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The defendant's summons to revise the taxation must be discharged with costs.

M. C. Cameron for pl'ff; John B. Read for def't.

U. C. COUNTY COURTS.

(County of Frontenac.—Kenneth Mackenzie, Judge.)

TEEFLES v. CARSON—*Replevin.*

(Reported by W. G. Draper, Esq., Barrister-at-Law.)

A Collector of taxes has no power to distrain for taxes after the period fixed by law, or extended by the County Council, for return of the Roll has expired. 12 Vic. ch. 81, sec. 28.—13 & 14 Vic. ch. 67, sec. 42.—16 Vic. c. 181, sec. 16. [July, 1854.]

The declaration stated that on the first day of January, 1853, the defendant took the cattle of the plaintiff, to wit, one yoke of oxen, of the value of £20, and unjustly detained same against sureties and pledges, until &c.

The defendant pleads first *Non Detinet.*

And second that he the defendant was at the time when &c., the collector of taxes for the township of Storrington for the year 1852. That a Collector's Roll for the township of Storrington for that year was placed in his hands by the township clerk, on which Roll was set down the name of the plaintiff as being a resident of the township of Storrington, and as being assessed on the Roll for the sum of £8 7s. 4d. for taxes due and in arrear on lot No. 7, in the 14th concession of Storrington. That the defendant called at the usual residence of the plaintiff within the township of Storrington, and duly demanded payment of the said taxes on the Collector's Roll. That fourteen days had elapsed since the taxes were duly demanded, still that the plaintiff neglected to pay the taxes, and that he the defendant as such collector, after fourteen days had elapsed since the making of the demand, proceeded to levy the taxes by distraining the yoke of oxen in the declaration mentioned, and that he detained them, as such collector, to satisfy the said taxes as he lawfully might.

The plaintiff replied *De Injuriâ* and issue.

The cause came on for trial at the January sitting of the Court. The taking and detention of the cattle were clearly proved. The cattle were taken by the defendant on the 16th or 17th of January, 1853, and were sold on the 25th of the same month.

The defendant on his part proved that he was the collector of taxes for the township of Storrington for 1852. That the plaintiff's name was entered on the Collectors Roll as in the plea alleged by the name of William "Tepple." That the taxes were in arrear, and the jury found specially that a personal demand of payment of the taxes was made on the plaintiff fourteen days before the seizure of the cattle.

I directed the jury to say whether a demand was made in person or at the place of residence of the plaintiff of the payment of the taxes fourteen days before the seizure of the cattle. And I charged the jury that if the service was made after the 14th December, 1852, that their verdict would be for the plaintiff, as the Statute 13 and 14 Victoria, chap. 67, and sect. 41, made it the duty of the defendant as such collector of taxes to return his Collector's Roll to the treasurer of the township of Storrington, and to pay over the amount payable to such treasurer, on or before the 14th day of December in each year, or on such other day in each year as the Municipal Council of the county shall have appointed, and if it did not appear that the Municipal Council of these counties had appointed another day to return the Collector's Roll of 1852, the defendant had a right to seize the cattle on the 14th of December. The jury found for the plaintiff on the ground that the seizure of the cattle was made by the defendant after the 14th of December, 1852, that is to say on the 16th or 17th of January, 1853. They also found that the defendant demanded payment fourteen days before the seizure, which disposed of that point in favour of the defendant. In March term last the defendant obtained a rule *nisi*, calling upon the defendant to shew cause why the verdict should not be set aside, and a new trial had, the verdict being contrary to law and evidence, and for misdirection.

The only question for the Court to decide is, whether the defendant as such collector of taxes for the township of Storrington had a right to seize the cattle of the plaintiff, or to levy the taxes by distress and sale of the cattle of the plaintiff after the 14th of December, 1852, the County Council having appointed no other day for the return of the Collector's Roll.

The Statute 12 Victoria, chap. 81, and section 28, authorizes the Municipal Council of each township to appoint a collector of taxes who shall hold his office until the third Monday of January of the year next after the appointment. The defendant was the collector of Storrington at the time of the wrong complained of.

And by 13 & 14 Vic. ch. 67, sec. 42, it is enacted, "That if any of the taxes mentioned in the Collector's Roll shall remain *unpaid and the collector shall* not be able to collect the same, he shall deliver to the township treasurer and to the county treasurer, an account of all the taxes remaining due on the *said Rolls*; and in such account the collector shall shew opposite to each separate assessment the reason why he could not collect the same, by inserting in each case the words 'Non-resident,' or 'No property to distrain,' as the case may be; and upon making oath before the treasurer that the sums mentioned in such account *remain unpaid*, and that he has not, upon diligent enquiry, been able to discover any goods or chattels belonging to or in possession of the parties charged with or liable to pay such sums whereon he could levy the same, he shall *be credited* with the amount thereof; and the said account shall be sufficient authority to the County Treasurer to proceed to sell the lands on which such taxes remain unpaid."

It is obvious, I think, from the above enactments, as well as from the whole tenure of the statute, that the collector derives his authority to collect the taxes mentioned in the collection Roll, and his power to levy taxes in arrear by distress and sale of the goods and chattels of parties in default, from the Roll itself, from delivery of a proper legal Collector's Roll to him by the clerk of the municipal council; and it is equally obvious, I think, that the power to levy taxes in arrear by distress continues in him so long as he can lawfully continue to hold the Collector's Roll in his possession, and no longer.

The Legislature in making the Collector's Roll returnable on or before the 14th of December, each year, must have done so to place a definite legal limit to the exercise of the great and active powers with which they have invested him, as well as to compel him by legal obligations to execute the duties of his office promptly, and in no case to extend beyond the limit of the period prescribed by law. When the collector receives his Roll from the township clerk, he receives it with the knowledge that unless he executes his duties on or before the 14th day of December, unless otherwise ordered by the County Council, he cannot execute them at all. He receives the Roll on condition that he will collect the taxes and make a proper return on or before the return day. The important fact that the statute confers the power on the County Council only to extend the time for returning the Roll, shews that the Legislature did not intend to leave it in the power of the Collector or the township council to extend, enlarge or vary the time for returning the Roll. The Roll must be looked upon in the nature of a warrant or writ delivered to the collector, and returnable on a day certain. Upon what recognised principles of law can it be said that the collector has the power of extending the time limited by law? The statute unequivo-

