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DIARY FOR MAY.

1. Mon ... *St. Philip and St. James.*
7. SUN ... *3rd Sunday after Easter.*
14. SUN ... *4th Sunday after Easter.*
15. Mon ... EASTER TERM begins.
17. Wed ... Last day for service for County Court.
19. Frid.... Paper Day Q. B. New Trial Day C. P.
20. Sat. ... Paper Day C. P. New Trial Day Q. B.
21. SUN ... *Rogation.*
2. Mon ... Paper Day Q. B. New Trial Day C. P.
23. Tues ... Paper Day C. P. New Trial Day Q. B.
24. Wed ... Paper Day Q. B. New Trial Day C. P. Queen's [Birthday.
25. Thurs. Paper Day C. P. *Ascension.*
26. Frid.... New Trial Day Q. B.
27. Sat .... Easter Term ends. Declare for County Court.
28. SUN ... *1st Sunday after Ascension.*
31. Wed ... Last day for Court of Revision fin. to rev. A. Rl. [and for County Court to revise Tp. Roll.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

MAY, 1865.

COLONIAL BISHOPS.

We had occasion in a former volume* to discuss the position of the United Church of England and Ireland in Canada, and this more particularly with reference to Provincial Synods and the appointment of Metropolitan or Diocesan Bishops. We published also the case of *Long* v. *The Bishop of Capetown*† which has an important bearing on, and was the origin of, the discussion on this subject.

The recent decision of the Judicial Committee of the Privy Council, *In re the Bishop of Natal*, has brought up kindred and even more important questions, and has caused no small stir among the members of the Church of England in the colonies; and not, indeed, without much reason.

The case of *Long* v. *The Bishop of Cape Town*, as presented for judicial investigation and determination, related to certain temporalities: the case of *The Bishop of Natal* to the right of a so-called Metropolitan to depose one of his suffragan bishops. But both cases discuss questions of great moment as to the position, jurisdiction and authority of colonial bishops.

Our limited space prevents our giving a report of this latter case, but we take from one of the leading English law periodicals a synopsis of the facts of the case.

By letters patent under the great seal, and dated in 1853, Dr. Gray was appointed Bishop of Cape Town, and Metropolitan of the Cape of Good Hope, &c., with metropolitan jurisdiction over the Bishops of Grahamstown and Natal. And it was by the same letters patent ordained that if any proceeding should be instituted against either of these two Bishops, such proceeding should originate and be carried on before the Bishop of Capetown. An appeal was given to the Archbishop of Cape Town from any decision of the Metropolitan. Fifteen days previously the appellant, Dr. Colenso, the Bishop of Natal, had been appointed to his see by letters patent declaring that he should be subject and subordinate to the see of Cape Town. And it was further ordered that the appellant should within six months take an oath of due obedience to the Bishop of Cape Town as Metropolitan. Under these letters patent the appellant took an oath professing obedience. The letters patent were not granted in pursuance of any order of Her Majesty in Council, or by virtue of any statute, although at the time they were issued the district of Natal had been erected into a distinct and separate government, with a legislative council empowered to make laws. There was also within the Cape of Good Hope a parliament with authority to make laws. In 1863 Dr. Gray, claiming to exercise jurisdiction as Metropolitan, deposed Dr. Colenso from his office as Bishop, upon certain charges of heresy and false doctrine; whereupon the latter appealed to the Queen in Council.

After elaborate arguments on both sides, the following points were established by the learned members of the Judicial Committee—

First, that the letters appointing Dr. Gray Metropolitan, and purporting to create a Metropolitan see, were invalid, inasmuch as they were issued after the establishment of an independent Legislature in the colonies referred to; or in the words of the judgment, "That after the establishment of an independent Legislature, &c,, there was no power in the Crown by virtue of its prerogative to establish a Metropolitan see or province, or to create ecclesiastical corporations whose status

* 9 U. C. L. J., 253. † *Ib.* Page 267.

rights and authority the colony could be required to recognise."

Secondly, that, assuming the letters patent to have been sufficient to confer upon Dr. Gray the *ecclesiastical office* of Metropolitan, the clauses contained in them which gave him a *coercive legal jurisdiction* were void.

Thirdly, with reference to the oath taken by Dr. Colenso, by which, it was contended, he *submitted himself, by way of contract*, to the jurisdiction of his Metropolitan, that even if the parties intended to enter into an agreement to create such a jurisdiction, of which, however, there was no evidence, it was not legally competent for the appellant to give, or for Dr. Gray to accept, or exercise any such jurisdiction.

Fourthly, that the letters patent had no power to confer upon the Archbishop of Canterbury the appellate jurisdiction which they purported to create; and that the decision of Dr. Gray, although he had no jurisdiction, might be set aside in the first instance by appeal to Her Majesty in Council.

The apparent result of the case is that, with the exception of the Indian Bishops, who were appointed by letters patent under the authority of the Imperial Legislature, and the Bishop of Jamaica, whose appointment by letters patent was confirmed by an act of the Colonial Legislature, the Colonial Bishops are exempt from ecclesiastical jurisdiction and legal censure, and even that the clergy who have submitted themselves to the authority of such Bishops are free to disobey them at their pleasure.

It is argued, however, by some legal writers in England, that these deductions are incorrect, and that there is still a means of bringing a contumacious or heretical bishop before a proper and a legally organised ecclesiastical tribunal, namely, a special commission to be obtained upon an application to the Crown as supreme ordinary and visitor of the Church.

But however this may be, it is eminently important that those most interested should take some immediate steps to remedy the evil that is said to exist. Good sometimes comes out of evil, and the effect may be to place the ecclesiastical and episcopal authority of the Church of England in the colonies on a more certain and useful basis.

QUIETING TITLES.

A Bill was introduced some time since by the present Vice-Chancellor Mowat, when a member of the present Government, under the title of "An Act for Quieting Titles to Real Estate in Upper Canada."

This bill did not, however, become law, and remained in abeyance until again introduced last session by the Attorney-General. It again had to lie over, with many other bills, but will probably again be brought up next session.

The bill, as mentioned by its original introducer, is "an adaptation of laws in force in other countries to the circumstances and requirements of this section of our own Province." The Encumbered Estates Act of Ireland was, we believe, the first step in the direction of obtaining an indefeasible title to real estate. This act was found to work well, and an act with a somewhat similar object in view was, on the 29th February, 1862, entered upon the Imperial statute book (25 & 26 Vic. cap. 67).

This statute is intituled, "An Act for obtaining a Declaration of Title." From this, the proposed enactment for Upper Canada is principally, in fact almost entirely taken. It bears, however, evident marks of careful study, and a thorough knowledge of the evils intended to be obviated. Indeed nothing less could be expected from the learned gentleman who first took up the matter in this country.

If the bill becomes law, it must rest with the Judges of the Court of Chancery so to work out and interpret it that it may become *practically* useful for carrying out its objects, and not be a pretty thing on paper, a beautiful but impracticable theory. And whilst speaking on this head, it may not be out of place to say that the provisions of the act will be none the less beneficial from the fact that its compiler now occupies a position where his knowledge of, and interest in the subject will be eminently serviceable.

In February last, Mr. Mowat addressed a letter to the Attorney-General on the subject of the bill, which has found its way into print, and a copy of which has been sent us. It may be interesting to many to hear the views of Mr. Mowat with reference to the evils which the bill was designed to meet, and of the method by which the bill proposes to remove them.

The following is a copy of the letter referred to:

"I am very glad to know that the Bill for Quieting Titles is to be carried through Parliament this Session as a Government measure. As I have taken great interest in the subject to which this Bill relates, and have given to it considerable attention, it has occurred to me that I may perhaps facilitate your work a little by stating my view of the evils which the Bill was designed to meet, and of the method by which the Bill proposes to remove them.

When I first introduced the Bill you were good enough to express your approval of its principle and object, and to go over its clauses with me very carefully and to suggest to some of them amendments which I had great pleasure in adopting.

The Bill as it now stands has thus had the benefit of a careful revision by yourself. For the original preparation of the Bill I frankly confess that I am entitled to no particular credit. My professional practice had called my attention to the great and growing evil of the insecurity of our Titles, and my reading had brought to my knowledge the remedy first adopted in Ireland, afterwards acted upon in Australia, New Zealand, and elsewhere, and lately applied to England itself. What I have done is the draftsman's work of adapting laws already in force in other countries to the circumstances and requirements of this section of our own Province.

The leading objects of the Bill are to give greater certainty to Titles; to facilitate the proof of them; to expedite transfers; and generally to render dealing with real property more simple and less expensive. Everybody is interested in these important objects, for everybody either owns property now, or hopes to do so some day.

The insecurity of Titles, which it is the purpose of the Bill to remove, has often been the occasion of the greatest possible hardship and suffering to individuals and families; and facility of transferring real estate, which it is the intention of the Bill to promote, is of the greatest importance to a young country, like Canada.

The method by which the Bill proposes to accomplish its design is by rendering Titles indefeasible whenever they have been submitted with this special object to the ordeal of a judicial investigation and their validity has in this way been ascertained. This investigation is not to be compulsory on owners, but the proposal is that an owner shall have the right to have the investigation made if he chooses, and though there may be no adverse claimant. On his establishing his Title, after due inquiry and every precaution by the Court against error or fraud, it is proposed that the owner shall receive a Certificate of Title; and that such Certificate shall operate as a new starting point in his title, and shall be conclusive at Law and in Equity against all the world that at the time mentioned in the Certificate the land belonged to the person it names. Thenceforward when the owner sells or mortgages, an intending purchaser or mortgagee will only have to search for conveyances or incumbrances subsequent to the Certificate—the work of perhaps five minutes or less.

As the Law stands now an owner may have an undisputed and indisputable Title; it may be easy for him to-day to prove every deed and every fact on which his Title depends; but a dozen years hence the case may be quiet different. The proof may then be difficult, expensive and perhaps impossible; witnesses whose testimony he needs may be dead; or if alive, it may be impossible to find them; or if found, they may be where the process of our Courts cannot reach them, and where therefore their evidence cannot be compelled. Or if these difficulties do not arise, others may. In a dozen years witnesses may forget important facts; or some of the papers on which the Title depends, may be mislaid or lost, and there may be the greatest possible trouble in tracing them, or proving by satisfactory evidence their loss and their contents. The Bill proposes to give to every owner the right, if he chooses, of producing his proofs now; and if they are clear and satisfactory, of being relieved forever afterwards from the necessity of producing them.

When an owner has occasion to prove his Title at law, this only gives him the opportunity of showing the legal title. An action at law seldom touches the question of the equitable Title, or of equitable interests in the property; and whatever such an action decides is binding on the parties to the suit only, and affects no one else. The evidence must be forthcoming, and may have to be repeated in every suit with everyone who at any future time sets up a claim to the property.

Then again many of the flaws on which a Title is defeated are such as, if known in time, could be easily and cheaply remedied; but are beyond remedy when the property becomes valuable enough to tempt the cupidity of those who are entitled to take advantage of the defects that are discovered; or the original party to the transaction may then be dead and his heirs may be minors or needy, and for these or other reasons unable or unwilling to correct or overlook the mistakes or omissions which render the title defective.

All sorts of questions have to be considered in looking into a title prior to making a purchase or

accepting a mortgage. Are the deeds and wills through which the title is traced, genuine instruments? or have any of them been forged or tampered with? Were they all duly executed? Have all the forms required by the Statute been observed in the registration of them? Were all the requirements of the Acts affecting married women complied with? Did every testator possess the requisite mental capacity at the time of his will? Was it read over to him? Did the witnesses subscribe their names in the presence of one another? Even in regard to these ordinary questions that occur on almost every title, examples of misinformation and misfortune have not been wanting.

But sometimes much more difficult questions than these have to be determined, as to the construction of wills. Occasionally difficulties of this class entirely escape attention when a Title is investigated, and at other times a wrong conclusion is come to in reference to them.

Then questions of identity and questions relating to possible claims for dower have sometimes been overlooked by former purchasers, and involve considerable perplexity in subsequent investigations.

Again, persons dealt with as legitimate, sometimes turn out not to have been legitimate; or a person who has conveyed as eldest son and heir under the old law, is subsequently ascertained not to have been eldest son and heir. So persons supposed to be all the children and co-heirs under the new law, may only be some of the children; persons may not be dead, who were supposed to be dead; or persons may not have been born at the dates supposed, and on which important rights depend; persons may have been aliens who were supposed to be British subjects, or may have been British subjects who were supposed to be aliens; and persons may have been absent from the country when the Statutes of Limitations were supposed to have commenced running against them, or may have been in the Province before the Statutes were supposed to have begun their operation in barring their rights.

There are even some causes of difficulty, delay and expense in the case of Canadian Titles, which do not exist to the same extent in England.

Thus we have not hitherto had any complete system for the registration of births, deaths and marriages, and the want of any has created much inconvenience.

