keith and his family intend to return to Yorkville and to his house, as soon as his sister-in-law returns to Toronto; that Keith has not removed his furniture from his house in Yorkville, and that Keith sometimes stops in the village and sometimes in Toronto—continues to pay his rent as before; that it was but a few weeks before the election that his family removed.

Keith himself confirms Atkinson's account given above, and swears that he and his family did and could get to the public street by passing out of the door at the foot of the stairway, and then passing along by one side of the said house outside; that he has not removed from his house, but states the circumstances in that respect as Atkinson has done above.

As to *John Mason:* Oswald Foster swears, no one of that name on the Collector's roll.

Contra—John Mason swears, that William Mason formerly lived in the house he now lives in; that he left about August 1854, and deponent has lived there ever since; that Foster has during that time been assessed, but deponent *has always believed that he was assessed* for said premises; that he pays £4 10s. per annum rent for them, and has paid taxes for them for the last two years; that he never gave in his name as William, and supposed he was assessed in his own name for the house; that William, since he left, has never been in the village.

Thomas Branton swears, that he lives near John Mason in Yorkville, and last April told Foster, the assessor, that John Mason lived in this house, and that William Mason, his father, who had lived there, had left the village.

As to *Leonard Pears:* Oswald Foster swears, that he was neither a freeholder nor a householder.

Contra—Pears swears that he was assessed for freehold in Yorkville, and owned it when assessed in 1855, and paid the taxes for that year; that in December 1855, he sold his freehold, but at the time of the election was a householder and resident in Yorkville, and paid £6 a year rent for his house; that he occupied a distinct portion of a house, and had a separate and distinct door by which he passed to the public street—not used by the other occupiers of the house; that his (former) freehold was assessed at more than £3.

As to *Roger Douglas:* Oswald Foster swears, that he owned no real estate in Yorkville, and was not rated on the collector's roll as the tenant of any house in the village at the time of the election, but was for a brickyard.

Contra—Roger Douglas swears, that he *is a householder* in Yorkville—rents a distinct portion of a house from Mrs. Arthurs, for which he pays £8 5s. a year, and he and his family alone live there; there is a distinct door by which he goes out, used only by himself and his family—passes round by one side of his house and then gets to Yonge Street, or by another side of the house to another public street of the village; that he has paid £1 18s. taxes for 1855—has lived 14 months in the house; that the house and brickyard are rented from the same landlord, but by different leases—rent of brickyard £32 10s. a year; that the house is built on the said yard.

As to *Thomas Atkinson:* Oswald Foster swears, that he voted as the owner of real estate, and that he was not then the owner of any such estate in the village, as he believes.

Contra—Thomas Atkinson swears, that he has been for the last three years a householder and resident in Yorkville, and still is and for the last three years has been a councillor qualifying on household property; has occupied the same house for 3 years; that Foster has been 3 years Clerk of the Council, and as such swore deponent to his qualification, and knew that he qualified on household property and not on

freehold; that Foster was assessor for 1855, and was told by deponent to assess him as householder—has paid taxes for his *house for 1855*; that none of the 9 were declared bad votes at the election.

Mr. Bostwick swears, that during the election he did not know of the qualification of any of the nine voters to whom he now excepts, and therefore did not challenge them as he otherwise would have done.

ROBINSON, C.J.—12 Vic., cap. 81, sec. 121, enacts, "That no person shall be qualified to vote under that Act who shall not at the time of his vote be a natural born or naturalized subject of Her Majesty."

The qualification of voters in incorporated villages is fixed by 57th sec. of that Act as amended by 14 & 15 Vic. cap. 109, sched. A., and the clause so amended, which is to read as part of 12 Vic., cap. 81, provides that the returning officer shall procure a correct copy of the collector's roll for the year next before the election, so far as such roll contains the names of all male freeholders and householders rated upon such roll in respect of rateable real property in the village with the amount of the assessed value of real property for which they shall be rated—which roll shall be verified, &c.

And the persons entitled to vote at such elections shall be the freeholders and householders of such village, whose names shall be entered on the roll as rated for rateable real property held in their own names or their wives' as proprietors or tenants thereof to amount of £3 per annum or upwards, and who at the time of such election shall be resident in such village.

The property need not be all freehold or all leasehold, provided the aggregate at which both are assessed is sufficient.

That the occupant of any separate portion of a house having a distinct communication with a public road or street by an outer door, shall be considered a householder, provided he be rated therefor as a *householder on the collector's roll.*

I think Johnson's vote was legal, he having been resident in this Province at and before and constantly after February 1841, and having taken the oath of allegiance before the Returning Officer at an election for the Legislative Assembly. The statute 12 Vic., cap. 29, sec. 43, taken in connection with 12 Vic., cap. 197, I think has the effect of entitling him to claim the privilege of a subject, though there is room to contend that under the 4th, 5th, 6th and 9th secs. of 12 Vic., cap. 197, it was necessary for the voter, Johnson, to obtain such a certificate as is mentioned in the 6th clause. He may obtain such a certificate undoubtedly, but I consider that a person standing in the situation that Johnson does, and having taken the oath of allegiance at county elections before a returning officer, could exercise the privilege of voting at the municipal elections aforesaid without having received a certificate and caused his name to be recorded under the 6th clause before referred to. This is open to doubt. However, according to my present opinion, I confirm his vote.

As to the four other votes given for the same councillor, which are objected to on the same ground of alienage, viz., Braman, Mossman, Bundy and Stetson, I take it to be the case upon what is before me, that they were all aliens by birth, and that they have none of them become entitled by a sufficient length of residence in Canada to claim the privilege of naturalization. Stetson is disqualified also on another ground, namely, that he was not resident in the village at the time of the election, nor for some time before.

Then, these 4 votes being bad, Mr. Bostwick would stand on the poll 3 below the relator, who would be entitled therefore to be returned if none of his votes had been challenged and invalidated. But nine of his votes are objected to, viz., Hilton, Dawson, Cox, Lawrence, Keith, Mason, Pearce, Douglas, and Thomas Atkinson.

Hilton's vote was not attempted to be supported and seems clearly bad, he being neither a freeholder nor a householder, but only renting a cellar, which he used in curing meat.

Lawrence's vote was bad, I think, because, though he had been a householder in Yorkville during part of the past year of 1855, and seems to have been properly rated as such in the collector's roll of that year, yet four months before the election he had ceased to be a householder within the meaning of the Act at the time of the election, but lived with another person as a servant or inmate. Whether if he had four months before the election become the holder of a new tenement at a sufficient rent to entitle him to vote, that would have qualified him, considering that he did not appear on the roll as assessed for such newly acquired tenement, might be thought to admit of doubt.

My impression at present is against his right to vote in respect of any property not assessed to him, but on the other ground that he was not a householder at the time of the election, his vote must clearly be rejected.

Cox's vote also, I think, cannot be supported, because his name was not on the collector's roll. It seems to have been an erroneous entry of the party by a wrong christian name, and probably by no fault of his; but Edward and Henry are distinct christian names, and neither of them given as a second name—so we can no more say that Edward Cox's name was on the roll for 1855 than if it had been Edward Jackson instead of Edward Cox. The statute 14 and 15 Vic., cap. 109, sched. A., is positive in its terms, and there is no hardship in it, because the Assessment Act, 16 Vic. cap. 182, sec. 26, gives ample opportunity to the inhabitants to have any errors of this kind corrected that may have crept into the collector's roll.

Mason's vote is bad on precisely the same ground, his name not being in the collector's roll, but that of William Mason, his father—there being this difference, however, between his case and Cox's, that this was not altogether an accidental error, if it were one, for William Mason had been properly assessed formerly for the same property, and his name was still continued on the roll, intentionally, no doubt; though, perhaps, such a change has taken place as would have made it proper that it should be assessed in John Mason's name, who, it seems, succeeded him in the occupation.

Douglas' vote is also bad; he owned no freehold, but rented a brickyard at £32 10s. a year, on which was a house, for which, however, he was not rated, but only for the brickyard.

Thomas Atkinson's vote seems to be another that must be rejected on the ground that he is not a freeholder, but a tenant; but is not rated otherwise than as a freeholder.

The rejection of these votes places Mr. Bostwick in a majority of three, so that it is unnecessary to go further.

The judgment is that the office of Councillor for the incorporated village of Yorkville be adjudged to the defendant; that he be dismissed and discharged from the illegal usurpation charged upon him: and that he recover against the relator his costs.

The objections to Dawson's, Keith's and Pearce's votes are less clearly made out than the objections to the six others, and I will only say as to them, that if the relator depended on them, I think it would be found difficult to support them.

MCDONALD V. PRENTISS.

(Hilary Term, 19 Vic.)

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

Purchase from patentee before patent issued—Long possession—Estoppel—Presumption of grant.

A. being the nominee of the Crown, transferred his certificate to B. in 1796, who soon after, by writing *not under seal*, contracted to sell to C. It was not shown whether C. had made the payments specified by his agreement, but he went into possession, and he and his descendants had held uninterruptedly for more than fifty years. The defendant claimed under them. In 1837 a patent first issued to A., whose heir brought ejectment.

It was left to the jury to presume a grant made by A. before the patent, but they found for the plaintiff, and the Court refused to set aside the verdict.

[14 Q. B. R. 79.]

Ejectment, for the west half of lot No. 12, in the 5th concession of Lancaster.

At the trial at Cornwall, before *Macaulay, C.J.*, it appeared that a patent issued for this lot 12, on the 28th of June, 1837, to Donald McDonald, describing him as formerly of North Britain, but now of the township of Cornwall, in the eastern district of Upper Canada; and the plaintiff proved that he was the eldest son and heir of the patentee, who died in the township of Roxburgh, five or six years before the trial.

On the defence there was produced a certificate from the Clerk of the Peace of the Eastern District, the late Mr. Farrand, dated 1st February, 1796, stating that he had received into his office on that day from Alexander McLeod a land-board certificate of the 25th of June, 1794, for lot 18, in the 15th concession of Lancaster, located to the said *Alexander McLeod;* and also a certificate, dated 23rd of November, 1787, of Deputy Surveyor General Collins, for lot No. 12, in the 5th concession of Lancaster, 200 acres, located to Donald McDonald, with a writing at the foot of the certificate, dated 18th of January, 1796, purporting to be a sale and transfer of the last mentioned lot, by the said Donald McDonald to the said Alexander McLeod, for the consideration of £25 therein acknowledged to have been paid.