cally declares that the collector shall execute the active powers conferred upon him by the delivery of the Roll within a certain limited period. Has he a right to execute that part of his power which relates to the levying of taxes by distress and sale of goods beyond the limited period, without being a trespasser? I think not. When a writ is placed in the hands of a sheriff or a bailiff against the goods and chattels of an individual returnable on a day certain, it is clear the sheriff would be a trespasser by making a seizure under it after its return day, because his power to seize is derived from a writ returnable on a day certain, and after that day has passed over the power conferred on him by the writ passed away. Can the township collector claim more than this under the power conferred upon him by the Roll? The Collector's Roll, which operates by force of an act of parliament, as a warrant or a writ against the goods and chattels of every individual named in the Roll liable to pay taxes, is placed in the hands of the collector by the proper source, and the same act of parliament requires him to return his Roll on or before the 14th day of December, or on a day to be named by the County Council.—The defendant thinks he can return his Roll and execute its powers when he thinks proper, if done before the expiration of his term of office, thereby placing his right to levy by distress on his appointment to office instead of the delivery of the Roll. The words in section 42, already quoted, "That if any of the taxes mentioned in the Roll shall remain unpaid, and the collector shall not be able to collect the same, he the collector shall show opposite to each separate assessment the reason why he could not collect the same," and that the collector's return would be a sufficient authority to the treasurer to proceed to sell the lands, go strongly to shew that the powers and functions of the collector come on the return day to an end, and the remaining powers of collection are on that day, and after it, transferred into other hands, namely, the County Treasurer. I look upon the Roll in the nature of a writ, and on the collector's return in the nature of the sheriff's return to the Court, "I have made the money," or "No goods." This peremptory obligation to return the writ need not operate against the collector, and in the event of his not being able by want of time or other circumstances to collect the taxes by the 14th day of December, an application should be made to the County Council for an extension of time. This is the course pointed out by law. The defendant however, by his conduct, seems to think he can extend it himself without the intervention of the council. In this he erred. Section 63 of the act will show strongly that all the power of the collector under the Roll terminates on the return day of the same. By section 63 it is enacted "That if any collector shall refuse or neglect to pay to the treasurer or such person as shall be legally authorised to receive the sums contained on his Roll, or duly to account for the same as uncollected, the county treasurer shall within 20 days after the time when such payment ought to have been made, issue a warrant under his hand and seal, directed to the sheriff of the county, commanding him to levy such sum as shall remain unpaid and unaccounted for, with costs of the goods and chattels, lands and tenements of the collector, and to return the same within 40 days." From this provision of the statute, it seems clear that the collector will be in default after the return day of the Roll, unless he has paid the money collected by him to the treasurer, and accounted properly for the sums uncollected. I think it is equally clear that he cannot relieve himself from the consequence of his neglect by making a seizure of the goods of the parties refusing or neglecting to pay the taxes, after the return day of the Roll. The sheriff is liable to an action on the case if he refuse or neglect to levy according to the exigency of the writ placed into his hand for execution within the return day of the writ, and he will not be allowed to relieve himself by making a seizure after the return day of the writ; and so the collector is liable, by statutory enactment, to have his goods and chattels, lands and tenements, sold, in the event of his refusing or neglecting to pay the sums collected, or to account for the uncollected sums on the Roll. Is the collector in a better position in this respect than the sheriff? Can he make a seizure after he is in default, and after the return day of his authority, to relieve himself from the consequences of his neglect? I think not. The statute of the last session of parliament, 16th Victoria, chap. 181, and section 46, restricts the County Council in the appointment of a day to return the Roll on the first day of March in each year. (a) This provision of course, cannot affect the present judgment, although it may tend to interpret the mind of the Legislature, shewing the Legislature did not intend any power of extending the time in a person or council, but the one pointed out in the statute, namely, the County Council, and that the County Council itself could only exercise that power within circumscribed bounds. A different construction of the statute from that given now, would in my opinion defeat the clear intention the Legislature had in view by compelling the Roll to be returned, the money to be paid, and the sums uncollected to be accounted for by the collector on a given day, namely, to do away with the practice which has prevailed so long in Upper Canada and so injuriously to the best interests of the public, by collectors taking their own time, sometimes years, to collect the taxes imposed on the inhabitants for the immediate benefit of the country. If the collector of taxes shall be allowed, of his own mere motion, to extend the time for levying the taxes of defaulters by distress and sale of goods until the 16th day of January, what is to prevent him to extend it to the 16th of July, or for years, if he should happen to be continued collector? The learned counsel for the defendant at the trial and argument, contended, though not as I thought with an over certainty, that the right to collect the taxes and to make levies for non-payment, remained in the collector until the third Monday in January in each year, the day upon which his time of office expires. If this view of the matter be the correct one, the right to collect the taxes and to levy by distress for non-payment, would depend not upon the Roll and its delivery to the collector and its continuance in his possession, but upon his appointment and continuance in office. This argument amounts to this, that the collector by virtue of his appointment to and continuance in office, can collect taxes and make levies for non-payment thereof, and that the right so to do continues until the legal expiration of his term of office, notwithstanding that the day for returning the Roll and for accounting to the municipality for what he did under the authority of the Roll has passed away. I cannot bring my mind to this view of the case. I think the collector derives his authority to collect the taxes on the Roll and his power to make levies for non-payment of the same, from the Roll itself, and its delivery to him by the clerk of the municipality, and that the right to collect the taxes, and to make levies for non-payment of taxes, become vested in the collector the very instant at which the Roll is delivered to him by the clerk of the municipality, and not before: and that the right to collect the taxes

(a) Since the above case was in type, we have received the Act of last Session (18th Vic. chap. 21) amending the Assessment law, whereof Section III is subjoined. In the absence of any such "Resolution" of the Council of the Municipality as is there spoken of, the above case would apply. The working of this section appears, indeed, to be open to objection on the practical grounds suggested by Judge Mackenzie, whilst it is not perhaps unreasonable to anticipate that the period of the continuance, under any such "Resolution," of the Collector's right to enforce payment, as also the effect of Sales of Land for Taxes by the Sheriff, may hereafter afford subject of discussion in our Courts.—[*Ed. L. J.*]

III. In any case when a Collector of any Municipality may have heretofore failed or omitted, or may hereafter fail or omit to collect the taxes mentioned in his Collection Roll, or any portion thereof, by the fourteenth day of December, or by such other day in the year for which he may have been or may hereafter be Collector, as may have been or may hereafter be appointed by the Municipal Council of the County, it shall and may be lawful for the Council of such Municipality to authorize and empower by Resolution the said Collector, or any other person in his stead, to continue the levy and collection of such unpaid taxes in the manner and with the powers provided for by law for the general levy and collection of taxes. Provided, always, that nothing herein contained shall be held to alter or affect the duty of the Collector to return his Collection Roll, or to invalidate or otherwise affect the liability of the said Collector or his sureties in any manner whatsoever.

and the power to make levies continue vested in him until the fourteenth day of December in each year as the County Council shall have appointed, and no longer. And as the defendant in his character of collector of taxes for the township of Storrington for the year 1852, seized the cattle of the plaintiff mentioned in the declaration after the 14th day of December, 1852, namely on the 16th or 17th day of January, 1853, a month after his right so to do had expired, the verdict rendered in favour of the plaintiff at the trial is right, and the rule obtained by the defendant must be discharged.

To Correspondents.

One, &c.—We advise you to bring an action under the 22nd section of the Division Court Act: the other remedy is in the nature of a penal proceeding and, if you adopted it, it is probable that the Judge would require more *strict proof* on every point.

R. J.—"The travelling witness" should be paid his fees with the Subpœna, and if he parts with or destroys the document he is required to produce, you will be in a position to apply to the Judge to punish him by fine, under the 48th sec. of the Division Court Act.

C. C. N.—We will keep in view your suggestions: many duties are now imposed on Clerks for which there is no sufficient remuneration.

A Merchant.—The promissory note for the horse, and the account for shop goods, "the one debt incurred long after the other," seem to us to be distinct causes of action: should you, then, bring two suits, it would not be a "dividing the cause of action," within the meaning of the 26th sec. 13 & 14 Vic. chap. 53.

A. P.—The Division Court Clerks should unquestionably meet together, settle upon a Tariff, and submit same for the consideration of the Government. We agree with you that Blank Forms, Books, &c., should be supplied.

H. C.—Your letter we do not understand as intended for publication; at all events, the way in which the subject is treated is far too off-hand and loose for so grave a matter. An extract from an able writer on Public Law, Dr. Bowyer, is so apt on the subject of Codification, that we give it:—"To codify laws while "in a state of transition and formation would be a serious error: the scientific "elements of the law would be blighted, its faults perpetuated, and its progress "towards perfection stopped."

F. M.—Your views harmonize with our own. We will take up the subject at an early day. The Civil Bill Courts in Ireland furnish a precedent.

J. C. B.—A nice question is raised upon the Assessment Laws in your letter and, as it affects a large class of Ratepayers, we will endeavour to resolve it in the March number.

Judex.—We much regret that your valued communication has been received too late for the present number; it will, however, appear in the next.

THE LAW JOURNAL.

FEBRUARY, 1855.

In this the second number of the *Law Journal*, the Editors feel it a pleasing duty to offer their thanks to the many who have expressed their cordial approval of the first issue, and have ably assisted in the circulation of the publication; and also to those who have kindly supplied Reports or other matter of interest,—tending thereby to effect one object stated in the Prospectus, viz: that "of a "monthly conference on the many difficult points "which are constantly arising" in our several courts.

The Editors are thus confirmed in their idea that a Law Journal was requisite in Upper Canada, and have every hope that the prospect before them is that of rendering generally useful, as well to the Profession, as to the Clerks and Bailiffs of Division Courts, Magistrates, Reeves, Municipalities and others for whom it is intended, the work which, under many difficulties known alone to those ever engaged in the labour and responsibility of a periodical, is now before the Public.