Again, our population is less stationary than that of Great Britain, or of the old countries of Europe. A much smaller proportion of our people, than is the case in an old country, remain permanently in one place; and a much larger proportion, after being concerned in the ownership of land, or being witnesses to transactions affecting the ownership, leave the part of the country where they were known at the time, and perhaps leave the country altogether. Native Canadians, or those who have lived for a time here, are to be found in British Columbia, Australia, New Zealand, and probably every state of the American Republic. The difficulty from this cause alone of tracing witnesses or former owners and of ascertaining and of proving the death of heirs and devisees, is sometimes found to be very serious.

Then again, Canadian Titles have, in many instances, to be traced through persons residing in Great Britain; through deeds and wills executed there; and heirs who were born there, and who married and died there.

So from time to time it happens that births, deaths and marriages which have taken place in the various State of the American Republic, or in the other British Provinces on this Continent, or in Australia, or in the countries of Continental Europe, form essential links in a Title. It is obvious that the difficulty of searching for such facts, and then of establishing them, must sometimes be very great, even when the events are comparatively recent; but when they occurred many years ago, the difficulty may amount to an impossibility. Every Title depending on such events, becomes less safe with every year that passes; and as the law stands now, no reasonable caution and no moderate expense can make such a Title entirely secure.

Again, in this country large blocks of farming land often depend on a single Title; or a farm lot is, in the formation of our cities, towns, and villages, divided into building lots; and a flaw in the Title of one of those who owned the property before the division of it, destroys the Title not of one person only or of one family only, but of many persons and many families.

It often happens too that the original Title is in such cases less carefully examined than if there had been no subdivision, and one person was buying all. Parties appear to think that a weak Title acquires strength by the number of persons who hold by it; or everybody assumes that his neighbour has examined the Title and found it correct, and he trusts to this supposed investigation in order to avoid the expense of an independent investigation of his own. Were there an easy method for obtaining an indefeasible Title, no one would think of sub-dividing his land without first obtaining a Certificate of Title.

Our Registry law has, beyond all controversey, been of immense advantage to the country; and

yet in regard to any of the questions I have spoken of, it cannot be said to afford any protection whatever; we need something to supplement its provisions before our Titles can have the reliability which it is very desirable they should possess. The Registry law in fact provides for but one source of danger to a purchaser, namely unknown conveyances affecting the property. It affords little or no aid in ascertaining the validity of conveyances, the proper construction of deeds and wills, or any events affecting Title otherwise than by instruments; or in supplying the future proof of such events. These things may be of greater moment to an intending purchaser, than the possibility of there being some deeds affecting the property, of which, but for the Registry law, he would not have known. In fact our people have been in the habit of trusting too much to the Registry, and have in consequence neglected to preserve their deeds as carefully as prudence required. The Registry law has not hitherto required a memorial of the whole deed to be registered; and the deed may consequently have contained conditions, provisions and trusts, of which the memorial gives no information. All that the Statute requires the memorial to state is, the date of the deed, the names of the parties and of the witnesses, and the description of the property. Even the estate or interest conveyed, need not be mentioned. There may therefore be an interest under a registered deed which does not appear in the memorial; and a man may have an interest, as (for example) mortgagor, remainder man, reversioner, or cestui qui trust, without any intimation of this being given by memorial. Mortgages have often been registered as absolute conveyances. If the new Registry Law which the Government has introduced should prevent this method of registering instruments for the future, the change will have no effect on past transactions.

It is a further serious inconvenience connected with our existing system, that if a purchase is effected or a loan granted after an investigation which satisfies the Solicitor employed that the Title is good, the whole investigation has to be gone over again upon every fresh transaction in reference to the property; and a title that was satisfactory to one lawyer may not be satisfactory to another; as among lawyers there are all degrees of professional skill and knowledge, and all degrees of prudence and caution, as well as of experience. Besides, the ablest and most cautious lawyer may occasionally make a slip or overlook a defect which an inferior man may happen to detect. Sometimes, therefore, one solicitor finds it his duty to reject a Title which another solicitor has examined and passed; and this is the case not only in Canada, but in England also, where conveyancing is a distinct branch of professional practice, and has received a degree of careful attention which it is not possible for general practitioners in Canada to give to it.

The desireableness of such a measure as you have brought in, and of there being no delay in passing it, further appears from the obvious fact that every year our Titles are becoming more and more complicated by sales, mortgages, wills, and settlements, as well as by deaths, marriages, births, and all other events affecting Titles. Every instrument that is executed, every transaction that takes place, every event that affects the ownership, increases the evil; for the more complicated a Title is, the more numerous the links in the chain are, the greater is the chance of a mistake being made in advising upon it, the greater the chance of there being some flaw which it may be difficult or impossible at the time to detect, and the greater the chance of the proofs necessary to establish the Title being lost, or for some reason not obtainable when needed. Even the mere lapse of time, until it is long enough to give a title by possession, but serves to enhance the danger, through the death of witnesses, or their forgetfulness or mis-recollection of facts, and other causes. With time, property is increasing in value; the importance of the Title being unimpeachable is augumenting; and yet with time, until the period of prescription is actually reached, come increased complication and increased danger.

Property more frequently changes hands in cities and towns than in the country; and at present the evils which the Bill is designed to remove, are greater in the former than in the latter. For the same reason they are greater in those parts of the country which have been long settled, than in those in which the lands have but recently been patented. Indeed some conveyancers of great experience have expressed the opinion that, unless a remedy is found, there will not in a few years be many marketable Titles in this part of the country. The evil is certainly increasing and must increase everywhere, until our Titles become as complicated, and the investigation of them becomes as expensive, as in England itself. There the investigation usually occupies months; and it appears from our law books that ten years and even more have sometimes been spent in making out a Title. Occasionally also the expense has nearly equalled the purchase money; one instance is mentioned by Lord St. Leonards in which a vendor gave the property to a purchaser for nothing, on condition

of the purchaser's relieving him from one part of the expenses of the investigation, namely that of furnishing copies of the Title deeds. On the other hand, the earlier in a country's history that some system is adopted for giving certainty to Titles, the easier is the task, and the more effectual are the means which it is practicable to adopt.

The truth is, that under the English system (which is also ours) there are, in a larger number of cases than I would like to designate, no means by which any one, when he buys a piece of property unless he buys from the Crown, can be absolutely certain that he is getting a good Title Even if his grantor was the patentee he may not be perfectly safe, for there may have been a prior patent of the same lot to another person, or the patent to the grantor may have been issued through some fraud or mistake which, on just grounds, may invalidate it. So a sale in Chancery is only enforced if the Title on investigation appears good; but even this investigation, as the law now stands, does not give perfect security, and in England there are in the books instances of a Title obtained under a Chancery sale, being afterwards successfully impeached from some unexpected quarter.

I think you will agree with me that it is specially important with us that means should be adopted to give the greatest practicable certainty and simplicity to our Titles, because emigrants and others are apt to take on trust the validity of the Title of the apparent owner of the property, especially if he appear to be a respectable man, and are unwilling or perhaps unable to bear the expense of obtaining competent professional advice in looking into the Title for them; and it is a cruel hardship that a man of this class, or of any class, after buying a lot, entering into possession, perhaps spending all his means and the labour of himself and his family for years in improving it, should be suddenly deprived of his property and perhaps the labour and acquisitions of a life-time, through some defect in his Title of which he had no suspicion. Yet instances of this kind are unfortunately within the knowledge of almost every lawyer.

It is hardly a less cruel hardship that the law should be in such a condition that a man who lends his money on a mortgage under professional advice, is liable to lose his money afterwards from some latent defect in the title. I have heard of one lender who in this way lost £11,000 in one transaction. Even Building Societies and Loan Companies occasionally meet with like losses, though for various reasons they are more frequently heard of in the case of private lenders.

But the advantage of our Titles being certain, is very far from being confined to the particular cases in which innocent persons might otherwise suffer. The country generally would benefit by its being known that our Titles were perfectly safe and simple, or could be made so. Such a state of the law would tend to encourage both settlers and those who have money to invest, while any doubt or fear about our Titles discourages both.

The saving of time on all subsequent transactions in relation to property after a Certificate is obtained, would not be the least valuable result of the system which the Bill proposes to introduce. Under the existing system the investigation sometimes takes weeks, sometimes months, and occasionally (as I know from personal experience) even years; and the transaction is sometimes broken off in consequence of the delay, or is only carried out when the owner's purpose in selling or mortgaging can no longer be answered. I have known some painful illustrations of these results, and probably no lawyer in large practice but has done so too.

Under the proposed measure, if an owner has a Certificate of Title, he may complete a sale or mortgage in two hours after bargaining for it. The preparation of the deed or mortgage seldom occupies much time; and the search at the Registry office for mortgages or conveyances subsequent to the certificate would be the work of but a few minutes.

The existing system exposes parties in taking or acting on a Title to the danger of the Title turning out to be bad through some unperceived flaw or some unknown fact, to the danger of losing the evidence of a Title that is really good, to delay in the investigation when expedition is an object; and to constantly increasing expense in the investigation and proofs. The Bill proposes by a short, inexpensive and just method to remove these evils. I say a just method, for I do not know that any one will think it unjust or objectionable that latent claims will be shut out by the Certificate. We already by our Registry law recognize the propriety of such a provision, and so great and undeniable are the advantages the country derives from the law, that the tendency is to extend and not to restrict it. Under its operation latent claims are excluded without any of the precautions which the Bill proposes that the Court should observe before a certificate is granted; and I think there can be no reasonable doubt that when a person is in possession of property as apparent owner, when his deeds and papers appear, on a rigid examination of them, to establish clearly that he is owner, when the

Registry office gives no intimation of an adverse claimant, when none can be discovered in answer to public advertisements, it is but just that the law should protect the person who purchases from such an owner, rather than protect the interest of some unknown person who afterwards sets up a claim of which he had taken no steps to give others warning.

The principle of the Act exists in Lower Canada where, I believe, Sheriff's sales give an indefensible Title. I have been informed that a Sheriff's deed is in consequence regarded in Lower Canada as the best, and indeed only entirely safe Title that a man can have.

The machinery which the Bill adopts, is, in principle, that which was adopted in the Statutes regarding Irish Incumbered Estates, and which was found to work so beneficially in Ireland that it was afterwards made to apply there to all lands, instead of being confined as it was in the first instance to Incumbered Estates. It has also, with the cordial approbation of English Law Reformers of all parties, been lately extended to England; though the opposition of the Solicitors has prevented much use being yet made of it there. In this Province the interest of the legal profession is not against the proposed measure. Conveyancing forms a smaller part of of professional business than in England, and the incidental advantages of the proposed measure will more than compensate solicitors for their loss of profit, through the general simplification of Titles. Had it been otherwise, I am bound to express my conviction that Canadian lawyers would have been found too liberal and patriotic to prefer their own interest to an important reform in the laws of their country.

The English law as to the sale of goods in *market overt*, is an illustration of the principle on which our Registry law and the Bill in question alike proceed; and for upwards of three hundred years a like doctrine was allowed to prevail to a considerable extent in regard to lands also, by the operation of fines and recoveries. Lord Coke said that 'the law had ordained the Court of Common Pleas as a *market overt* for assurances of land by fine; so that he who shall be assured of his land not only against the seller but against all strangers, it were good for him to pass it in this *market overt* by fine." But the change of manners gradually destroyed the value of the precautions which originally were a sufficient protection to persons who were no parties to the proceeding, and ultimately rendered necessary the abolition of fines and recoveries. For it will be remembered that there was no investigation of the Title by the Court in such cases; all that was required was, that the person 'who levied the fine' should be in possession of a freehold by right or by wrong, and that no adverse claim should be duly made; and the only notice given was the rehearsal of a fictitious formula couched in technical and obsolete language to an uninterested audience in the Court of Common Pleas at Westminster. The fine bound all persons who were not under disability, even though they were entirely ignorant of the proceedings.

To prevent possible injustice from the working of the new system, the Bill provides all reasonable precautions. The Court, before declaring a Title good, is to make, by itself or a competent officer acting under its own supervision, a thorough examination of the Title deeds and evidences of Title in the possession or power of the party; a thorough search at the Registry office is also required; and copies of all memorials are to be produced that relate to deeds of which the originals cannot be found. An affidavit is required from the owner that he knows of no adverse claim; and a certificate from his solicitor or counsel that he has examined the Title and conferred with the owner, and believes the affidavit true and the Title good. There will thus be the best possible security that nothing is kept back. Notice of the application for a Certificate is further proposed to be given, not only to any one having an adverse claim, but to any one whom the Judge thinks it prudent to notify. In addition to all these precautions, notice is to be published in the *Canada Gazette*, and in any other newspapers the Court sees fit, in order that if there is any claimant whose Title neither appears on the deeds nor in the Registry, nor is known to the claimant or his professional adviser, such claimant may still, if possible, receive an intimation of what is going on, and have an opportunity of establishing his right.

But if any one has a claim which is not shown by the deeds or the Registry, and which the astuteness of the Court and its officers cannot detect, and which even advertisements cannot bring to light, the Bill assumes that the public interests require that such a claim should thenceforward be excluded as against honest purchasers or their representatives.