Defendant also produced an instrument in writing, not sealed, bearing date 22nd of January, 1798, purporting to be a sale by Alexander McLeod to Donald McDonell of Glenoir, in the county of Glengary, and township of Charlottenburg, (not the patentee) of lot 12, in the 5th concession of Lancaster. The vendee by this writing agreed to pay for the lot £50—viz., £10 on the first of May following, and £10 in each of the four following years, on a day named—at least that was evidently the meaning of the instrument, though it was most inaccurately expressed; and it was stipulated that McLeod should receive for himself three-fourths of whatever hay might be collected on the aforesaid premises (not said for what term of time,) and to leave the said premises under such fences as might be deemed sufficient. On this agreement was endorsed a receipt for £10.

The Donald McDonell mentioned in the instrument lived on the lot, having succeeded Alexander McLeod in the possession of it; and it appeared from the evidence that this Donald McDonell died upon the lot, leaving Hugh McDonell, his eldest son and heir, who succeeded him in the possession, and on his death, his son and heir, Alexander McDonell, went into possession. He seemed to have removed to Lower Canada, leaving the defendant, who was his father-in-law, in possession of the lot. So that it appeared that the Donald McDonell who purchased from McLeod, the assignee of the original nominee of the crown, and his family, had been in possession of this land from the time of his purchase in 1798, or soon after.

It was proved by a witness, Archibald McDonell, who was also a son of Hugh McDonell, and a brother of the Alexander McDonell under whom the defendant appeared to hold, that his father, Hugh McDonell, the son and heir of Donald McDonell, vendee of McLeod, (not the patentee) went to Donald McDonell, the patentee, who sold his right to McLeod, before the patent was issued, and endeavoured to obtain a deed from him, but it seemed he failed; and afterwards Archibald McDonell, the witness, who had obtained possession of the east half of the lot from his father, Hugh McDonnell, also applied to the same Donald McDonell for a confirmation of his title, but did not receive it, as the latter refused to give it unless he was paid £60. After his death, which occurred six or seven years ago, the same Archibald McDonell applied to his heir, the present plaintiff, and upon terms made with him succeeded in getting a conveyance from him.

The defendant in the present action endeavored to maintain his possession of *the west half* upon the evidence, without the aid of any confirmation of title from the patentee or his heir.

The learned Chief Justice of the Common Pleas (*Macaulay C.J.*) before whom the cause was tried, stated to the jury that what the plaintiff relied upon was that the patent having issued to the original nominee of the Crown, the plaintiff's father, in 1837, about eighteen years only before this action was brought, and it not being shown that up to that time the estate was not in the crown, there could be no title made out under the Statute of Limitations by showing twenty years' possession; but that it was contended that in support of so long a possession as fifty years a grant from the patentee might be presumed to have been made before the patent—such a grant as would operate against himself and his heir by estoppel; and being inclined to countenance the defence as much as possible in a case in which justice seemed to be so clearly on the side of the defence, he left it to the jury to find upon the evidence of possession and the other facts proved, whether the patentee did make a grant to McLeod, or the other Donald McDonell, McLeod's assignee, and the father of Hugh McDonell. He left it to them to find whether the plaintiff's father was certainly the locatee of the lot, and the person intended by the patent to be the grantee. This charge was objected to by the plaintiff's counsel.

The jury found in favor of the plaintiff, the heir of the grantee of the Crown.

Brough obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence and the judge's charge.

McDonald, Q.C., showed cause, citing Connell v. Cheney, 1 U.C.R. 307; Doe McGill v. Shea, 2 U.C.R. 483; Doe Charles v. Cotton, 8 U.C.R. 313.

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

This case may be shortly stated thus:—Donald McDonell "from North Britain," was the original nominee of the Crown, and received a land-board certificate for this lot. In January, 1796, he sold the lot to Alexander McLeod, as the certificate of the Clerk of the Peace shows—that is, he transferred his certificate to him; and in January, 1798, McLeod sold or contracted to sell the lot, by a writing not under seal, to Donald McDonell of Glenoir, who was to make certain annual payments.

Whether these have been made or not does not appear; but the vendee went into possession, and he and his descendants, and the defendant holding under them, have held uninterrupted possession ever since; that is, for more than fifty years.

Then we see that in 1837 a patent first issued from the Crown for the land, granting it to the original nominee, Donald McDonell, who was then still living; and his son and heir has brought this action against the defendant in possession under the title derived from McLeod, and has obtained a verdict in his favour.

So it is the heir of the person who assigned to McLeod, (though not by deed) bringing ejectment against the person holding under the heir of McLeod's assignee.

If the assignment to McLeod had been such at the time as could convey a legal estate, there would be no question that the plaintiff would have no right to recover; but when McLeod took the writing, such as it was, from Donald McDonald the owner, his grantor had no legal estate to convey, for the title was then in the Crown; and, moreover, if he had held the legal title, it would not have passed by that writing not under seal.

The possession of fifty years held by defendant and those under whom he claims, or any possession above twenty years, would bar the plaintiff's title if the patent had issued more than twenty years ago; but there can be no bar, and the legal title under the patent cannot be held to be extinguished under the Statute of Limitations, without allowing the statute to run while the estate was yet in the Crown. This we have always held to be inadmissible.

The learned Chief Justice struggled to support the defendant's long possession, as it was natural and proper that he should; and he left it to the jury to presume a grant made

by the patentee before his own legal title accrued, and such a grant as would support an estoppel working in interest after the completion of the patent. But the jury declined to find such a grant, and have found for the plaintiff, which we apprehend is according to the legal right, however hard it may seem.

We see nothing to found an estoppel upon—no deed made at any time; and we do see what it was that McLeod did hold—a mere writing not under seal, and not such in its terms as would support an estoppel. The only question, as it seems to us, is, whether a grant from the Crown ought to have been presumed in support of the long possession—that is, a grant prior to the one which we see; we cannot say that we think it should, and we still continue to entertain the opinions which were expressed on that point in the case in this court, of Doe dem. Finn v. Fitzgerald (1 U. C. R. 70.)

If, however, it could have been presumed, the jury did not presume it, and we cannot insist on their doing so. It is, besides, rather a strong circumstance that the brother of the defendant's landlord—that is, the other son of Hugh McDonell, —has so far acquiesced in the plaintiff's title, that he has compromised with him, and paid him for the half of the lot which he was occupying.

If that was just in his case, there is nothing to show that the plaintiff's title to the other part of the lots did not stand on as good a ground. It may be that McLeod had not made the payments which he was to have made for the land to the plaintiff's father; or it may be that the other son of Hugh McDonell submitted to pay a sum of money merely to save the trouble and expense of an uncertain law suit. However that may be, the verdict that has been rendered seems to us in accordance with the law of the case, and certainly cannot be ascribed to and misdirection, for the learned Chief Justice was desirous of giving to the defendant the full benefit of all that could be urged in his favour.

We see no ground on which we can set aside the verdict; for the cases cited by Mr. Brough of England dem. Syburn v. Slade (4 T. R. 682), and Doe dem. Bowerman v. Syburn (7 T. R. 2), cannot be applied under the circumstances of this case. There it was quite clear that no beneficial interest could have been remaining in the party after a certain time; and the question was whether he should be presumed to have made a conveyance which it was plainly incumbent on him to have made many years before, and the making of which was a mere matter of form. Here we know not what may have intervened: the consideration money may never have been paid by McLeod; and we cannot, as a court of law, say that the heir of the patentee was bound to confirm a disposition attempted to be made by his ancestor by a writing not under seal, and that he must therefore be presumed to have done so.

Rule discharged.

McWHIRTER v. BONGARD.

(Hilary Term, 19 Vic.)

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

Division Court—Prohibition.

Held, (affirming Bongard v. McWhirter, 12 U.C.R. 143) that under 16 Vic., cap. 177, sec. 9, a suitor in the Division Court, who desires to remove the cause to another division, must apply to the judge who ordinarily would have cognizance of the cause, and not to the judge of the division to which he desires to transfer it; but,

Held, that in this case the question was not open for decision, the only issue taken being as to which of the two divisions was most convenient to try in, and upon that point the decision of the judge who had granted the order was decisive.

(14 Q. B. R. 84.)

The plaintiff in this case had applied for a writ of prohibition, but the point involved being considered by the court to be one of some doubt, the writ was refused and he was ordered to declare in prohibition, which he now did accordingly.—See Bongard v. McWhirter, 12 U.C.R. 143.

The declaration alleged a writ of prohibition to John Bongard to cease further to prosecute his suit against David McWhirter in the 8th Division Court of the county of Prince Edward.

Plea—averring, that before defendant brought said suit—viz.: on the 1st of March, 1851—he resided within the limits of the 8th Division Court of the county of Prince Edward; and that the plaintiff resided within the 9th Division Court of the united counties of Frontenac, Lennox and Addington, and so resided when the judge's order was obtained; that said 8th and 9th divisions are adjoining divisions; that it was more convenient for plaintiff, defendant, and their witnessess, to attend at the 8th than at the 9th Division Court; that defendant obtained from David Lockwood Fairfield, Esq., judge of the County Court of Prince Edward, a special order to try the suit in the 8th Division Court.

Replication—That it was not more convenient to go to the 8th Division.

At the trial, at Picton, at the Spring Assizes of 1855, *Mr. Justice Burns* held that the issue was improperly taken on a matter in which the law gave the judge discretion, and entered a verdict for the defendant, reserving "leave to the plaintiff to move the court to enter a verdict and judgment for the plaintiff, if upon the facts disclosed upon the plea and upon his notes, the court should be of opinion that the plaintiff was entitled to judgment, without reference to the immateriality of the issue raised: in fact, to decide as if upon demurrer.

It was contended on the part of the plaintiff, that the judge of the County Court of the county of Prince Edward was not authorized by law to grant the order, which should have been granted by the judge of the County Court of the united counties of Frontenac, Lennox and Addington.

Patterson for the plaintiff. *Fitzgerald*, contra.

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

Upon the question which gave rise to this proceeding, we retain the opinion expressed in Bongard v. McWhirter (12 U. C.R. 143.) We think, as the law then stood, it was to the judge who ordinarily would have cognizance of the cause, that application was to be made by the suitor who desired to remove the cause to another division, and not to the judge of the Division Court, to which it was the desire of the suitor to have the cause transferred. The 69th rule of the judges of the Division Courts promulgated in 1851, so far as it could be allowed to affect this question upon the construction of the statute, is only prospective, and can only as to past acts be material, as being an indication of the footing on which the judges of the Division Courts thought it best that the matter should rest.