As in the preceding so in this number, we have thought it for the benefit of our Subscribers, to republish from the *Upper Canada Reports*, decisions of an important nature affecting Municipalities, &c., and on other subjects, of which many persons have been hitherto not in possession: and there yet remain a few which for the same reason we desire to publish. But through the kindness of C. Robinson, Esq., Barrister-at-Law, we are enabled to publish one decision, as yet otherwise in manuscript, and we have every reason to hope that we may continue to supply early unpublished Reports of cases in the Superior Courts.

From the number of communications received at a late hour, we are led to ask that those sent for publication may be forwarded at an early period of the month in which it is desired they should appear.

The continuation of the Digest of Municipal Cases, is from want of space, necessarily deferred until the March number.

THE PROSECUTION OF OFFENDERS—COUNTY ATTORNIES.

Following up the suggestion of "A Clerk of the Peace of Twelve Years' Experience," we assert that the appointment of Local (County) Attornies to conduct the Criminal business at the Courts of Quarter Sessions, is essential to the due administration of justice in these Courts, and is called for with a view to the more efficient restraint and punishment of crime and misdemeanours; and moreover, that aided by such an institution the Criminal business of the Courts of Assize may be placed on a better and more economical footing.

Let us ask a preliminary question. If it be necessary that a Crown Counsel should conduct the criminal business of the Court of Assize (and that it is necessary no one denies), is it not equally requisite that there should be such an officer, for a like purpose, at the Quarter Sessions? Both are Courts having criminal jurisdiction, with similar powers for the punishment of offenders: if the Courts of Assize can sentence to hard labour in the common gaol, or to long imprisonment in the Penitentiary, so can the Courts of Quarter Sessions.—A judgment of the Court of Assize affects liberty and character (comprehending the interests of many—wife, children, relatives, &c.,) in no greater degree than would a judgment of the Quarter Sessions! Are the cases at the Sessions few and insignificant? No: these Courts sit four times in the year (the Courts of Assize sit only twice), and dispose of more cases than the Superior Courts; and, if we leave out capital felonies and some few

offences excepted from the jurisdiction of the Quarter Sessions, the description of cases in both Courts is the same! Do the Judges of Assize need the assistance of counsel more than the Judges of the Courts of Quarter Sessions? Certainly not. What then—does a crime when presented for trial *at the Quarter Sessions lose the distinctive character* it has at the Assizes? An offence against the peace or dignity of the Crown—the Queen, the Plaintiff—is it at the Sessions to be regarded wholly as an offence of a private nature, affecting only the individual injured, (who is allowed to manage and conduct it as he sees fit) that the party injured is in fact the plaintiff? Certainly not, or the law would confer upon him the rights of a plaintiff. A crime, then, is to be regarded in all respects as losing nothing of its nature or character whatever tribunal it is brought before for investigation. But in practice the Queen is represented in the Courts of Assize, and by her representative "learned in the law" brings her cases before the Court and Jury, presenting them in that clear and intelligent way which so greatly aids the administration of Justice; while, in her Courts of Quarter Sessions, her cases are left to take care of themselves. We might content ourselves here, and assert that the necessity for a Crown Officer at the Courts of Quarter Sessions has been abundantly proved, but let us examine the matter further in detail.

Criminal procedure in the Courts of Assize may be thus stated. On the Assize day the Crown officer appears, commonly at the opening of the Court: he knows little or nothing of the business he has to conduct; even of the cases remaining from the last Assizes, his predecessor may not have left any notes for his guidance—of the new business he must look to the depositions and other papers for his information. (*a*) The Crown officer's first care, then, is to *hunt up* the depositions and papers in each case, and to examine them that he may be able to judge from the facts and circumstances alleged what offence should be charged, and how it should be set forth: and herein are important considerations, for the same facts may support charges of a very different character, and a misdemeanor or a more serious charge—felony—or several charges of a like hue may rest on the facts. Again, the offence may require to be varied in several counts of an Indictment, to meet the facts as they can be sustained in evidence. The examinations, &c., taken by Magistrates, are not to be relied on as designating the offence with legal accuracy,—what it may be is to be collected from the statements therein—and it is often necessary to examine the prosecutor and his witnesses *viva voce* to understand the matter set out in the depositions, or to *obtain data from facts and circumstances necessary* to be alleged and proved, but yet not stated in the depositions. Having determined on the offence to be charged and the mode of laying the same, the Indictment is drawn. The Crown officer must then ascertain if the witnesses necessary to the finding a Bill and proceeding to trial are present, if not they must be sent for, or if impossible to procure their attendance in time an application must be made to put off the trial to another Court—frequently causing great inconvenience to the prosecutor, the witnesses, and the public, and working with unnecessary severity against the party accused.

If an Indictment be found, the trial goes on; the Crown, if need be, exercising its right to challenge. The prosecution is conducted by 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 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 in the administration of Justice, he is free from that bias which, otherwise, he might not be able to divest himself of, if the paid advocate of the party directly affected.

Criminal procedure at the Quarter Sessions is of a most anomalous character. The Clerk of the Peace prepares an Indictment, as best he can, on the depositions returned to him. In ordinary cases he may be equal to it, but he is not competent to determine the way in which the charge should be laid, the sufficiency or completeness of the evidence, &c.—for competency involves a thorough knowledge of the body of Criminal law, the law of procedure, and the law of evidence. Can it be a matter of surprise, then, that prosecutions are defeated from defects in the Indictment, or fail for want of sufficient evidence being at hand?

The Indictment drawn, the duties of the Clerk of the Peace, as to the proceedings are at an end; the Jury is then called, but the right of challenge in the Crown is here a nullity. At the trial the Chairman examines the witnesses (re-examining them if needed), and cross-examines the defendant's witnesses, and is compelled to combine in some measure the office of Judge and Crown Prosecutor: this is obviously an anomalous position, the Judge

(*a*) Crown Officers are sometimes blamed for delay in not preparing Indictments and sending them at once before the Grand Jury, whereby the criminal business is at a stand still, the fault, however, is not with the officer, but with the system. The necessary papers are not always in at the opening of the Court, and they are often in such a slovenly and uncertain shape as to be of little assistance—all the witnesses have not been bound over to appear—some important document is wanting—and various other circumstances, over which the Crown officer has no control, cause the delay.

at any moment liable to have exception taken to his mode of examination, his questions objected to, and then required as a Judge to decide on the propriety of the questions by himself proposed! Yet this is forced on the Chairman whenever counsel is employed on the defence, for he has either tacitly to allow justice to be defeated by permitting half answers, and doubtful or colourable assertions to go before the Jury as evidence, or to elicit the whole truth by examination and cross-examination of witnesses: this observation has special force when the witnesses for the prosecution are disposed to favor the accused. 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, then, so retained, the matter is not bettered; he is disposed to identify himself with the complainant, and 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, and the counsel employed by the complainant—the former conducting his case in a fair, calm, and ingenuous manner, the latter professedly acting for the Crown, but in reality bringing all the tact and ability he is master of to advocate his employer's views.

Let us further consider the effect of the present mode of proceeding at the Quarter Sessions. At the Court of Assize Indictments are prepared by men conversant with, and skilled in, their duties; at the Sessions, by the Clerks of the Peace; and as a consequence, the Indictments in the latter Court are frequently proved defective in form and substance, or some link in the evidence is found to be wanting—the result is a failure of Justice. Our own experience has presented many cases in which no doubt could be entertained of the guilt of the parties, and yet, by reason of some defect, an acquittal of necessity took place; and from different quarters we have heard of similar cases in which the ends of justice have been defeated. Again, 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. Is this reconcilable with justice, or the principles of sound policy?

The appointment of County Attornies would also have an important bearing on the Crown business at the Assizes. A great saving of time, trouble, and expense, would follow to Suitors, Jurors, and all others connected with the Courts, if the evidence was properly got up by the Crown Prosecutor, and the *necessary witnesses all found in attendance at the opening of the Court*, instead of the delay we have before referred to, occasioned by the want of knowledge or carelessness of the committing Justice. The Local Attorney could accomplish all that was necessary in this particular, for the depositions in every case could be returned to him; he would inspect them in good time; see if more evidence was to be sought for; secure the attendance of additional witnesses; and have all things in readiness for trial:—and, failing the appearance of the Attorney or Solicitor-General (or a Queen's Counsel specially authorized by the Attorney-General), conduct the criminal business of the Assizes.

