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THE

UPPER CANADA LAW JOURNAL

AND

LOCAL COURTS' GAZETTE;

FROM

JANUARY TO DECEMBER, 1856.

VOLUME II.

EDITED BY

W. D. ARDAGH, ESQ., BARRISTER-AT-LAW.

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1856.

GENERAL INDEX.

TABLE

OF THE

CASES REPORTED AND CITED IN THIS VOLUME.

DIVISION COURTS.

OFFICERS AND SUITORS.

At the commencement of a new volume, we may be permitted to make a brief reference to what has already appeared in the *Law Journal* under this department. In the first number it was intimated, that under this heading would appear matters having special reference to *Clerks* and *Bailiffs*, as well as information for *Suitors*. We desired to assist officers in the performance of their arduous and important duties, and promised special attention to what more immediately concerned them. On referring to our pages it will be found that the law and practice of arbitration in the Division Court has been treated of, and suitable forms furnished—that the practice of attachments has been discussed both in reference to Clerk and Bailiff, and forty-four necessary forms given, which neither the Statute nor Rules supplied—that the Clerk's duties in taxing costs have been very fully explained and appropriate forms furnished—that the duties of Clerks and Bailiffs in Court were copiously treated of, and a set of forms comprehending all the ordinary business of the Court, set down in order for their convenience—that the provisions generally of the late Act in its bearing on officers were not left unnoticed, while the subject of "Transferred Judgments," "Foreign Summonses," the transmission of papers, &c., and the mode of opening and keeping the necessary books under the requirements of the same Act, were examined and explained, and forms made out—that the appointment of Deputy Clerks, with its incidents, was noticed, and also the process of Subpœna in arbitration with an examination as to the proper practice and forms.

With respect to *Bailiffs*, those parts of their duties not immediately connected with the Clerks—such as the service of process generally, arming Bailiffs with information at all points for their guidance—practical hints respecting their responsibilities, their remuneration and privileges—their protection under the Statute, and the proceedings necessary to avail themselves of this privilege—seizures, &c., were specially examined in our pages.

We have spoken of what appeared under this head, but editorially, also, in many reports of cases, their duties and responsibilities were illustrated and explained: moreover, officer's just claims for increased remuneration were advocated, with what success, truth is all powerful, we leave our readers to determine; we were, at all events, as the Organ of the Local Courts, the first in the field to represent their grievances and claims.

Suitors will have seen that every pains have been taken to enable them to use with advantage the Tribunals to which they resort, "the People's own Courts" as the Division Courts are emphatically styled. Our aim has been to show in plain language what should be done and attended to by Suitors from the commencement of a suit—with this in view, we gave full and practical instruction for reference to arbitration, by parties having matters in difference with the jurisdiction of these Courts; and for the due and orderly holding of arbitration, also hints on securing the attendance of witnesses and their payments—and a series of articles showing what causes of action are within the jurisdiction, what are exempted, the parties to sue and be sued, in what Court the plaintiff is required to enter his suit, the form and requisites of a plaintiff's account, demand or claim; including the statement of the cause of action, leaving particulars for suit, the preparations for trial, &c.

We briefly glance at these heads of subjects treated of in the volume just concluded, not so much to show that officers and suitors have had a liberal supply of original matter for their information, as with a view to make those, who have not yet become subscribers, aware of the character and design of the *Law Journal*, and to enable them to judge from the matter of the first volume what may be expected in the one commencing with this number.

We feel that we have a just claim to be supported by Division Court officers and suitors—and that we can promise them good value for their subscriptions. More than a year ago the County Judges expressed an opinion that they recognized in such a Publication "A source of great public utility in advancing the sound administration of Justice in Courts, which from their local character so immediately comprehend the interest evolved from the masses of a peculiarly industrious and progressive people, &c., &c.

Notwithstanding this there are several Clerks and Bailiffs who do not yet take the *Law Journal*, though it seems not unreasonable to suppose that every officer would desire to make himself better acquainted with the duties of his office; and we may add that a number of the most intelligent officers (subscribers) have acknowledged in strong terms the value and usefulness of our publication. Surely an office cannot be worth holding, if it does not enable the party holding it to pay at the rate of 1s. 8d. per month for a work, the leading object of which is to explain his duties and responsibilities, and thus to give him confidence and security in acting.

We will send this number to those who are not now on our list and ask them to become regular subscribers. Those who refuse, will please return in an open cover directed to the Publishers, marking it "Refused," with their names and addresses.

We have already offers to produce in our columns the treatises referred to in our advertisement on another page, viz.: the Law and Practice of the Division Courts, including the duties of Clerks—and a manual of the office and duties of Bailiffs) and one or both will probably be commenced in the February number. We have also commenced and will continue to completion, a full Directory of all the Division Courts in Upper Canada, a work indispensable under the recent Act: these will alone cost us upwards of £100 so much disbursed for the benefit of officers, and additional inducement to new subscribers. The question is to be answered whether officials will support us by their individual subscriptions and by inducing Suitors and others to take the Law Journal.

CLERKS.

APPLICATIONS FOR NEW TRIALS.

The difficulties which suitors experience in procuring legal assistance in remote parts of the country often throw upon clerks the work of drawing papers for parties applying for new trial. To do so is no part of the officer's duty, but as he is generally the best informed person in the neighborhood, and moreover the best acquainted with the subject, the Clerk is the person commonly applied to to prepare the necessary papers. He may refuse doing so, if inconvenient to him, but if he renders this service to Suitors, it is not necessarily in his capacity as Clerk, and as a private individual he may, it would seem, charge a reasonable sum for his work, and is not tied down to the scale of charges in the Tariff, unless what is done is of that description of work, which is *specified* therein. We desire to give a few hints for the information of those who act in the assistance of parties in the matter referred to. Looking to the 52nd Rule of Practice it will be seen that applications made after the Court day must be in writing, showing briefly the grounds on which they are made, which grounds "*if matters of fact requiring proof* shall be supported by affidavit." The meaning of this is that where the Judge has personal knowledge from what passed before him at the trial of the matter on which the application is founded—as for example, where the new trial is applied for on a point of Law arising out of the facts proved at the trial, a perverse verdict or the like, it is sufficient to *state* the grounds in the form of an application; but this is rarely the foundation of an application unless when made by professional men. When the grounds are not within the knowledge of the Judge, but are facts capable of proof, they must be supported,—in other words, proved by affidavit: the following are, among others, the class of applications requiring proof, viz.: on the ground of the perjury of witnesses, the discovery of fresh evidence that is material, being misled or surprised by the opposite party, the applicant having been disabled from attending by sudden sickness, accident, or otherwise, the misconduct of the Jury.

To the last description of applications we confine ourselves at present. When a party thinks he has fair claim for a new trial, the first thing is to set down the facts he considers material. For those not familiar with drawing affidavits, the simplest way is to state the grounds plainly and briefly in ordinary language, and append an affidavit verifying the statement of facts: if more than one person's statement is material to be laid before the Judge, each must be verified in the same way. Perhaps the simplest plan of illustrating our meaning will be, to suppose *An Application by Defendant for new Trial on the ground of the discovery of fresh evidence that is material*—and give suitable forms.

In the———Division Court for the County of———
Between A. B. Plaintiff;
and,
C. D. Defendant.

I C. D.—The Defendant states that *since the Verdict was rendered against me in this cause, I have discovered that the note which forms the plaintiff's claim was endorsed and delivered to him by E. F., to whom the said note was made payable by me, long after the same was due and payable,—that the Plaintiff gave no value for the same—that in point of fact the note now belongs to E. F.— that the Plaintiff has allowed his name to be used in order to deprive me of the right of set off against the said note and that I expect to be able to substantiate these facts by the evidence of———. I state further, that said E. F., is justly indebeted to me in the sum of———for goods sold and delivered to him, on the understanding that the amount should be credited on the note—and unless I am enabled to set off my claim against the said note, great injustice will be done me, as the said E. F. is in insolvent circumstances.*

On the grounds above stated, I make application to set aside the Verdict rendered at the last sittings of this Court, and for a new trial in this cause.

C. D. Defendant

This statement must be verified by oath. It may be in form of affidavit following:—

In the———Division Court for the County of———Between A. B. Plaintiff;
and,
C. D., Defendant.

C. D. of———, the Defendant, maketh oath and saith, that the within (or annexed) statement, signed by him, is true in substance, and in matter of fact.

Sworn before me at———
In the County of———this day of———A. D. 185—
X. Y. Clerk.

C. D.

Should the party making application for a new trial, bring the statement of his grounds ready prepared to the office instead of employing the Clerk to draw it, the above form of affidavit will in general be sufficient to verify the statement of fact therein; but, in such case, the statement and affidavit must be accompanied by an application attached thereto, which may be in the following form, or to the like effect.

In the———Division Court of the County of ————
Between A. B. Plaintiff;
and
C. D., Defendant.

I maketh application to set aside the Verdict rendered in this cause, and for a new trial on the grounds disclosed in the statement signed by me which is hereunto attached.

C. D., Defendant.

(To be continued.)

Bailiffs.—In the December Number we examined the defences that Bailiffs may avail themselves of, under the D. C. Act, Sec. 107: let us now turn to the 14th Sec. of the D. C. Extension Act—which provides that no action shall be brought against a Bailiff for anything done in obedience to a warrant of the Court, until a demand of perusal and copy thereof has been made and the same refused or neglected to be given for the space of six days; and that if such demand be complied with, the Clerk who signed the warrant shall be joined, and on proof at the Trial of the warrant that a Verdict shall be given for the Bailiff. In the September number, we pointed out to Bailiffs the necessity for prompt compliance with this demand. We now proceed to notice what the officer should do to avail himself of a defence under the clause.

The object of the Section is to protect Bailiffs in what they have done in obedience to a warrant under the hand of the Clerk and the Seal of the Court, although the warrant may be defective or irregular; but it does not protect where a Bailiff has no warrant so signed or sealed, and has acted beyond his authority: in such case he is liable for the excess, and no demand of copy is necessary; thus if he take the wrong person, or if the warrant direct him to take the goods of A and he takes the goods of B, he is not within the protection of the Statute.

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

1. That no *written* demand signed by the party demanding the same, was made of the perusal and copy of the warrant.
2. That the demand of warrant was complied with, and that the Clerk who signed it, is not joined as a Defendant.
3. That the Bailiff acted in obedience to a warrant signed by his co-defendant the Clerk, and sealed with the seal of the Court.

The grounds of defence may be given in evidence under the general issue, and what has been said in the last number may be repeated here, that the *principle* may be so far applied to suits in the Division Court as to make a general reference to the clause in question sufficient; but it will be best to specify the particular ground of defence relied on. Some question may arise as to whether this clause applies to actions in the Division Courts, or is confined to actions in the Superior Courts: but this is not the proper place to discuss that question. We hold that it applies to Suits in *any* Court, and have therefore so assumed in this article.

A notice in the following form should be given where a defence under the Section referred to is open to the Bailiff:

Notice of defence under Statute (D. C. E. Act, Sec. 14.)

In the———Division Court for the County of———
Between A. B., *Plaintiff*;
and,
C. D., Defendant.

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

C. D., Defendant.

Dated this———day of———A.D. 185
To A. B, Plaintiff.

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

SUITORS.