If, notwithstanding all the precautions referred to, a Certificate of Title should happen to be obtained through fraud or false statements on the part of a petitioner, the Certificate is declared (§47) to be void in such a case as respects the petitioner, and to be valid only in favor of a purchaser for value who had no notice of the fraud or falsehood. The chance of the Act working injustice in any possible case, is thus reduced

to a minimum; while on the other hand it is especially declared that the Act is to be so construed and 'carried out as to facilitate as much as possible the obtaining of indefeasible Titles by the owners of Estates in Lands, through the simplest machinery, at the smallest expense, and in the shortest time, consistent with reasonable prudence in reference to the rights and claims of other persons.'

The machinery provided is so simple that I do not see that, with the exception of the disbursements for publishing and serving notices, the expense of a judicial investigation need be much greater than that of one thorough investigation out of Court on a sale or mortgage of the property. It will certainly be less than two of such investigations; and the judicial investigation will have the immense advantage of being made once for all, instead of having to be repeated at every new sale or mortgage of the property; and will have the further advantage of being certain and conclusive, instead of being forever open to question. I am satisfied that a measure which secures these advantages will prove a great boon to the country."

SELECTIONS.

REPORT OF THE STANDING COMMITTEE OF JURISPRUDENCE AND AMENDMENT OF THE LAW, ON THE LAW OF APPEAL IN CRIMINAL CASES.*

In February of last year a paper was read before this Department by Mr. G. Harry Palmer, in which he brought forward some "suggestions for the amendment of the law of appeal in criminal cases." This paper was referred to the Standing Committee, and the result of their deliberations is embodied in the series of resolutions which they submit to the Department this evening. These resolutions were only arrived at after long and careful consideration and discussion, and it will be as well to state the reasons which have led to their adoption in committee.

In his paper on the subject, Mr. Palmer based his suggestions for a change in the present system on this proposition:—That a criminal "is entitled by the mutual rights and obligations of citizenship, upon showing reasonable cause for being dissatisfied with the decision of one tribunal, to have his defence laid before another." Viewed as an abstract principle of criminal jurisprudence, there can scarcely be any difference of opinion as to the soundness and justice of this proposition: and the committee quite concur in the position taken by Mr. Palmer, that the total denial to our criminals of the right claimed by it is a grave defect in our system of criminal procedure; that the attempt to make the royal prerogative of mercy supply this defect has failed to remedy the evils to which it gives rise; and that these evils are such as demand some legislative attempt at their removal.

The deficiencies in the existing system are sufficiently obvious. After trial and conviction, circumstances may, and, as experience shows, occasionally do arise which cause a reasonable doubt whether the conviction has been a just one; or whether if these circumstances had been exposed to the court at the trial the conviction would have been obtained. For instance, new facts may have come out after the trial, contradicting or discrediting the evidence which procured the conviction. Here there would be just ground for asking that the decision of the convicting tribunal should be replaced by another decision in which these new facts should be produced, and allowed to exercise their due influence upon the minds of the jury or judges as to the fact. At present the only substitute for this application is an appeal "*ad misericordiam regis*," through one of the Secretaries of State* who exercises in an informal and extra-judicial way, the functions of a court for reviewing the facts of a criminal case after conviction.† The ordinary duties of the Home Secretary are necessarily incompatible with the onerous duty of an appellate judge. He is compelled by his position in the State to examine every case that is laid before him in private, upon the *ex parte* statements of persons in no way responsible for what they say. His enquiries are conducted not only secretly, but without any rules of procedure. He has at his command none of that machinery for eliciting and testing the value of evidence which is afforded by a public trial; and yet he is bound to decide, not merely whether there is ground for a new trial, but upon the facts and merits of the whole case, whether the verdict already given should be quashed, or the sentence varied. If in the face of all these difficulties he has been able to form a conscientious opinion that the conviction should be reversed, he cannot reverse it, but must apply the prerogative of mercy to pardon an accused for a crime of which he judges him to be not guilty.

It is admitted on all hands that this anomalous method of supervision over the verdicts of juries in criminal cases, exercised as it is in such an objectionable manner, should be replaced by some court of law charged with the duty of doing openly and judicially, what the Home Secretary now does in secret. The only question upon which there seems to be any material difference of opinion is as to the

*Read at a Meeting of the Department, Monday, February 27, 1865.

*As a matter of custom this application is always made to the Secretary of State for the Home Department.

†It is scarcely necessary to observe that questions of law that arise at a criminal trial are considered and decided by the court established by the Act 11 & 12 Vict., c. 18, for crown cases reserved.

nature and constitution of this court. By some it is maintained that the existing defects would be effectually removed by merely granting a right to move for a new trial in criminal as well as in civil cases; whilst others maintain that the most efficient remedy would be found in the creation of a court of appeal and review, which should hear and decide the appeal, whether involving questions of law or fact, without a jury.

The main objection to every scheme for the creation of a mere tribunal of review is the fact that it interferes with the constitutional privilege of trial by jury; and this is the strongest argument in favour of introducing the principle of new trials. When a person convicted of a criminal offence has made it appear, after conviction, that there is evidence now available which, if it had been before the convicting jury, would have altered the complexion of the case against him, he is clearly entitled, if he prefers it, to have this new evidence submitted, not to a court, but to a jury. For this reason the Committee are of opinion that the concession of any right of appeal should include the right of re-trial by jury. The practical objections, however, to the introduction in criminal cases of an unqualified system of new trial, similar to that in civil cases, seem to the committee to be very strong. It may be, as Mr. Palmer says, that even if no restraint were put upon an application for a rule *nisi*, the applications would not be so many as to add materially to the work of the judges. But with no experience to confirm this view, Parliament would not be acting with ordinary caution if it did not provide against the possibility of groundless appeals. For this reason there can be little doubt that the Legislature of to-day would not be at all more ready than that of 1844 to pass a measure so comprehensive and sweeping as that brought in last session by Sir Fitzroy Kelly. That Bill proposed to constitute the court for crown cases reserved, a court of criminal appeal. Subject only to the formal certificate of a barrister that there was reasonable ground for appeal, it made it matter of right that any one convicted of treason or felony should be allowed to appeal to the superior courts or the court of criminal Appeal for a rule to show cause why a new trial should not be granted, or a verdict of not guilty entered in lieu thereof; or why the judgment should not be arrested or reversed. If the rule *nisi* were granted, it was to be argued before the court of criminal appeal, who were to have full power, not only to grant a new trial, but to order a verdict of not guilty to be entered, or that the judgment should be arrested or reversed, or to make such order as justice shall require.

It is the opinion of the Committee that a sufficient guarantee against the possibility of groundless and dilatory applications for new trials by wealthy criminals would not be afforded by the certificate of a barrister that "there is cause for an appeal." Few barristers would undertake the responsibility of saying that there was no ground for a review upon reading a strong *ex parte* statement in favour of an application for a new trial. And it is submitted that as fees would necessarily be given, such a rule would place the whole profession in a false position. On the other hand, the only effectual alternative would be to give the presiding judge the discretion of deciding whether there was any reasonable ground for an application for a new trial. Against this expedient will probably be urged the statement referred to by Mr. Palmer in his paper, that the discretion vested in the judges as to reserving points of law on criminal trials has been exercised in an unsatisfactory manner. It is not necessary to consider in this report how far this objection is well founded, for it cannot be extended to the case now under discussion. The points of law reserved are invariably technical, and never affect the substantial issue of guilt or innocence, as is always the case with questions of fact. A judge would naturally lean to an adverse decision, where he was asked to reserve the question, whether a thief acquitted on indictment for larceny, as bailee, could be convicted for larceny at common law. But where he was asked to allow an application for a new trial, on the ground that there were facts to show that the offence had never been committed at all, it may be safely assumed that the application would be acceded to, if there were any just grounds for it. The Committee, therefore, have come to the conclusion, that, at all events as a first step, application for a review or for a new trial, in criminal cases, should only be allowed on the certificate of the presiding judge that the case is one for such an application. For the reasons already stated, they consider it of importance that the right of being re-tried before a jury should not be withdrawn. At the same time they are quite sensible of the substantial benefits which would be gained, if, on the grant of a new trial, the new trial were taken without a jury before the court which had granted the application. This benefit would be practically attained, in a great measure, if the court were made competent to try questions of fact, and the option were given to the accused of having the case so tried, or having it sent down to a jury. The majority of those who obtained a new trial, would elect with confidence to have the case decided by a tribunal, which had already gone so far towards reversing the decision of a jury; and thus, whilst the constitutional right of trial by jury would be untouched, the practical advantages of a central court of review would be secured.

These, then, in the opinion of the Committee, are the chief objects which should be accomplished by any scheme for amending our law of criminal appeal:—

1. That it should afford to those convicted of any criminal offence, the means of bringing under judicial consideration any fair grounds for submitting the charge to a second investigation.

2. That the public should be carefully guarded against the possibility of the right being exercised in such a way as to defeat or delay the execution of criminal justice.

3. That all persons convicted of any criminal offence, should be entitled, if they prefer it, to have any second investigation of the facts constituting the charge against them taken before a jury.

These objects, the Committee believe, would be secured by a system of appeal, framed in accordance with the following resolutions:—

1. That the present system of revising sentences of the courts, by means of the Home Office, is unsatisfactory.

2. That any person convicted of treason, felony, or misdemeanor, should be entitled to apply for a new trial, and such application should be made by motion before a court composed of not less than three judges of the superior courts, and that the said courts should sit at intervals of not less than one month throughout the year; but that no such application should be made, except upon the certificate of the judge who shall have presided at the trial, that the case is one for such an application.

3. That if an application for a new trial be granted, the accused should have the option of being tried before the court which shall have granted the new trial, or before a jury, as in the case of new trials in civil cases.

4. That if the accused elect to be tried by the court which has granted the new trial, that court should have the power of summoning and examining witnesses on oath, and all the power, jurisdiction, and authority exercised by the court before which the accused was originally tried.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

Small v. Eccles.

Rule moved on affidavit filed in Chambers—Discovery and production of documents.

Where a rule nisi in full court did not disclose the fact that it had been obtained on an affidavit previously used in Chambers to obtain a summons for the same purpose, and the leave of the court to take such affidavit off the files was not shewn: *Held*, irregular, and the rule was discharged with costs.

Plaintiff, as judgment creditor of H. & Co., had obtained a writ calling on defendant as garnishee to shew cause why he should not pay to the plaintiff a debt which he owed them, the allegation being that he had sold certain goods of H. & Co. under a chattel mortgage which they had given him, and received more than the mortgage money.

Held, that upon the affidavits set out below enough was stated to call upon defendant to shew what books he had in his possession relating to the matters in dispute.

The plaintiff also swore that he believed the defendant had received certain notes and securities in connexion with the sale, some of which remained in his possession. *Held*, insufficient, the documents asked for not being identified or shewn to exist.

If defendant admits the possession of certain documents, but states positively, or even says he is advised and believes, that they will not support the plaintiff's case, *Semble*, that that the production will not be ordered.*

[Q. B. T. T., 1863.]

In Easter Term, C. S. Patterson, for the plaintiff, obtained a rule calling upon the defendant to shew cause why he should not answer on affidavit, within such time as the court should order, stating what documents he had in his possession or power relating to the matters in dispute in this cause, or what he knew as to the custody they or any or either of them were in, and whether he objected (and if so, on what grounds) to the production of such as were in his possession or power, on grounds disclosed in the affidavits filed.

The plaintiff's affidavit stated that he was plaintiff in a cause wherein Henry John Haycraft, and two others, (naming them,) were defendants, and the said Eccles was garnishee: that proceedings being taken in that cause by the plaintiff for the attachment of a debt alleged by the plaintiff to be due by Eccles to two of the said defendants, Eccles denied that he owed the said debt, and thereupon by a judge's order, dated the 25th of July 1862, a writ was issued in this cause, calling upon Eccles to shew cause why the plaintiff should not have execution against him for such alleged debt: that on the 10th of November, 1862, an order was made, referring the matters in difference to an arbitrator: that a meeting was had before the arbitrator, on the 6th of March, 1863, attended by the plaintiff and Eccles and their counsel, and was adjourned: that the plaintiff sought to establish against said Eccles a debt for money had and received to the use of the said two defendants, the said Eccles having held a chattel mortgage from them to secure to him the payment of a debt alleged to be due from them to said Eccles, and to secure him from loss as endorser of a bill of exchange, under which said Eccles *sold* the goods mortgaged, and realised, as plaintiff believed, a much larger sum than was payable to him under the said mortgage, and that such sum was in the hands of said Eccles, which was the debt in question: that the said sale was conducted by one Houghton, an auctioneer, who, as the plaintiff had been informed by him and by said Eccles, rendered an account of such sale and the proceeds to Eccles, and which account remained in his possession: that Houghton had told the plaintiff he could not give him a copy of the account, as the books containing the same were lost: that said Eccles obtained possession of the account-books and other books used in the business of Haycraft, Small & Addison, and which books had been used in continuing the same business by C. S. Small, the younger, and Robert Addison, (the other partners of Haycraft,) up to the time when said Eccles took possession of the goods under the mortgage: that the plaintiff had seen two of the said books, a ledger and another book, in defendant's possession, and be-

* As this case is frequently referred to in practice but although prepared for the regular reports, has not yet appeared in them, we publish it for the benefit of our readers: it will hereafter appear in the next number of Mr. Robinson's Practice Reports.—Eds. L. J.

lieved that said Eccles had in his possession other books and documents relating to the business and matters aforesaid: that the plaintiff believed said Eccles received, besides the proceeds of the sale, and as part thereof, promissory notes and other securities from the purchasers at the sale, and from other customers of the execution debtors, as well as notes which had been given to the execution debtors by customers and others, and that he had received large sums of money in payment of such notes, and that some of such notes remained in his possession: that the plaintiff was advised and believed that it was material and necessary for him, in order to support his claim, to have such account-books, notes and securities produced to him, and that he would derive material support and advantage from their production.