But really the question on the proper construction of the statute 16 Vic. is not open to us, for the reason which struck Mr. Justice Burns at *Nisi Prius*, when the issue upon this record was brought before him to be tried. No point was raised in this prohibition suit upon the legality of the proceedings for effecting the removal of the cause from the 8th to the 9th division, but merely upon the question of fact, which of the two divisions *was the one most convenient* for the cause to be tried in. We agree with the learned judge that the decision of the judge who made the order settled that point, if he was the proper person to apply to, which is not made a question upon this record. The jury were asked to determine the question of convenience, after an order had been made by the judge of the Division Court, determining that the 8th division was the most convenient court.

It is not denied in the record that the judge who made the order was the proper person to apply to, and that point not being denied, then his discretion could not be overruled by a jury.

We think, therefore, the rule for setting aside the verdict for the defendant should be discharged, for we cannot deal with the case, even by consent, without regard to the nature of the only issued raised, and the verdict upon that issue cannot be held by us to be contrary to evidence.

Rule discharged.

Daniel B. Reaume v. Daniel Gurchard.

Sheriff's deed—Previous conveyance—Consideration.

(Practice Court.)

Ejectment for lot No. 146 in the front or first concession of the township of Sandwich. Writ issued 4th Sept., 1854.

This case was tried at Sandwich in April last, before *Hagarty, J.* It was admitted that the Crown granted the premises in question to John Askin, by letters patent dated 21st Feb., 1806; that on the 27th Dec., 1806, John Askin conveyed the same premises in fee to Robert McDougall—Registered 8th Sept., 1818; that on the 4th July, 1827, John Robert McDougall conveyed the same premises in fee to James McDougall—Registered 18th July, 1827. A deed was put in (execution thereof admitted) dated 14th April, 1843, from James McDougall to the plaintiff, of the premises. Consideration £62 10s. *Hab.* in fee—Registered 17th April, 1843.

The plaintiff further proved that McDougal had a tenant in possession at the date of this deed. Sometime afterwards the lot was sold at Sheriff's sale, when the defendant bought it, and McDougall's tenant gave up the possession to defendant.

On the defence was put in an exemplification of a judgment recovered in the Queen's Bench by Louis Joseph Fluett against James McDougall on cognovit in assumpsit for £42 11s. 4d. entered the 17th Dec., 1842. An alias *fi. fa.* against goods issued in February, 1843, returned *fact* as to £20 *nulla bona*, as to residue. This debt was afterwards paid off. It was proved that on the 12th February, 1844, an attachment issued against James McDougall at the suit of the defendant, treating McDougall as an absconding debtor; and on the 25th Sept., 1846, by Indenture of that date, George Wade Footte, then Sheriff of the Western District, conveyed to the defendant, in consideration of £271 18s., the premises in question, and the estate right, title and interest which James McDougall had in these premises on the 4th of August, 1845, or at any time after that day—*Hab.* in fee. This deed recited that an execution issued out of the Queen's Bench, tested the 28th of July, 1845, against the lands of James McDougall, an absconding or concealed debtor, to make £240 debt and £20 2s. 4d. costs, which the defendant in this case had recently recovered against McDougall. No judgment or writ on which this deed was founded were produced. It appeared that McDougall left this Province about the date of the deed from himself to the plaintiff. He was embarrassed, though he had other property besides these premises, and his estate afterwards turned out well.

Before that time he had arrested the defendant on some alleged claim against him—the defendant was committed to gaol, and was discharged from custody for non-payment of the weekly allowance. He had previously lived with Mr. McDougall as his clerk.

The plaintiff was also called as a witness for the defence. He stated that the consideration for McDougall's conveyance to him was $250, of which he paid $50 prior to—not at the execution of the deed. That he gave no notes or security to McDougall, who was his father-in-law, for the balance. That he (plaintiff) has lived in Michigan 25 or 26 years. That McDougall came to his place soon after executing the deed, and lived with him two years. He could not remember any particulars of the payment of the $50; in what sums paid or the dates. It was McDougall proposed to him to buy the land. He swore that he had no idea the deed was to defraud creditors—that he took it in good faith. According to some of the witnesses, the land in 1843 was worth about 10s. per acre.

No other debts were proved against McDougall except those of Fluett and of the defendant.

The learned Judge directed that the question was whether the deed to plaintiff from McDougall was a voluntary conveyance bad against creditors. That at its date the only debt was that due Fluett, which was afterwards paid. He directed the jury to determine whether it was voluntary or for a valuable consideration. That as to mere inadequacy of consideration it must be so gross as to startle. That McDougall should be shown to be indebted to the extent of insolvency.

The jury said the sale by McDougall to plaintiff was *bonâ fide* and for value, and found for plaintiff.

A. Prince, in Easter term, obtained a rule *Nisi* for a new trial, on the ground that the verdict was against law and evidence—citing Graham v. Fueber, 14 C. B., 134, 410.

Cooper showed cause. He urged that the evidence warranted the finding, and that no misdirection was complained of. He cited Jenkyn v. Vaughan, 2 Jur. U. S. 109.

Draper, C.J.C.P.—It appears to me there was sufficient evidence to go to the Jury, for the purpose of establishing that the deed in question was for valuable consideration. It was open to observation and to doubt, but it was a matter for them to decide, and in deciding in plaintiff's favour I do not think they have done so without or even against evidence. The only creditor existing at the date of that conveyance, whose debt is proved satisfactorily, was Fluett. This debt, after deduction of the amount made on the alias *fi. fa.* against goods, was under £30, and was subsequently satisfied.

Now, looking at the small amount of this debt, and at the fact that James McDougall had other property besides the premises in question, and that his (McDougall's) estate afterwards turned out well, I cannot say the effect of the deed to the plaintiff was to delay him, and if not it is difficult to say on the evidence that this deed could have been (being for valuable consideration) made for the fraudulent purpose of delaying or defeating the defendant. And indeed as regards the defendant, he is hardly in a position to raise that question, for he does not prove his debt, though he must have recovered a judgment on which the Sheriff's deed is founded.

The defence seems to have rested on showing the deed to plaintiff to have been voluntary, and as such, fraudulent. This question having been submitted to the jury they have answered it in the negative, and there is no sufficient reason to disturb it.

Rule discharged.

Dewson v. St. Clair.

(Hilary Term, 19 Vic.)

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

Ejectment—Amendment—Demand of possession.

The record in ejectment may be amended at the trial by adding the plea.

Defendant held under a lease for a term of five years, containing a covenant by the lessor to grant him a renewal for five years at a rent named, if he should request it. The first term having expired, and no request made for a renewal.

Held, that the lessor might maintain ejectment without any demand of possession.

[14 Q.B.R. 97.]

Ejectment, for 45 3-10 perches, part of the north half of No. 1, in the 6th concession of West Gwillimbury (particularly described by metes and bounds.) This writ issued on the 18th of August, 1855, with a notice of claim for substantial damages. The defendant appeared by attorney, for the whole property claimed. In making up the record, however, no plea was entered, and after the jury was sworn the record was amended by adding the plea prescribed by 14 & 15 Vic. cap. 114, sec. 6, by order of *Gwynne, Q.C.*, before whom the cause was tried, at Barrie, in September last. The plaintiff claimed as devisee under the will of Jeremiah William Dewson, whereby he gave, devised and bequeathed to her, "during her lifetime, in trust for the maintenance of herself and the younger children," the house and premises in question; and besides proving this will, the plaintiff put in and proved a lease, dated the 23rd of April, 1850, made between Jeremiah Wm. Dewson, of the one part, and the defendant of the other part, whereby J. W. Dewson demised the premises in question to the defendant, for five years from the 1st of May, 1850, at £20 per annum, payable half yearly, with a covenant (among others) on the part of the lessor, his heirs, &c., that if the lessee (defendant) at the expi-

ration of the term thereby granted, should have paid the rent reserved, and have performed the covenants on his part to be performed, and if it should be the request of the lessee, then the lessor covenanted with the lessee to grant unto him a renewal of the said lease for other five years, to commence from the termination of the term thereby demised, at the rent of £27 10s. per annum. The plaintiff's counsel claimed a verdict, on the ground that the first term of five years having elapsed, the plaintiff had a right to recover the possession, the defendant's remedy being in equity for specific performance, or for an injunction to restrain an action at law. The defendant's counsel moved for a nonsuit on the evidence, and Mr. Gwynne, being of opinion that at all events a demand of possession was necessary, nonsuited the plaintiff, with leave reserved to set it aside and enter a verdict for plaintiff, with nominal damages, if the court should be of opinion that the action was sustainable on the evidence. The defendant offered no evidence of a request for a new lease.

In Michaelmas term, *Cosens* moved to enter a verdict for the plaintiff, pursuant to leave reserved. He cited Adams on Ejectment, 141–2, 129; Doe dem. Knight v. Quigley, 2 Camp. 505; Doe Richardson v. Dafoe, 4 U.C.R. 481; Doe Hollingsworth v. Stennett, 2 Esp. 717; Doe Roby v. Maisey, 8 B. & C. 767; Thompson v. Guyon, 5 Sim. 65; Doe Maitland v. Dillabough, 5 U.C.R. 214.

Dempsey and *Blevins* showed cause, citing Platt on Leases, I. 707,733; Statham v. Liverpool Dock Co'y, 3 Y. & J. 567.

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

Looking at the words of the 6th section of 14 & 15 Vic. cap. 114, it is plain that on the entry of appearance the cause is at once considered at issue, and the record for trial is the first place in which the formal plea given by statute appears. We think, therefore, no objection can be now properly urged to the adding the plea at the trial. It was amending a mere matter of form, causing no possible prejudice to the defendant.

The whole question as to whether the plaintiff's rule should be made absolute, turns on the necessity for a demand of possession.

The second term of five years was not actually created. No new lease was requested or made. It all rested in covenant, to lease on the defendant's request. Is that a defence in ejectment, brought after the first term has expired? We think not, for it is only an equitable interest or right, but the legal estate is in the lessor. If the tenant had proved a request it might probably have made this difference, that his possession would be referable to the agreement, and he could not be ejected without a demand of possession. But here, for all that appears, he has made no request, and the option is his whether he will take a new lease or no. It seems to us, therefore, that he is in the position of a tenant whose term has expired, and who is not entitled to a demand of possession.

Rule absolute.

KETCHUM v. MIGHTON ET AL.

(Hilary Term, 19 Vic.)

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

Statute of Limitations—Want of possession.

The right to land is not barred by forty years want of possession, unless some other person has also been in possession for that time.

In this case, where the plaintiff had been out of possession more than forty years, and had asserted no right, but declared that he owned no land in the township, and the deed under which he claimed had a suspicious appearance, the jury having found in his favor, a new trial was granted.

(14 Q. B. R. 39.)

Ejectment for lot 24, in the third concession of Pickering. The writ issued on the 4th of February, 1854. The defendant, Mighton, appeared by one attorney and defended for the whole of the premises. The other two defendants appeared by another attorney, and also defended for the whole of the premises.