What the Defendant should do between the service of Summons and the Court day:

When a Defendant is served with a copy of Summons, he will find annexed to it or written in the margin, a copy of the Plaintiff's account or claim. He should at once examine it, and if he finds it wholly correct, let him pay the amount and costs to the Clerk of the Court with as little delay as possible; or if not able to pay at the time, sign a confession for it like an honest man. The confession may be made before the Clerk or Bailiff, so it may save a journey to the Clerk's office if the party who means to confess, tells the Bailiff that he is willing to do so: and as the Bailiff is bound to have forms with him or to draw up a confession when required, should he refuse, the Judge would probably order him to compensate the Defendant for his trouble in coming to the Clerk's office, for the purpose of confessing judgment in the suit: the prompt admission or confession of a claim saves the Defendant costs, that might otherwise be incurred. If the claim be *in part* correct, for example—if only one or two of several items in an account are denied, or if the claim be made up partly of a note and partly of an account, and the latter only is objected to, there is a provision made by the Rules of Court for saving unnecessary expense in proof, of which the Defendant may avail himself. He is at liberty to give the opposite party a notice in writing that he will admit on the trial of the cause any part of the claim, or any facts which would otherwise require to be proved, the effect of which will be to deprive the Plaintiff of any expense incurred by him, after such notice given, for the purpose of proving any part of the claim, or any fact so admitted.

This Notice must be served personally on the plaintiff or left for him at his usual place of abode, at least six days before the trial or hearing.

A form of the notice is given in the rules† which it will be well to follow. It is headed in the Court and cause (same as in the heading of the summons) and shortly notifies the plaintiff "that the defendant will admit on the Trial of the cause, the *first, second* &c., items in the plaintiff's claim to be correct" [or the signing "of the promissory note sued upon" *or any other fact as the case may be, otherwise requiring proof*]. This notice is to be signed by the defendant and may be embodied with a notice of set off or of any other defence. This is an equitable and valuable regulation and should be acted on: it will serve to bring up the *real questions* in every disputed case and to reduce them to the narrowest point; thus saving as was intended by the Judges, unnecessary expense.

(To be continued)

† The rules and forms, prepared by the Judges for the Division Courts, were printed in pamphlet form, at the Leader Steam Press, Toronto, and maybe procured there, or, at Maclear & Co.'s; every suitor should have a copy.

ON THE DUTIES OF MAGISTRATES.

(SKETCHES BY A J. P.)

(*Continued from vol.* 1., *p.* 223.)

THE SERVICE OF THE SUMMONS.

In those cases which are not within, the 16 Vic. C. 178, the directions regarding service given by the particular act must be followed, and where no special direction is given the service of the summons should be personal. (*a.*)

In cases which are within, the 16 Vic., c. 178. that statute expressly authorizes the summons to be delivered to the defendant, or left with some person for him at his place of abode: the language of Sec. 1. on the subject is as follows:

Every summons shall be served by a constable or other Peace officer, or other person to whom the same shall be delivered upon the person to whom it is so directed, by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode.

It will be found convenient in practice to make out the summons in duplicate, both to be signed and sealed by the Magistrate and delivered to the person appointed to serve it. One of these to be delivered to the defendant *personally* or *left for him*, as the statute requires the other to be retained by the person who serves the summons, and a memorandum should be endorsed thereon of the time and manner of service. When not personally served the name of the person with whom the summons is left should be found out, and the relation in which such person stands to the defendant, as wife, daughter, servant, &c., noted down. The person who serves is required to attend at the hearing, to depose if necessary

(a) R. v. Hall 6 D. & R. 14. R. v. Colamins, 8 D. & R. 344. R. v. Simpson, 12 Mod, 351. Mason, v Baker, 1 Car. & Kin. 367—630.

to the due service of the summons; that in case of non-appearance the Magistrate may be able to proceed against the defendant *ex parte* or issue a warrant for his apprehension. (*b*)

Where no duplicate is delivered to the Constable or other person he should make a copy, in order to be able to prove the service properly, and deliver the original to the defendant or leave it for him. A word of caution to Magistrates as to what may be considered proof of due service, when the summons is not personally served. Every principle of justice demands that a party who is to be affected either in pocket or person by any proceeding against him should have notice thereof, that he may not be condemned, without hearing what he has to urge in his defence: and this is obviously necessary in proceedings of a criminal nature, wherein the defendant may upon conviction incur a penalty or be subject to loss of liberty.

Now the statute in allowing service to be made by leaving the Summons with *some person* for the defendant at his last or most usual *place of abode* goes on the presumption that the summons will by this means come to the notice of the defendant. "*With some person,*" can scarcely be taken in its broadest sense; it must mean some person who is a relation of the defendant, or a person in his employ, or some one who may reasonably be supposed to have intercourse with him, and from whom he is likely to receive the summons. Leaving it with a mere stranger who happens to be in the house, or with a child of tender years, could not be held a sufficient service. And, therefore, the necessity of the Officer making proper enquiries and being prepared to state the name of the person with whom he leaves the process and the relation in which he stands towards the defendant.

"Place of abode" is synonymous with the word "*dwelling*"; it is a place where a man lives and considers his home. A man's dwelling is *prima facie* where his wife and family reside; and if he has a family dwelling in some place, and he occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home is where his family reside. (*c*.)

(*b*) 16 Vic. c. 178. Secs. 1 & 2.
(*c*) Story's. Conflict of Laws. S. 63. R. O. Duke of Richmond, 6 T. R. 561.

And where a man had a shop and private parlour in which he carried on his business and entertained his private friends, but neither himself nor his servant slept there, the Judges held that such occupation did not constitute a dwelling. (*d*.)

On the whole, it is recommended that Magistrates should require proof that the summons, when not personally served, has been delivered to the wife or child or servant of the defendant or other person having intercourse with him: and the propriety of such practice has been distinctly recognized by the Judges (*e*). Whether this practice be adopted or not, Magistrates should require such evidence of service as will satisfy them, by a fair inference, that the summons has in fact found its way to the hands of the defendant a reasonable time before the hearing (*f*); for this purpose the officer should be questioned on oath as to the manner and particulars of the service (*g*). If the Magistrate is of opinion that the defendant has not been duly summoned either with reference to the time or manner of service, he should issue another summons. It may be added, that proof of the summons having actually come to the knowledge of the defendant a reasonable time before the return, will relieve the Magistrate of any difficulty in proceeding *ex parte* or issuing his warrant as the case may seem to require.

Having spoken of what seems to be the reasonable construction of the statute and the practice most in accordance with sound principles of justice, it only remains to add on this head that the Magistrates are the proper judges of what is due service, and that if they are satisfied, the Courts above will not in general interfere with their decisions.

TO BE CONTINUED.

(*d*) R. v. Martin, R. & R. 108.
(*e*) R. v. Clement 4 B. & A. 218.
(*f*) In re Hopwood, 19 L. J. 197. M. C. 152 R. 121.
(*g*) If we are rightly informed the able and experienced Magistrate who presides over the Police Court of Toronto, makes it a practice in all cases where the service of summons is not personal to enquire very minutely as to the mode of service and to postpone the case, if the Officer in his evidence is not able to state, facts and circumstances, from which it may be reasonably inferred that the summons came into the defendant's hands.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

IN CHAMBERS.

OTIS *vs.* ROSSIN *et al.*

Irregularity in original writ—Acceptance of service how far a waive..

An application to set aside original writ or the service there-

of on the grounds that it bore no indorsement of the name and place of abode of the Attorney by whom it was issued, and that the copy contained no place marked on the margin where issued, nor the name of the Clerk by whom issued.

Defendant's Attorney endorsed and signed an admission of service on the original writ.

BURNS, J.—*The question* is whether in case of service on the party himself being warned, and service on the Attorney being substituted for convenience as we may suppose, technical irregularities, such as in the present instance, can be taken advantage of. It appears to me that when an Attorney accepts service of a writ for his client, the Attorney should refuse to accept it and oblige service in the ordinary way. The client cannot complain when it is served on the Attorney, because *no service has in fact* been made; and the question always is, when the Attorney accepts service, whether he can be compelled to appear. The Attorney may take that course here, and refuse to appear, and take the opinion of the Court whether he shall be compelled to do so.

The Summons is, therefore, discharged with costs.

YOUNG *et al. vs.* LAIRD.

A Judge's Summons was obtained on the 10th of November, 1855, to send the issues down for trial to County Court. On the 19th, the Summons having been enlarged in the meantime, an order was made to try the cause at the 1st or 2nd Sittings of the County Court, after the making of the order. On the 13th November, notice of trial was served for 20th—the sitting day of the County Court. The cause was entered on the 2nd day of the sittings of the Court, without defendant's leave, and was tried.

Defendant moved, during last Term in Practice Court to set aside Notice of trial and order for writ of trial, and all subsequent proceedings thrown upon the grounds.

1. That the notice of trial was served before any order was made for the writ of trial. 2. That the order was made too late to admit of proper notice of trial being given for the next sittings of the County Court. 3. That the writ of trial was entered without the defendant's consent, on the second day of the sittings of the Court.

The rule was enlarged, by consent, on the merits only, to be disposed of by the Judge in Chambers.

BURNS, J.—I do not see that this case can be distinguished from Reach *et al. vs.* Hall, 11 U.C.R. 356. It is urged that having applied for the writ of trial before the notice served, though the order was obtained afterwards, distinguishes it from that case. Further, it is urged that the order specially mentioning that the plaintiffs might take down the cause at the first sittings of the County Court, so far cures any irregularity, that it would have the effect of compelling the defendant to move to set aside the service of the notice immediately, and that it was too late to make the application now. I do not think there is any weight in the argument. The service of a notice of trial, previous to obtaining an order for a writ of trial, is not a mere irregularity—it is a nullity, and the obtaining an order from a Judge authorizing the taking down the cause at the first sittings of the County Court, does not cure the nullity or impose an obligation on the defendant to move to set aside such notice previous to the cause being tried. The order was obtained the day before the sitting day of the Court, but because it is worded that the plaintiff might take down the cause at the first sittings, did not sanction the dispensation of a proper notice of trial according to practice. The Judge, when granting the order did not intend it to have that effect; and, indeed, he had no power to do it. The meaning of the order is that the plaintiff might take the cause down at the first sittings, if proper notice could be given; if not, then it might be done at the second sittings. The proper order to make is, that the verdict and any subsequent proceedings be set aside with costs. The writ of trial is rightly obtained and will stand good. The notice was a nullity, and requires nothing to be said about it.

REGINA EX. REL. COLEMAN *vs.* O'HARE.
" " " LOYALL *vs.* PONTON.
" " " CORLY *vs.* BROWN.
" " " PADWELL *vs.* STEWART, HAWBLY, DAVY, BOGART and MCAMMANY.

BURNS, J.—Writs in the nature of Quo Warranto were issued at the relation of the different persons named, calling upon the respective defendants to show by what authority they respectively claim to hold and exercise the office of Councillor for the town of Belleville—the different relators complaining that the defendants were respectively disqualified to be elected at the last election held in January.

1. The grounds alleged against Mr. O'Hare are, that he was at the time of the Election and afterwards, surety to the town of Belleville by bond, for the due performance of his office by the Treasurer of the town. That he was also surety by bond to the Treasurer for the due collecting of the taxes by the Collector of the said town. Further, that at the time of the Election he was employed by the Town Council as the Attorney and Solicitor of the town, in defending suits then pending. Also, that Mr. O'Hare was and is a member, or shareholder, in the Belleville Gas Company, in which Company the town, as a corporation, hold 600 shares, and besides has lent to the Company £2,000, to secure the repayment of which, the Company has given a mortgage to the Corporation of the town. A further complaint against Mr. O'Hare is, that at the time of the election he was a stockholder in the Belleville Harbor and Marine Railway Company, and a Trustee thereof which Company holds a license of occupation, by resolution of the town Council, for occupying the water lots in front of the town under a contract for remuneration to the town.