In Trinity Term, *Gwynne*, Q. C., shewed cause. He filed an affidavit of Mr. Eccles, stating that the plaintiff's affidavit, on which the rule *nisi* issued, was filed in Chambers in March last, and used in support of a summons granted in the very same terms as the present rule, and which summons was heard and discharged by Hagarty, J., though the order was not drawn up: that deponent appeared at the arbitration and offered to be sworn as a witness, and to detail all matters and circumstances connected with the subject of this suit, but the plaintiff would not allow deponent to be sworn: that long before this proceeding was commenced deponent furnished to the plaintiff a full statement of all transactions between the firm of Small & Addison and himself, by which it appeared that deponent was not indebted to them, and deponent then and frequently afterwards offered to go through the whole matter with the plaintiff, and to produce satisfactory vouchers for deponent's discharge, which offer the plaintiff declined: that deponent had not and never had in his possession or power any document or paper relating to the matters in dispute in this cause which would be evidence for the plaintiff in support of his pretended claim, but such documents as deponent had, related principally to his discharge: that deponent had some books of account which did belong to the firm of Small & Addison, and which came to his possession under circumstances which he was willing to disclose and explain if he was examined as a witness in this cause, but the said books did not contain any thing which could be evidence for the plaintiff.

C. S. Patterson, in support of the rule, cited *Scott* v. *Walker*, 2 E. & B. 555; *Forshaw* v. *Lewis*, 10 Ex. 712.

Gwynne, Q. C., contra, cited *Thompson* v. *Robson*, 2 H. & N. 412; S. C., 26 L. J. Ex. 367.

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

The plaintiff comes before us as the judgment creditor of Henry John Hayecraft, Charles C. Small, the younger, and Robert Addison, and he has obtained and served upon the defendant an attaching order, under the 288th section of the C. L. P. Act, (Consol. Stats. U. C., ch. 22.) The defendant as garnishee has, upon being called upon to shew cause why he should not be ordered to pay over, denied his liability; and an order has been made that the plaintiff may proceed against him by writ calling upon him to shew cause why there should not be execution against him for the alleged debt. It is to be assumed, though it is not distinctly stated, that this writ has been served. The statute directs that the proceedings shall be the same, or as nearly as may be, as upon a writ of revivor. What proceedings were taken on this writ in the nature of pleadings does not appear. The order for the writ was made on the 25th of July last, and on the 10th of December following the matters in difference were referred to an arbitrator, who, on the 6th of March, 1863, was attended by the parties and their counsel, but the plaintiff not being prepared with the necessary evidence the reference was adjourned. On the 20th of May last, in Easter Term, a rule issued calling on the defendant to answer upon affidavit what documents he had in his possession or power relating to the matters in dispute in this cause, or what he knows as to the custody they or any of them are in, and whether he objects, and if so on what grounds, to the production of such as are in his possession or power.

The plaintiff states in his affidavit that he seeks to establish that defendant is indebted for money had and received to the use of C. C. Small, junior, and Robert Addison, the defendant having held a chattel mortgage from them to secure payment of a debt due by the firm to him, and to protect him against loss as endorser or acceptor of a bill for their accommodation. This statement as to the chattel mortgage the defendant does not notice in his affidavit. The plaintiff further states that under this mortgage the defendant sold the goods and realized therefrom, as plaintiff is informed and verily believes, more than any sum payable to him under the terms of the mortgage, and that it is the overplus which is the debt in question in the cause. The defendant passes by all this allegation, by answering thus:—that before the proceeding was commenced he furnished the plaintiff a full statement of all transactions between the said firm and himself, by which it appeared that he was not indebted to the firm. The plaintiff further states that this sale of the goods was conducted by an auctioneer, who rendered an account thereof and of the proceeds to the defendant, and that owing to the alleged loss of the auctioneer's books, the plaintiff cannot obtain a copy of this account. The defendant in his affidavit takes no notice of the plaintiff's allegations in respect of this account.

As to this document—the auctioneer's account—it appears to us certainly that it may, and indeed if it be what is represented, must contain matter material to the question whether the defendant is indebted to the firm of Small & Addison for money had and received, and that it is in the possession of the defendant. Discovery of this document is not therefore wanted, but an inspection of the same, an application for which should be made under the 197th section of the C. L. P. Act. The plaintiff does not state any application to the defendant for an inspection or copy of this account.

But having thus established, *primâ facie* at least, that the defendant is in possession of a document to the production of which he is entitled for the purpose of discovery or other-

wise, the plaintiff, under sec. 189, is entitled to ask what documents the defendant has in his possession or power relating to the matters in dispute, and to have the defendant's answer (on affidavit) to the enquiry. But an order to produce or to inspect is not the object of the application. When the defendant has answered on affidavit as to what documents he has, &c., and admits that he has any, the court may make such *further* order as is just. If a defendant, admitting the possession of certain documents, denies that they will sustain the plaintiff's case, or even says that he is advised and believes they will not do so, it seems production will not be ordered. See *Peile* v. *Stoddart*, 1 McN. & G. 192; *Reynell* v. *Sprye*, 15 Jur. 1046.

The case of *Scott* v. *Walker*, 2 E. & B. 555, was on an application to inspect. The case of *Thompson* v. *Robson*, 2 H. & N. 412, has more bearing. As to the books of Small & Addison, they are not open to the objection that their existence is not shewn, though it is at least very doubtful whether they would contain evidence against the defendant on this claim. They may do so, but the affidavit of the plaintiff does not assert it, at least positively. Enough however is, we think, stated with regard to them to call upon defendant to answer what books he has in his possession relative to the matters in dispute. Upon his affidavit it will be seen whether the court should make further order; but as to notes and other securities, the affidavit is no stronger than in *Thompson* v. *Robson*, where Bramwell, B., says, "It is necessary to identify the particular document asked for." This affidavit does not assert the existence of any notes or securities, but only that the plaintiff is informed and believes there are such. Pollock, C. B., says: "We cannot grant a rule calling on defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case."

There is, however, an objection taken, and the fact is shewn in the first paragraph of the defendant's affidavit. The only affidavit produced on moving this rule *nisi* is an affidavit of the plaintiff, which was filed and used in Chambers for the purpose of obtaining a summons similar to the rule now before us. How the plaintiff got this affidavit off the files on which it was placed in Chambers and produced it on moving this rule is not shewn, or rather it is not shewn that the court permitted it to be done. The rule itself does not disclose that it is drawn upon an affidavit which has been already used, and such has been the practice in our courts, and it is founded on the English practice. If, as it is stated in the defendant's affidavit, the summons was discharged, it is the more necessary that the attention of the court should be drawn to the fact that the rule was moved upon the original affidavit.

We consider this to be irregular, and though we have thought it better to examine the whole matter, indicating our views, so as to save parties the expense which might attend other applications aiming at the same result, we discharge this rule on the point of practice, and as it is on the ground of irregularity, with costs.

Rule discharged with costs.

COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

Buchanan et al. v. Frank.

Sheriff—Poundage.

Held, that under Con. Stats., U. C. ch. 22, sec. 271, a sheriff is not entitled to poundage unless he *actually levies the money* due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt.

[C. P., H. T., 28 Vic.]

T. Ferguson obtained a rule *nisi* on behalf of the sheriff of Middlesex calling on the plaintiff to shew cause why the order made by the Chief Justice of this court on the 7th of February of the present year, whereby it was ordered that the said sheriff should be disallowed all poundage claimed by him for proceeding on the writ of *fieri facias* in this cause, should not be rescinded, on the ground that the sheriff is by law entitled, under the circumstances, to the said poundage, or to some part thereof, and to tax the same against the plaintiff, and on grounds disclosed in affidavits and papers filed.

The affidavits referred to shewed, that the sheriff received an execution against the defendant's goods to levy for debt, interest and costs, $3,465 60; that the sheriff seized of the defendant's goods sufficient to satisfy the amount of the execution; that after such seizure, and without any sale by the sheriff, and without any money having been paid to the sheriff by the defendant, or made by the sheriff, the plaintiffs and defendant arranged the claim between themselves; that the sheriff was requested to render a bill of his fees, which he did, making the total $103 64, of which the poundage constituted $96 64; that the bill was taxed and the poundage was allowed to the sheriff; that the arrangement made with the plaintiffs by the defendant was brought about by the pressure of the seizure which the sheriff had made upon the goods so taken.

Downey shewed cause.—This whole question must be determined by the construction to be placed upon the Con. Stats. U. C. ch. 22 ss. 270, 271. The following cases shew that the sheriff, in such a case as this, is not by that statute entitled to poundage, but only to such remuneration in the stead of poundage as shall be specially awarded to him: *Winters* v. *The Kingston Permanent Building Society*, Chy. Chamb. Rep. 276; 1 U. C. L. J. N. S. 107; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100.

Robert A. Harrison, with him *Ferguson*, supported the rule.

The statute should not be so rigidly construed as it has been: the sheriff should receive his poundage after a levy has been made; and, if necessary, section 271 should be read as applicable only to cases where there are different writs of execution in the hands of different sheriffs, which would be giving effect to the previous law when it is clear no change was intended by the consolidation, and would harmonize the two sections of the statute:

Alchin v. *Wells*, 5 T. R. 470; *Chapman* v. *Bowlby*, 8 M. & W. 249; *Morris et al.* v. *Boulton*, 2 Chamb. Rep. U. C. 60 *Thomas* v. *Cotton*, 12;

U. C. Q. B. 148; *Brown* v. *Johnston*, 5 U. C. L. J. 17; *Walker* v. *Fairfield*, 8 U. C. C. P. 75; *Miles* v. *Harris*, 31 L. J. C. P. 361, S. C. 12 C. B. N. S. 550; *Colls* v. *Coates*, 11 A. & E. 826; *Corbett* v. *McKenzie*, 6 U. C. Q. B. 605; *Gates* v. *Crookes*, 3 U. C. R. C. S. 286; *Leeming* v. *Hagerman*, 5 U. C. R O S. 38; Watson on Sheriff, 2nd ed. 110; 9 Vic. c. 56, s. 2, 3, Con. Stats. U. C. c. 2.

A. Wilson, J., delivered the judgment of the court.

As the sheriff is not an officer who at the common law is entitled to recover any fees as remuneration for his services, his sole claim to them being based on positive enactment, we must see whether he has clearly made out his right to the amount he demands, for the burden of establishing them is upon him, before we can rescind the present order which disallows this poundage.

The whole legislative provision is contained in the two sections of the C. L. P. A., ch. 22, secs. 270 and 271. Sec. 270 provides that,

"Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage, fees, expenses of execution, and interest upon the amount so recovered from the time of entering the judgment."

Sec. 271 provides that,

"In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed on the writ, and in case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued or any judge thereof in vacation may allow him a reasonable charge for any service rendered in respect thereof in case no special fee be assigned in any table of costs."

Since the case of *Alchin* v. *Wells* it has been settled that after a levy has been made by the sheriff he is entitled to the poundage, although no sale is made, and further proceedings are stayed, in consequence of a compromise between the parties. That decision was made upon the 29 Eliz. c 4, which provides that the sheriff shall receive his poundage "on the sum he shall levy, extend *and* deliver in execution;" and this "levy," as is said by counsel in *Holmes* v. *Sparkes* (12 C. B.) may be either actual or constructive; for the money is considered to have been levied by "the sheriff when he enters upon the possession of the goods, and by the compulsion of the levy the defendant has been compelled to pay the debt:" *Chapman* v. *Bowlby*, 8 M. & W. 249. Until a seizure has been made the sheriff is not entitled to poundage; therefore, when the debt is paid to him without a seizure he cannot claim poundage: in such a case there has been no levy made—*Graham* v. *Grill*, 2 M. & S. 296; *Colls* v. *Coates*, 11 A. & E. 826, either actual or constructive.

A seizure, however, is not properly a levy: it does not become a levy until the goods seized have been turned into money: *Miles* v. *Harris*, 12 C. B. N. S. 558; *Drewe* v. *Lainson*, 11 A. & E. 529.

But this money, as before mentioned, need not be made by a sale of the debtor's goods by the sheriff: he may so make the money, but he need not actually do so: if he bring about a payment or settlement of the debt by reason of the compulsion of his seizure, *he* is held under the statute of Elizabeth to have *levied* the money; and if a statute make no difference between an actual and constructive levying of the money, he will still be entitled to his poundage in that case; but if it do make such a difference, we must of course give effect to the provision, however hard it may bear against the officer, who has practically done all or nearly all the duty, and incurred all or nearly all the responsibility to have earned his compensation.