The case was tried at Whitby, in November last, before *Draper, J.* The plaintiff produced an exemplification of a patent from the crown, dated 8th of July, 1799, granting the lot in question to "John Caldwell, U. E." in fee. 2nd, A deed, bearing date the 1st of December, 1798, made between John Caldwell, of the township of Ernestown, Midland District, wheel-maker, and himself, whereby the said John Caldwell, in consideration of £10, bargained, sold, remised, released, aliened, and confirmed to him (plaintiff,) the lot in question, *habendum* in fee, with a covenant of warranty. To sustain this deed, and to establish the identity of the John Caldwell by whom it purported to be made, the plaintiff gave proof of the hand-writing of the subscribing witnesses, and that they lived near John Caldwell, who lived and died in Ernestown: that he was married to Julianna, daughter of one Jacob Miller; and a copy of a petition of John Caldwell, a loyalist, was put in, in which he, in November, 1797, petitioned for a grant to his wife Julianna, and to his child Jacob, born before 1789, and stated that he had drawn but one hundred acres, and prayed for his additional land as a settler, to which petition was appended an affidavit of Jacob Miller, father to the petitioner's wife, and upon which petition an order in council was made, granting to himself two hundred acres to close all claims, and for his wife four hundred acres, as the daughter of a subaltern. A son of this Caldwell proved that they were aware, in the family, that his father had drawn a lot in Pickering, but they never looked after it, as they expected it was sold to the plaintiff. For the defendant, it was contended that the plaintiff's title commenced, and his right accrued, more than forty years before this action was instituted, and that consequently his right and title were extinguished. Witnesses were also called to prove that in 1810, the plaintiff having sold another lot in Pickering, near the lot in question, had repeatedly asserted that he owned no land in Canada except the lot he had then sold and two hundred acres in the township of Haldimand; and also, that parties had commenced about 1832 or 1833, to clear on this lot an acre or so: that since 1836 and 1837 the lot had been a good deal cleared off. The objection as to the forty years' possession was overruled *pro formâ*, leave being reserved to move to enter a nonsuit if it should be found entitled to prevail. The jury were strongly urged to reject the deed on which the plaintiff relied, because on the face of it, as was contended, it bore marks of fabrication and fraud. They however gave a verdict for the plaintiff.

In Micaelmas term, *Bell* obtained a rule *Nisi* for a new trial because the verdict was contrary to law and evidence; or for a nonsuit on the point reserved. He cited Doe Corbyn v. Bramston, 3 A. & E. 63; Scott v. Nixon, 3 Dru. & Warr, 388; Smith v. Lloyd, 9 Ex. 562.

Vankoughnet, Q.C., showed cause, citing Doe Maclem v. Turnbull, 5 U.C.R. 129; Keyse v. Powell, 2 E. & B. 132; Cannon v. Remington, 12 C.B. 1; Remington v. Cannon, Ib. 18.

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

The case of Smith v. Lloyd (9 Ex. 562) settles conclusively that the statute in England similar to ours of 4 Wm. IV., cap. 1, does not apply to cases of want of actual possession by the plaintiff, but to cases where he has been out and another in possession for the prescribed time: that there must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. I must admit I had a contrary impression as to a discontinuance, but the judgment of the court gives no countenance to any such distinction. So far as the point reserved therefore is concerned, the plaintiff is entitled to judgment, for all that was in question was the effect of the plaintiff not having taken actual possession for more than forty years after his title.

The question as to the authenticity of the plaintiff's title as to all matters of fact was submitted to the jury, and no other objection was raised to it. The appearance of the deed was commented on as leading to the conclusion that it was a fabri-

cation, and not a genuine instrument, and the same line of argument has been followed in supporting this rule. The deed certainly has a very suspicious appearance, and the non-assertion of the plaintiff's right, if it were valid, for so long a course of years, and his own declarations as to not owning property, make it, we think, a very proper case for a new trial. The point whether the plaintiff by this deed, assuming it to be genuine, entitles himself to recover as against the present defendants, was not urged either at the trial or since.

Rule absolute.

TO READERS AND CORRESPONDENTS.

All Communications on Editorial matters to be addressed to

"The Editors of the Law Journal,"
Barrie, U. C.

Remittances and Letters on business matters to be addressed (*prepaid*) to

"The Publishers of the Law Journal,"
Barrie, U. C.

Whatever is intended for publication must be authenticated by the name and address of the writer, not necessarily for publication, but as a guarantee of his good faith.

Matters for publication should be in the Editors' hands three weeks prior to the publication of the number for which they are intended.

NOTICE.

The *Upper Canada Law Journal* is not liable to postage. The Terms are 20s. *per annum*, if paid before the 1st of March in each year—if paid after that period 25s. The Scale of Charges for

ADVERTISEMENTS:

Card, for one year, not exceeding four lines	£1	0	0
One Column, (30 lines) per issue	1	0	0
Half a Column, (40 lines) per issue	0	12	6
Quarter Column, (20 lines) per issue	0	7	6
Eighth of a Column, (10 lines) per issue	0	5	0

Advertisements should reach the office not later than the 25th of each month.

The Upper Canada Law Journal is published at the *Barrie Herald* Office, Dunlop-Street, Barrie.

THE LAW JOURNAL.

SEPTEMBER, 1856.

SUMMARY PROCEEDINGS TO EXECUTION IN DEFAULT OF APPEARANCE.—C. L. P. ACT.

By the 41st section of the Act, in demands for debts and liquidated sums, the plaintiff is at liberty to endorse on the writ of Summons and copy the particulars of his claim in the form contained in the Schedule. The effect of this endorsement in "special form" is greatly to accelerate the judgment, if the defendant does not enter a defence; for by the 60th sec., in case of the non-appearance of the defendant to a summons so endorsed, the plaintiff, in filing an affidavit of personal service, or rule, or order for leave to proceed, may, at the expiration of eight days from the last day for appearance, sign judgment for any sum not exceeding the sum endorsed on the writ, and sue out his execution. But there is a provision enabling the Court to let in a defendant to defend upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits.

As both these sections are taken from the English Common Law Procedure Act of 1852—the former from the 25th, and the latter from the 27th section—the English pratice will guide us in this country till our own Courts have established one. As these are very important sections, and likely to be brought early into play, we have considered that some extracts from a work by *Kerr*, (notes on the English Act) would be acceptable, at all events to the great body of country practitioners; we therefore subjoin them nearly as contained in the work referred to, observing that it is only when the defendant resides *within* the jurisdiction that final judgment on default is obtained:—

The final judgment under this (sec. 60, our Act) section is only to be obtained in cases where the writ of summons is specially endorsed (under sec. 41, our Act.)

The writ must have been served personally, or leave obtained to proceed, as if personal service had been effected under sec. 7, (sec. 34, our Act); in the former case the affidavit of personal service, in the latter the Judge's order must be filed in signing judgment.

The defendant may be let in to defend after judgment signed, upon an affidavit of merits, (*Listed v. Lee*, 1 Salk. 402), but the defendant must be *on the merits*. Pleas of the Statute of Limitations (*Maddock v. Holmes*, 1 B. & P. 288) of bankruptcy (*Evans v. Gill*, 1 B. & P. 52) or infancy (*Delafield v. Farmer* 5 Saunt. 856) (Marsh 391) are defences on the merits within this rule. A plea to an Attorney's action that no bill was delivered, was in *Beck v. Mordaunt*, (4 Dowl. 112) held not to be a plea to the merits, but in *Wilkinson v. Page*, 1 D. & S. 913. Tindal, C.J., expressed an opinion to a different effect.

The defendant must also account in some way for not having entered an appearance.

The defendant must generally pay the costs of the application (*Listed v. Lee*, sup.) and he must plead issuably on the same day: sometimes he may be ordered to bring money into Court: (see *Wade v. Simeon*, M. & W. 637.)

The affidavit must state in express terms that there is "a good defence to the action on the merits," (*Lane v. Isaacs*, Dowl. 652.) It may be made not only by the defendant, if *he is advised* and believes, but by the Attorney or his Clerk, if he *is informed* or *instructed* and believes, or by an agent, if he state that *from his instructions* he believes, (*Rowbottom v. Dupree*, 5 Dowl. 557,—*Schoffield v. Huggins*, 3 Dowl. 422.) The affidavit must state the defence to be *merits to the action*, (*Browley v. Gerish*, 1 D. & L. 768.) See also what the affidavit should state, (*Tate v. Bodfield*, 3 Dowl. 218; *Bower v. Kemp*, 1 Dowl. 282; *Page v. Smith*, 7 Dowl. 412; *Crosby v. Junes*, 5 Dowl. 566.)

In addition to the above the following modern cases may be mentioned:—

An application to set aside the order for leave to proceed under the 17th section (English Act) may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence on the merits, but if the order stands it would seem that judgment signed in pursuance of it cannot be set aside without such affidavits as are mentioned in sec. 27, (*Hall v. Scotsun*, 9 Exc. 238.) The English Rule of Court excluding Sunday from the computation of legal time, when it is the last day for doing an act, does not apply to sec. 27, and therefore if Sunday is the last day of the eight days after which execution may issue, such execution may issue on the Monday following, (*Rowbury v. Morgan*, 9 Exc. 730.)

ATTACHMENTS—EFFECT OF, WITH RESPECT TO SUITS PREVIOUSLY COMMENCED.

By the 55th sec. of the Common Law Procedure Act, any person who shall have commenced "a suit "in any Court of *Record* in Upper Canada, the pro- "cess wherein shall have been served or executed "before the suing out a writ of attachment against "the same defendant as an absconding debtor, "shall, notwithstanding the suing out of the writ "of attachment, be entitled to proceed to judgment "and execution in the usual manner," and if he obtain an execution before the plaintiff in the attachment, he will be entitled to the advantage of his priority of execution subject to the costs of the attachment, if the Judge shall so order.

It will be observed that the prior suit must have been commenced in Courts of *Record*. Now it is expressly declared by the D. C. Act, that the Division Courts shall not be a Court of Record, and therefore the person commencing a prior suit, a suit in a Division Court against the defendant, will not be entitled to the advantage of his priority of execution. This probably was not foreseen by the Legislature, for it never could have been contemplated to place the small debt suitor in a worse position than the suitor for a large amount. The man who sues for £26 is an eminently more favorable position than the man who sues for £25. We are more strongly convinced that this could not have been so designed by the Legislature in looking at the 57th section, which places attaching creditors in the Superior Courts and in the Division Court on nearly the same footing in respect to distribution.