The charges made in the statement are not denied in any way, and the only one attempted to be explained is that of the employment as an Attorney and Solicitor on the part of the Corporation. It is shown that Mr. Benson was formerly the Solicitor for the town Council, and since his death no appointment of a Solicitor has been made, and that Mr. O'Hare has not received any remuneration for services, nor has he demanded any. It is not denied that he is acting in the defence of suits against the Corporation in the ordinary way. It is sworn that neither the relator nor any other person objected to Mr. O'Hare's qualification at the time of the Election, though the relator was himself a candidate.

It is no answer to this application to say that the relator did not object at the Election to Mr. O'Hare's qualification. If the relator was seeking to obtain the seat, it would be an answer to that part of the application to say that no notice of disqualification was given; because before it can be said the electors have wasted or thrown away their votes, it should be shown that the candidate's qualification was questioned.

If the relator had assisted or taken part in the election of Mr. O'Hare, that fact would disqualify him from afterwards questioning the validity of the Election—the relator was a candidate opposing Mr. O'Hare, and though he knew of the disqualification he was not bound to mention it. The 25th Sec. of 16 Vic. ch. 181, enacts "that no person having by himself or partner, any interest or share in any contract with or on behalf of the town in which he shall reside, shall be qualified to be or be elected Councillor therein." The rule with respect to disqualifying a relator from complaining is personal, but the rule is not to be applied in case of acts of omission, where all that is asked by a relator is to ascertain whether the person complained of is disqualified; for if he be, then the

Law declares he shall not be a Councillor, and shall not be elected such.

The objections against Mr. O'Hare that he is surety for the Treasurer of the town, and that he is acting as the Solicitor for the Corporation, are fatal to his retaining his seat as a Councillor for the town. By the 17th Sec. of 12 Vic. ch. 81, it is imperative upon the Treasurer to give security for the due accounting and paying over of all monies; and the relators statement shows that to have been done by bond. Here we have a direct contract with the Corporation. Though the town Council may not have appointed Mr. O'Hare, to conduct suits on behalf of the Corporation either under a Corporation seal or by a resolution—yet I cannot suppose Mr. O'Hare would undertake business of that description without being sanctioned in some way which must give the matter a character of being a contract; in fact, to be remuneration for his services. It is said that the Collector has given security for the due performance of his duties to the Treasurer, and that it is not a contract with the Corporation. The terms of the bond are not shown, but the taking of such security must be under the authority conferred upon the town Council for regulating the bonds, recognizances or sureties, to be given by the Municipal officers for the faithful discharge of their duties.

There must be a new election ordered for Coleman Ward, for a Councillor in room of Mr. O'Hare, whose election is void, and the relator must have his costs.

2. The grounds alleged against Mr. Ponton are, that he is also a Shareholder in the Gas Company and a Shareholder and President of the Harbor and Marine Railway Company. The relator in this case is a voter in the Ward for which Mr. Ponton was elected, namely Retcheson Ward, and it is shown that the relator, at the Election, voted for Mr. Ponton, and must have known all the time that he was a shareholder in both of the Companies mentioned. The relator, having been himself instrumental in electing Mr. Ponton, is disqualified from afterwards complaining of the election, unless he could show that he was at the time of being so instrumental in his election, ignorant of his disqualification. The objection, if it be one, to Mr. Ponton, is not removed or got rid of by adjudging against the relator; but as the relator complains of the election which he was instrumental in bringing about by his vote, and with as much knowledge then as he had afterwards, he is prevented from questioning the Election. This writ must be quashed with costs against the relator.

3. The objections made to Mr. Brown's election to Baldwin ward are, that he is a Shareholder in the Gas Company, and also the Harbor and Marine Railway, Company, and further, that he is one of the sureties for the Collector of taxes. It now appears that the relator attended at the Election and voted for Mr. Brown, knowing, as I must believe from the depositions that he was such Shareholder in the Companies mentioned. For the reason already given, he is disqualified to complain against an election which he has been instrumental in promoting.

4. The objection made against Messrs Stewart, Hambly, Davy, Bogart, and McAmmany, is, that they are respectively shareholders in the Gas Company. The relator is a voter in Retcheson Ward. Stewart and Hambly were elected for the same Ward. Davy and Bogart were elected for Baldwin Ward and McAmmany for Samson Ward. It is said in answer to the objection made against the defendants, that the relator is an alien. If this were clearly made out, of course it would disqualify the relator from properly being such; but the proof is entirely the belief and opinion of the respective deponents; and their statements that they have searched and cannot find any registry under the Alien Acts that he has been naturalized. If the allegations were sufficient to cause me to entertain doubts, then it would be proper that I should afford an opportunity to the relator to answer—but on examination of the affidavits, I see no reason to postpone the matter for such investigation. It appears that the relator voted at the Municipal Elections some years ago, and it is said that it was a subject of remark, that he had then taken an oath before a Returning Officer or Magistrate to qualify him, and that it was an easy way of doing it. He again voted at the last Municipal Election, and no objection was raised that he was an alien. All the affidavits show that if the relator was liable to be objected to on that ground, the parties knew it before the Election and at the time. They could easily have tested the fact by requiring the elector to swear he was either a natural born subject or he had become naturalized. The 122nd Sec. of 12 Vic. ch. 81 provides for this. It appears to me that the objection should have then been made, and not ask me now, after it is apparent he has been exercising the right of a subject for several years to try the question as a collateral issue, to determine whether he shall complain of the Election. It appears that the relator voted for the defendant Stewart at the Retcheson Ward Election. That fact disqualifies him to complain of Stewart's election. He was himself, as well as Stewart, a shareholder in the Gas Company. This writ, as against Stewart, must therefore be quashed, with costs to Stewart.

As against Hambly, there is nothing to prevent the relator from making good his complaint, and the single question is, whether the case discloses a legal disqualification by reason of Hambly being a shareholder in the Gas Company, which Company has borrowed £2,000 from the Town Council, and secured the payment by mortgage. It is not said whether this Company has any contract with the Town Council for supplying the town with Gas. The Imperial Statute 5 and 6 Vic. ch. 104, defined the meaning of the word contract as used in 5 and 6 Wm. 4th ch. 76. The present case is whether a shareholder in an incorporated Company which has a contract with the Town Council to repay it a sum of money loaned, is disqualified. If the defendant Hambly had entered into such a contract personally, there could be no doubt, for though the English Act declares that the word contract shall not be construed to extend to a security for the payment of money only, yet our Legislature has not declared any meaning to be put upon the word, but has left it to its ordinary signification; and the interpretation which would have, before the passing of 5 and 6 Vic. ch. 104, been placed upon the word in England, must be that it extended to a mortgage given to secure the loan of money. Does this same rule extend to the shareholders of the Gas Company, when the Corporation has entered into the contract to repay the loan? The 25th Sec. of 16 Vic. ch. 181 extends to those having by himself or partner any interest in a contract. The Gas Company is incorporated under Statute 16 Vic. ch. 173. The 24th Sec. authorizes the Municipality to take stock in such Company, and that the Mayor for the time shall be *Ex-officio*, a director of the Company. In the present case the Town Council has taken £3,000 in stock of the Company, besides the loan. The 36th Section authorizes the Company to borrow more and to secure the same by mortgage, and to assign not only the rents, revenues, &c., of the Company, but also future calls on the shareholders of the Company.

We cannot fail to see—that by an Election of a person, a member of a Company with which the town has a contract, a very great influence may be exerted in the Town Council in the dealings of the town with the Company; and that every individual shareholder has an interest in the contract which the Company has entered into with the Town Council. It is true the Company would only transact his business through the voice of its Directors; but if it be open to a person to become a Director of the one Corporation and a Town Councillor of the other, or a Councillor of the latter without being a Director of the former, we must see it is also open to him to use his influence and vote upon a subject affecting his individual interest. It appears to me, therefore, that being a member of a

Corporation, which Corporation is again divided into or composed of individual interests, such as trading or manufacturing Corporations, is within the spirit and meaning of the Act. I am strengthened in this view, I think, on reference to the English Corporations Act 5 and 6 Wm. 4 ch. 76. In the 28th Sec., immediately after disqualifying persons on the ground of being interested in a contract, this provision is contained: "Provided that no person shall be disqualified from being a Councillor or Alderman of any borough as aforesaid, by reason of his being a proprietor or shareholder of any Company which shall contract with the Council of such borough for lighting or supplying with water or insuring against fire, any part of such borough." This provision, it appears to me, assumes that a proprietor or shareholder of a Company having such a contract has an interest, and that but for the exception of the proprietor or shareholders whould be disqualified from being Councillor or Alderman. It does not appear to me there is any difference or distinction between incorporated and unincorporated Companies with respect to the disqualification, as it was suggested there perhaps might be. The relator sustains his complaint, therefore, against Hambly, and there should thereupon be a new election for a councillor for the Retcheson Ward in his place, and the relator must have his costs—that is, such proportion as the master shall tax and allow.

With regard to the remaining three defendants, a question is presented, which so far as I am able to ascertain, is quite new. The relator is a voter of Retcheson Ward, and he complains of the want of qualification of two of the Councillors for Baldwin Ward, and of one for Samson Ward; and the question is whether he is a good relator for that purpose. After much consideration of the subject, I have arrived at the conclusion that he has no right in this form to complain against these defendants. In the English Corporation Acts there is no provision for a summary trial similar to ours. There the ordinary rule for a *quo warranto* must be moved in Court, and the discussion arises whether it is proper to grant the writ upon the application for the rule. Rex. *vs.* Parry 6 A. and E. 810, and Regina *vs.* Quayle 11 A. and E. 508 shew that a relator residing in and voting in one ward might complain of a Councillor elected for another ward. I am of opinion that any rate payer in the town of Belleville might, in a similar manner, complain of a Councillor holding a seat, if he were disqualified to hold it; but then, in such case, the complainant would have to resort to the ordinary mode of obtaining the *quo warranto*, and could not take the personal method. I look upon the provisions of the 25th Sec. of 16 Vic. ch. 181 as being twofold; first, that no one who is interested in a contract &c., shall be qualified to be a Councillor; that is whether he were so at the time of the election or became so afterwards, and as to him the objection exists as the Court says in Regina vs. Francis 21 Law J. Q. B. 304 *de die in diem* and any rate payer might complain—and secondly, that no one so interested shall be qualified to be elected for any ward of the town in which case it isthe election which is complained against on the ground of disqualification. It is the election which is complained against in the present case; and as to the jurisdiction of the writ to issue and the authority of a Judge to try that in a summary mode, it all depends upon the 146 Sect. of 12 Vic. ch. 81 as amended by 13 and 14 Vict. ch. 64. The writ may issue on the complaint of any relator having an interest as a Municipal voter, or having an interest as a Candidate. If a person were to be proposed as a candidate at two or more ward elections, it might, I suppose, sustain, if he found it necessary to do so, a writ against the successful candidates in more wards than one. A voter must vote in the ward in which he resides, if rated in that ward; and in case the election is contested by a voter, it must be done in the Ward in which the voter has the right to, or by law is, compelled to vote. It appears to me the intention of the Legislature is that when the election is attacked in the summary mode, it shall only be done by the two classes of persons, viz., candidates or persons having votes at the election which is questioned.

The writ issued, and the statement in support of it, would support an application on the ground that the defendants are disqualified, independent of questioning the election on the ground that the disqualification is one existing *de die in diem* and liable to be questioned by any rate payer of the town; but then if the case be just upon that ground, it is one over which a Judge has no jurisdiction to order a writ to issue or any authority to try in the summary mode provided for in the act. The two cases are distinct, as I view the provisions of our statute. If the election be questioned, it may be done by a candidate or a voter who has the right to vote at the election questioned, in the summary mode provided for; but if the right to be Councillor be questioned by any other than the two classes mentioned then it must be done in the ordinary way proceeding to obtain a writ of *quo warranto* by application to the point for a Rule for that purpose.