Now our statute, after providing generally for poundage in every case in section 270, provides that in cases where a part only of the debt has been levied, the sheriff shall be entitled to his poundage on the amount so levied; which was a needless enactment, as this has always been the law; and then it provides, as before stated, that "in case the real or personal estate of the defendant be *seized* or advertised on an execution, *but not sold* by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be *actually* levied on such execution, the sheriff *shall not receive poundage*, &c."

Now this enactment does in our opinion establish a distinction, which before that time did not exist, between an actual and a constructive levy, and makes a special provision for those cases in which a mere seizure is made, but which are not followed by a sale, and where no money is actually levied. When the money is actually levied the sheriff may levy his poundage: when the money is not actually levied the sheriff cannot levy or demand any poundage, although he may have seized, but he shall "receive fees only for the services actually rendered."

In the present case the sheriff seized, but he did not sell; nor did he actually levy any money: we have only, therefore, to declare that he is directly within the special provision we have just referred to, and, in the language of the act, that he "shall not receive poundage."

It is of no practical value to follow this further, and to say that the present reading of the law has probably arisen from an unintentional oversight in the work of consolidating, for we must accept the law as it stands. If it were not an intentional alteration, the legislation will no doubt, if it be thought to be expedient, amend the law.

Most of the decisions in our own courts to which we were referred were made upon the law as it stood before the consolidation, and are therefore inapplicable, as are also all of the English authorities. The other cases to which we were referred, and which have been decided since the consolidation, and when the attention of the court was called to the change which had been made in the law, have ended in the same manner as the present one, adversely to the sheriff, and therefore the rule will be discharged with costs.

Rule discharged with costs.

ELECTION CASES.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

Reg. ex rel. Rollo v. Beard.

Municipal Institutions Act—Disqualification of members of council—Time to which disqualification relates—Costs.

Where it was shown that the firm of which defendant was a member dealt in coal and wood, and during the year 1864 supplied large quantities of both coal and wood to the Corporation of the City of Toronto, without any arrangement as to price or terms of payment, sold in the ordinary course of business, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city, he was *held* disqualified as being a person having by himself or partners or partner an interest in contracts with or in behalf of the corporation.

So where it was shown that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the price remained unpaid at the time of the election.

Where it was shown that the price was paid before defendant took his seat, he was still *held* to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals for the trial of such questions at the peril of having to lose the costs necessarily incurred, even if successful. Therefore in a case where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him.

[Common Law Chambers, Feb. 8, 1865.]

The relator complained that George T. Beard, of the city of Toronto, in the county of York, general merchant, had not been duly elected, and had unjustly usurped the office of councilman for the ward of St. James, in the city of Toronto, in the county of York, under the pretence of an election held on Monday and Tuesday, the 2nd and 3rd days of January last, at the Police Court, in the said ward of St. James, in the said city of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, showed the following cause why the election of the said George T. Beard to the said office should be declared invalid and void. That the said George T. Beard was not at the time of the said election qualified to be a councilman and member of the corporation of the said city of Toronto, in this, that before and at the time of the said election he had, by himself, partners or partner, an interest in a contract or contracts, with or on behalf of the corporation.

The statement was sustained by the affidavit of William Hewitt, of the city of Toronto, hardware merchant, wherein he swore that he was a householder entitled to vote at the election of aldermen and councilmen for the ward of St. James, in the said city of Toronto. That as such he voted for aldermen and councilmen for the said ward at the election holden on Monday and Tuesday, the 2nd and 3rd days of January last. That George T. Beard was elected one of the councilmen for said ward at said election. That he did not vote at said election for the said George T. Beard. That the said George T. Beard was not, as deponent was informed and believed, qualified to be elected a councilman and member of the said corporation, in this, that the said George T. Beard had, as deponent was and verily believed, at the time of the election, by himself, his partners or partner, an interest in a contract or contracts with or on behalf of the corporation of the said city. That the said George T. Beard was before and at the time of the said election a member of the firm of "Joshua G. Beard & Sons," wood and coal merchants and stove manufacturers, in the said city of Toronto. That the said Joshua G. Beard, the senior member of the said firm, is, so far as the deponent could ascertain and verily believed, a lessee of the said corporation of the city of Toronto, under a lease from the said corporation, dated 15th January, A.D. 1849, for the term of 21 years, of Lots Nos. 2 & 3, on the east side of Church street, in said city, of an annual rental of sixty-two pounds, which said lease deponent was informed and verily believed contains the usual covenant to pay rent to the said corporation. That the said J. G. Beard, the senior member of the said firm, is, as far as deponent could ascertain and verily believed, also a lessee of the corporation of the city of Toronto, under a lease from said corporation, dated 13th April, A D. 1863, for the term of 21 years, of a water lot to the south-east of the City Hall, on Esplanade Street, in the said city, at an annual rental of $146, which said lease, deponent was informed and verily believed, contains the usual covenant to pay rent to the said corporation. That the business of the said co-partnership, of which the said George T. Beard is a member, is, as deponent was informed and believed, carried on upon the parcel of land last described. That the said firm of Joshua G. Beard & Sons had, as deponent was informed and verily believed, before and at the time of the said election, a contract or contracts with the said corporation for the delivery of a large quantity of coal to the New Gaol in and for the said city, and for the use of the St. Lawrence Hall in said city. That the said George T. Beard received, as the deponent was informed and verily believed, on the 13th of January last, since said election, from said corporation, for and on account of the contract or contracts last mentioned, the sum of $1,609 09, shown in the books of the said corporation, as follows:—

Coal, &c., for Gaol.....	$1,522 84
Coal for St. Lawrence Hall..	80 75
Culvert and gratings	5 50
	$1,609 09

Joshua G. Beard, the senior member of the firm of "Joshua G. Beard & Sons," in answer, made oath,—That he is the lessee from the corporation of the city of Toronto, of Lots Nos. 2 & 3, on the east side of Church Street, in the said city, under a lease from the said corporation to deponent alone, dated the 15th day of January, in the year of our Lord one thousand eight hundred and fifty-nine, at an annual rental of sixty-two pounds, for the term of forty-two years. That the said firm of Joshua G. Beard & Sons has no interest whatever in the said lease or in the property therein contained; but the same is deponent's own private individual property, unconnected in any way with the said firm or the said partnership business. That deponent holds no lease from the said corporation dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, of land to the south-east of the City Hall; but is lessee of the said corporation under a lease from the said corporation to depo-

nent alone, dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, for the term of twenty-one years, of a water lot directly south of the said City Hall, at an annual rental of one hundred and fifty-six dollars. That the business of the said firm of Joshua G. Beard & Sons is carried on upon a lot to the east of the said City Hall, of which deponent is the owner in fee simple, where his coal and wood yard and office are situate, and not upon the said lot contained in the lease last herein mentioned, but a few loads of coal and wood have, by deponent's permission, been landed at the wharf on the said lot. That the said lot of land last mentioned was leased by deponent from the corporation for his own use alone, and without any previous arrangement of any kind with the said firm in connection therewith. That there has never been any agreement, verbal or written, between deponent and the said George T. Beard, or between deponent and any member of the said firm, relating to or in any way connected with the said lot of land last herein mentioned or the lease thereof. That being in bad health, deponent has been unable to attend regularly to business during the last nine months.

Defendant made oath, that is he a member of the firm of Joshua G. Beard & Sons, carrying on business as wood and coal merchants and stove manufacturers in the said city of Toronto. That during the year one thousand eight hundred and sixty-four, the corporation of the city of Toronto purchased from the said firm a large quantity of coal for the use of the New Gaol and of the St. Lawrence Hall, in the said city of Toronto; but that as to all, except ten tons of the said coal, there never was any contract or arrangement whatever, either as to the price, quantity, or terms of payment; but the same was ordered by the chairman of the Gaol board of the said corporation, without any previous notice to the said firm, and furnished by the said firm as they might have been ordered from and furnished by any other coal merchants in the said city. That as to ten tons of the said coal, tenders for that quantity of coal were advertised for by the said corporation, and the said firm having sent in a tender, the same was accepted, and the said firm furnished the said coal in the month of September last. That no terms of payment were ever agreed upon therefor, nor any contract, verbal or written, entered into with the said corporation relating thereto, except as aforesaid; but the said tons, as well as all other coal supplied during the said year one thousand eight hundred and sixty-four, were supplied before the first day of December last, and were to be paid for on delivery or demand, and was not paid for in full until the thirteenth day of January last, only because payment was not sooner required. That on the said thirteenth day of January, and before deponent was sworn in or took his seat as a member of the council, which he did on the sixteenth day of the said month of January, the said firm was paid in full for the said coal by the corporation of the year one thousand eight hundred and sixty-four, and he, deponent, had not, when he was so sworn in and took his seat, nor had the said firm, any claim whatever against the said corporation on account thereof, nor had any dispute ever arisen between the said firm or deponent and the said corporation relating to the said coal. That the sum of five dollars and fifty cents mentioned in the eleventh paragraph of the affidavit of Mr. Hewitt, was a payment for goods ordered by the said corporation from the said firm, in the year one thousand eight hundred and sixty-three, without any contract or agreement whatever, and not paid for before only because such payment was not sooner demanded —The affidavit of defendant was, in all material parts, corroborated by the affidavit of Charles Shall, book-keeper in the employment of Joshua G. Beard & Sons.

Robert A. Harrison, for the relator, contended that the word "contract," as used in the Con. Stat. U. C. cap. 54, sec. 73, is to receive a liberal interpretation; that it has been held to extend to leases from the corporation (*Reg. ex rel. Stock* v. *Davis*, 3 U. C. L. J. 128; *Reg.* v. *York*, 2 Q.B. 847; *Simpson* v. *Ready*, 12 M. & W. 344; *The Queen* v. *Francis*, 18 Q. B. 526), and to all cases where goods have been supplied to or work done for the corporation, the price of which is unpaid at the time of the election (*Reg. ex rel. Moore* v. *Miller*, 11 U. C. Q. B. 465; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 45; *Reg. ex rel. Davis* v. *Carruthers*, 1 U. C. Pr. R. 116), and that where goods have been supplied without price agreed upon, there is, of anything, greater room for holding the case within the Act than if the goods were supplied at fixed prices, for opportunity would otherwise be given to the seller to procure the acceptance of goods not before accepted, or to procure for them, if accepted, greater prices than their real value (*Ib.*)

C. Robinson, Q. C., argued that no interest on the part of defendant was shown in the corporation leases, and that as to the supplies of coal and wood, they were not matters of contract so as to work a disqualification. But admitting the latter to be so, he contended that the disqualification related not to the time of the election, but to the time when the relator took his seat. That *Reg. ex rel. Davis* v. *Carruthers* was decided under Stat. 16 Vic. cap. 181, which enacted that "no person having, by himself or partners, any interest or share in any contract with or on behalf of the township, county, village, town, or city in which he shall reside, shall be qualified to be, or be elected, alderman or councilor for the same in any ward therein; whereas the present Act simply provides "that no person having, by himself or his partners, an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of a corporation (sec. 73.) He urged that no person elected becomes a member of the council till acceptance of office (sec. 130); and that when defendant accepted office, in that case his disqualification was removed.

Robert A Harrison, in reply, pointed out, that by sec. 7 of the Act, the persons qualified to be elected mayors, members of a council, &c., are such residents, &c., as are not disqualified under the Act, and have at the time of the election the requisite property qualification. That there could be no qualification at the time of the election if there were then an existing disqualification, and that an interest in a contract is by the Act expressly declared a disqualification; that by elec-

tion the party elected became a member of the council *in posse* if not *in esse;* and that reading sec. 73 of the Act by itself, the words "member of the council," were not to receive the narrow construction for which defendant contended, but rather a broad and liberal construction, in unison with the object and spirit of the law, which is to secure independent, honest, and impartial men for the situations of public trust created by the Act. (See *Powell* v. *Bradley*, 11 L. T. N. S. 602.)

Hagarty, J.—This is a summons in nature of a *quo warranto*, calling on George T. Beard to show by what authority he claims the office of councilman for the ward of St. James, Toronto. The election was held on the 2nd and 3rd of January, and Mr. Beard was then elected. The objection is wholly to his qualification, viz., that before and at the time of election he had, by himself or his partners or partner, an interest in a contract with the city corporation. It is sworn on the part of the relator, that Beard is a member of the firm of J. G. Beard & Sons. That the senior partner, J. G. Beard, is a corporation lessee of land on which the partnership business was carried on. In reply it is sworn that the partnership, as such, had no interest whatever in the leasehold premises; that only a small portion of the premises was occasionally used for landing coal and wood; the business being actually conducted in other premises, and that the defendant Beard had no interest in the lease, and no agreement existed with the lessee respecting same or the rents or covenants.