One result of this enactment whenever the debt approaches £25 will probably be this—that persons naturally desirous to make the best of a demand against a debtor whose means are trifling and who is expected to abscond, will sue in the County Court to obtain the advantage of priority of execution, even if deprived of costs, rather than by suing in the Inferior Courts having cognizance, to risk losing the whole demand. It may also lead to fraud in this way—that the party intending to abscond, and desiring to prefer a particular creditor to whom he is indebted to the amount of, say fifteen or twenty pounds, will put him in a position to make out a case to an amount exceeding £25, and thus defraud other creditors. Where, under the circumstances first mentioned, a party is indebted to several for small sums in the shape of negotiable instruments, it will not be thought by the parties, unfair to transfer all to one of the creditors, so as to raise the claim beyond £25 to enable a suit to be brought in a Court of Record.

The clause certainly provides for setting aside or staying proceedings on a judgment obtained by fraud or collusion, but transactions of this kind are generally so secretly managed that it is very difficult to make out a case that would justify the interference of the Court. The provision giving the suitor in the Court of Record an advantage, thus not only operates unjustly, but holds out temp-

tation to fraud and collusion in the way indicated.

But what is to become of the honest creditor who fairly enters his suit and receives judgment in the Division Court before any attachment is sued out? What is his proper course in order to obtain the benefit of his judgment? The only method we can perceive open to him is to sue out an attachment in the Division Court, and make claim for a distributive share of the proceeds of the goods seized.

TRIAL BY JURY.

As we survey the machinery used in the Courts for the dispensation of Justice, no part is more conspicuous than that of Trial by Jury. Its importance is only equalled by its antiquity. Long before man had correct notions of Jurisprudence, including the formula of an action, he was wont to refer questions in dispute to the arbitrament of disinterested parties. Is there anything more natural? In the case of a dispute between two parties, an appeal to a third is both rational and natural. What are Jurors but arbitrators called together to pronounce upon facts disputed? What is the Judge but an superior arbitrator, whose duty it shall be to direct the Jury in matters of law? The trial of a man by his peers, is in Britain the sacred right of every subject, be he lord or peasant. It has existed time out of mind, and is supposed to be coeval with civil government itself. The number of Jurors varies in different countries, but the principle is everywhere the same. In England the number has ever been twelve at least. Originally called together to testify, but latterly to judge between the parties, their verdict must be unanimous. Why the number should be twelve, and neither more nor less, has never been satisfactorily explained. There is nothing but conjecture to supply the place of authority upon this point. Why the verdict should be unanimous, and not that of the majority, we are left to decide for ourselves. *Ita lex scripta est*—let the reasons be ever so frail or so forcible.

Here a vexed question in jurisprudence presents itself—it is one of no common difficulty—Shall the verdict be that of the majority or that of the twelve? Much has been said and can be said upon both sides. Perhaps when Jurors were in olden times summoned from the vicinage or locality where the cause of action arose, having of themselves knowledge of the facts in dispute, the reasons for an unanimous verdict were unquestionable. We do not say that they are less so to-day. To pronounce an opinion upon a topic so momentous requires at our hands more time for deliberation than at present we are able to give. But we have every confidence in English legislation. The march of Englishmen in law reform is slow but sure. Little by little the great fabric of Law is repaired, amended, simplified and beautified. The process is so gradual, so easy, and so even, that ever changing, the body of the law appears to be unchanged. In this respect it is not unlike one human body. Take two periods of English history remote from each other: let a comparison of the laws of the two periods be made, and the result will not a little astonish the credulous. The transition from youth to old age may not be felt or seen—but the man of eighty is easily distinguishable from the child of four. Great changes in the English laws are wrought by slow degrees; there is in consequence no retrogression. Steady and persevering as are the people, the laws are made to keep pace with the spread of civilization and of commerce, and the consequent diffusion of wealth. In this, perhaps more than in any other aspect, we behold our laws with pride. Other States may tear down in a day, but not build for ages. England builds *peu a peu* for ages, but never tears down. To this national trait of English character the Jury laws are no exception. They have been undergoing a gradual reform. And who knows what an age may bring forth? Juries, not long since, were locked up "without meat, drink or fire." They were coerced into a verdict, and that nothing less than an unanimous one. They were deprived of all necessary comforts, and deprived of liberty itself, until forced into unison. Twelve men of divers minds, brought together by chance, were compelled by duress to arrive at one and the same conclusion. No meat, no drink, no food of any kind to assist nature, sinking under the pains of hunger and the fatigues of close confinement. These men, too, from the country, better accustomed to the bracing air of the fields than the noxious miasma of the Juror's room; better accustomed to ploughing and other out-door exercise than the solution of abstract question of facts and the application of knotty points

of law. How was it ever thought that confinement of such men, without nourishment, could lead to conviction? No doubt it might lead and has led to "unanimous verdicts," but unanimous verdicts obtained under such circumstances would be a curse to the laws of any country! The minds of men were placed upon the rack till they, to preserve themselves from intense suffering, sacrificed their individual opinions. To our mind this mode of procedure was as inhuman as it was impolitic. The evil does not exist in our day with all its attendant horrors; but still, we are not entirely free from its odium. What then is a sure remedy? Would the majority system be all that is required? We fear the rush for relief would be from Scylla into Charybdis. Under the unanimous system perhaps we sometimes sacrifice the interests of suitors to undue severity. Under the majority system we may do so from a different cause—undue lenity.

Jurors assembled together are expected to investigate facts, and therefrom to decide the merits or demerits of a case;—to do all this calmly, patiently and conscientiously. If the vote of a majority were sufficient upon which to render a verdict, then the dissentient minorities not feeling themselves bound by the verdict, *in foro conscientiæ*, might be satisfied to retain their opinions and allow the verdict to pass. As a result, there would be less discussion and less deliberation than at present. The ballot box, so hateful to British Institutions, might even in the Jury room usurp the place of sober argument and straightforward expression of opinion. The bare apprehension of such a calamity is enough to warn us against hasty legislation. Indeed of late, little or nothing has been done by the legislature towards effecting organic changes in the Jury laws. Whatever ameliorations have taken place are entirely owing to the wise interposition of the Courts. It is refreshing to read in the late but notorious Palmer case of the kind and hospitable manner in which the Jurors were there treated: day after day throughout the trial, of a long and serious investigation, their comforts were studied by those in whose power it was to relieve. Instead of being barred and bolted within a confined room, guarded without by a semi-formidable bailiff, these Jurors were daily driven out to the country, and so prepared for renewed exertion. In this way the body was nourished, the mind was supported. There was not wanting the *mens sana in corpore sano*. Does any one imagine that the verdict was less just or less in accordance with the evidence, because of this considerate treatment?

But this is not the only manner in which the Courts have lately evinced a disposition to relieve Jurors. Consistently with the due administration of justice, they have laid down the rule that if a Jury, after having retired, is unable to agree within a reasonable time, they shall be discharged. This is just as it ought to be. Neither the rights of the parties nor the obligations of the Jurors are thereby compromised or prejudiced. Delays may ensue, but delays prevented by the sacrifice of justice and mockery of reason are a sorry gain. Justice in the end, for the most part, triumphs, if left to work out her own salvation by rational means.

This article has been penned more to show what has been done than what might be done. Perhaps at some future day we may take up the latter branch of the subject.—*Communicated.*

The clever writer of the foregoing article appears to be struggling against his convictions, and without running into the Blackstonian view of eulogy of the "time-honored system spoken of in the law of King Ethelred!!" it strikes us he has a kind of holy fear in approaching the subject. Now we are bold to assert that the indiscriminate application of trial by jury in *civil* cases is a great evil, and we rejoice to see the day approaching when it will be confined to cases where it may serve a useful purpose.

The first blow struck in this country was by the Division Court Act (1843); it was an open and public blow, and exercised an indirect jurisprudential influence apart from its direct practical benefit. This Act enabled suitors to obtain a jury in small debt cases, and reduced the number of jurors to five. The rule was that the Judge of the Inferior Court should decide the *fact* as well as the law—the exception, trial by jury, in the option of either party. What has the experience of years shown?—that trial by jury is not resorted to, and that in the Courts where either party may obtain it, neither in fact desire it. Jury trials are almost unknown in the Division Courts.

The next blow was struck by the Common Law Procedure Act, and among the best features of that statute are those provisions for the settlement of a certain class of disputed facts, by a less expensive, a more expeditious, and a more certain method than the "antient system."

The argument to be drawn from prestige and habit merely is of little avail, when speed, cheapness, and certainty of decision are in the opposite scale: if good justice may be had without troubling twelve men to agree in an inference, it will be sought for without their aid.

We would not desire to be understood as disparaging trial by jury in criminal cases, or desiring to see it entirely withdrawn as part of the machinery of civil proceedings; but the "gradual, easy process" our contributor refers to, is at work, and may before many years, pronounce that the institution of trial by jury has outlived its value, as respects indiscriminate application. So far as individual opinion goes, we are "heretical enough" to suppose that the judgment of a single, intelligent judge, will be better than that of a jury; and at no distant day we propose discussing the question, unless in the meantime our valued contributor should favour us with a full examination of the *pros.* and *cons.*

FALSIFICATION OF DOCUMENTS.

The act of erasing writing, though brought to comparative perfection by the inducement to falsify documents and the fear of detection, owes its origin to a more honest source, and perhaps dates from an earlier period. The scarcity and expense of parchment suggested the idea of removing the ink from old manuscripts. Skins from which the first writings have been erased, and which have been written on a second time, are called *palimpsest manuscripts*: they are met with not unfrequently in the continental libraries, and are traced to the monks of the middle ages, who, anxious to supply the demand for books of devotion, erased the writing of classical authors to make room for those of the Fathers. The erasure was frequently imperfect, which has led to the restoration of some valuable works supposed to have been lost. Thus the "*De Republica*" of Cicero was discovered in the Vatican, re-written with St. Augustin on the Psalms,—and the Institutions of Gaius gleamed through the epistles of St. Jerome in the library of the Chapter of Verona.