For these reasons the writ as against these three defendants must be quashed, and with costs.

HODGSON v. THE MUNICIPAL COUNCIL OF YORK AND PEEL, AND THE MUNCIPAL COUNCIL OF ONTARIO.

By-law establishing a road—Insufficient description—Discretion in quashing by-laws.

The statute does not make it strictly imperative upon the court to quash defective by-laws; and this case—where the road established by the by-law was not sufficiently described, but it appeared that it was clearly defined and marked by fences on each side, and had been travelled for eight years—they refused to interfere.

Wilson, Q. C., obtained, last term, a rule *nisi* to shew cause why a by-law (No. 83) for opening a road across lots 15, 16, 17, 18, 19, & 20, in the 8th concession of Whitby, should not be quashed, on the ground that it does not sufficiently describe the line of road.

The by-law was passed on the 14th of August, 1845, by the District Council of the Home District, and it enacted "that a new line of road, surveyed, laid out, and reported by John Farquharson, Esq., a road surveyor, across lots 15, 16, 17, 18, 19, & 20, in 8th concession of the township of Whitby, by his report bearing date the 1st day of August, 1845, be established and confirmed as a public road or highway."

The by-law did not refer to the surveyor's report as being annexed to it, and it was not shewn that there was or had been a report on the same sheet of paper with the by-law, or in any manner annexed to it; but on the same sheet of paper which contained the copy of the by-law duly certified by the clerk, as the foundation of this application, there was a copy of a report purporting to be addressed, on the 12th of August, 1845, by John Farquharson, surveyor, to the District Council of the Home District, in which he recommended a new line of road to be established, of which the field notes, he said, "are as follows, viz., commencing," &c., and describing a line intended to be the centre line of the new road by courses and distances.

On the back of this copy the clerk certified that it was a copy of a report purporting to be made by J. Farquharson, a surveyor, being the report referred to in the by-law.

He did not state whether the report itself was annexed to the by-law, or whether he found it among the records and papers of his office.

On the part of the Council it was shewn, in answer to this rule, that the road in question was clearly defined and marked with fences on each side of it; that it had been established and travelled by the public for eight years, and connected with other roads leading through Whitby; and there had been

statute labour or grants of public money expended on it, and that it was of great use to the inhabitants in its vicinity.

M. C. Cameron shewed cause and cited 11 East, 375, note *a*; Regina v. Spence et al., 11 U. C. R. 31.

Wilson, Q. C. contra, cited McIntyre v. Municipal Council of Bisanquet, 11 U. C. R. 460; Dennis v. Hughes et al., 7 U. C. R. 444; Brown v. Municipal Council of York, 8 U. C. R. 596; 5 Q. B. 94; Rex v. Trevenen, 2 B. & Al. 339; Rex v. Symmons, 4 T. R. 223; Rex v. Slythe, 6 B. & C. 240.

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

For all that appears, this applicant may have purchased the land long after the road was opened and in use. What is complained of in this by law is not so much an illegality as a defect; by which I mean, that in passing it the municipality were doing nothing beyond their powers, and were committing no wrong. But they have not made their by-law so complete in itself as to guard against the objection of uncertainty and informality.

In such case we think it not unreasonable to hold, that a party seeking to set it aside directly, by the summary intervention of this court, should not delay as many years as he chooses, but should come within a reasonable time. Here nine years or more have elapsed; public expense has been incurred in improving and maintaining this road, the intended bounds of which seem to have been well marked out on the ground, and to have been so long acquiesced in by the defendants that there might be ground for contending that the road could be supported on the footing of a dedication.

The inconvenience to the public might be very serious, of allowing a party interested to lie by for so many years, and then to claim as of right to have the road abolished, which he had most probably been using himself in common with the public, and upon which, in the mean time, a valuable bridge may have been erected, or other costly improvements made.

The statute makes it lawful for the court to set aside a by-law where they see sufficient grounds, but it does not make it strictly imperative. We therefore discharge this rule but not with costs; and in taking this course we are not determining whether this is or is not a legally established highway.

Rule discharged.

TILT vs. THE MUNICIPALITY OF THE TOWNSHIP OF TORONTO.

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

[Q. B. Michaelmas Term, 19 Vic.]

Mr. Dempsey obtained a rule last term upon the Municipality of the Township of Toronto, to show cause why their by-law No. 71, passed on the 2nd of April, 1855, should not be quashed on the ground that the Municipal Council in passing it, exceeded their powers, and that the by-law is therefore illegal.

The By-law is entitled a by-law to alter and amend by-laws 53 and 62, and it enacts that so much of those by-laws passed respectively on the 19th of June, 1853, and the 8th of May, 1854 as relates to the sums to be paid in lieu of Statute Labor, shall be repealed. Sec. 2—that the Port Credit, and Horontario Street, and Streetsville Plank Road Companies shall have the right to claim in terms of their charters (in so far as the Municipality may have acquired any control in or over the same) at the rate of five shillings for each day's statute labor that each person shall be liable to perform according to the terms of their respective charters.

3rd. That all persons liable to perform Statute labor, under the control of this Municipality, may compound for such duties by paying the Overseer for their division five shillings for every day they may be required to work at any time before the 1st day of June, and every Overseer is required to accept the same in lieu of such Statute labor.

The Municipality maintain their authority to pass the by-law under the Assessment Consolidation Act 16 Vic. ch. 182, and they show that at the present increased price of labor, five shillings per day is a very reasonable and low rate, and that laborers cannot be hired for less.

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

I see nothing which bears upon the question raised in this case besides the Statutes 12 Vic. ch. 81 Sec. 31—sub-sections 27 and 97 and 16 Vic. ch. 182, Sec. 35 and 38, and reading these enactments in connection I am of opinion that, however low a rate two shillings and six pence may be for a day's labor at the present time, there is no authority given to the Municipal Councils to go beyond it in fixing the terms of commutation.

The only effect of the latter Statute is, that it leaves to non-resident proprietors no option as to commuting, but provides that they shall commute by paying at the rate of two shillings and six pence a day, *or such other sum* as may have been determined by the Municipal Council as the rate of commutation for residents.

Now the former Act authorises the Municipal Councils to pass by-laws "for empowering *the landholders* in any township to compound for the Statute labor by them respectively, performable for any time not exceeding *at any rate not exceeding two shillings and six pence for each day's labor.*" Now whether this provision extends to any but residents in the township or not, there can be no doubt it does embrace them, and that as to them no more than two shillings and six pence can be fixed under that Act as the rate for the day's labor, and that being so, the rate of two shillings and six pence cannot under the latter Statute be exceeded in respect to non-residents, unless we could hold that the 36th clause of the same Statute gives authority to the Councils to impose whatever rate they please, and relieves from the restriction contained in the 12th Vic. ch. 81. It does not appear to me that it does, for I think that clause is not to be looked upon as conferring authority at all in this respect, it only refers to what may have been done in any township under the former Statute, which it does not, as regards the rate of commutation, profess to alter or repeal.

The words in the 38th clause, *or such other sum* must be taken, I think, to mean as has been argued, *any less sum* at which the Council may have fixed the commutation rate for resident proprietors. That there would otherwise be no limit, is an argument no doubt in favor of this construction, though not a conclusive one, since the Legislature has in some instances forborne to limit the power of the Municipalities in regard to taxation; I mean as respects the amount.

We are of opinion that the by-law must be quashed, with costs.

REGINA EX REL. SWAN V. ROWAT.

Contested election—Costs.

This was a *quo warranto* case, tried before *Mr. Justice Richards*, to determine the right of defendant to hold his seat as a township councillor, to which he had been returned as duly elected. The learned judge determined that the defendant was entitled to retain his seat, but conceiving that he had a discretion to withhold costs, and that there were circumstances in the case which made it proper to do so, he gave judgment in favor of the defendant, but did not give him his costs against the relator.

Hellivell, for the defendant, obtained a rule *nisi*, in Easter term, to amend the order of *Mr. Justice Richards*, by giving to the defendant his costs of defence. He contended that the

relator having failed, must be ordered to pay costs, and that there was no discretion to adjudge otherwise.

On the return of the rule this term, *Eccles* shewed cause, and affidavits were filed, shewing that the relator died on the 6th of July last; that is, after this rule *nisi* had issued, and before its return.

Cosens supported the rule, citing 16 Vic. ch. 181, sec. 27, Doe ex dem Hay v. Hunt, 12 U. C. R. 626; 2 Saund. 101, *t. v.*

ROBINSON, C. J.—It appears that most of the judges in cases before them in Chambers have acted upon the provision respecting costs in the statute as if it were discretionary to the full extent of withholding costs from the successful party. This being so, we shall not reverse this order, under the circumstances of the relator, against whom we are desired to give costs, being no longer living. Upon reference to the judges of both courts, we find that a majority of them place the same construction upon the clause in question as was placed by *Mr. Justice Richards.*

DRAPER, J.—The first statute on the subject (12 Vic. ch. 81, sec, 146) provided, with reference to the adjudication of these elections, that the cases should be decided on a writ of summons in the nature of a *quo warranto*, by the judge of the Court of Queen's Bench, upon statement and answer, and without formal pleadings, "and that the judge *shall have power* to hear and determine the validity of such election. and to award costs against the relator or defendant on such writ, *as he shall deem just.*"

This was amended by 13 and 14 *Vic. ch. 64*, Sched. A., No. 23, which, with regard to costs, contains the following provision: "And it shall and may be lawful for such judge, *and he is hereby required, in the disposing of every such case*, to award costs for or against the relator or defendant upon such writ, or for or against the returning officer, when he shall be so made a party to such proceedings as aforesaid, *as to such judge shall seem just.*" There is a proviso, "that no costs shall be awarded against any person against whom any such writ of summons in the nature of a *quo warranto* shall be brought, who shall, within one week after being served with such writ," disclaim the offer in the mode pointed out, "unless it shall have been proved to the satisfaction of such court or judge that such person had been a consenting party to being put in nomination as candidate for such election, in which latter case *such costs shall be in the discretion* of such court or judge;" and there is a further proviso enabling an intervention and defence to be made, notwithstanding such declaimer, either by the municipal corporation, or a municipal voter, in every which case such intervening party shall be liable and entitled to as any other party to such proceeding.

The 153rd section of 12 Vic. ch. 81 gives authority to the Court of Queen's Bench by rules to settle forms of writs, &c., to regulate the practice respecting the suing out and execution of such writs, the punishment of those guilty of contempt in disobeying the same, and generally for the regulation of the practice, as well at Chambers as in Banc, in hearing and determining the validity of such elections, and the allowance of costs thereupon. The power is extended by 13 and 14 Vic. ch. 64, to the judges of the two Superior Courts of Common Law at Toronto, or the majority of them.

The 16 Vic. ch. 181, sec. 1 repeals the 146th sec. of 12 Vic. ch. 81, and its amendments as made by 13 and 14 Vic. ch. 64. This Act was passed on the 14th of June, 1853, and came into force on the 1st of July, 1853. Section 27 of this latter act authorises the issue of the writ of summons in the nature of a *quo warranto out of either of the Superior Courts of Common Law at Toronto*, on an order of such court in term time, or on the fiat of a judge of either such courts, or of the judge of the county court having jurisdiction over the municipality within which such election has taken place, in vacation. The relator must enter into a recognizance with two sureties, conditioned to prosecute the writ with effect, or to pay to the opposite party all such costs as shall be adjudged to him against such relator. The writ may be returnable before any judge of the superior courts, or before the judge of such county court. The judge is to "proceed in a summary manner, upon statement and answer, without formal pleadings, to hear and determine, &c. * * and it shall and may be lawful for such judge, and he is hereby required, in disposing of every such case, to award costs for or against the relator or defendant upon such writ, or for or against the returning officer, when he shall be so made a party to such proceedings as aforesaid, as to such judge shall seem just,—thus following the words of 13 and 14 Vic. ch. 64. There is precisely a similar proviso as to disclaimer, placing, under the same circumstances, the power of giving or withholding costs in the discretion of the judge; and a similar proviso as to parties being allowed to intervene in case of disclaimer,

I have not been able to satisfy my own mind that a judge who is "*required*, in disposing of every such case, to award costs for or against the relator or defendant, or for or against the returning officer when he is made a party," obeys that requisition, and fulfils the intention of the legislature, although the words "*as to such judge shall seem just*" complete the sentence containing the requisition, by either omitting in his disposal of the case to say anything about costs, or by adjudging that he will not give costs to or against any of the parties before him on the writ.