No doubt a corporation lessee is disqualified, but nothing appears to me in this case in any way to connect defendant with any obligation, interest, or contract under the lease, and this objection, I think, wholly fails. The remaining one is more serious. It appears that defendant's firm dealt in coal and wood, and during the year 1864, supplied large quantities of both coal and wood to the corporation, as defendant swears, without any arrangement as to price or terms of payment; and in ordinary course of business, for a small portion, viz., ten tons, a tender by defendant's firm had been accepted. No written or other contract, except the contract implied by the relator of vendor or purchaser, existed. All the coal was supplied before the 1st of December, and was to be paid for on delivery or demand, and was not paid for in full until the 13th day of January, 1865, only because payment was not sooner required. Defendant swears that on that day, being after his election but before he had taken his seat, the unpaid balance was paid by the corporation in full. It would seem that the payments made to defendant's firm, in January, amounted to over $1,600.

I think I am bound to hold that a claim against the corporation for the price of goods sold, work and labour, &c., comes clearly within the words of the statute disqualifying any person having, by himself or his partners or partner, an interest in any contract with or on behalf of the corporation. I think this point has been expressly decided before now. The case of *Carruthers* 2 U. C. Pr. R., which was for work done, is hardly distinguishable. I do not, however, see how there can be any doubt on this question. The object of the Act was to keep from the council board any person having any interest in procuring the corporation funds to be applied in satisfying any claims he might have against them for payment. The vendor of goods, as a general rule, has a marked interest in obtaining prompt payment, &c., and very many cases arise in which it is all-important to the public interest that perfectly unbiassed councillors should decide on the amount when the price is not fixed; on the acceptance or rejection of inferior goods or imperfect workmanship; or claims for services of doubtful existence or utility.

The word "contract" is of wide significance, and I think clearly embraces a case like the present. But Mr. Robinson, for the defendant, argues with much force and ingenuity, that even if defendant were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council, viz., on the 13th of January, a day prior to the earliest lawful assembling of the new council. He points out that, in the earlier Acts, the words are that "no disqualified person shall be elected," &c. The last Act governing this case is Con. Stat. U. C. cap. 54, sec. 73, which differs from the preceding Acts, that no disqualified person "shall be qualified to be a member of the council of the corporation;" and the argument is, that this points not to the time of election, but to becoming a member, or, in other words, taking a seat in the new council. And Mr. Robinson urges here, that Mr. Beard wholly ceased to be a contractor, or to have any claims, before the new council had any legal right to meet or act as such. But the last statute says, in sec. 70. "the persons qualified to be elected mayors, members, &c., are such residents of the county within which, &c., as are not disqualified under this Act, and have, at the time of their election, property,"&c. Then, the disqualifying clause, sec. 73, declares, amongst other disqualifying clauses, "that no person having, by himself or his partners, any interest in any contract, &c., shall be qualified to be a member." First, we have a declaration that the persons qualified to be elected are those not disqualified under the Act. Next, we have a list of the disqualifications which prevent persons becoming members of the council. I feel no doubt whatever that it is at the time of the election that the disqualification or disqualifications of the candidate is to be considered. He is then either a qualified or a disqualified person for the suffrages of the electors. I should hold the same opinion if I had nothing but the 73rd section to guide me. To refer the qualification to the time when the person elected might actually take his seat at the council board, would be, in my judgment, wholly at variance with the spirit of the Act of Parliament, and fatal to the usefulness of this very wholesome provision as to disqualifications.

In the present case we may possibly regret the result from a conviction of the apparent good faith of the whole proceeding. We may be satisfied that the disqualification was wholly accidental, and that Mr. Beard might as readily have settled with the corporation and removed all objections before the election as after. But the rule must not be infringed; the election must be set aside, and a new election had.

I unwillingly feel compelled to make defendant pay costs. But I think I cannot weaken the effect of this wholesome provision by discouraging parties from bringing a case of disqualification under notice at the peril of having to lose the costs necessarily incurred. The defendant might have disclaimed, and saved further expenses. He must be unseated, with costs.

Order accordingly.*

THE QUEEN ON THE RELATION OF BUGG V. SMITH.

Con. Stat. U. C. cap. 54, sec. 73—Insurance agent—Not dis qualified to be member of City Corporation.

An agent of an insurance company paid by salary or commission, who both before and since the last municipal election in the City of Toronto had, on behalf of his company, effected insurances on several public buildings, the property of the Corporation of the City of Toronto, and on several common school buildings within the city, and who at the time of the election had himself rented two tenements of his own to the Board of School Trustees for common school purposes, *held* not to be "a person having by himself or his partner an interest in any contract with or on behalf of the Corporation," and so not disqualified under s. 73, of Con. Stat. U. C. cap. 54, to be and become an alderman for a ward within the city at the last municipal election.

[Common Law Chambers, Feb. 11, 1865.]

The relator complained that James E. Smith, of the City of Toronto, in the County of York aforesaid, one of the United Counties of York and Peel, merchant and insurance agent, had not been duly elected and had unjustly usurped the office of Alderman for the Ward of St. John, in the said City of Toronto, under the pretence of an election held on Monday and Tuesday, the second and third days of January, in the year of our Lord one thousand eight hundred and sixty-five, in and for the Ward of St. John in the said City of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, shewed the following causes why the election of the said James E. Smith to the said office should be declared invalid and void.

1st. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with the corporation of the City of Toronto, effected with the said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, all of which were subsisting at the time of the said election and still are subsisting contracts; and the said James E. Smith as such agent of said insurance company being paid by such company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

2nd. That the said James E. Smith, since said election, had become disqualified to hold the said office in this, that he has an interest in contracts with the corporation of the City of Toronto, effected since said election with said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

3rd. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with or on behalf of the corporation of the City of Toronto, effected with or on behalf of the said corporation, or the school trustees of the said City of Toronto, by him, the said James E. Smith, as agent of the Imperial Insurance Company for the insurance against loss by fire of certain schoolhouses and appurtenances in the said City of Toronto, all of which contracts were subsisting at the time of the said election and still are subsisting contracts, the premiums therefor being paid directly or indirectly by the corporation of the said City of Toronto; and the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

4th. That the said James E. Smith at the time of the said election was disqualified in this, that he at the time of the said election had an interest by himself or his partner or partners in a contract or contracts with or on behalf of the corporation of the said City of Toronto, or the school Trustees of the said City of Toronto for the leasing or renting by him the said James E. Smith, his partners or partner, of two houses on Centre Street in the said City of Toronto, used as schoolhouses in said city, the rent therefor being paid directly or indirectly by the corporation of the said City of Toronto, and the said contract or contracts being subsisting at the time of the said election and still subsisting.

The relator made affidavit that he is a resident freeholder in the City of Toronto, having real estate sufficient to entitle him to become an alderman of the council of the corporation of the said city. That he was a candidate for the office of alderman for the Ward of St. John, in the said City of Toronto, at the last municipal election, holden in and for the said ward in said city on Monday and Tuesday, the second and third day of January last past. That Robert Moodie, of the said City of Toronto, innkeeper, and James E. Smith, of the said City of Toronto, merchant and insurance agent, were also candidates at said election in and for the said office of aldermen in and for the said ward. That according to law the said ward was and is entitled to be represented in the council of the said city by two aldermen and two councilmen. That at the close of the said election the votes for aldermen in said ward stood as follows:

Robert Moodie	535
James E. Smith	563
John Bugg	388

That the said Robert Moodie and James E. Smith were thereupon declared duly elected as aldermen for the said ward, and have since accepted the said office. That the said James E. Smith was before and at the time of the said election a

* As to costs, see *Reg. ex rel. Charles* v. *Lewis*, 2 U. C. Cham. R. 177, Burns, J.; *Reg. ex rel Hawley* v. *Hall*, 2 U. C. Cham. R. 187, Sullivan, J.; *Reg. ex rel. Dillon* v. *McNeill*, 1 U. C. C. P. 137, Macaulay, C. J.

member of the firm of J. E. Smith & Co., wholesale dealers in the said City of Toronto. That the said James E. Smith was before and at the time of the said election, and still is an agent for the Imperial Insurance Company for the purpose of accepting risks for and on behalf and in the name of the said company against fire, on houses and other tenements. That the said Jas. E. Smith was also, as deponent was informed and verily believed, before and at the time of the said election the owner by himself, his partners or partner, of two houses situate on Centre Street in the said city before and at the time of the said election, rented for school purposes in said city as hereinafter mentioned. That the said James E. Smith was, as deponent was informed and verily believed before and at the time of the said election, and still is paid for his services as agent of the said insurance company, by salary or commission, in proportion to the number of risks secured by him for valuable consideration in that behalf for said insurance company or otherwise, to the effect last mentioned. That the said Jas. E. Smith acting as agent for the said insurance company, has induced the said corporation to insure against loss by fire with said insurance company the following public buildings and personal property of the corporation of the said city, for the amounts and at the rates and for the premiums undermentioned:

	Amount.	Rate.	Premium.
Crystal Palace	$8,000	at 20s.....	$80 00
House of Refuge.....	4,000	at 12s. 6d.	25 00
New Gaol.....	6,000	at 12s. 6d.	37 50
St. Lawrence Hall and Arcade.....	8,000	at 12s. 6d.	50 00
Furniture in City Hall.....	2,500	at 15s.....	18 75
	$28,500	.....	$211 25

That all the said insurances had been, as deponent was informed and verily believed, effected by the said James E. Smith with the said corporation during the months of November, December and January last past; and that as deponent was informed and verily believed, receipts for premiums paid were, at the times of payment of premiums, given by the said James E. Smith to the said corporation. That the said James E. Smith, acting as agent for the said insurance company, induced the said corporation, or the board of school trustees for the City of Toronto, to insure against loss by fire with him, the said James E. Smith, on behalf of the said insurance company, the following common schoolhouses in said city for the amounts and for the premiums undermentioned:

	Amount.	Premium.
Palace Street School..... Givens Street School..... Additional Building of Louisa Street School	$6,900	... $58 75
George Street School.....	2,000	... 12 50
	$8,900	... $71 25

That policies for said insurances last mentioned were, as deponent was informed and verily believed, issued by the said James E. Smith to the said school trustees, or to the said corporation, before the said election, and were subsisting at the time of the said election and are still subsisting. That the amount of such premiums last mentioned, together with other expenditure incidental to the common schools aforesaid, are as deponent was informed and verily believed, directly or indirectly, paid to the said James E. Smith by the said corporation of the said City of Toronto. That the houses mentioned in paragraph ten of his affidavit are situate on Lot No. 41, on the west side of Centre Street, in the said City of Toronto. That the said lot last mentioned, according to the books of the Registrar of deeds in and for the said City of Toronto, is (subject to a mortgage thereon for the sum of £3..0) the property of the said James E. Smith. That the rental paid for the use of said houses on said lot last mentioned is $140 per annum, being in deponent's opinion much more than the fair value thereof; and that said rent was, as deponent was informed and verily believed, directly or indirectly, paid by the said corporation of the said City of Toronto.

Robert A. Harrison, for the relator, moved, upon reading the statement and affidavits filed in support of the same, together with the recognizance of the relator and his sureties therein named, and the same being allowed as sufficient for an order for a writ of summons to issue calling upon the said James E. Smith to shew by what authority he, the said James E. Smith, now exercises or enjoys the office of alderman for the Ward of St. Johns in the City of Toronto. Mr. Harrison submitted that the defendant was in law disqualified as having an interest in the existence or continuance of contracts with or on behalf of the corporation, and so within the letter and the spirit of sec. 73 of Con. Stat. U. C. cap. 54. He contended that the evil contemplated being evident and the words used general. The act should be construed so as to extend to all cases that come within the mischief, and argued that this case was one clearly within the mischief of the act. He referred to *Towsey* v. *White*, 5 B & C. 125, 131; *Reg. ex rel. Armor* v. *Coste*, 8 U. C. L. J. 290.

Hagarty, J., having taken time to consider, held that Jas. E. Smith was not, upon the facts stated, to be deemed "a person having by himself or his partner an interest in any contract with or on behalf of the corporation," within the meaning of the statute, and so refused the order.

Order refused.

Reg. ex rel. Grayson v. Bell.

Municipal Institutions Act, ss. 70, 175, 183—Qualification—Declaration of qualification—Misstatement therein—How election affected thereby.

The power of a judge under s. 128 of the Municipal Institutions Act as to the issue of a *quo warranto* summons is to be exercised upon a relator shewing reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected; but where the relator admitted a qualification in fact, and made no complaint as to the legality of the election or the conduct of it, contenting himself with attacking the declaration of qualification subsequently made by the candidate, the writ was refused.

[Common Law Chambers, February 13, 1865.]

The relator complained that Robert Bell, of the city of Toronto, painter, had not been duly elected to, and had unjustly usurped the office of

councilman for the ward of St. Andrew, in the said city of Toronto, under the pretence of an election, held on Monday and Tuesday the second and third days of January, 1865, at the said ward of St. Andrew, in the said city, and declaring that he the said relator had an interest in the said election, as an elector in the said ward, who gave his vote at the said election, shewed the following causes why the said election of the said Robert Bell to the said office should be declared invalid and void—

1st That the said Robert Bell has not, and at the time of the said election had not the necessary property qualification as a freeholder for election as councilman, for the reasons following, namely: that at the time of the said election, and the making and subscribing the declaration required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell was not the proprietor in fee simple of the lands and premises mentioned and described by the said Bell in the said declaration.