Having shewn the necessity for the office, we do not need to refer to precedent at Home or in the United States—though we could do so—in its support: but let us enquire what would the change involve that could raise even a momentary question? We discover nothing, except on the ground of expense:—and while we assert that it is unsound policy to allow expense to stand in the way of securing the due and orderly administration of justice, we believe that so far from the public expense being increased it would be lessened; for the Crown business would be greatly facilitated, the public time saved, the sending special messengers for required witnesses at the last moment avoided, and crime itself diminished by affording aid to arrest its progress, and securing prompt and certain punishment where deserved.

To come to details, what we suggest is that in every County, or Union of Counties for Judicial purposes, a Barrister of several years standing should

be appointed—by the Government or the Attorney-General—with some certain tenure of office, and a small salary attached to it, (as it were a retainer from the Crown), with certain fees on every Indictment and trial: the fees now payable to Clerks of the Peace for Indictments to cease. An arrangement of this kind would induce respectable practitioners to accept an office that would thus confer a certain *status*.

The duties of the County Attorney might be as follows:—to act for the Crown at the Quarter Sessions in the same way as the Attorney General, or other Crown officer, officiates at the Assizes; to receive from Magistrates and Coroners the informations and papers in criminal cases; to inspect these papers, and examine the character and sufficiency of the evidence; to secure the necessary documents and the attendance of all necessary witnesses; in a word, to get up the evidence and arrange all things ready for the trial. To attend, also, at the Assizes, and assist the Attorney or Solicitor-General, or Queen's Counsel, (as the case may be), and in the absence of such an Officer to conduct the business himself. And, moreover, to assist Magistrates, by his advice, in their primary investigation of important cases. The County Attorney might also see to the enforcement of forfeited recognizances—appear for the Crown on application to bail prisoners—might have the charge of prosecutions, under the laws for summary convictions connected with the revenue or public domain—in fact, all cases prosecuted in Petit Sessions by Public Officers in the name of the Queen.

We have now noticed briefly what has occurred to us in favor of the institution, and the duties we would have assigned to County Attornies, and believe the subject is of sufficient importance to claim the attention of the Law Officers of the Crown during the present session of Parliament. The point occupying greatest prominency is *the absolute necessity for Crown Prosecutors at the Quarter Sessions:* and we appeal to every one conversant with the transactions of these Courts if criminal trials *can* be conducted satisfactorily, or consistent with the public interests on the one hand, and what is due to the accused on the other, while criminal prosecutions are left to take care of themselves, (unless, indeed, the Judge acts in the double capacity of Judge and Public Prosecutor) and defences are conducted by counsel for the accused:—if compelling parties injured, in addition to their loss, to pay for conducting a trial for an offence of a public nature is reconcilable with the spirit of justice and attention to individual rights; and if there is not a consequent unwillingness to prosecute, or private agreements to compromise, in defeat of justice:—if cases of failure in justice and abortive prosecutions against guilty parties are not of frequent occurrence at the Sessions from errors in the Indictment, defects in the evidence, the want of searching examination of witnesses, and the like? Need we pursue this question further, having everything that can be deduced from principle and experience in support of our views! While, then, it must be admitted by all that the interests of the Public require that no guilty offender should escape punishment, it would seem an equally clear and incontrovertible position that whenever from any defect in the system of prosecutions, or from whatever cause it proceeds, a prisoner escapes that punishment which is due to his crimes, substantial justice is wounded, and public wrong thereby increased.

PROMISSORY NOTES FALLING DUE.—The Statutes of the Session of 1854 being as yet in possession of very few, it may be useful to notice here the Act of 18th Vict. chap. 10, relating to Bills of Exchange and Promissory Notes, which comes into force on the *1st day of March next.* The Preamble refers to the 12th Vict. ch. 22, and section I provides that, when the last day of grace falls on a Holiday or Sunday, the Bill or Note is to be *payable the day next after* which shall not be a Sunday or Holiday.

I. Notwithstanding any law, or provision of law, statute, usage, or custom to the contrary, whenever the day which would otherwise be the last day of grace for the payment of any Bill of Exchange or Promissory Note, shall fall on a Sunday, legal Holiday, or any of the days mentioned in the Act cited in the Preamble to this Act, as being a Holiday at the place where the same is payable in Upper or Lower Canada respectively, such Bill or Note shall be payable and the days of grace shall expire, on the day next thereafter which shall not be a Sunday or Holiday as above mentioned, and not before.

REPORTS FROM COUNTY AND DIVISION COURTS.—We urgently request that Officers of these Courts, or Practitioners in them, will furnish us with any case of importance decided by the Judges—when desired, the name of the Gentleman by whom the case is reported will be published. It is impossible for the *Law Journal* to accomplish all the benefit desired, unless we are furnished with such Reports. In the January number we had only our own County to draw upon, but in this, it will be seen, we have been more successful, and with succeeding numbers we trust to have it in our power to furnish cases from other Counties as well. If we could procure but six cases on an average from each County yearly (there are Thirty Judicial Counties in the Upper Province) it would furnish ample material, and the information now confined to few and the narrow limits of a County would be laid before our numerous readers throughout Upper Canada. Surely there is no Judge but must decide at least four or five cases, during the twelve months, of sufficient importance to be reported!

JUDGES' SALARIES.—We noticed in our first number the intention of the Government to increase the salaries of the English County Court Judges, and we now learn, from our late files, that an order of Government has issued, by which fifteen of the Judges have been selected to receive £1,500 st'g. a-year each—the *maximum* salary being £1,500 sterling, and the *minimum* £1,200 sterling,—besides an allowance for travelling expenses.

ARTICLE ON ATTACHMENT—In preparing the Division Courts' Article on "Attachment," we have availed ourselves of a very valuable Paper by Judge Gowan, issued some years ago, for the information of Officers in his county. The learned Judge has therein entered fully into the duties of Officers, and pointed out the mode of procedure under the Act of 1850.

DUTIES OF CORONERS.—Limited space must be our apology for not inserting an appropriate article "On the Duties of Coroners." Sound practical directions, for the guidance of coroners, are contained therein, and we will give it in our next issue.

SURROGATE COURT.

(Notes of English cases in relation to)

PRIVY COUNCIL—*Cutto v. Gilbert—July 7th*, 1854—[On Appeal from the Prerogative Court of Canterbury.]

Will—Revocation—Parol evidence of subsequent Will which is not forthcoming—Force of words "last Will."

A. duly executed a Will in 1825, leaving B. his sole executrix, and this was the only Will found at his death in 1853. G., a party hostile to the Will, alleged that, in 1852, A. executed a subsequent will, and proved this by witnesses, who recollected seeing the will, but could speak to none of its contents, except that it began "this is the last will and testament of me, A." This will was not found after A.'s death.

Held, reversing the Judgment of the Prerogative Court, that the *onus* lay on G. to prove that the later will expressly revoked the former, and was of different contents; that the mere words "this is the last will" were not of themselves sufficient for that purpose; and that, as the evidence failed to establish this, the former will remained valid.

No authority lays down the proposition, that the execution of a subsequent will destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in the case where a revocation has been held to be effective, there has been proof of a difference of disposition.

To revoke an existing instrument by parol evidence that another will has been executed, and by such evidence alone, *though the law may admit of that course of proceeding, is one* attended with danger, and consequently the oral evidence produced must be strong and conclusive.

After reviewing the authorities bearing upon the case, viz.: *Helyar v. Helyar*, 1 Lee, 511; *Moore v. Moore*, 1 Phil. 375; *Passey v. Hemming*, 1 Phil. 439; *Henfrey v. Henfrey*, 2 Curt. 468; *Plenty v. West*, 1 Rob. 264—The Right Hon. Dr. LUSHINGTON said, "Now let us consider how these authorities bear upon the present case. There is not one authority which lays down the proposition that the execution of a subsequent will, destroyed *animo revocandi* by the testator, the contents of which are not known, revokes a prior will. On the contrary, in the case where a revocation has been held to be effective, there has been proof of a difference of disposition. This alone induces us to doubt the correctness of the judgment in the Court below in the case now under consideration, and it appears to us unsound. That judgment is mainly based on the evidence, that the latter paper contained the words "this is my last will and testament." We are of opinion, that these words do not import that the paper contained a different disposition of the property, and that the mere fact of calling it by such words cannot possibly render it a revocatory instrument. We think that the interpretation put upon these words by Lord Brougham, in his judgment in *Stoddart v. Grant*, 1 Macq. H L. 163, is the true meaning to be attributed to them.