Confining attention for the moment to this last act, and being called upon to construe it, so as if possible to give effect to every word of the enactment, I think the words "as to such judge shall seem just," taken in connection with what goes before, might be held to give the judge a discretion, not to withhold costs altogether, but to award them to or against *some*, and not *all*, of the parties brought before him; as if the relator, the defendant and the returning officer were before the judge, and the relator failed, the award of costs against the relator might be either the costs of the defendant, or of the returning officer, or from both; thus the direction to award costs would be obeyed, and the discretion in regard to them would be exercised. Against this construction, however, it might well be answered that the words "as he shall deem just" are to be found at the end of the 146th section of 12 Vic. ch. 81, in reference to the judges, how to award costs, and that in that statute no provision is contained for making the returning officer a party to the proceeding, or for disclaimer and intervention by other parties having an interest. Admitting the full force of this consideration, it must also be remembered, that in this act it is provided that the judge "shall have power, and he is hereby required to proceed in a summary manner, &c. &c., and to award costs against the relator or defendant upon such writ as he shall deem just;" while the later act, as well as that of 13 & 14 Vic., enact that the judge "is hereby required to proceed in a summary manner," &c., and in the latter part "that it shall and may be lawful for such judge "and he *is hereby required in disposing of every case* to award costs, &c., as to such judge shall seem just." The repetition of the phrase "and he is hereby required" may be deemed intentional, and designed to remove any doubt which the use of the words "shall seem just" might give rise to; while on the other hand some discretion must be presumed to be conferred on the judge by this phrase, and it may be strongly urged that, whatever that discretion may be, it must be the same under the first and the last act.

But it does not appear to me that the only construction of which the first act is susceptible is that of giving the judge a discretion whether costs shall or shall not follow the decision. The 153rd section of the same act has given extensive power to the court, to be exercised by rules made in term time, regarding the practice to be followed in determining the validity of such municipal elections, and the

allowance of costs thereon; and until such rules were made the quantum of costs to be given for the necessary proceedings in the trial of such elections would be unsettled, unless the legislature gave an intermediate power to the judge before whom any case was brought; and the power to award costs against the relator or defendant as the judge shall deem just, might be considered as a power to fix what amount of costs should be awarded until the court settled it by rule. The statute may be read thus, "which judge shall have power, upon proof by affidavit of such personal or other service, and he is hereby required, to proceed in a summary manner upon statement and answer, and without formal pleadings, to hear and determine the validity of such election, and to award costs against the relator or defendant upon such writ, *as* (*i. e.*, in such manner as) he shall deem just." The judge is required to determine the validity of the election, and to award costs to one party or to the other, in such manner as he shall deem just. Whatever power the judge has in reference to costs, whether it be as to giving or withholding them, or as to the amount only, it is clearly in either case subordinate to the authority of the court, as given in the 153rd section; and in this particular, the words used being "the *allowance* of costs" it might be contended much more clearly that they gave authority to withhold them, than the phrase used in the statute can be said to do, for by it the judge is "required, in disposing of every such a case, to award costs for or against, &c., as to such judge shall seem just"—shewing, I think, that he is as much required to award costs as he is to determine the validity of the election.

(TO BE CONTINUED.)

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THE LAW JOURNAL.

JANUARY, 1856.

☞ It is specially requested that Correspondents and Contributors will be particular to address their communications thus—"The Editors of the Law Journal, Barrie"—or where the matter is mailed *in Toronto* it may be added thus, "*The Toronto Editor of the Law Journal.*" ☜

At the commencement of a new volume, it appears necessary to give a brief general idea of what we have been doing during the last year in fulfilment of the promises made in the first number of this Journal: and that parties, whose names are not yet on our subscription list, may be able to judge from what has appeared what may be expected in the present volume.

The first to enter on the publication of a Law Periodical in Upper Canada, adapted to many and varied interests, and designed for the information of all, we have doubtless hitherto needed indulgence in our progress over an unbeaten path; with additional exertion and outlay, as well as more experience on our parts, we hope from this time to make the *Law Journal* more than ever acceptable to our present subscribers and better deserving of general support. We refer officers and suitors of Division Courts to another page of this number for an outline view of what has appeared with special reference to their interests and information; and as it is erroneously supposed that the object of the *Law Journal* embraces only the doings of Division Courts, we must take the liberty of correcting that error by referring to our files for the last year. With respect to the local administration of the Criminal Laws in this Province, we have presented our readers with Notes containing the principles involved in a number of late Criminal law cases decided by the Judges in England, and the summary jurisdiction of Magistrates has been examined at length. In this last work, all important as it is to Justices of the Peace in consequence of the statutory alterations lately made in their duties, has already been treated of, the Office of Justices of the peace—their powers generally ministerial and judicial—matters generally antecedent to the information—the information or complaint, its form and requisites, and when, how, and before whom laid—are examined in detail: also the mode of compelling the appearance of parties and the proper choice of process to be used—the summons, its requisities, when preferable to other process and how and when to be served, &c. &c: further, the bearing of the late acts are carefully noted, and every important position sustained by reference to authorities and adjudged cases—and the work will be continued in the present volume. The Law of Coroners has also been treated of at length; viz The office of Coroners—their appointment, their

powers and duties in relation to Inquests; their judicial duties generally—summoning jury—charging jury—viewing the body—the authority to examine witnesses—the mode of conducting an Inquest—the adjournment thereof—proceedings after the adjournment—the form of inquisition—including a great variety of forms suited to every state of the proceedings, and many varied circumstances as to the mode of death.

With respect to Municipal Law, more than ordinary attention was given to the subject, with the object of presenting full and accurate information to the numerous and important Municipal bodies, Councilmen and others, which it affected. Owing to the kindness of Mr. Robinson, the Reporter of the Court of Queen's Bench, we have been able to lay before our readers, in advance of the regular Reports, a number of cases reported in full on the Law, as to the legality of Elections and Bye-Laws, the duties responsibilities, and powers of Municipal Corporations: and it is due to that gentlemen to state that he has gratuitously given to us, for the early information of the public, all the decided cases in our Courts reported in the Queen's Bench and Common Pleas Reports from the 12 Vic: c. 18—the Act forming the foundation of our present Municipal Law—to the present time, has been digested under two divisions—the first embracing the decisions as to Elections—the second as to By-Laws; and both are brought down to the latest cases: it is hoped that they may form some guide to Municipal Corporations in their deliberations.

Clerks of the Peace, Sheriffs and other local officers, will have found in our pages matters interesting to them discussed, as well as cases and information respecting their duties—nor will practitioners find that we have failed in allotting to them a fair share of matter.

In addition to the subjects and cases already referred to, we give notes of about fifty Chancery and eighty Common Law recent English cases applicable to our laws, serving in some measure to keep the practitioners "posted in the law as it is," besides decisions of our County Judges on many important points. In other particulars it will have been noticed that their interests have been attended to, and their honorable and responsible position enlarged upon. Their just interests will ever find advocates in us. We trust to make the *Law Journal* more deserving of their favor, and we naturally look to them for a liberal support.

Our views and tendencies on general subjects are sufficiently unfolded in the *Law Journal:* we do not wish for alterations in the Law, merely for the sake of a change: we do not belong to the school of selfish and presumptuous innovators; but the improvement of the Law "by cautious, gradual, and permanent reform, for the love of excellence," we would earnestly desire.

We cannot conclude without expressing our thanks to those gentlemen, who have interested themselves for this Publication, by extending its circulation and contributing to its pages—we solicit a continuance of their support. Our advertising columns (page 3.) will show that we are disposed to expend liberally in procuring suitable treatises and essays; and should our expectations of increased circulation be sustained, we will, instead of three hundred pounds now offered, be enabled to tender six hundred pounds before the year is over, for like matter for the benefit of our readers. We would make the *Law Journal* not merely a permanent publication, but would fain enlarge and render it equal to any similar periodical elsewhere; believing that there is sufficient available talent in Upper Canada to enable us to accomplish this end. A large edition of this number has been struck off: We send copies to those to whom there is reason to believe the work will be acceptable and useful, and to those whose support we would on broader grounds claim. If refused, the party will be pleased to return the copy sent, in an open cover marked with his name and address—we will assume that those who do not promptly return the number are desirous of becoming subscribers and will accordingly enter their names on our subscription list.

COUNTY ATTORNEYS. THE PROSECUTION OF OFFENDERS.

In the February number of last year, we asserted that the management of the Criminal business of the Courts of Quarter Sessions should be specially intrusted to a qualified and responsible agent in order to the due administration of Justice—and the more efficient restraint and punishment of crime.

Moreover, that by such an institution, the criminal business of the Courts of Assize would be placed on a better and more economical footing.

On that occasion we endeavored to show that a Crown Counsel or County Attorney, to conduct the criminal business, was more necessary at the Sessions than at the Assizes—that the practice of allowing complainants to shape and manage prosecutions as they thought fit, thus in effect dealing with an offence as if wholly of a private nature affecting only the party injured, led to abortive prosecutions—gave impunity to crime—was an anomaly in the administration of the Criminal Law, and irreconcilable with justice and sound policy.

We recur again to this subject, desiring to bring before our readers, the views of others who have considered the subject, and we would ask those who feel an interest in the administration of justice, to read what we formerly said. Our observations and suggestions then made, nearly a year ago, have been since, as it were, reiterated; and the fact that other minds brought to bear upon the subject, have arrived at the same conclusion, fortifies our position.

In England, prosecutions are not in general managed by Public Agents. The practice, we believe, to be otherwise in Scotland and Ireland; but with few exceptions, the prosecuting party is allowed to select his own attorney and counsel, who are entitled to payment for their services out of public monies. This practice, long objected to, has latterly been vigorously assailed: public attention was aroused, and the subject came before Parliament. "A Select Committee on Public Prosecutors" made a report containing the evidence taken before them, which was published in a book of some six hundred pages—we believe in November last. In the evidence by Mr. A. Compton, (the Treasurer by whom the Costs of Prosecution are paid in Liverpool) the evils of the present system of managing prosecutions are thus described:—

I think that the scrambling for prosecutions to get them out of the hands of Constables, who are bound over to prosecute; the multiplication of indictments against the same prisoner or prisoners, where there is no chance of any evidence being offered in those additional indictments, for the sake of costs; the presenting of indictments to the Grand Jury, without a previous enquiry before a Magistrate, and even in cases that have been examined and dismissed by a Magistrate, for the sake of getting costs, from motives of revenge, or for the purpose of prejudicing a witness in a case at *Nisi Prius*, are all evils resulting from the want of a responsible person to manage criminal prosecutions.

This refers chiefly to the evils resulting from the wish on the part of Attorneys to put monies in their pockets, and would not apply in Upper Canada as respects public monies: for private prosecutors pay the Counsel they employ. Yet the want of an authorised Minister of Justice, paid by the public, is a no less evil. Motives of revenge, or a desire to shield crime by a "lenient prosecution" are every where concomitants of human passion and weakness. We would here beg permission to repeat what we on another occasion advanced. *First*, on the want of a public servant to manage criminal business. *Secondly*, on the conduct of prosecutions being entrusted to private hands.