Cicero himself shows that the practice was common in his day, by praising his friend Trebatius for his economy in using a *palimpsest*, though he hints at the same time the supposition that he had destroyed writings more valuable than his own: Martial also refers to it, Lib. XIV 7. But enough of the history of erasure: we will proceed to mention the agents by which it may be effected, and the means which may be employed for their detection. Ordinary ink is composed of sulphate of iron and nutgall, and may be dissolved by using diluted nitric, hydrochloric or oxalic acids, by a solution of caustic, potash, and by butter of antimony: all these substances, while they destroy the writing, attack also the paper, softening it, and changing its colour; this is guarded against by using the agent much diluted, by washing the paper to remove it as soon as the object is effected, and by sizing it afresh and pressing it. Nitric acid gives a yellowish colour to the paper where it has been applied, as do likewise the alkalies and the butter of antimony; hydrochloric and oxalic acids, on the other hand, give it an extreme whiteness, especially the former: sometimes the place of erasure is browned, *i.e.*, when an alkali has been used. Any change of colour should be noted, when falsification is suspected. If the erasure is even, the writing may be restored; if it was removed by nitric acid, it will reappear when the spot is wetted with a weak solution of carbonate of potash; if an alkali was employed, it will return if wetted with diluted nitric acid; if hydrochloric acid was the agent, an infusion of nutgall will restore it; if oxalic acid was used, a solution of ferrocyanide of potassium will bring out the words. If the erasure is so old that the words cannot be made to appear, the solution of ferrocyanide of potassium will show the place by striking a blue tint, forming prussian blue with the iron which remains in the paper from the ink which has been effaced; if an alkali was employed to destroy the ink, reduced tincture of litmess applied to the spot will change it by having its blue colour restored. The endeavor to prevent erasure has led to many attempts to invent an ink which could not be destroyed without the destruc-

tion of the paper; the nearest approach to this is made by using oil in its composition. Clops recommends a solution of 25 parts of gum copel in 200 parts of oil of lavender, coloured with three parts of lampblack, which should be diluted, as it thickened, by the addition of more of the oil.

The erasure of writing by mechanical means is so easy of detection that little need be said of it; an examination with a pocket microscope will show a change in the substance of the paper; if it has been recently made, the writing may be made legible in many cases by washing with an infusion of galls, or its presence may be shown by its forming prussian blue with the solution of ferrocyanide of potassium.

THE COMMON LAW PROCEDURE ACT WITH NOTES, BY HARRISON.

This work is fast progressing. The Author has obligingly forwarded to us the sheets completed as far as sec. 12, and after a careful examination of the notes we are so far enabled to give them our unqualified approbation. In our poor judgment they are much more complete than Kerr's notes on the C. L. P.; certainly they are fuller and more carefully written.

The notes are foot-notes in double column, and the whole mechanical execution is good and in good taste. This is not the time to review Mr. Harrison's work, but we subjoin a note taken at random from the sheets before us as a specimen:

"In any of the said Offices, &c." "Any" must relate either to one of the Principal Offices at Toronto, or to any of the offices in outer Counties; *"Unless some particular office * * * be expressly stated, &c."* It seems clear that this statement, if made, must be in the body of the document. The intitling of a cognovit would only indicate *one* of two Courts, and not one of several offices. Warrants are not intituled in any Court.

A cognovit is a confession by the defendant, of the plaintiff's cause of action to be just and true, whereby judgment is entered against him without trial: (Smith on Action 21, note *a*.)

A Warrant of Attorney is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment: (*Ib.* note *b*.)

In Upper Canada cognovits are much more in general use than warrants of attorney. And here the practice with respect to cognovits has always varied from that of England. In England the cognovit differs from the warrant of an attorney in that the action must be commenced by the issue of a writ before a cognovit can be taken, which in the case of a warrant of attorney is unnecessary. In Upper Canada no such difference has ever, in fact, existed between these two instruments. It has been usual to take cognovits before the issue of a writ, and the Courts have sustained the practice: (*Walton v. Hayward*, 2 O. S. 473.) The object was to save expense. Though no writ was in fact issued, yet the judgment roll on a cognovit has always presupposed a writ and declaration. The cognovit may be taken at any stage of a cause; but, if after plea pleaded it is proper that it should contain an agreement to withdraw the plea. From what has been said, it will be observed that s. x. is merely declaratory of an existing practice in Upper Canada. Perhaps it will be held that the act goes further than the old practice. As it now expressly enacted that final judgment may be entered on a cognovit given before the suing out of process, it may be inferred that the judgment roll need not for the future presuppose the issuing of a writ. A judgment entered on a cognovit without commmon bail held to be irregular: (*Goslin v Tunc*, 1 U.C.R. 277.) The authority of this case is rendered doubtful by the new Practice. S. lix. enacts that "no appearance need be entered by the plaintiff for the defendant." A judgment entered upon a cognovit by a Deputy Clerk of the Crown, no previous proceedings having been had in his county, was held void: (*Lavelle v. Patterson*, 5 U. C. R. 641; *Commercial Bank et al v. Brondgeest et al*, 5 U.C.R. 325.) Where a cognovit was given by one practising attorney and witnessed by another, who was absent from the Province, leave was given to enter judgment upon proof of the hand-writing of the defendant and the witness: (*Cleal v. Latham*, 1 U.C.R. 412; *King v. Robins*, Tay. U.C.R. 409.) The Court gave leave to enter judgment against one defendant, the other being dead, and a suggestion to that effect entered of record: (*Nicholl v. Cartwright et al*, Tay. U.C.R. 639.) *Sed. qu.* In connexion with this case, see stat. U.C. 1 Vic. cap. 7, & secs. ccxi, ccxii, ccxiii, of this act. Where there are several defendants and a cognovit intituled in the cause against all, is executed by some only, judgment cannot be entered against the latter alone: (*Roach v. Potash et al*, T. T., 2 & 3 Vic., *MS.* R. & H. Dig. "Judgment" 8. Where a cognovit was given with a stay of execution till a future day, and a mem. was endorsed deferring payment of part of the debt for a longer time, and at the day of judgment was entered for the whole amount—the Court restrained the levy according to the mem., with costs—(*Fisher et al v. Edgar*, 5 O. S. 141; *Alexander v. Harvey*, T. T. 7, Wm. iv., *MS.* R. & H., Dig. "Judgment" 9. Where defendants, as executors in right of their testator, gave a cognovit which might be held to bind them personally, upon which a judgment against them as individuals was entered, the Court allowed the judgment to be amended, and set aside an execution issued against defendants in their individual capacities: (*Gorrie v. Beard et al*, 5 U.C. 626.) By rule K. B., E.T., 9 Geo. IV.: (Dra. Rules 12.) "It is ordered that the 7th Rule of M. T. 4 Geo. IV., shall be rescinded, and that in future *no judgment shall be entered* on any warrant of attorney to confess judgment, or upon any *cognovit actionem*, that shall not have been obtained through the intervention of some practising attorney of this Court, whose name shall be endorsed on the warrant or cognovit; and unless the affidavit shall state the same to have been obtained through the intervention of some practising attorney, whose name is endorsed thereon." This rule does not it seems apply to cases where an attorney is himself plaintiff. (*McLean v. Cumming*, Tay. U.C.R. 340.) And the rule has been held to be sufficiently complied with where an attorney prepared the cognovit, and endorsed his name upon it, though neither he nor his clerk was present at the execution of it. (*Thompson v. Zwick*, 1 U.C.R. 338, P.C., *McLean, J.; Clarkson v. Miller*, 2 U.C.R. 96 P.C., *Jones, J.; Patterson v. Squire et al*, 1 U.C. Cham. R. 234.) In the last case, the late Mr. Justice Sullivan gave away to the weight of authority, though he disapproved of the practice. His words as reported are, "that if he had to decide the point in the first instance, he should have hesitated in coming to the same conclusion" as in the previous cases. Where one of the bail to a Sheriff, whose principal had left the Province, acting under the impression that his principal would not return, gave a cognovit to the Sheriff, proceedings were stayed upon an affidavit of merits. (*Roberts v. Hazleton*, Tay. U.C.R. 35.) Costs in such a case (See *Hazleton v. Brundige*, Tay. U.C.R. 105. *Semble*—if a

cognovit be so given, with a power to enter judgment and issue execution, but by contemporaneous verbal agreement it is understood immediate execution should not issue, the Court will in some cases act upon the agreement. (*Parker et al v. Roberts*, 3 U. C. R. 114.) If plaintiffs improperly described, are so described in the subsequent proceedings, defendant who signed cognovit, without exception cannot afterwards take advantage of the error. (*Ib.*) In Ejectment plaintiffs were nonsuited for not confessing lease, entry, and ouster. Subsequently defendant executed a cognovit; held that he had waived previous formal objections. (*Doe Kerr v. Shoff*, 9 U. C. R. 180.)

By Rule H., 11 Vic., (Dra. Rules 12) it is ordered, that "after the first day of next term, judgment shall not be entered upon any cognovit given in a case in which no process shall have been served, without the order of the Court or fiat of a Judge, in cases where, from lapse of time, an order or fiat would be required, in order to enter up judgment on a warrant of attorney, and the practice as to obtaining such order or fiat, shall be the same as upon warrants of Attorney." Within a year and a day from the date of a warrant of attorney, judgment may be entered as of course, but not after that time, without the leave of the Court or a Judge—(Chit. Arch., 8 Ed. 869, and cases there cited.) The Court refused leave on a cognovit 15 years old, where plaintiff had taken an assignment of personal property, though unproductive in satisfaction of his debt. (*Grant v. McIntosh*—executors of—IV. O. S. 184.) Leave was granted when the cognovit was seven years old, upon an affidavit from the plaintiffs of the whole debt being due, and also stating, that having received a letter from defendant, the plaintiff believed him to be still alive: (*Oliphant v. McGuinn*, 4 U. C. R. 170.) Final judgment upon a cognovit or warrant of attorney to confess judgment for a sum not exceeding £100, may be entered in County Courts. (Co. C. P. Act, sec. 6.) In accordance with previous legislation and the current of authorities, it may be presumed that when a plaintiff enters up judgment on a cognovit in a Superior Court, when the same falls within the cognizance of the County Court, that only County Court costs will be taxd. If the sum confessed be £100 or less than that sum, the County Officer will be bound to notice the fact and act accordingly. *Cognovit*, Judgment, Execution, &c. See Chit. Arch., 8 Ed. 844; Tidd's New Prac., 287; Bag. Prac., 395; *Forms*, Chit. Forms, 6 Ed., 308; Tidd's Forms, 6 Ed., 217; *Warrants of Attorney*—Judgment, Execution, &c., Chit. Arch. 852; Tidd's New Prac., 275; Bag. Prac., 395; *Forms*, Chit. Form, 313; Tidd's forms, 212.

The above is the note on sec. 10 of the Statute.

Having carefully examined all the English works already published similar to Mr. Harrison's, we venture to say with some confidence that the possessor of his book, if the promise the commencement gives be sustained throughout, can well afford to dispense with the English publications.

The addition of the new Rules of Court to the work which the Author has promised in his prospectus to make, and which we believe he will now be enabled to do, will render the volume still more complete and useful to all who have to act under the new Statute.