DIVISION COURTS.

(*Reports in relation to*)

ENGLISH CASES.

REGINA *v.* MYOTT.

Felony—Acting under false pretence of the process of the County Court stat. 9 & 10 Vict. ch. 95, sec. 57.

The stat. 9 & 10 Vict. c. 95, s. 57, which enact. that every person who shall act or profess to act under any false colour or pretence of the process of the County Court, shall be guilty of felony, is confined to the use of false instruments, and does not apply to the mere verbal assertion of authority.

Therefore, where the prisoner had obtained payment of a sum in discharge of a debt and costs from a defendant (who had been previously duly served with a summons in the County Court), by pretending that he was an officer of, and authorized by the court to receive it, it was held, that the offence was not made out.

The indictment alleged that the prisoner, John Myott, on the 30th day of June, A.D. 1853, feloniously and unlawfully did act under a certain false colour and pretence of the process of the County Court of Warwickshire, holden at Birmingham, against the form of the statute, &c.

In the second count, the charge was that the prisoner *professed* to act.

The third count alleged that the prisoner feloniously and unlawfully did act under a certain false colour and pretence of the process of the County Court of Warwickshire, holden at Birmingham, to wit, under the false colour and pretence of being authorized and empowered to issue process (to wit) an execution in the said County Court, against one John Wainwright, at the suit of one John Kingstone, for the recovery of the sum of £1 7s. and costs, against the form of the statute, &c.

The fourth count was for *professing* to act, as alleged in the third count.

The indictment was framed under the latter part of the 57th section of the 9 & 10 Vict. c. 95, which enacts that "every person who shall forge the seal or any process of the court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any

summons or other process of the said court, knowing the same to be false, *or who shall act or profess to act under any false colour or pretence of the process of the said court, shall be guilty of felony.*"

It appeared in evidence that John Kingstone had brought an action in the County Court of Warwickshire, against Joseph Wainwright, to recover £1 7s. for goods sold and delivered. The summons bore date the 7th of May, 1853, and called on the defendant to appear on the 7th of June. He did not do so; and on the 30th of June the prisoner called at Wainwright's house, and said he was authorized by the court to receive the debt and costs, and if the amount was not paid on that day, or before ten o'clock the following morning, he should bring an execution and take the goods. The sum asked for by the prisoner was £1 6s. 9d. for the debt. Wainwright showed him the summons claimed £1 7s. The prisoner said there was a mistake, and if he, Wainwright, paid him £1 8s. 9d. it would cover all expenses. The defendant went with the prisoner to a public house, and there paid the money.

CROMPTON, J., stopped the case for the prosecution, saying that, in his opinion, the charge was not made out, as he thought the act of Parliament applied to false instruments, and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the process of the County Court.

The prisoner was accordingly acquitted.

There was another indictment against him for a misdemeanor, in obtaining the money by falsely pretending that he was an officer of the County Court, and a person authorized by the Court to apply to Wainwright for payment of the debt, and to settle the action. It appeared, however, doubtful whether the prisoner had not been authorized by Kingstone's son, to obtain the money, and the sum having been in fact paid on the faith that the prisoner was authorized by the plaintiff in the action, rather than by reason of any supposed authority from the County Court, the case broke down, and the prisoner was discharged.

Rupert Kettle for the prosecution.

The prisoner was not defended by counsel.

[The 86th sec. of the Division Courts Act 13 & 14 Vic. ch. 53 is taken from the 87th sec. of the Imperial Act 9 & 10 Vic. ch. 95. and the language in both is the same; this case, therefore, is in point in the construction of our Statute. It is reported in Cox's Criminal Law Cases, Vol. VI, p. 406.—*Ed. L. J.*]

MONTHLY REPERTORY.

Notes of English Cases.

COMMON LAW.

C.C.R. REG. *v.* HOBSON. *Nov.* 11.

Felonious receiving—Evidence for the Jury.

Upon an indictment for feloniously receiving a hat and a watch, it was proved that in consequence of information received from L., (the thief) a constable went to a room in a lodging-house where the prisoner slept, and in a box in that room, found the stolen hat. The prisoner produced it at once, and admitted that L. had brought it there; but denied any knowledge of the watch. On the following day he was taken into custody, and, after he had left the house, he told the constable that he knew where the watch was, but did not like to say anything about it before the people in the house. The watch was not found at the first place to which he took the constable, but he afterwards sent a boy for it; and the boy having brought it to him, he gave it to the constable.

Held, that there was sufficient evidence to go the Jury of a felonious receiving.

E.X. WOODGATE *v.* WETTON. *Nov.* 16.

Contract—Breach of warranty—Refusal to accept the goods.

A bookcase was warranted to be an ancient bookcase; but it was a modern bookcase, made to appear only as ancient. The purchaser having discovered that fact, refused to receive it or pay for it, notwithstanding he had bought, received, and paid for the articles of the same time;

Held, he was not liable for it, the jury having believed the warranty to be made, and returned a verdict for the defendant, the alleged purchaser.

C.P. CUMBERLAND *v.* BOWLES. *Nov.* 15, 23.

Landlord and tenant—Outgoing tenant—Fair valuation—Market price—Consuming price—Striking out words from written instrument.

A tenant occupied a farm on the terms (by reference) of an old draft lease, by the terms of which, as it had originally stood, the tenant was bound to consume on the farm all the produce in hay and straw, but might sell it in every year but the last, on condition that he brought on to the farm two loads of dung for every load of hay and straw taken off, and the last year's produce was to be left on the premises, and to be paid for and to be valued at a consuming price. The draft had, however, been altered, and the words "fair valuation" substituted, for "consuming price"; the two latter words having been struck through. The hay and straw left on the premises by the out-going tenant having been valued, and the valuer having sworn at the trial that he did not value it at a consuming or a market price, but as it stood at a fair value as between incoming and outgoing tenant.

Held, that the valuer had acted rightly, and that the outgoing tenant was entitled to recover to the full amount of such valuation, and not only to the amount of a consuming price; and that it was not necessary, in order to come to this conclusion, that the words "consuming price," which had been struck out, should be looked at at all.

DALBY *v.* THE INDIA AND LONDON ASSURANCE

EX.CH. COMPANY. *Nov.* 27.

Life Assurance—Interest—Godsall v. Boldero, 9 East 72; S. C. 2 Smythe's L. C. 157*—Cessation of interest in the life after the making of the Policy does not make the Policy void.*

[Error from the Common Bench. Before Parke, B, Alderson, B., Wightman, J., Erle, J., Platt, B., and Crompton J.]

The plaintiff, as trustee for the Anchor Life Assurance Company, sued the defendants on a policy for £1000 on the life of the late Duke of Cambridge. The Anchor Life Assurance Company had insured the Duke's life in four separate policies—two for £1000 and two for £500 each—granted by that company to a Mr. Wright. They afterwards effected a policy with the defendant for £1000 by way of a counter insurance; afterwards an arrangement was made between the Anchor Company and Mr. Wright for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money and of the delivering up of the four policies to be cancelled, which was done. One of the directors kept on foot the policy declared upon. The declaration averred that, at the time of the making of the said policy, and thence until the death of the said Duke, the Anchor Life Assurance Company was interested in the life of the said Duke. Plea—That the said Anchor Life Assurance Company was not interested in the life of the said Duke in manner and form, &c.:

Held, That the contract called Life Assurance is not a contract of indemnity as stated by Lord Ellenborough in his judgment in *Godsall v. Boldero*, but is a mere contract

to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life. That such a contract at common law would have been legal, whether the plaintiff had an interest in the life of the Duke or not; that, under Statute 14 Geo. III., chap. 48, sec. 1, which recites, "that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming," and for the remedy thereof enacts that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatever, wherein the person or persons for whose use or benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering, and that every assurance made contrary to the true intent and meaning thereof, shall be null and void; any interest, however small, would be sufficient to support the contract.