An offence is committed, and public justice—the safety of the community—demands that the offender should be proceeded against and punished; but the party injured reasons thus:—"To have the prosecution properly conducted at the Sessions, I will be compelled to employ Counsel and pay him out of my own pocket; and this too in addition to my personal expenses, loss of time, &c., in attending the Court. It may be my duty to lend my aid in punishing a criminal act, but it will be better for me to put up with the injury done than subject myself to the annoyance of a cross-examination by defendant's Counsel, and be at such trouble and expense—the public are as much interested in the prosecution as I am: the county will be the gainer, I cannot be." The matter is then allowed to drop. Even where willing to engage Counsel, parties are not always able to do so—and yet the law professes to shed its protection over all: Criminals are thus allowed to escape, and emboldened by impunity to persevere in crime. But sometimes the complainant will retain Counsel: why should *he* do so? it is not a proceeding to give satisfaction to *him*, but to vindicate public justice? *He* has but expense and trouble—the fruits of the conviction, when the criminal has any property, go to the county or the crown. With Counsel so retained, the matter is not bettered: he is disposed to identify himself with the complainant, and to look on *his client* as the prosecutor, instead of considering himself acting for the crown. Will he not be moved to handle the case just as he would an action of trespass, giving an exaggerated view to the jury, and using all his ability to secure a conviction against the accused—in whose favor the benevolent principle of the English Law has made all exception, and commands the very Judge to be *his* Counsel. Any one familiar with the proceedings at Quarter Sessions must have been struck with the contrast between a Counsel commissioned by, and acting for the Crown at the Assizes, and the Barrister employed by the complainant at the Session; the former an officer of the Crown who feels that his duty is not to fight for a conviction, but to

lay the facts and the Law bearing upon the matter calmly and deliberately before the Court and Jury—his aim is to bring under review all that tends to throw light upon the charge, his only wish is that the supremacy of the Law may not be defeated from the omission of proper evidence, or through any inaccuracy in the proceedings: whether examining witnesses or addressing the Court or Jury he *feels his position*; and being specially appointed to aid the administration of justice, he is free from that bias which he might not be able to divest himself of, *the paid advocate of the party directly aggrieved.* How is it with the latter? Does he not identify himself with his *Client*, and while professedly acting for the Crown, does he not in reality bring all the tact and ability he is master of to advocate his *employer's* views?

Hear an American who saw and studied the English system of trials at the Criminal Courts:

There is no public prosecutor; the complainant is bound over to prosecute the charge, and the witnesses to testify. The complainant selects the Attorney for prosecution, and the Attorney selects the Barrister. This practice is obviously open to great abuse. It may make the prosecution too lax or too severe according to the disposition of the prosecutor or of the Attorney he employs. The appointment of officers analogous to our District Attorneys, and the French *procureurs du roi* has been recently and strongly urged, but it encounters a vigorous opposition from the young Barristers, to whom the straggling criminal business often affords the first, and for years the only opportunity of making their appearance on the forensic stage. It seems to me clear, however, on principle, that the criminal functions of the Government should never be intrusted to private hands—that, as on the one hand, the sword of justice should never be whetted by private rancor, so, on the other, it should never be blunted by private indifference or personal favor. Such are the objections which struck me, and struck me forcibly on the present English system. In times of public excitement, when party spirit ran high, or worse still, when, as so frequently happens in our age, class rivalries and social animosities are stirred up, I should think the English system might lead to frequent injustice: but I saw many cases tried of all grades, from petty larcenies up to capital felonies, and they were all not only well but fairly tried, humanly tried, carefully tried. The Judges were patient, attentive in the last degree; the summing-up was full, laborious, and just, in the strongest sense of the words; *and the prosecuting Barrister was kept under strict and constant surveillance.*

In the report before referred to, appears some very interesting evidence by Mr. W. Foote, of Swindon, who submitted to the Committee a scheme for the conduct of prosecutions from which we make the extracts following, viz.:

In every County or in such County or place, as may be deemed expedient, appoint a competent person to be Crown Attorney or public prosecutor for the whole County or division of a County.

The duties of the Crown Attorney might at the commencement be rather difficult to define, as such officer would have to combine and exercise great caution, skill, vigilance, forbearance, promptitude and determination, great knowledge of human nature and an aptitude for business.

It would be his duty to investigate all criminal cases for trial, to see that prosecutions at Assizes and Sessions did not fail from not being properly conducted, to undertake and watch over the conduct of a case, but not unnecessarily to interfere with private individuals who wish to prosecute, but nevertheless to possess the necessary power so to do, and generally to attend to all criminal business: also, to take up and conduct any prosecution, either in criminal courts or in petty sessions, when required to do so, or of his own authority upon special occasion; and when the case is of such a nature as to require the interference of the Crown officer: and it is in this respect that all the caution and judgment of such an officer would have to be exercised: for it is not every case in which for the reason that there is no apparent prosecutor, he is to be called upon: for if such was the case, he might be continually running about to every part of his county on some unimportant matters, which might otherwise have been dealt with. He must necessarily have great latitude allowed to him for the exercise of his discretion in such cases.

The Crown Attorney must understand thoroughly his position, that he is not to act as mere prosecutor for the Crown, but that he must also see that justice is done towards the accused; and whilst protecting the public, must stand as it were, a mediator between the accuser and the accused, and see that strict justice is done to either party.

The Public Prosecutor or Crown Attorney must not be a public informer. He will, for his own sake, and the safety of individuals, require certain conditions to be complied with previous to his services being called into action: in some cases a complaint in writing by a party: in others, a request in writing from a Justice. Again, a similar request from a public board or authority, but in all cases the Crown Attorney must have ample power to act upon his own responsibility, with such formal requisition in cases wherein he considers that his office ought to be exercised.

The Crown Attorney to be appointed by the Crown, to be subject to the control of the Home Secretary, who is to have power to make regulations touching the office.

In examining the adaptability of such a scheme as this, it must be borne in mind that the offices of Attorney and Counsel are not in the same person as it is with us. And it would be more easy to effect the desired alteration here, as the County Crown Prosecutor would be able to discharge the duties both of Attorney and Counsel. The principle embodied in Mr. Foote's scheme is the same in substance as that advocated by us a year ago, which was shortly this: that in every County or union of

Counties, a Barrister should be appointed by the Government or the Attorney General to conduct the criminal business with a small salary, in the nature of a retainer from the Crown and certain fees attached to the office. His duties to act for the Crown at the Courts of Quarter Sessions, to receive from the Magistrates and Coroners the "Criminal papers," to examine into the character and sufficiency of the evidence, to secure the needful documents for proof, and the attendance of necessary witnesses; in a word to get up the evidence and to arrange all things necessary for the Trial. To attend also at the Assizes and assist the Attorney or Solicitor General or Queen's Counsel, and in the absence of such an officer to conduct the business himself. Further, to assist Magistrates when advisable, in their preliminary investigations of serious felonies and other important cases. To see to the enforcement of forfeited recognizances, to appear for the Crown on applications to bail prisoners, and to have charge of prosecutions connected with the revenues or public domain.

It appears that the evidence before the Committee discloses a difference of opinion as to the propriety of public prosecutors in England, though defects in the present system are not denied. The reasons urged against the scheme are, that it would practically destroy the Criminal Court Bar—"I am jealous, I confess (says the Recorder of London) of the inroad it would make upon the honorable competition of the Bar." That the Criminal Courts would be attended only by the Public Prosecutor and one or two defenders of prisoners, in many places by the public prosecutor only, so that the prisoner would in effect be deprived of his right of defence by Counsel.

These reasons have no application to us—the state of things is very different here—a Crown prosecutor is part of the machinery of our Superior Criminal Courts; an extension to the Inferior Courts by giving them such an officer is all that is urged. The expenses of prosecutions do not come from the public purse. The Bar has no Attorney patronage to look for. In every County there is a local Bar in attendance at the Courts, (Quarter Sessions and County Courts both held together) and the cases in which parties employ Counsel on the prosecution are few as compared with those in which Counsel are retained by prisoners on the defence. So that the appointment of a Local Crown prosecutor would not prejudice the Bar. But if it did, what then? Is not the due administration of Justice a matter of paramount importance, and are not minor considerations to give way before it?

The tenor of the evidence taken before the Committee *as applied to things as they are in Upper Canada*, is wholly in favor of the Institution, and we reiterate that Local Crown prosecutors are an absolute necessity in our Inferior Tribunals—that Criminal proceedings in these Courts cannot be conducted with due regard to the public interests on the one hand, and what is due to the accused on the other, while prosecutions are left to take care of themselves (unless indeed the Judge assumes the anomalous position of Judge and Crown prosecutor) more especially with Counsel on the defence—that compelling parties to pay for conducting a trial for a public offence is not reconcilable with the spirit of Justice, and attention to individual rights, and leads to unwillingness to prosecute or to private compromise in defeat of Justice: and we appeal to every one conversant with the practice of the Courts in proof of our assertions.

NEW TRIAL IN THE DIVISION COURTS: LATE ENGLISH CASE.

Of late very few cases have been decided on the English County Courts Act. Mossop vs. G. T. Railway Co. (the Report of which appears in another page) is the first which has occurred for a long time. In considering its bearing on our Division Court Law, the difference between the English Statute and ours should be noticed.

The 89th Sec. of the County Courts act, so far as it bears on the question, is quoted by Counsel in support of the demurrer in the case referred to. Our statutory regulation is more stringent and specific: the 72d. Sec. of the D. C. Act provides that it shall be "lawful for the Judge in his discretion to grant a new trial upon application, if either party shall apply for the same within fourteen days after the trial of any case; "and the 84th Sec., which was evidently borrowed from the 89th Sec., of the English Act, has a proviso, which

the clause, from which it is taken, does not contain, viz. "provided such new trial, be applied for at furthest within fourteen days, and good grounds be shown therefor by the party so applying."

A point, therefore, similar to that in the case under review, could not for a moment be supported under the D. C. enactment—but in other respects the case has its bearing. In the Division Court proceeding, the time within which a new trial must be applied for is not a directory rule of practice, but a positive statutory regulation.

To enable the Courts to grant a new trial a statutory power was required; and being the only foundation for action, it must be strictly pursued. The D. C. rule No. 50 only makes provision for the *mode* in which application is to be made and the *manner* in which the "good grounds" spoken of in the statute must be shown. It is probable that the D. C. Judge might in furtherance of justice be authorised to exercise a discretion in dispensing with some requirement of the rule, but not so with any statutory regulation. It will be observed, in looking to our rule, that the application is considered as made when the necessary papers are delivered to the Clerk of the Court; but that, according to the requirement in the 84th. Sec., must be at furthest within fourteen days after the trial of the cause.

THE COMMON LAW PROCEDURE ACT.

A great change the Common Law Procedure Act made in the administration of the Law in England, sweeping away what was superfluous, supplying what was deficient, and enabling the Courts of Justice to grasp at once the real and substantial questions to be disposed of, unincumbered by refined subtleties which only obstructed the road to justice. It may in truth be said of this Act that it placed procedure on its proper footing, by making substantial justice paramount to merely technical rules: nor is its least favorable feature this, that it obviated the *necessity* of wheeling about from one jurisdiction to another (for a discovery, &c.,) on pretence of more suitable machinery—in reality only in delay of justice: a necessity which in a late case, Lord Campbell declared *brought great scandal on the administration of justice.*

This Act has been in force some time in England, and has undergone a searching judicial examination. It seriously interfered with a variety of interests, and as might be expected the *measure* met with great opposition when introduced, and a very busy throng have since been actively at work to discover weak points in the *law.* It has stood the test—it has been found to answer the purpose for which it was designed. We do not by any means say that it is perfect in all particulars, but with the light thrown upon it by judicial construction, it forms a model for imitation upon which men of learning and genius may improve. Has the time arrived when we should seek to profit by the lesson it teaches? Have we amongst us minds capable of grasping the matter?