2nd. That the said lands and tenements mentioned in the said declaration are the lands and tenements of the trustees of the Toronto General Hospital, and the said Bell is the lessee of the said trustees, and never was the proprietor of the said lands and tenements, or interested therein, except as tenant.

3rd That before the election for councilman for the said city of Toronto for the year of our Lord one thousand eight hundred and sixty-five, the said Bell mortgaged his interest in the said leasehold premises for four hundred dollars or thereabouts, as appears by the records in the registry office in and for the said city of Toronto, and the said mortgage, as appears by the said records is still unpaid and undischarged.

4th. That at the time of the taking of the last assessment for the city of Toronto, he was not the owner of the property on which he claims to qualify as freeholder, and that he falsely and fraudulently represented in his said declaration of office that he was the owner in fee of the said lands and tenements.

5th. That inasmuch as the said Bell has not made and subscribed the declaration as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, and within the time required by the 183rd section of the said chapter of the said Statutes of Upper Canada, he, the said Bell, is therefore disqualified from holding said office of councilman for the said ward of St. Andrew for the said city of Toronto.

The relator made oath that he was at the time of the municipal elections held in the said city of Toronto, on the second and third days of January last past, a freeholder in the ward of St. Andrew, in the said city, and had been for upwards of one month next before the said election, and was at the time of said election, and still is, a resident in the said ward and a freeholder therein.

At the said election he gave his vote in the said ward for David Kennedy and William Moulds, candidates for election as councilmen for the said ward: that Robert Bell was a candidate for election at the said election as councilman for the said ward, and received votes thereat as such candidate, and at the close of the said poll on the second day of the said election was declared by the returning officer duly elected to the said office of councilman, and has since taken his seat as such councilman in the council of the corporation of the said city: that the said Robert Bell in his declaration in that behalf made and subscribed by him after the said election states, as his property qualification for the said office, an estate in freehold, to wit—three dwelling houses and premises in Camden street, in St. Andrew's ward, in the said city of Toronto: that the deponent examined the last revised assessment rolls for the said city of Toronto, for the year of our Lord one thousand eight hundred and sixty-four, and found that the name of the said Robert Bell appears thereon as stated for the said premises on Camden street as a leaseholder for $186, and that he is not rated for any other property in the said city: that the said premises on Camden street aforesaid on which the said dwelling houses are erected is leased by said Bell from the trustees of the Toronto General Hospital, being lot number three on the north side of Camden street aforesaid, with a frontage of fifty-two feet, and about eighty-six feet deep: that the deponent examined the records in the registry office of the said city, and it thereby appears that at the time of the taking of the assessment for the said city for the year of our Lord one thousand eight hundred and sixty-four, the leasehold interest of the said Bell in said premises on Camden street aforesaid was mortgaged by the said Bell for the sum of one hundred pounds, and the said mortgage does not appear from the said records to be discharged: that at the time the said Bell made and subscribed the declaration of office, as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell falsely and fraudulently represented that he was the owner in fee simple of the said land and premises mentioned in the said declaration, as appears by the said declaration, when in fact he only held the said premises as tenant: that the declaration of office made and subscribed by the said Bell pursuant to the statute in that behalf, is in the words following:—

I, Robert Bell, do solemnly declare that I am a natural born subject of Her Majesty: that I am truly and *bona fide* seized or possessed to my own use and benefit of such an estate in freehold, to wit three houses and premises on Camden street, in St. Andrew's ward, as doth qualify me to act in the office of councilman for the ward of St. Andrew, according to the true intent and meaning of the said municipal laws of Upper Canada.

(Signed) Robert Bell.

H. J. Bradbeer made oath that he made inquiry in the office of the Toronto General Hospital Trust, and found that the said Robert Bell is lessee of lot number three on the north side of Camden Street, in the said city of Toronto, having a frontage on said Camden street of fifty-two feet, and a depth of about eighty-six feet: that the said property is leased to the said Bell for the term of twenty-one years, and said term commenced on the eleventh day of July, in the year of our Lord 1855, and that the rent paid by said Bell to said Hospital Trust is $36.40 per annum.

John Carr, the city clerk, certified that Mr. Robert Bell was assessed in the assessment roll for the ward of St. Andrew for the year 1864, upon which he qualified as councilman for St. Andrew's ward, for 1865, as follows—

Camden-street, N. S.

No. 718—Robert Bell, leasehold, Robert Bell, painter, leasehold $72 72

No. 719—Donald Grant, household, Robt. Bell, painter, leasehold 42 42

No. 720—Robert Johnston, household, R. Bell painter, leasehold 72 72

And that the above property was entered in the declaration of qualification book of the city of Toronto, as in "freehold," in place of, as property, in "leasehold."

A. McNab for the relator, referred to Con. Stat. U. C., cap. 54, ss. 72, 175 and 183.

Hagarty, J.—The Municipal Institutions Act, section 175, requires that each person elected shall before taking office make a declaration of qualification. This was made by Mr. Bell, declaring that he was "seized or possessed to his own use and benefit of such an estate in freehold, to wit, three houses and premises on Camden-street, in St. Andrew's ward, as doth qualify him to act in the office of councilman, &c." It is now stated as a matter of fact that Bell is not the owner of an estate in freehold in the property mentioned.

On the assessment roll he appears as a leaseholder, rated for these premises at $186 per annum, and it is admitted that he is correctly assessed therefor at that rate. Now, section 70 of the act declares that $160 per annum is a sufficient qualification for a councilman. Mr. Bell therefore, as a matter of fact, was duly qualified when he was elected.

I am, however, asked to grant a *quo warranto* summons, on the ground that although true it is he was qualified, and made a declaration to that effect, yet as the declaration for some reason or other describes his estate as a freehold, instead of a leasehold for years, the election should be declared void.

The judge to whom application is made for a *quo warranto* summons under s. 128 of the act, may order the writ to issue, if there be reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected. Nothing of this kind is here suggested. If Mr. Bell's declaration has been made in bad faith, there is ample redress provided therefor by s. 423 of the act, and I think I must leave all persons considering themselves aggrieved thereby to seek the remedy provided by the statute. The candidate being in fact fully qualified, it is difficult to understand what evil motive could have induced the misstatement in the declaration. I am very far from adopting the confident assertions of the relator charging that such misstatement was made falsely and fraudulently.

As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because no apparent mistake has been made in the description of the nature of an estate in property, amply sufficient in itself as a qualification. If it were more than a mistake the parties have another and different remedy.

I refuse the summons.

Summons refused.

COMMON LAW CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

Kelly v. Henderson.

Arbitration—Admission in writing as to taxation of costs—Meaning thereof.

Where plaintiff sued defendant, an attorney, for the amount of an account, and defendant set off several bills of costs, including three in the County Court, several in the Division Court, and some for insolvency and conveyancing, and the cause was referred to arbitration; and after the reference, plaintiff, an unprofessional man, signed a memorandum as follows: "I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to taxation of all items, properly taxable as aforesaid, charged for costs in suits:" *Held*, that not only were the costs in the County Court suits taxable, but the costs in the Division Courts, insolvency fees, &c., were also taxable.

[Chambers, Jan. 22, 1865.]

The plaintiff sued defendant, an attorney, at Belleville, on an open account for goods. Defendant denied the claim, and set off an attorney's bill for costs of suit, conveyancing, &c., and a sum of money due on a mortgage.

The case was referred to the award of F. McAnnany, Esq.

Pending the reference, the plaintiff and defendant met, and each signed a paper. The plaintiff signed this:—"I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to the taxation of all items, properly taxable as aforesaid, charged for costs in suit"

Defendant, in consideration of this admission, admitted plaintiff's account in writing.

On going to the office of the deputy clerk of the Crown to tax, the parties differed as to the extent of his right so to do, under the admission.

The bill contained three items for suits in the County Court, and several items for Division Court suits, insolvency costs, conveyancing, &c. The plaintiff contended that the whole bill was taxable. The attorney, on the contrary, contended that the only items properly taxable were the three items relating to the County Court suit. The deputy clerk of the Crown adopted the latter view.

A summons was obtained on behalf of the plaintiff calling upon the attorney, among other things to shew cause why the admission should not be rescinded on the ground of fraud, and why all the bills should not be referred to taxation.

S. Richards, Q. C., shewed cause.

John Paterson supported the summons. Several affidavits were filed by each party, of a very contradictory character.

Hagarty, J.—I think Mr. Northrup, the deputy clerk of the Crown, has taken an unnecessarily restricted construction of the admission. The defendant was dealing with an unprofessional opponent, and it seems to me that the construction that the latter would reasonably put on the words used would cover all items "charged for

costs in suits," without reference to the courts in which such suits or business might be; and that to restrict it merely to the three bills is unfair towards the plaintiff, and not required by a reasonable construction. The costs in the two suits of *Kelly* v. *Robinson* (of course including the retaining fee charged), the costs in *Kelly* v. *McDonell*, all the Division Court suits and fees, and business done as to transcript, &c., the insolvency costs in another matter, and costs or fees in a criminal charge or suit, should, I think, be included in the taxation.

No doubt the attorney swears he did not mean all this; but I think his opponent, in all human probability, so meant and understood it; and I think justice may be done without straining the words beyond a reasonable construction.

As to the various allegations of fraud in the obtaining these memoranda of agreement, I may say that I have no present power over them. The matter has devolved upon the arbitrator, Mr. McAnany. He can deal with them as a court and jury could deal with admissions, oral or written, said to be made a few days or weeks before the trial.

It would be a good answer to an admission or a receipt, that it was obtained by fraud, or not properly understood by the person making it, or made under a mistake, &c. I pass no opinion on the merits or demerits.

As to the alleged error in a considerable sum paid on the mortgage, Mr. Richards, who appears for defendant, says he has no doubt the defendant has no desire to take any advantage of any supposed admission, if the mistake be clearly shewn. I trust, for the honor of the profession, that this honest expression of opinion rests on a sure foundation. If not, the arbitrators must deal with it.

I discharge the summons, as I have no power to make it absolute. I might have done so without expressing any opinion. I have written thus far in the hope that my suggestions may help a final solution of this most melancholy example of litigation about a very simple matter, needlessly extended over several years, at a ruinous expenditure of costs.

I discharge the summons without costs: neither party should have any costs.

Summons discharged, without costs.

Dougall v. Yager.

Con. Stat. U. C., cap. 26, sec. 8—Execution debtor applying for discharge from custody—Sufficiency of affidavit.

Held, that an affidavit by an execution debtor applying for his discharge from close custody, must, under sec. 8 of Con Stat. U. C. cap. 26, be positive to the effect that he is not worth $20, exclusive of his necessary wearing apparel, &c.

[Chambers, Jan. 4, 1865.]

C. E. English, obtained a summons calling on the plaintiff to shew cause why defendant, a prisoner in close custody of the sheriff of the county of Hastings in execution for debt, should not be discharged from custody, upon the ground that he was not worth $20, exclusive of his necessary wearing apparel, &c., and upon grounds disclosed in affidavits and papers filed.

He filed an affidavit of the defendant, in which among other things he swore that he was a prisoner in close custody, on a writ of *capias ad satisfaciendum*; that the judgment was entered on three promissory notes on which he, defendant, became liable as surety for one Peter F. Bell, the first of which is dated on or about 29th October, 1863, for $150; second, 1st February, 1864, for $304 22; and third, 19th May, 1864, for $212; that judgment was entered on 30th September, 1864, for $750 76; that plaintiff had not served him, defendant, with any interrogations herein, but caused him to be examined orally before Anson Gilbert Northrup, clerk of the County Court, under an order of Wm. Smart, judge of the county of Hastings; that he, defendant, had answered everything truly as nearly as he could; that he was a man of very little education, had never kept any books of accounts and was obliged to answer from memory; that Adam Wallbridge owed him $50; that he defendant was willing to assign to the plaintiff any interest he might have therein, "after paying him, Wallbridge, his lien upon it for getting him, defendant, out of gaol;" that excepting the said sums, such interest as he might have therein, which he did not believe to be worth five pounds or anything of any consequence, he was not worth $20, exclusive of his ordinary wearing apparel.

Robert A. Harrison, shewed cause. He objected that the affidavit under Con. Stat. U. C., cap. 26, sec. 8, should be positive; that defendant's affidavit was not positive; that it appeared from it he was worth more than $20, for Mr. Wallbridge could have no lien such as represented for future services on $50 admitted to be due by him to defendant.

C. E. English, supported the summons and argued that the affidavit was sufficient, and that at all events upon reference to defendant's oral examination it would be found he was not worth $20, exclusive of his necessary wearing apparel.

Richards, C. J.—The affidavit is the foundation of the proceeding now taken by defendant with a view to his discharge from close custody, and must comply with the provisions of the statute. The statute requires a positive affidavit and the affidavit made by defendant is in no sense positive. If he cannot conscientiously make the affidavit which the statute requires, he is not entitled to avail himself of its provisions. I discharge the summons, but without costs.

Summons discharged without costs.*

Dougall v. Yager.

Using affidavits filed on a former application—Form of summons—Refiling affidavits.