And that the 3rd section of the same Statute, which enacts "that in all cases where the insured has an interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer, or insurers, than the amount or value of the interest of the insured in such life or lives, event or events," limits the amount to be received to the value of the interest which the insured hath in the life at the time of the policy being effected, and does not mean that the insured shall recover no more than the value of the interest which he hath at the time of the recovery; and therefore, that it was sufficient for the plaintiff to prove that the Anchor Company was, at the time of effecting the policy, interested in the life of the Duke to the amount of the sum insured.

Q.B. MOORE AND ANOTHER *v.* WOOLSEY. *Nov. 21.*

Life Policy—Condition—Dying by his own hand.

By the conditions, a life policy was to be void as against the representatives of the insured dying by his own hands, but to remain in force as to any interest under assignment for valuable consideration, or by virtue of any other legal or equitable lien as a security for money, the directors being satisfied as to the existence of such legal or equitable interest.

A., on his marriage gave a bond of £5000 to be settled on his wife; in substitution, life policies were effected and lodged with the trustees of his wife, and it was intended that they should be legally assigned to them for her benefit; but before this was done the insured died by his own hands:—

Held, that the policy was assigned to the trustees for valuable consideration, viz., the bond executed before marriage; and that it was only necessary to lay such proof of this before the directors as would satisfy reasonable men, to entitle the trustees to recover the sum assured:—

Held, also, that the condition did not vitiate the policy, on the ground of public policy, as tending to encourage suicide.

Lord CAMPBELL, C. J., in delivering judgment, said: "It is argued that the whole policy is vitiated on the ground of its being an encouragement to commit suicide. If a man insures his life for a year, and commits suicide within the year, his executors cannot recover on the policy. So the owner of a ship, who insures for a year, cannot recover on the policy, if, within the year, he causes her to sink. The stipulation that in either case, upon such an event, the policy should give a right of action, would be void. But, where a man insures his own life, we can discover no illegality in the stipulation; and if the policy should afterwards be assigned *bonâ fide* on a valuable consideration, or a lien upon it should afterwards be acquired *bonâ fide* for a valuable consideration, it might be enforced, whatever may be the means by which the death is occasioned. No authority has been cited in support of the position that such a condition is illegal; and the frequent introduction of it into life policies indicates a general opinion that it is not. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the inoffensive and useful transactions of mankind. That the condition under consideration may promote evil by leading to suicide, is a very remote and improbable contingency; and it may frequently be very beneficial by rendering a life policy a safe security in the hands of an assignee."

C.C.R. REGINA *v.* MORGAN AND ANOTHER. *Dec.*

Larceny—Fraud—False Sale.

A and B by false representations induced C to become the purchaser of a dress for 25s. They then took one guinea out of her hand, she being taken by surprise and neither consenting nor resisting, and left with her a dress of considerably inferior value, but refused to give her one which they had promised to give if she would buy that. Upon a case reserved the question put was, whether the facts warranted a verdict of guilty:—

Held, that they did, the court being bound to assume that it was part of the fraud to obtain the property by a false sale.

JERVIS, C. J., (after stating the facts as above) said: "We are of opinion that the facts warrant the finding. We are bound to assume that the Jury were properly directed by the chairman, and that they found that it was part of the scheme that the property was to be obtained by a false sale. If so, there was no contract, but a fraud whereby the felony was committed. (*a*)

REGINA *v.* THOMAS.

(Staffordshire Assizes.—Before Mr. Justice Crompton.)

Embezzlement—Master and Servant.

A "charter master" who received a certain sum for every ton of coal he raised, was also allowed to sell coal for his employer, the owner of the colliery. It was the prisoner's duty to pay over the gross money received on such sales, and he was subsequently allowed a poundage thereon. The prisoner having converted money, received for coal, to his own use, and neglected to account for it:—

Held, that although the sale of the coal was not compulsory he was servant to the colliery, so as to support an indictment for Embezzlement.

The evidence showed that the prisoner had sold coals to three different persons, and received the amounts charged in the Indictment; that he had given receipts for three sums, using for that purpose the usual printed forms of the prosecutor's office; and that he had not accounted for these sums.

CROMPTON, J., said that *Barker's case* (1 D. & R. 19 N. P.) was not unlike the present, where it was held, that a person employed as a journeyman in the trade of a miller, and not to collect moneys, but was in the habit of receiving money on his master's account, might be guilty of embezzlement. "But without it, I do not, on consideration, feel much difficulty. This is like *Spencer's* case (R. & R. 299) where the prisoner was employed to go errands when he liked, and it was held, that he might be a servant for the time." "I am of opinion that the prisoner received the money as servant to the prosecutor, and that it was his duty to pay it over immediately as he received it."

CHANCERY.

V.C.W. MORGAN *v.* HATCHELL. *Dec. 9.*

Appointment of guardian under Statute 12 Car. 2, c. 24—Attestation—Guardian attesting witness.

An appointment of a guardian under the Statute 12, Car. 2, c. 24, which is required to be executed in the presence of two or more credible witnesses:—

[(a) The Reporter's note to this case adds, "There are many cases in which persons have been convicted of Larceny, where possession of the property has been fraudulently obtained by means of a pretended sale."—R. v. *Campbell*, Ry. and Moo. C. C. 179; R. v. *Sharpless*, 1 Leach 92.—*Ed. L. J.*]

Held, to be well executed, the guardian being one of the attesting witnesses.

V.C.S. HOUGHTON *v.* LEES. *Dec.* 9.

Specific performance—Compromise—Consideration.

A., by his will made a distribution of his property amongst his children, which some of them considered would lead to litigation, as he was only tenant for life of part, with remainder to B, his son; and during A's lifetime, with his approbation, an agreement was entered into between B and the other children, by which B agreed to convey the property of which he was tenant for life to the devisees named in the will. It appeared that the consideration to B was very small in amount.

Held, that this was an agreement of which the Court would decree specific performance, and that the smallness of the consideration did not vitiate the agreement, it being a compromise between members of a family.

L.J. SOUTH WALES RAILWAY COMPANY *v.* WYTHES. *Dec.* 12.

Contract for railway works—Specific performance—Part performance.

The defendant contracted to make a railway according to a specification to be prepared by the Engineer of the railway company for the time being, the details of the arrangement in case of difference to be determined by a referee; and to execute a bond to secure the performance of the contract. Specific performance refused of the substance of the agreement the entire contract not being such as would be decreed to be performed by a Court of Equity; and the like of the execution of the bond as being merely incidental to it. A Demurrer to the whole bill allowed.

V.C.W. TEE *v.* FERRIS. *Dec.* 13

Pleading—Inquiry.

An admission by a defendant, upon his answer, of an allegation in the bill that such defendant claims to be heir-at-law, is not such evidence of his heirship as to prevent the necessity of an enquiry, the admission not being binding upon co-defendants.

V.C.K. IN RE BAILEY'S SETTLEMENT. *Dec.* 14.

Scandal—Motion after order.

Where there is scandal in affidavits filed on the hearing of a petition, and a motion is made (after an order on such petition) to expunge such affidavits as scandalous, the Court will not grant the motion, but on consideration of the scandal refuses it without costs.

V.C.K. MARTIN *v.* FOSTER. *Dec.* 15.

Settlement on married woman.

A, being entitled to a share of a fund, marries without application to the Court, but with the consent of the Trustees and of her mother, and on becoming entitled to her share, petitions for payment out, proposing a settlement of less than half, the residue to be re-paid to the husband. Upon a private interview with the lady, the whole stock ordered to be settled, and a small sum of cash only paid to the husband.

V.C.S. ANDREWS *v.* MORGAN. *Dec.* 21.

Costs.

The Court does not deal with the question of costs where it does not adjudicate upon the subject matter of the suit; therefore, where, upon a motion for an injunction to restrain a partner from dealing with the partnership assets, it was referred to arbitrators to take the accounts, (that being the only question at issue) and the result was that a certain sum was due to the plaintiff.