The subject is fraught with grave consideration and should only be approached with the firm step of an enlightened statesman, conscious alike of power and responsibility, and animated by a spirit of true patriotism.

We think it is Lord Campbell who says that great alterations in the course of the administration of justice ought to be sparingly made and by degrees, and rather by the Court than the Legislature: but there may be evils that all the exertions of the Court cannot cure; and if on examining our system, inert and incompassable obstacles are found to clog and fetter the due administration of justice, the remedy which the Courts *cannot* apply, should be invoked from the highest Power in the Province.

Whatever move may be made, anxiously, fervently we hope may originate with some one equal to the weighty task: one who will not be above seeking light wherever it may be found: "Scientific skill is required to know causes: the quack in curing one evil creates another." A writer in the *Westminster Review* says all men fancy that they know how to poke a fire or boil potatoes—so they all seem to fancy that they know how *to make all kinds of Laws.* Of Acts of special kind which simply relate to the administration of the Law, practitioners alone are fully qualified to judge of the fitness. With this we leave the subject for the present.

THE "ATTACHMENT" LAWS.

Our attention has been called to the state of the Law on the subject of attachments in the case of absconding debtors. It is said that "no portion or

our jurisprudence more requires revision"; and we are disposed to agree with a valued correspondent who argues that the Legislature, at its approaching Session, should be moved to revise it. This article will, no doubt, be seen by some of those whose duty it is to improve existing enactments, as well as to make new laws, and we regard the subject as possessing sufficient intrinsic importance to command attention.

The Acts still in force which were passed previously to the D. C. Act of 1850, only provide a remedy for Creditors against the estate (real and personal) of Debtors, who either have absconded out of Upper Canada, or remain concealed therein, with intent to avoid arrest or service of process—and any remedy against their property is reserved exclusively for the benefit of those creditors who may place writs of attachment in the Sheriff's hands within six months—unless (as is very seldom the case) there be property enough seized to satisfy all, besides payment of expenses: the effect of this is, that attaching creditors in the Division Courts are obliged (no matter that the aggregate of their claims may quadruple those in the Superior Courts,) to wait until the Sheriff's processes are satisfied, and then *to divide the residue*, which frequently amounts to "*Nil!*"

On the other hand, attachments may issue from the Division Courts against the personal estate of debtors for demands within the jurisdiction of these tribunals, where the debtor has absconded, provided he has left "*personal*" property liable to seizure under execution for debt," or has attempted to remove his said "*personal*" property either out of Upper Canada or from one county to another, or from Upper to Lower Canada,—*or* keeps himself concealed in some county in Upper Canada, to avoid service of process; and all creditors issuing attachments from the Division Courts within ONE month are entitled to share in the proceeds of the sale of such personal estate, to the exclusion (as some of the C. C. Judges maintain with some reason) of all attaching creditors in the Superior Courts until such D. C. creditors are satisfied. So that a creditor may see his debtor quietly and fraudulently selling off his personal estate and preparing for a movement to parts unknown, and yet cannot attach the property if his claim be above £25, unless he abandons all over that sum—or he waits until the debtor has actually gone and the remedy is lost. If the claim be for £25 or under, the proceeding by service of process in the ordinary way is open with a view to judgment and sale of the debtor's lands in satisfaction; still, if he absconds *before* the service of process—leaving no goods (personal property) behind, there is nothing to ground substitutional service, and the creditor is without remedy, although the debtor may have *lands* amply sufficient to satisfy every claim.

We think the basis upon which these attachments issue, should be reduced to one and the same footing in *all* the Courts—and the fraudulent conduct of the debtor be met in every court upon the same suggestions of fraud verified by affidavit: that the Sheriff of the County should hold the estate attached for the benefit of all creditors, no matter whether the process be placed in his hands for execution or not—that all attachments issuing from the Division Courts should be notified to him, and the property seized by the bailiffs of the D. C., or the securities or bonds given therefor, should be taken in his name and handed over to him to be dealt with for the benefit of all; and that he should alone be responsible for what he actually seizes or receives, and should hold the same in trust for the payment ratably of all the creditors attaching within a specific time—that the useless expense of advertising in the *Official Gazette* (which very few read) should be abandoned for the like *benefit of the creditors!* and that the Clerks of the D. C. should cease to have the custody of the property attached.

The granting orders for attachments in the Superior and Inferior Courts are regulated by the same principles and subject to the same rules—and the Judges of the County Courts are as competent to fiat attachments in the Superior Courts as in their own, the necessary papers being in both cases alike, and we think that it would conduce to both security and economy if power was given to the County Judges in the outer counties to grant fiats for attachment from the Courts of Q. B. and C. P. It would only be adding one additional item to their many unrequited labors, and County Judges are really such convenient functionaries for these odd jobs that our bowels of compassion have no yearning to spare them, in this particular at least.

The Reports in another part of this number will be found interesting to *Municipal Authorities*, and to the profession, they will not appear in the usual way for some time yet. We have made arrangements by which we will be enabled to continue to lay before our readers the decisions in Chambers of sufficient general interest for publication, and we trust to accomplish the same thing in respect to those decisions in Chancery which bear on the Equity Jurisdiction of the County Courts. Under the head of *Our Monthly Repertory*, it may be necessary to explain to our new subscribers, is set down matters more especially interesting to the profession, but at the same time useful to Magistrates and others engaged in the administration of the Criminal Law. The leading feature in the Repertory is notes of important recent English decisions in General Law, and the practice of the Courts so far as may be applicable to Upper Canada.

Correspondence has so accumulated upon us that at present we find it impossible to answer those who have written to us. We have many thanks to express to friends, which must be accepted generally for the present; and we would ask those who look for replies to spare us for a while.

A JUDGE'S ADVICE TO COUNSEL.

During a late trial in the Court of Common Pleas, Mr. Hawkins, counsel for the defendant, having commenced his address to the jury with the words "I regret to say my client insists upon going into the witness box," Mr. Justice Cresswell said, "Oh, don't say a word upon what your client insists upon. I used, when I was at the Bar, to say to my client, 'Either let me manage your case for you or conduct it yourself.' It is becoming too much the fashion to say, 'My client insisted;' and it looks as if you were going to do something wrong. At all events, keep your own counsel, whatever pressure you may be subjected to."

THE NEW JUDGE.

It is probable that ere this number is before our readers, John Hawkins Hagerty, Q.C., will have been sworn in as one of the Judges of the Court of Common Pleas, to fill a vacancy consequent on the resignation of that good man and upright Judge, Mr. Chief Justice Macaulay.

Dr. Hagerty had neither political connections nor party services to secure him favour: he was doubtless selected for the high and responsible office of Judge as "one in whom talent, integrity and experience, did most abound and were best united." The chastness of selection which directed his appointment will be universally appreciated, and it was a distinct recognition of the just claims of professional capacity and moral worth. Most sincerely do we hope that a long career of dignified usefulness is before him.

Dr. Hagerty is an Irishman by birth, but received his professional education in Upper Canada. We believe it was in Trinity College, Dublin, he graduated, but his degree of D.C.L. is from Trinity College, Toronto.

MONTHLY REPERTORY.

Notes of English Cases.

COMMON LAW.

Q.B. KENT *v.* GODTS. *Nov.* 9.

Contract—Deliveries at several times—Discharge.

A contract to deliver oil of first quality, five tons in October, five in November, and five in December. The purchaser refused to receive part of the oil tendered in October, as of inferior quality, and sued the vendor for breach of contract, but failed in proof that the oil was of inferior quality, and it was found that the plaintiff, the purchaser, did not intend to repudiate the contract.

Held, that the vendor was not thereby discharged from the further performance of the contract.

Q.B. SEARLES *v.* SADGROVE. *Nov.* 17.

Pleading—Tender of part—Set off as to residue.

Action for money had and received, plea of tender as to part; replication, that a large sum was due and demanded; rejoinder of set off, as to the excess beyond the amount tendered.

Held, that such rejoinder is bad if does not allege that at the time of tender of part, defendant gave notice of such set off as to residue.

EX. EX PARTE YOUNG. *Nov.* 20.

Custody of infant—Husband and wife.

The father is entitled in law to the custody of his child, though an infant under seven years, and the court will, in its discretion, order such child to be delivered to the custody of its father, if the court see no ground to impute any motive to the father injurious to the health or liberty of such a child.

EX. CROFTS *v.* VIVIAN. *Nov.* 20.

Sharebroker and customer, principal and agent—Variance between pleadings and evidence.

Upon a declaration for the price of certain shares sold by the plaintiff to defendant, it appeared by the evidence at the trial, that the plaintiff was employed as an agent for the defendant.

Held, that the evidence did not support the declaration, and there being no count for money paid, a nonsuit should be ordered.

B.C. REG. *v.* RICHARD HASLAM. *Nov.* 24.

Indictment—Particulars of charge.

This court has no jurisdiction to make an order for the delivery of the particulars of a charge of embezzlement to a defendant who is awaiting his trial at the assizes; such application should be made to a Judge at the assizes.

B.C. PONTING *v.* WATSON. *Nov.* 24.

Staying proceedings—Action against good faith.

In 1852 an action for libel and malicious prosecution was tried, when a verdict was returned with £5 damages for the libel, and £15 for the malicious prosecutions. Subsequently the defendant applied for a new trial, on the ground of misdirection with reference to the counts or malicious prosecution, when the court, who were prepared to make the rule absolute, intimated the propriety of an arrangement, upon which it was arranged that the rule for a new trial should be

discharged, the plaintiff undertaking to enter a *nolle prosequi* on the counts for a malicious prosecution. The costs were then taxed and paid together with the damages for the libel. In 1855 the plaintiff commenced a fresh action against the defendant for malicious prosecution upon the same facts, and upon a rule obtained by the defendant to stay all further proceedings on the ground of the action being brought against good faith, the Court made such rule absolute.

C.C.R. REG. *v.* SMITH. *Nov.* 24.

Shooting with intent to murder—Mistake as to person shot at.

If A., intending to murder B. shoots at and wounds C., supposing him to be B., he is guilty of wounding C., with intent to murder him, for he intends to kill the person at whom he shoots.

C.C.R. REG. *v.* DIXON. *Nov.* 24.

Larceny—Finding lost note—Means of discovering owner—Prisoner's belief that the owner could be traced.

Upon an indictment for stealing a note, was found by the Jury that the note was lost by the prosecutor and found by the prisoner. There was no evidence that the note had any name or other mark upon it indicating to whom it belonged, nor was there evidence of any other circumstances which would disclose to the prisoner at the time when he found it, the means of discovering the owner.

Held, that he could not be convicted of larceny, although the Jury, being asked whether at or after the time of finding, he believed that there was not a reasonable probability that the owner could be found, had answered that he did believe the owner could be traced.

Q.B. (Ireland.) HAUGHTON *v.* MORTON.

Contract—Statute of frauds—Constructive signature.

A sale-note for absolute delivery of the goods is made at the time of sale, but not signed by the party. The sale is referred to in a letter written before action brought, signed by the party to be bound in which he alleged that the sale was conditional.

Held, (dissentiente, LEFROY, C. J.) that there was no note in writing under the Statute of Frauds.

Q.B. REG *v.* COYLE. *Dec.* 6 & 7.

(Sittings after Term, at Westminster, before ERLE, J.)