To Readers and Correspondents.—We fear some errors will be found in this number, for which we must ask indulgence. The temporary absence of the office Editor has produced also some little confusion, causing delay in respect to Correspondence, &c., which will be rectified in our next issue.

NEW RULES OF COURT.

The Common Law Procedure Acts of last Session, without Rules to perfect details in Practice, would not secure the full practical benefits they were designed to accomplish;—and we are are pleased to see by a notice from Mr. Draper in our advertising columns in this number that rules will be framed by the Judges in sufficient time to enable him to publish, with notes of English cases, early in September.

Mr. Draper has already produced a very useful book, well known to the profession and others connected with the administration of the law, as "Draper's Rules," and we make no doubt his notes in the present work will be all that the profession can desire.

Mr. Draper is in the position to feel an ample incentive to sustain the name he bears.

COUNTY COURTS.

ENGLISH CASES.

Mercer v. Standerry.

County Courts—Interpleader—Summons—Damages by seizure—Jurisdiction of judge—Staying proceedings in action—9 & 10 Vic., cap. 95, sec. 118.

The 9 & 10 Vic., cap. 95, sec. 118, provides for the issuing of an interpleader summons where goods taken in execution under county court process are claimed by a third party, and it enacts that "the judge of the county court shall adjudicate upon such claim, and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit."

Quære—Whether the judge has jurisdiction when he decides in favour of the claimant to award him damages for loss sustained by reason of the seizure.

The Court refused to interfere to stay proceedings in an action against the execution creditor for taking goods brought by the claimant in whose favour the county court judge had decided upon an interpleader summons, as it appeared that the county court judge had not awarded damages for the seizure.

[4 W. R., 643.]

This was a motion for a rule to strike out the first and second counts from the declaration. The action was for trespass to the plaintiff's house, and seizing his horse, cart, and harness; there was a second count alleging the seizure to be of the cart and harness; and a third alleging it to be of plaintiff's horse. The application was originally made to Alderson, B., at Chambers, and was made upon the ground that the first and second count related to a seizure of goods under execution upon a judgment of the County Court of Hertfordshire, holden at Barnet; and that the matter had been adjudicated upon by the judge of that court on an interpleader summons in favour of the claimant, the judge adjudicating that the cart and harness was his property. The 9 & 10 Vic., cap. 95, sec. 118, provides for the issuing of an interpleader summons where goods taken in execution under county court process are claimed by a third party, and enacts that "the judge of the county court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit." The application to strike out the counts was made on the authority of *Abbott v. Richards*, 15 M. & W. 191, where the Court struck out counts for a trespass in taking goods in execution after an interpleader issue. A rule *nisi* having been granted,

M. Chambers and *Codd* showed cause against the rule:—First, this Court has no jurisdiction to stay proceedings in this action, or to strike out the counts in question, which amounts to the same thing. The county court judge decided merely that the goods were the property of the claimant, and he did not and could not award any damages for the loss sustained by the seizure. He has no jurisdiction to give damages. The cases in which the Court has interfered to stay proceedings are cases where the action has been against the bailiff, and not as here against the execution creditor, and in which the adjudication in the county court has been against the claimant, where, consequently, the county court judge had decided that the alleged trespass was a lawful entry: *Tinkler v. Hilder*, 4 Ex. 187; *Winter v. Bartholomew*, 25 L. J. Ex. 62; *ante* 246; *Jessop v. Crawly*, 15 Q. B. 212; *Beswick v. Boffey*, 23 L. J. Ex. 89; W. R. 1853-4, 156. Secondly, if this Court has a discretion to interfere, it will not do so in a case such as this, where substantial damage has been sustained.

Russell in support of the rule.—The county court judge had jurisdiction to award damages to the claimant for any loss he may have sustained by the seizure; the matter has, therefore, already been decided, and this Court will interfere to prevent its being further litigated.

Cur. ad. vult.

The judgment of the court was now delivered by

POLLOCK, C.B.—We are of opinion that this rule ought to be discharged. The action was for trespass and seizing goods. There had been an interpleader summons, the county court judge having interposed upon goods taken in execution being claimed by a third party under the clauses of the County Courts Act, giving him a jurisdiction in such cases similar to that possessed by the superior courts in cases of interpleader issue. The application was to strike out of the declaration several counts, on the ground that they were for the seizure of goods; with respect to which seizure the county court judge had adjudicated upon an interpleader summons, and the application was made on the authority of a case in this Court. It appears to us, whether or not the county court judge had the power it was contended he possessed of awarding damages to the claimant, that he has not in point of fact done so. Without, therefore, deciding whether it was competent for him to give damages, it is sufficient to say that he has not entertained that question, and that the counts ought therefore to stand.

Rule discharged.

KERNOT v. BAILEY AND ANOTHER.

County court—Jurisdiction—Mandamus—9 & 10 Vic., cap. 95, sec. 60.

A writ of mandamus will not be directed to the judge of an inferior tribunal, unless he has refused to exercise the duty which the mandamus seeks to compel him to perform. Where, on the hearing of a plaint in a county court, the judge, having heard the evidence as to the jurisdiction, thinks that the cause of action did not arise within his jurisdiction, and nonsuits the plaintiff.

Held, that he has heard the cause, and that no mandamus will issue to compel him to hear it, his decision being final.

[4 W. R. 603.]

W. M. Cook moved for a rule *nisi*, calling upon the judge of the county court, held at Bath, to show cause why a *mandamus* should not issue to command him to hear and adjudicate upon a certain plaint between Kernot and Bailey and another. It appeared by the affidavit that the plaintiff, residing within the jurisdiction of the Bath court, had sued out a plaint, by leave of the Court, for £50 for goods sold to the defendants, who resided in a foreign district, viz., Bristol, and on the 18th of April the cause came on to be heard, and the plaintiff called his witnesses, when it was objected by the defendants that the delivery of the goods was in another district, and that the cause of action not arising within the Bath district, the judge had no jurisdiction. The case was adjourned to the next court day, when some further evidence was given, and the judge nonsuited the plaintiff on the ground that he had no jurisdiction, and ordered the plaintiff to pay the defendants' costs. It was now contended that the affidavit showed that the judge had jurisdiction to try the cause, and therefore he ought to have given judgment upon the merits. [COLERIDGE, J.—But he has heard the evidence, and upon that has decided that he has no jurisdiction.] The judge has not only decided that he has no jurisdiction, but he has given the defendants their costs and left the plaintiff without remedy. [CROMPTON, J.—But he can sue the defendants in the right district court.]

COLERIDGE, J.—I think in this case there ought to be no rule. The *mandamus* is asked for on the ground that the judge has declined to exercise his jurisdiction when he ought to have exercised it. But the facts as set forth in the affidavit do not show this. The plaintiff had to show that the cause of action arose within the jurisdiction of the Court; to prove this he brought all his evidence, upon which the judge thought he had failed; and whether he were right or wrong is not for us to say, as we are not a Court of Appeal. If the judge has heard the evidence, and has determined against the plaintiff, he has exercised his jurisdiction.

ERLE, J.—A *mandamus* never goes to command a party to do anything, unless having the power he has refused to exercise it, and to enter upon his duties. Here the judge is not within that principle. The plaint was issued, and the parties appeared; the judge entered upon the trial, and having heard it, thought the plaintiff failed to show that the complaint arose within his jurisdiction. This was properly a matter to be tried by the judge; and having decided against the plaintiff upon the evidence given, I think the cause was tried, and that we cannot interfere. There will, therefore, be no rule.

CROMPTON, J.—Jurisdiction is given generally to that Court where the defendant resides; but by sec. 60 power is given, under certain circumstances, to the Court where the cause of action arises; and it then becomes material for the plaintiff to show that what arose within that jurisdiction is a material in the cause. Here the judge hears the evidence upon this point, and he thinks that the cause of action does not arise within his jurisdiction. This is a question of fact which he has to decide upon; he has done so, and decided against the plaintiff. I think, therefore, that this case does not fall within the principle upon which this Court acts in granting a *mandamus*.

Rule refused.

MONTHLY REPERTORY.

COMMON LAW.

Q.B. REYNOLDS v. BRIDGE. *May* 31.

Covenant—Construction—Liquidated damages.

An indenture between B. and R. (two medical men) contained the following covenant: "Provided that after the determination of the said term of three years, &c., B. shall not practice as a surgeon, &c., nor see patients, except as hereinafter mentioned, &c., in W., or within 12 miles thereof; but shall before the end of that term introduce R. to his patients, and shall during the term endeavour to secure them for R.; Provided always, that in case B. shall make default in the observance of the covenant lastly hereinbefore contained, he shall pay to R. £2000, not in the nature of a penalty, but as ascertained liquidated damages. That B., after the determination of the term of three years, may attend midwifery cases in W., and within 20 miles thereof, the fees for which shall equal or exceed £1 15s., but shall pay half of the fees to R."

Held, that the sum of £2000 was not a penalty, but liquidated damages, as no one of the stipulations in the covenant

on the breach of which the £2000 became payable was capable of accurate valuation, (the stipulation for the half fees forming no part of the covenant.)

EX. AIKINS, P. O. v. SHORT. *June* 7.

Money had and received—Mistake—Payment—Recovery back of money paid.

A. having purchased from B. a share in the lands taken under the will of his father, subject to an incumbrance by way of an equitable charge, paid £200, the amount of the charge to the creditor of B., upon his demanding the same. It afterwards turned out by the discovery of a will subsequently made, that B. had no power to make the assignment.

Held, that A. could not recover back from B.'s creditor the £200 as having been paid under a mistake.

EX. BARSTOW v. REYNOLDS. *June* 11.

Practise—Appeal—Rule to enter nonsuit—Rule for new trial—Common Law Procedure Act, 1854, secs. 34, 35.

A rule *nisi* was granted to enter a nonsuit upon a point reserved at the trial, at the argument there was a difficulty as to the facts, and a new trial was ordered.

Held, that there was no appeal under either the 34th or 35th section of the Common Law Procedure Act, 1854.

GULLIVER v. GULLIVER AND OTHERS, EXECUTORS, &c.

EX. *June* 6.

Pleading—Equitable replication—Statute of Limitations—Set-off.

In an action against an executor for a debt due his testator the defendant pleaded the Statute of Limitations. The plaintiff replied on equitable grounds that by the will the defendant was made a trustee for payment of debts, and that the assets were sufficient to pay debts and legacies, relying on the practice in Courts of Equity, not to admit the Statute of Limitations as an answer to a claim in respect of trust-monies.

Held, that the replication was bad, as Courts of Law have no power to modify the application of the Statute.