Held, that the Court, knowing nothing of the merits of the case, would make no order against the defendant in respect of the costs of the arbitration and award.

V.C.S. ALEXANDER *v.* HAMMOND. *Dec.* 21.

Agreement—Lien—Legal and equitable right—Want of equity.

By an agreement between A and B, A agreed to exert himself to prove that B was entitled to certain property in India, for which A was to have half the value of what might be recovered. A succeeded in recovering a certain amount, which was sent home to the correspondents, in London, of a firm in Calcutta, who acted for A in the matter. Upon demurrer to a bill to declare A's right to half the amount under the agreement,

Held, that A had no lien on the fund, and that his right, if any, was purely legal, and not equitable.

V.C.W. CRACE *v.* CRACE. *Dec.* 21.

Practice—Married woman—Next friend.

A copying clerk to a Solicitor, at a salary of £1 a week, and living in lodgings, continued on the record as next friend to a married woman; the defendant, who sought to remove him on the ground of his inability to answer the costs of the suit, having taken no steps for more than six months after he became acquainted with his position, and it appearing that the costs ordered to be paid by such next friend had been paid, though not without delay.

L.J. HERTZ *v.* THE UNION BANK OF LONDON. *Dec.* 21.

Ancient lights—Injunction.

The Court of Chancery will not, unless in a very clear case, interfere by a perpetual injunction to restrain the erection of buildings alleged to obstruct ancient lights, without the previous decision of a Jury.

CORRESPONDENCE.

To the Editor of the "Law Journal."

SIR,

Will you be kind enough to propose the following questions in the next number of your Journal. If you have time to give answers to them in the same journal, so much the better; but if not, perhaps some of your correspondents will be so obliging as to give them an answer.

(*a*) DIVISION COURT.—*Splitting of Suits—Estoppel—Costs.*

A. B. sues C. D. for conversion of a stove, value £5. The evidence is that the stove, without the trimmings, is worth £2 10s. C. D. objects that the particulars of the plaintiff's demand do not include the trimmings. The Judge sustains the objection, and gives judgment for the value of the stove, £1 10s.

A. B. then sues C. D. for conversion of the trimmings, value £2 10s.

Can C. D. plead the first suit in estoppel?

If not, can the Judge give the defendant the costs of the second suit, though he gives judgment in favour of the plaintiff for the £2 10s. secondly claimed?

(*b*) E. F. sues G. H. on his note of hand; G. H. at the same time owing E. F. £5 on a book debt.

E. F. subsequently sues G. H. for the book debt. Can G. H. plead the suit on the note in estoppel?

The amounts in the above cases do not, you observe, raise the question of jurisdiction.

(c) Division Court—*Attachment—Judgment—Execution—Priority.*

A. B. attaches the goods of C. D., and proceeds by summons at the next ensuing Court, and obtains judgment.

E. F. also, at the same Court, sues C. D., and obtains judgment, and issues execution before A. B.

Can the execution of E. F. be levied on the goods attached by A. B., to the prejudice of his attachment. Does not the priority of A. B. ensure back to his attachment? Supposing the Judge had given A. B. execution in 20 days, and E. F. in 15 days, would E. F. take the attached goods in execution to the prejudice of A. B.'s prior attachment?

(d) Division Court—*Chose in action—Assignment—Evidence.*

A. B. assigns his stock-in-trade, securities for money and book debts, to C. D., for the benefit of himself and other the creditors of A. B.

C. D. desires to sue on the book debts. Can he, in his own name with the addition of "assignee of A. B.," sue for the book debts?

Would A. B. be a competent witness for C. D?

I remain, Sir,
Your obedient servant,
P. F. P.

15th February, 1855.

[(a) There is some difficulty in the question; the 26th section of the Act seems to contemplate actions for *debt* more particularly, though its principle would doubtless comprehend also actions sounding in *damages*. If the conversion of the stove and trimmings together was one act (constituting the party's cause of action) we think the better opinion is that C. D. might plead the recovery in the first action in bar; if not, surely it might be contended that A. B. could bring separate actions for every pot and pan!

Supposing the second action to lie, it is a case plainly calling for the exercise of the Judge's discretion in *disallowing* costs to the plaintiff.

(b) He cannot, but when both suits are matured to Judgment, one can be set off against the other, under the 51st section of the Act.

(c) This case will probably be noticed in the next number, if in the meantime no answer is sent to us.

(d) A book debt is not assignable at law so as to give a right of action in the name of the assignee, and there is nothing in the Division Court Law to warrant it; on the contrary, the 90th section of the Act plainly recognizes the principle that the creditor's name must be used, and makes provision to meet it. See also the 19th Rule.

If, however, the defendant does not object, the Judge is not called upon to reject the claim.—*Ed. L. J.*]

NOTICES OF NEW LAW BOOKS.

***The Rules of the Courts of Queen's Bench and Common Pleas, the Municipal Council Rules, the County Courts' Equity Extension and the New Division Court Rules; together with a complete compilation of The Criminal Law of this Province*—By W. G. Draper, M.A., Barrister-at-Law. Toronto: Maclear & Company, 1855.**

The very valuable compilation, by the Hon. J. Hillyard Cameron, some years ago, of The Rules of the Court of Queen's Bench, together with the addition of such of the Statutes on Criminal and General Law as were most generally referred to, had gradually, and necessarily so, become so much superseded by the fusion of new rules and statutes into our system of Jurisprudence in this Province, (added to its having for some time been out of print), that such a work as that of Mr. Draper was greatly needed. The one before us most ably supplies the existing want. Though based in principle on that of Mr. Cameron, it has the advantage of much additional matter, especially the Local Courts and Municipal Council Rules, whilst those of the Superior Courts are now presented to the Practitioner in alphabetical order under their respective titles, at the foot of each being placed the date of its Term.

The same advantage obtains in the compilation of Criminal Law,—an admirable alphabetical arrangement of our several Provincial Statutes, or such portions of them as relate to that branch of the Law. This renders the work peculiarly useful to the Magistracy of this Province, and we cordially recommend that body—as a necessary means of assisting them in the due administration of their office—as well as members of the Profession, to avail themselves of the labour and talent which Mr. Draper has exercised in the volume. For Nisi Prius reference, we regard it as indispensable. The price is 20s., and the volume of a portable size.

***The Municipal Manual for Upper Canada*, Fifth Edition. Toronto: Thompson & Co., 52, King-street East.—Price 10s.**

Were any proof requisite for the necessity which exists for such a work as this, it might be found in the number of cases which so frequently arise in our Superior and Local Courts on questions of Municipal Law. The cause of this no doubt exists in the difficulty which occurs from the frequent amendment of those Laws, in each successive Session, and the awkward mode of amendment by Schedules adopted by our Legislature, which renders to most of our County Councils, the Law (which in any event requires much study) as a sealed book.—The present work, however, places each section of the several Municipal Laws in its proper place as it should stand, if complete in one Act, and obviously saves great trouble to the reader; and in this respect is a decided improvement on the editions of preceding years by the late Mr. Scobie.

There are also contained Acts and sections of Acts useful for reference, but we would suggest that those having mere local effect and interest, might with benefit to the Public be omitted, and thereby afford room for the substitution of the School Acts, in the same volume. In addition, there is a carefully prepared Analytical Index, which greatly facilitates the reference to the different Acts, and we doubt not that the enterprising Publishers will have numerous demands for the work from Practitioners, Magistrates, Township Councillors, and others interested in Municipal affairs.

***An Analytical Index to the Upper Canada Division Courts' Acts, and to the Rules and Forms in use in the several Division Courts in Upper Canada, as approved by the Judges of the Superior Court of Common Law, by His Honor* James Robert Gowan, *Judge of the County of Simcoe.* "Leader" and "Patriot" office, Toronto.**

Since the Extension Act of 1853, a General Index—referring to the Acts of 1850 and 1853, as well as to the Rules and Forms—for the whole body of Law, pertaining to the Division

Courts, has been greatly needed, and we are glad to notice the timely appearance of this valuable and truly useful work. Judge Gowan has here rendered signal service to all connected with the Local Courts, or interested in their efficient working, by placing within their reach the means of easy reference to the Statutes, Rules and Forms, now in force. Practitioners and Officers, as well as Suitors, will find very great assistance from the "Analytical Index." For sale by Maclear & Co., Toronto; and at the *Colonist* office, King-street, Toronto. Price 1s. 10½d.