Presumption against a prisoner from conduct of counsel at former trial between the same parties.

On the second trial of an indictment for perjury, fresh witnesses for the defence were called to prove facts confirming the prisoner's alleged false statement. A witness called by the prosecutor to contradict a fact deposed to by them, was allowed to prove that on the former trial a particular question was put to him on his cross-examination by the prisoner's counsel, in order to show that at that time the prisoner's counsel had notice of the testimony now given, but did not venture to call the witnesses.

CHANCERY CASES.

M.R. DIXON *v.* GAYFERE. *Nov.* 10 & 11.

Vendor and purchaser—Purchase in consideration of annuity—Charge on land.

Where an agreement was made for the purchase of a property in consideration partly of an annuity to be granted, payable for the life of the vendor and two other persons, and the survivor of them to be secured by bond.

Held, that the form of the agreement showed an intention to discharge the land from a lien in respect of an annuity, and that the annuity was therefore a personal annuity only.

The case of *Winter* v. *Lord Anson*, 3 Russ. 488, noticed.

V.C.W. WOOD *v.* SCARTH. *Nov.* 12.

Vendor and purchaser—Specific performance—Omission of a term of the stipulation—Mistake.

The owner of a public house stated in a letter to brewers that the terms of letting were at a certain rent and for a stated time. The brewers, after sending an agent to look at the house and discuss the terms, agreed to take it according to the letter. Subsequently the owner required a premium of £500. The brewers filed a bill to enforce specific performance, and the owner adduced a memorandum made by the brewers' agent to shew that the £500 formed part of the bargain, and called evidence to prove that in a previous offer to another brewer, that sum was mentioned. The former evidence failed, but the latter was confirmed. The brewers had commenced alterations in the premises.

Held, that the offer to the plaintiffs omitting the £500 was clearly a mistake, and that specific performance should not be decreed.

C. *of* A. MORLEY *v.* MORLEY. *Nov.* 13, 14 & 17.

Tenant for life paying off bond debts—His right to charge the inheritance considered—Distinction between a tenant for life paying off bond debts and incumbrances, or charges on the inheritance considered—Costs.

F., being tenant for life of an estate with remainder to his sons in tail male, pays off bond debts created by the devisor; he takes no steps to make such payments legal charge on the inheritance. Twenty years elapse from the date of the securities. A bill filed by the personal representatives of F., seeking to have the amount of the bond debts, which he had paid, declared charges upon the estate, was, on appeal affirming the decision of the V. C., dismissed with costs.

DIVISION COURT.

(*Reports in relation to*)

MOSSOP *v.* GREAT NORTHERN RAILWAY COMPANY.

C.B. *Nov.* 21, 1855.

Prohibition—Co.C.—Power of Judge to grant a new trial—9 & 10 Vic., ch. 95, sec. 89, and the 141st rule of practice in the Co. Courts.

The Judge of a Co. C. having refused upon the day of the hearing to grant a new trial, cannot grant one at the next court.

The plaintiff in prohibition brought an action in the Co. C. against the defendants, and obtained a verdict. Immediately after the trial the defendants applied to the Judge for a new trial; that application was opposed by the plaintiff, and the Judge refused to grant it. At the next court, the application being renewed in consequence of an intimation from the Judge himself, the Judge granted a new trial:

Held, that, the Judge having once determined the matter, and refused to grant a new trial, that judgment was final.

This was a demurrer to a declaration in prohibition. The original action was tried in the Co. C., and a verdict was found for the plaintiff, damages £8 4s. An application was then made by the defendant's advocate for a new trial, which was opposed by the advocate for the plaintiff and refused by the Judge, and the judgment was entered and the damages and costs paid. The Judge afterwards at another place told the advocate for the defendant that he had reconsidered the matter and was dissatisfied with the verdict and his own refusal of a new trial, and that if he would apply again for a new trial at the next court for the place where the trial took place, he would grant it. The application was accordingly made, and a new trial was granted. There was then a declaration in prohibition, and issue taken as to whether the Judge refused a new trial on the first occasion, and it was found that the Judge had decided to refuse it.

Hayes in support of the demurrer.—The Judge had power, notwithstanding his prior decision, to alter his judgment and grant a new trial at the subsequent court. 9 & 10 Vic., ch. 95, sec. 89, enacts, "that every judgment of any court holden under that Act, except as therein provided, shall be final and conclusive between the parties; but the Judge shall in every case whatever have the power, if he think fit, to order a new trial to be had upon such terms as he shall think reasonable." Then the 141st rule of practice made by the Judges in pursuance of 12 & 13 Vic., ch. 101, sec. 12, says: "An application for a new trial may be made and determined on the day of hearing, if both parties are present, or may be made at the first court held next after the expiration of twelve clear days from such day of hearing." That rule being only a directory rule of practice, does not interfere with the discretion of the Judge, as has been held in the case of *Carter* v. *Smith*, 24 L. J. Q. B. 141. It was there decided that, notwithstanding the omission to give seven days' notice of the intended application for a new trial, as required by that rule, the Judge had a discretionary power to grant a new trial. This is like this court dispensing with the rule that a motion for a new trial must be made within four days. Can a Judge alter his mind at the same court? If he can, can he not do so afterwards? Is it to be said that he is to be taken to be infallible? He is under great difficulties, both from the press of business and the absence of a bar to call his attention to the authorities, and it is reasonable that he should be allowed to say he was mistaken: (*Jones* v. *Jones*, 5 Dowl. and Lownd. 698, was also cited.)

Byles, Serjt. contra.—A statutory power is required to enable an inferior court to grant a new trial. Here, the application having been once refused, it was *res judicatæ*. The same party comes a second time upon the same grounds. The statutory power was gone, and the Judge was *functus officio*. I may ask, can a Judge alter his judgment after ten years? Can his successor alter it? Could he again alter his mind back to his original judgment? *Carter* v. *Smith* is quite a different case from this. The Judge doubtless must be allowed a discretion in some particulars, but not such an extensive discretion as this. Where the Judge is to have the power of altering his decision the power is expressly given, as in sec. 100. Is the Judge bound to hear the application again?

Hayes in reply.—The Judge is clearly not bound to hear it over again. He might say, "I have decided, and I will not dispense with the ordinary rule of practice." He might dispense with it if he liked.

JERVIS, C.J.—I confess I thought the court had determined this question when the case was first brought to the notice of the court. My brothers Maule and Creswell were of opinion that this, being a statutable power, the Judge, having refused the application at the first court, was *functus officio*. I am of that opinion. In some cases there may be a new trial. Well, application is made for a new trial. It is refused, and the damages and costs are paid. The thing is at an end: it is out of court and gone. I apprehend the jurisdiction of the Judge is exhausted, and he has no right to revise his judgment, and the present plaintiff is entitled to prohibit him.

V. WILLIAMS, J.—I have arrived at the same conclusion, not without difficulty. The Judge has power to grant a new trial after execution as before. The difficulty which occurred to me is, whether the exercise of that power is not a mere matter of practice, and whether we ought not to assume that that would be done properly. My brothers Maule and Creswell having entertained a different opinion, and the rest of the court agreeing with them, I have acceded to their view.

CROWDER, J.—I am of opinion that this matter was wholly decided upon the first application. It is a matter of importance that we should know when a cause is at at end. A discretion is doubtless to be allowed to the Judge; and *Carter* v. *Smith* is an authority for that. But it is not an authority for such an extensive discretion as that the Judge may always grant a new trial. That would be a very dangerous thing.

WILLES, J.—The object of having a court of justice is, that all litigation should be determined, and that finally. It is a long time since a reason was given why judgments should be considered final, and not opened up again, *ne lites sint immortales dum litantes mortales*. A court of justice must be suited to the lives of the persons concerned. Life is not long enough for opening up again matters that are already *res judicatæ*. Then, when the Legislature gave this power to the Judges of Co. Courts, it must be taken to have intended that those courts should have those accidents which belong to other courts. The judgment, therefore, of those courts is to be final, except where the power of granting a new trial is given. That power is to be exercised with reference to recognised principles. The judgment, therefore, is to be final, unless it comes within the power given; and therefore, when the Judge has determined that there shall not be a new trial, then the judgment must stand final.

Judgment for the plaintiff.

APPOINTMENTS TO OFFICE, &c.

QUEEN'S COUNCIL.

OLIVER MOWAT, of Osgoode Hall, Esquire, Barrister-at-Law, to be a Queen's Counsel in Upper Canada.—[Gazetted 5th January, 1856.]

NOTARIES PUBLIC IN U.C.

JOHN LEYS, of Toronto, Esquire, Attorney-at-Law, and JOSHUA ADAMS, the younger, of Port Sarnia, Esquire, Attorney-at-Law, to be Notaries Public in Upper Canada.—[Gazetted 12th January, 1856.]

ARTHUR JOHNSON KINGSTON, of Bayfield, Gentleman, to be a Notary Public in Upper Canada.—[Gazetted 19th January, 1856.]

ASSOCIATE CORONERS.

MORGAN HAMILTON, Esquire, M.D., to be an Associate Coroner for the United Counties of Huron and Bruce.

ELIAS VERNON, Esquire, M.D., to be an Associate Coroner for the County of Ontario.

JOHN STEWART, Esquire, Surgeon, to be an Associate Coroner for the City of Kingston and the United Counties of Frontenac, Lennox and Addington.

BENJAMIN SEYMOUR WILSON, Esquire, M.D., to be an Associate Coroner for the County of Hastings.—[Gazetted 12th January, 1856.]

THE DIVISION COURT DIRECTORY.

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

COUNTY OF LAMBTON.

Judge of the County and Division Courts, CHARLES ROBINSON, Port Sarnia.

First Division Court—Clerk, Thomas Forsyth, Port Sarnia; *Bailiff*, Tilton Howard, Port Sarnia; *Limits*—The Townships of Sarnia, Plympton and Enniskillen, and the eight northern concessions of Moore.

Second Division Court—Clerk, J. F. Elliott, Warwick; *Bailiff*, Robert Evans, Warwick; *Limits*—The Townships of Bosanquet, Warwick and Brooke.

Third Division Court—Clerk, G. M. Webster, Dresden; *Bailiff*, William Sixsmith, Dresden; *Limits*—The Townships of Dawn and Euphemia.

Fourth Division Court—Clerk, Ewen McMillen, Wallaceburg; *Bailiff*, James R. Maybee, Wallaceburg; *Limits*—Township of Sombra, and the four southern concessions of Moore.

COUNTY OF ESSEX.

Judge of the County and Division Courts, ALEXANDER CHEWETT, Sandwich.

First Division Court—Clerk, Joseph Mercer, Sandwich; *Bailiff*, Constant Gauthier, Sandwich; *Limits*—The Townships of Sandwich and Maidstone, including the Town of Sandwich.

Second Division Court—Clerk, Alanson Botsford, Amherstburgh; *Bailiff*, Thos. Brush, Amherstburgh; *Limits*—The Townships of Anderdon and of Malden, including the Town of Amherstburgh.

Third Division Court—Clerk, James King, Kingsville; *Bailiff*—Ernest Nightingale, Kingsville; *Limits*—The Township of Gosfield.

Fourth Division Court—Clerk, Gordon Buchanan, Colchester; *Bailiff*—James Waddell, Colchester; *Limits*—The Township of Colchester.

Fifth Division Court—Clerk, Jonathan Wigfield, Mersea; *Bailiff*—James Robson, Mersea; *Limits*—The Township of Mersea.

Sixth Division Court—Clerk, — Graham, Maidstone Cross; *Bailiff*—Patrick Daly, Maidstone Cross; *Limits*—The Townships of Rochester and West Tilbury.

† Vide observations *ante* page 186, Vol. I. on the utility and necessity for this Directory.