To a declaration for a debt due from the defendant's testator the defendant pleaded a set-off of monies due from the plaintiff to his testator. To this the plaintiff replied on equitable grounds, that the testator by his will declared that monies already advanced to the plaintiff and the testator's other children, should be deemed to be advancements, and that they should not be required to account for the same, and alleged that the matters of set-off were monies so advanced.

Held, that the replication was no answer to the plea, the effect of the will being to make the monies advanced a legacy, and there being no allegation of assets to pay debts, and a Court of Law being unable to deal finally with the matter.

EX. C. HASLETT v. BURT. *June* 13, 24.

Landlord and tenant—Fixtures—Plate glass, shop front—Right of tenant to remove—Covenant—Construction.

By deed the plaintiff demised to B. a messuage and premises for 21 years; the lease contained a covenant to repair, and a covenant that B., his executors, administrators and assigns, should at the end of the term, yield up the premises to the plaintiff, his executors, &c., together with all wainscots, *windows*, shutters, &c., and other things which then were, or at any time thereafter should be thereunto *affixed or belonging*, (looking-glasses and furniture excepted); and together, also, with all sheds and other *erections*, buildings and *improvements* which should be erected, built, or made upon the demised premises, in good repair and condition.

An assignee of the lease during the term removed an old shop window, and put up in its place a plate-glass front, but without in any manner, except by wedges, fastening it to the premises.

Held, (affirming the judgment of the Common Pleas) that the plate-glass front was a window set up or affixed to the demised premises within the meaning of the covenant, and that the assignee was not entitled to remove it.

EX. JONES v. JENNER. *June* 12.

Practice—Attachment of debt—Judgment in County Court—Common Law Procedure Act, 1854, *sec.* 61.

A creditor who has obtained judgment in the Superior Court by having judgment in the County Court upon the judgment so obtained, loses his right to proceed by attachment, if a debt in the hands of a garnisher, under the 17 & 18 Vic., cap. 125.

EX. INSOLE v. JAMES AND ANOTHER. *June* 11.

Easement—Flowing water—Diversion—Grant of water for mining purposes—Pleading—Variance.

A declaration alleging the plaintiff's possession of *mines, lands and premises*, and claiming a right to the use of the water of a stream flowing alongside the said *lands and premises*, is not supported by proof that the plaintiff was a lessee of mines under land adjoining the stream, with a grant from the surface-owner of the use of the water for colliery purposes.

EX. JONES v. BROWN. *June* 10.

Trover—Conversion—Joint owners—Partnership property.

Trover will not lie by the partner against the purchaser under a sale on an execution against his copartner of partnership property, of which such partner has obtained and refused to give up possession.

EX. TAYLOR v. LAIRD. *April* 22, *May* 6, [& *June* 10.

Contract—Quantum meruit.

A cause of action once vested, is not subject to be divested by the plaintiff's desertion or abandonment of the contract, but he is entitled to recover a quantum meruit for services performed. The entire performance of a contract is not a condition precedent to the right of payment.

CHANCERY.

RE CHESLYN HALL, (a solicitor) AND RE DOLLOND v. JOHNSON.

V.C.S. *June* 27.

Practice—Solicitor—Striking off rolls.

A solicitor who, being one of the trustees of a settlement, had been guilty of fraudulent misapplication of, and misrepresentation as to, a part of the trust-fund, was ordered to be struck off the rolls upon the petition of his co-trustees. In such a case, the fact that the delinquent was not at the time of committing the fraud in question acting as the solicitor of the defrauded *cestuis que trust*, is immaterial.

V.C.W. BENECKE v. CHADWICKE. *June* 25.

Specific performance—Parol acceptance.

A. B. offered in writing to grant a lease of a coal mine upon certain terms: C. D. verbally accepted the offer. A draft lease was sent to him, and returned with approval of C. D.'s solicitor. C. D. laid out money in driving shafts towards the coal mine through the adjoining property. Before any lease was executed, and something more than a month after the return of the draft lease, A. B. died.

Held, that the parol acceptance of the written offer of the lessor coupled with the subsequent acts in the lifetime of

A. B., entitled C. D. to specific performance of the agreement from the representatives of A. B.

M.R. GREEN v. LOW. *June* 25.

Specific performance of one branch of an agreement after failure of the rest.

Under an agreement to grant a building lease, including a covenant to insure in a particular office in the joint names of lessor and lessee, and to give the lessee an option to purchase for £500, the lessee built a house at the cost of more than £1000, and insured in his own name only, and in the wrong office. The lessor brought ejectment, and the lessee thereupon claimed to exercise his option of purchase, and specific performance of this part was decreed.

COSTS UNDER THE ACT FOR THE RELIEF OF INSOLVENT DEBTORS.

The following Table of Fees we believe has not before appeared in print, and is now especially necessary to be known on account of the recent enactments :—

In the Court of Queen's Bench,
Hilary Term, 9th Victoria.

It is ordered that Fees for the undermentioned Services be allowed as set down in the following Table of Costs, settled under the Statute 8th Victoria, entitled An Act for the relief of Insolvent Debtors in Upper Canada, and for other purposes therein mentioned :—

JUDGE OR COMMISSIONER.

Fee on each order for protection, *ad interim*, 2s. 6d.—For nomination of official assignee, 2s. 6d.—For meeting of creditors and directing notice to be given, 2s. 6d.—To compel attendance of petitioner or other person, 2s. 6d.—For the purpose of disclosing or for the production of books or papers, 2s. 6d.—For appraising excepted articles, 2s. 6d.—To transfer stock, funds, or securities, 2s. 6d.—On each order to substitute name of surviving or new assignee, 2s. 6d.—Respecting costs on motion for rescinding petition, 2s. 6d.—Final order for protection, 5s.—For discharge of petitioner, 5s.—Refusing final order of protection, 5s.—For rescinding final order of protection, 5s.—For remanding prisoner to custody, 5s.—For official assignee to sell, 5s.—Respecting a lease or agreement for a lease made or to be made to petitioner, 5s.—By the assignee to sell and to assign debts, 5s.—On each order on a claim or an objection to a claim, 5s.—On every other order not special, and necessary to be made in each cause, 2s. 6d. On each attendance at an examination of an Insolvent for hearing, not exceeding 5s.: in the whole for such attendances in the case of any one estate, 25s.—Each warrant of commitment or other attachment for bringing up prisoner, 2s. 6d.—Every certificate of appointment of assignee, 2s. 6d.—Authenticating every copy of order of protection or appointment of assignees, or other proceeding in a case of insolvency, 2s. 6d. On every notice of making final order, 2s. 6d.—On each affidavit, 1s.—Taxing costs and certificate thereof, 2s. 6d.

TO THE CLERK.

Fee for filing petition for protection with Schedule, 1s.—Drawing every order for protection *ad interim*, 1s. 3d.—Each renewal for protection, 1s. 3d.—Each order of appointment of assignee, 1s. 3d.—For attendance of petitioner or other person for the purpose of disclosure and for production of books, papers, &c., 1s. 3d.—To appraise excepted articles, 1s. 3d. To substitute the name of surviving assignee or new assignee, 1s. 3d.—Notice of final order, 2s. 6d.—Final order for protection, 2s. 6d.—Every order for rescinding final order for protection, 2s. 6d.—Every order for discharge of petitioner, 2s. 6d. Order on official assignee to sell, 2s. 6d.—Order respecting lease or agreement for lease to petitioner, 2s. 6d.—Order for a dividend, 2s. 6d.—Order on assignee to sell or assign debts, 2s. 6d.—On every writ or warrant of commitment or attachment, 2s. 6d.—Every summons to a witness, 1s. 3d.—Drawing certificate of appointment of assignee, 1s. 3d.—Swearing affidavit, 1s.—Every order not hereinbefore specified and necessary to be made, 1s. 3d.—Copies of all proceedings made by judge or commissioner, or by desire of party per folio of 100 words, 6d.—Every certificate of authentication, 1s. 3d.—Filing each necessary proceeding in a case, 6d.

TO THE ATTORNEY.

Fee for attending in prison and taking instructions from petitioner, 5s.—Taking instructions when party is at large, 2s. 6d.—Drawing and engrossing petition, 5s.—Attending and taking instructions for Schedule, 2s. 6d.—Preparing Schedule, per folio, 6d.—Preparing petition, per folio, 4d.—Attending a party in prison to same executed and signed, 5s.—Attending for the same purpose when party at large, 2s. 6d.—Attending judge or commissioner with petition, and to obtain the *ad interim* order, 2s. 6d.—Preparing notice of petition and procuring it to be published, 5s.—On each copy of notice served on a creditor, 1s.—Every common affidavit, including attending, 2s. 6d.—Each special affidavit, 5s.—All necessary copies per folio, 4d.—Attending each examination of petitioner or other parties, 5s.—Copy of each rule, order, or notice, and service thereof, 1s. 3d.—Preparing each notice or advertisement, 2s. 6d.—Each copy for publication or service, 1s.—Each necessary special attendance, 2s. 6d.—Bill of costs and attending taxation, 2s. 6d.—Disbursements for printing to be allowed on affidavit.—Each service of notice, 1s.—Mileage, per mile 6d.—Brief on each special motion, 5s.

COUNSEL FEES.

Fee on brief where motion or application not special, 10s. On brief or motion to make or rescind final order, or on application special in its nature, 25s.

SHERIFF OR CONSTABLE.

In executing Warrants or Writs of Attachment, the same charges as in Process from District Court.

WITNESSES.

The same as in the District Court,

(Signed) J. B. ROBINSON, C.J.
J. B. MACAULAY, J.
JONAS JONES, J.
A. MCLEAN, J.

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 WENTWORTH.

Judge of the Division Courts, ALEX. LOGIE, Esquire—Hamilton,

First Division Court.—Clerk, William R. Macdonald,—Hamilton P.O.; *Bailiffs*, Samuel Davis and William A. Smith,—Hamilton P. O.; *Limits*—The city of Hamilton and the townships of Barton and Glanford.

Second Division Court.—Clerk, Alexis F. Begue—Dundas P.O.; *Bailiff*, George W. Wright,—Dundas P. O.; *Limits*—The townships of Ancaster and West Flamborough, including town of Dundas.

Third Division Court.—Clerk, Andrew Hall,—Waterdown P.O.; *Bailiff*, John Graham,—Waterdown P.O.; *Limits*—The township of East Flamboro'.

Fourth Division Court.—Clerk, William W. Barlow,—Rockton P. O.; *Bailiff*, Charles Babcock,—Rockton P. O.; *Limits*—The township of Beverly.

Fifth Division Court.—Clerk, John J. Bradley,—Stoney Creek P. O.; *Bailiff*, Stid Springstead,—Stoney Creek P.O.; *Limits*—The townships of Saltfleet and Glanford.

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