Professional Ethics—by GEORGE SHARSWOOD. Philadelphia: T. & W. Johnson, Law Booksellers, 195, Chestnut-street. 1855.

This work, being "a Compend of Lectures on the Aims and Duties of the Profession of the Law, delivered before the Law Class of the University of Pennsylvania," is from the pen of The Honorable Judge Sharswood, Professor of the Institutes of Law, in that University, and has issued from the press of the Messrs. Johnson, to whom we beg to acknowledge its receipt.

Mr. Sharswood is already known to the Profession in this Province, as well as the United States, by the many works which he has so ably edited. This,—though from its size (pp. 120) the subject, in itself of great magnitude, is necessarily cursorily treated,—is a work which, taking as its basis the necessity of high moral principle in members of the Profession, commands much respect and attention. Want of space prevents the extracts in which we should otherwise wish to indulge; one however, will shew the sound views advanced by Mr. Sharswood:

Of the *morale* of the Profession, the following excellent remarks are made, (p. 94):

"Let it be remembered and treasured in the heart of every student, that no man can ever be a truly great lawyer, who is not, in every sense of the word, a good man. A lawyer, without the most sterling integrity, may shine for a while with meteoric splendor; but, depend upon it, his light will soon go out in blackness of darkness. It is not in every man's power to rise to eminence, by distinguished abilities. It is in every man's power, with few exceptions, to attain respectability, competence, and usefulness. The temptations, which beset a young man in the outset of his Professional life, especially if he is in absolute dependence upon business for his subsistence, are very great. The strictest principles of integrity and honor, are his only safety. Let him begin by swerving from truth or fairness, in small particulars, he will find his character gone—whispered away, before he knows it. Such an one may not indeed be irrecoverably lost; but it will be years, before he will be able to regain a firm foothold. There is no profession, in which moral character is so soon fixed as in that of the law; there is none, in which it is subjected to severer scrutiny by the public. It is well, that it is so. The things we hold dearest on earth,—our fortunes, reputations, domestic peace, the future of those dearest to us, nay, our liberty and life itself, we confide to the integrity of our legal counsellors and advocates. Their character must be not only without a stain, but without suspicion. From the very commencement of your career, then, cultivate, above all things, truth, simplicity, and candor; they are the cardinal virtues of a lawyer. Always seek to have a clear understanding of your subject; be sure it is honest and right, and then march directly to it. The covert, indirect, and insidious way of doing anything, is always the wrong way. It gradually hardens the moral faculties, renders obtuse the perception of right and wrong in human actions, weighs everything in the balances of worldly policy, and ends most generally in the practical adoption of the vile maxim, 'that the end sanctifies the means.' If it be true, as he has said, who, more than any mere man, before or since his day, understood the depths of human character, that one even may,

'By telling of it,
Make such a sinner of his memory;
To credit his own lie:'

be careful never to speak or act without regard to the *morale* of your words or actions. The habit may and will grow to be a second nature."

In the appendix is given a chapter on the Course of Legal Study. This embraces a much larger field than that prescribed by the Law Society of Upper Canada in their new Rules of Trinity Term, 1854, for the examination of students, whether "for Honors" or otherwise, on application for call to the Bar. Nevertheless, the suggestions made in this chapter may well be adopted with great benefit to the Student.

We recommend the book to the careful perusal of every young Barrister; and cannot but think that those, also, who have Students in the Law under their tuition would discharge some portion of the responsibility which is assumed with the Student, were they to present a copy to each one under their professional care, taking additional precaution to ascertain that the work is duly digested.

APPOINTMENTS TO OFFICE, &c.

COUNTY JUDGE.

JOHN GUSTAVUS STEVENSON, of Osgoode Hall, Esq., Barrister-at-Law, to be Judge of the County and Surrogate Courts of the County of HALDIMAND, in the room of Bernard Foley, Esquire, deceased.—[Gazetted 27th January, 1855.]

CLERK OF THE PEACE.

JAMES WALTER KERR GRAHAM, of Cayuga, Esq., to be Clerk of the Peace, County of HALDIMAND, in the room of John G. Stevenson, Esquire, resigned.—[Gazetted 27th January, 1855.]

NOTARIES PUBLIC IN U. C.

THOMAS FORTYE, of Peterboro', Esquire, to be a Notary Public in U. C. [Gazetted 27th January, 1855.]

ROBERT GEORGE BARRETT, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in U. C.—[Gazetted 3rd February, 1855.]

JOHN COOKMAN, of Allansville, Township of Peel, Gentleman, and WILLIAM DAVIS ARDAGH, of Toronto, Esquire, Barrister-at-Law, to be Notaries Public in U. C.—[Gazetted 10th February, 1855.]

CORONERS.

CHARLES GRAHAM SACHE, of Perth, and JAMES ATCHISON, of South Elmsley, M.D., Esquires, to be Associate Coroners for the United Counties of Lanark and Renfrew.—[Gazetted 10th February, 1855.]

COMMISSIONER IN U. C.

SAMUEL SOLMES, of North Port, Esquire, to be a Commissioner for the protection of Indian Lands in Upper Canada, from trespass and injury.—[Gazetted 10th February, 1855.]

LAW SOCIETY OF UPPER CANADA,

Osgoode Hall.

The following Gentlemen were called to the degree of BARRISTER-AT-LAW, in the Hilary Term, 18th Vic.:—Francis Evans Cornish and Henry Macpherson, on 5th February; Samuel Bickerton Harman, William Davis Ardagh, and Samuel Jonathan Lane, on 13th February.

On Tuesday, 6th February, the following gentlemen were admitted as Law Students:—

In the UNIVERSITY CLASS.—Messieurs Caleb Elias English, B.A., and Thomas Wardlow Taylor, B.A.; in the *Senior Class*, Mr. Thomas Hodgins; in the *Junior Class*, Messieurs Abraham Diamond, Valentine Phelan, Samuel Lount, Joseph Henry Nelles, John Wedgwood Bowlby, Featherston Osler, William Irvine Stanton, John Wilson, and Oscar Hodges.

SPRING ASSIZE LIST FOR 1855.

Eastern Circuit.

The Hon. Mr. Justice RICHARDS.
Perth—Monday, 16th April.
Brockville—Tuesday, 24th April.
City of Ottawa—Monday, 30th April.
L'Orignal—Wednesday, 9th May.
Cornwall—Monday, 14th May.

Midland Circuit.

The Hon. Mr. Justice BURNS.
Whitby—Wednesday, 21st March.
Cobourg—Monday, 26th March.
Peterboro—Monday, 9th April.
Belleville—Friday, 13th April.
Picton—Wednesday, 25th April.
Kingston—Monday, 30th April.

[In consequence of the absence of the Chief Justice in England, his circuit is taken by the other Judges as follows:]

Home Circuit.

The Hon. Mr. Justice DRAPER.
Niagara—Monday, 12th March.
The Hon. Mr. Justice McLEAN.
Cayuga—Friday, 10th April.
The Hon. Mr. Justice RICHARDS.
Sydenham—Wednesday, 14th March.
The Hon. Mr. MACAULAY, C.J.C.P.
Barrie—Tuesday, 3rd April.
The Hon. Mr. Justice BURNS.
Milton—Thursday, 15th March.
Hamilton—Tuesday, 15th May.

Oxford Circuit.

The Hon. Mr. Justice DRAPER.
Simcoe—Wednesday, 21st March.
Brantford—Wednesday, 28th March.
Stratford—Thursday, 5th April.
Woodstock—Monday, 9th April.
Guelph—Thursday, 24th May.
Berlin—Tuesday, 24th May.

Western Circuit.

The Hon. Mr. Justice McLEAN.
St. Thomas—Tuesday, 17th April.
Goderich—Wednesday, 25th April.
London—Monday, 30th April.
Chatham—Monday, 14th May.
Sandwich—Tuesday, 22nd May.
Sarnia—Tuesday, 29th May.
The Hon. Mr. MACAULAY, C.J.C.P.
City of Toronto, Monday, 7th May.