Where leave is given, on an application for a summons, to use the affidavits filed on a former application, which was unsuccessful, such affidavits must either be refiled or specifically referred to in the summons.

[Chambers, Feb. 24, 1865.]

W. A. Foster obtained a summons, "upon reading the affidavits and papers filed on the former applications," (of which there had been two,) for the discharge of the defendant in this cause, and the further affidavits "now filed," calling upon the plaintiff to show cause why the

* Defendant made a second application and filed a positive affidavit that he was not worth $20, but in no manner attempted to explain how he had disposed of the amount admitted to be due him by A. H. Wallbridge, and upon this ground, Draper, C. J., discharged the second summons.—Eds. L. J.

defendant should not be discharged from custody under the act respecting the relief of insolvent debtors (Con. Stat. U. C. cap. 26, sec. 8), upon grounds disclosed in said affidavits and papers filed, with leave to defendant to use his examination filed in the office of the court, if so advised.

R. A. Harrison shewed cause, and objected that the particular affidavits upon which defendant relied as disclosing the grounds of his application, should either have been refiled on this application, or else more specifically referred to in the summons, and contended that the only affidavits really filed on this application disclosed no grounds whatever for the application.

C. E. English supported the summons, contending that he was in a position to refer to the affidavits already on the file of the court for the discharge of the defendant, and that his summons was sufficiently specific to enable him to do so.

The following cases were referred to in the argument: *Atkins* v. *Reynolds*, 2 Chit. R. 14; *De Woolf et al.* v. ——, 2 Ib. 14; *Cliffe* v. *Prosser*, 2 Dowl. P. C. 21; *The King* v. *Kirke*, 6 B. & Ad. 1089; *Reg.* v. *Peterhouse*, 1 Q. B. 314; *Small* v. *Eccles*, 1 U. C. L. J. N.S. 122; 2 Chit. Archd. 11 ed. 1567.

Morrison, J.—I think the objection must prevail. The summons will therefore be discharged, but without costs. Defendant may of course make a fresh application.

Summons discharged, without costs.*

CHANCERY.

(*Reported by* F. W. Kingstone, Esq., *Barrister-at Law.*)

Harrison v. Armour.

Equitable Mortgage—Registration.

A memorandum of deposit given with deeds deposited by way of equitable mortgage is not a "deed, conveyance, or assurance," within the meaning of Con. Stat. U. C. cap. 89, sec. 17, and does not require registration. Such a memorandum is only a matter of evidence, the mortgage being created by the deposit of the deeds.

Semble, There may be a difference between an executed and an executory contract to assign.

[Nov. 15 and April 18, 1865.]

This was an appeal from the master's report. On the 28th September, 1857, the defendant, Armour deposited four mortgages with the plaintiff as security for a loan of £1000, and at the same time gave him the following memorandum of deposit:—

"William Armour to Robert Armour.....	£500
James S. Bailey to Robert Armour.....	1493
Wm. John Fraser to Robert Armour.....	240
Johnstone & White to Robert Armour.....	140
	£2373

I have this day borrowed from Mr. Duncan B. Harrison one thousand pounds, and I have deposited with him the above mortgages as security for the re-payment, one half at two months and one half at six months, and I agree to execute any power of attorney or other writing to empower said Duncan B. Harrison to transfer or contract the same. Robert Armour.

September 28, 1857."

This memorandum was not registered. On the 8th of February, 1859, the defendant Fanson recovered a judgment against the defendant Armour, and registered it in the county of Durham. Subsequently the plaintiff obtained a decree for sale of the lands comprised in the mortgages deposited with him. And the master by his report found that as to the land in Durham the plaintiff was first and the defendant Fanson second in priority. Against this finding the defendant Fanson appealed on the ground that the master should have found that by reason of the non-registration of the memorandum of deposit the plaintiff was postponed to him.

Fitzgerald for the appeal.

Kingstone for the report.

The following authorities were cited in the argument. Con. Stat. U. C. cap. 89, sec. 53; 7 Anne. cap. 20, sec. 65; *Wright* v. *Stanfield*, 27 Beav. 8; *Moore* v. *Culverhouse*, 27 Beav. 639; *Reg.* v. *Reg. of Middlesex*, 15 Q. B. 976. Rigge on Registration, p. 104, Prec. No. 4; *Galt* v. *Bush*, 8 Grant, 360; *McMaster* v. *Phipps*, 5 Grant, 256; *Ex parte Nielson*, 14 Jur. 1011.

Spragge, V.C.—The point argued before me is whether or not the memorandum, as above set out, is capable of or requires registration. In the case which I have just disposed of, *Robson* v. *Carpenter*,* I considered the effect of the cases before the master of the rolls: *Wright* v. *Stanfield*, 27 Beav. 8; and *Moore* v. *Culverhouse*, 27 Beav. 639. In the former case the paper was in this form: "*Memorandum.*—In consideration of your having this day advanced and lent to me the sum of £125, for which I have given you my warrant of attorney, I hereby agree to charge my leasehold houses situate in Grosvenor street, Pimlico, with the payment of the same, and I hereby undertake at your request and at my own cost to execute a proper assignment of the said premises as you may direct, &c." This paper the master of the rolls held not registrable, but he held the paper in *Moore* v. *Culverhouse* registrable. Counsel distinguished the latter case from the former on the ground that in the former the contract was merely executory. The mortgagee having agreed to execute at a future time an assignment; and which assignment therefore it was impossible to register until it had been completed; whereas in the latter case there was an equitable assignment of the existing interest of the depositor, and nothing more remained to be done by him. By comparing the papers in the two cases it will be seen that the one in the earlier case is not less formal than the other. The only distinction attempted to be drawn was, the agreement in the earlier case to execute an assignment, and to this Sir John Romilly seems to have acceded.

There is an older case of *Sumpter* v. *Cooper*, which was not referred to in *Moore* v. *Culverhouse*, though it had been cited in *Wright* v. *Stanfield*. In that case an equitable mortgage was created by deposit of title deeds, and sometime afterwards the depositor executed an assignment to the depositee, but which assignment was not registered; and it was contended that whatever lien was obtained upon the premises by the depositor, as equitable mortgagee, was merged when he took an absolute assignment of the same property, and that by that assignment his title must stand

* Defendant made a fresh application, which was refused on the merits.—Eds. L. J.

* Not yet reported.—Eds. L. J.

or fall. The judgment of Lord Tenterden was given after taking time to consider upon this point. It is very short. "As to the statute, of course, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered."

These cases are thus noticed by Lord St. Leonards: (V. & P. 14 Ed. 727.) After giving instances of instruments not requiring registration, he says, "nor does an agreement to assign a leasehold estate as a security for a loan," and for this he cites *Wright* v. *Stanfield*. He proceeds, "for the statute does not apply to the case of an equitable mortgagee," for which he cites *Sumpter* v. *Cooper*. He then refers to *Moore* v. *Culverhouse*, in which he says, "the master of the rolls held otherwise, and considered that his own decision was the only authority the other way, and he thought his former decision rested on different grounds; but in the case of *Sumpter* v. *Cooper* in 1831 the court of King's Bench expressly decided that the statute did not apply to the case of an equitable mortgage," and he then adds the words of Lord Tenterden. "It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds there is no instrument to be registered." It is clear enough that where an equitable mortgage is created simply by the deposit of deeds, there can be no instrument to be registered; but, I think it is evident, that both Lord Tenterden and Lord St. Leonards meant that the memorandum of deposit, which, though it is not essential to the validity of an equitable mortgage, ought, it is said, always to be made and signed when title deeds are deposited, is not an instrument which requires registration. What is meant I have no doubt is that it is the deposit which creates the equitable mortgage, that the memorandum is not a deed or conveyance; or, in the language of our statute, "a deed, conveyance, or assurance, affecting lands," but simply a memorandum shewing as a piece of evidence the purpose for which the deposit of title deeds is made; a purpose which may be shewn by parol, but is better shewn by a memorandum in writing, and it is on this ground I apprehend that Lord St. Leonards questions the case of *Moore* v. *Culverhouse*.

But supposing both the cases before Sir John Romilly to be good law, this case falls within the one in which the instrument was held not to require registration, the paper in this case, as in that, containing, in addition to the memorandum an agreement to execute a transfer, the ground upon which in the latter case the earlier ones are supposed to be sustainable.

My conclusion is that the paper in question did not require registration, and that the appeal from the master must be disallowed, with costs.

With regard to the state of the law in regard to instruments incapable of registration, but which create equities to which the court is bound to give effect, it is a question for the legislature. In this case, however, there appears to be no real hardship, as the party seeking priority is a judgment creditor, who has no equity whatever to be preferred to the plaintiff.

INSOLVENCY CASES.

Before the County Court for the County of Elgin.

In re John Campbell.

Election of assignee—Appointment of agent must be in writing, and filed of record.

At the first meeting of creditors to choose an assignee, several creditors appeared in person, and some by attorney, under appointments in writing duly authenticated.

Mr. Scarth, the clerk of Messrs. Adam Hope & Co., claimed a right to represent them as being their clerk; but exhibited no authority from them in writing. He stated that he was not aware it was necessary: that he could make oath to their being creditors of the insolvent, and of his being their agent duly appointed.

Hughes, Co. J.—From the analogy which proceedings under the Insolvent Act of 1864 bear to proceedings in bankruptcy in England, and because the practice in bankruptcy requires an appointment under a duly authenticated letter of attorney to entitle a person calling himself the representative of a creditor to advise in the choice of an assignee, I must decline to take the advice of any person not appearing to be so duly authorised, and, more than all, the authority must be filed of record.

The other creditors then stated that they were satisfied of Mr. Scarth's being duly authorised, and consented to his being sworn, and to his advising upon the choice of an assignee

Upon this consent Mr. Scarth was sworn, and an assignee was unanimously elected.

UNITED STATES REPORTS.

Commonwealth of Penn. for use of Benjamin Kellogg, &c., v. Alfred C. Harmer, et al.

1. The liability of a Recorder of Deeds on a false certificate of search, only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him.
2. The sureties of the Recorder of Deeds are not liable for false searches.

At Nisus Prius. Opinion of Agnew, J., on demurrer.

The first three causes of demurrer are unimportant as they are all amendable, but the amendments should be made. The remaining four bring into view substantial defects. The first to be noticed is the manner of stating the plaintiffs. Kellogg was the person who obtained the recorder's certificate and made the first purchase under it. He sold to Wm. Mullison who afterwards sold to Anna Shott. Under the act regulating suits on official bonds the suit is in the name of the Commonwealth, and as many persons may be suggested plaintiffs who choose to join, but each must declare and assign breaches for his separate injury. Here, however, the pleader has suggested Kellogg as plaintiff for use of Mullison for use of Shott. Kellogg, in this suit, is the only plaintiff, while the others are merely persons to whom his right of action has passed. This being the suggestion of the plaintiff, it is plain that no injury sustained by either Mullison or Shott can be declared upon, for in

this form the last assignee merely takes what Kelogg may recover.

In one point of view this cause is also unimportant because is is clearly amendable by striking out the use and permitting the two last named to come in as plaintiffs in their own behalf, the act referred to giving the right of suggestion at any time before judgment. But this change in the relation of the parties from uses to plaintiffs, discloses the real vice of this declaration. The only damages averred are those arising upon the sale from Mullison to Anna Shott, who it is alleged paid $13,000 for the property upon the faith of the false certificate of the recorder of deeds. The declaration being amended, that is, Anna Shott being suggested plaintiff in her own right the question is at once presented, can she found an action against the recorder for damages upon a certificate of search given to Killogg, an antecedent purchaser?

The question is important, as in this city the custom is to pass the certificates of search of deeds, mortgages and judgments with the title papers, each subsequent purchaser taking the title upon the faith of the former searches down to the date of the certi cate, and procuring new searches only for subsequent conveyances and liens. While it is important, still I think it is not difficult of determination. So far as the certificate is the evidence of the state of the public record this custom is well enough. A search once made by the officer under his official responsibility is in all probabilities correct and therefore may be relied upon without a new one. It is not often these searches are incorrect, otherwise actions upon false certificates would be more frequent, their rarity is the evidence of official correctness and fidelity; and therefore the certificate has all the force of evidence in the hands of subsequent purchasers, that it had in those of the first. But when you touch the official responsibility of the officer, you reach a different question. It is then not simply the evidence which the certificate affords, but the duty it involves.

What is this duty? It is, as the keeper of the record, to make searches for deeds and mortgages, and other recordable instruments at the instance of those who may apply therefore and pay him the fee, which the law allows him for the performance of the duty. The duty is specific to make it for him who asks for it and pays for it, and therefore has a right to the responsibility of the officer and to rely upon it. It is he who is deceived by the officer's false search because he alone stands in privity with him, by demanding performance of the duty and making compensation for it. The emoluments of the office constitute the consideration of undertaking the responsibility. Who would accept the office and perform such duties involving such heavy liabilities, if he were to be allowed no equivalent. The officer who makes a search stands, in reference to its correctness, in the attitude of an insurer, and his fee represents the premium. To make him responsible to every new purchaser without a fee would be as inequitable as to hold an insurer liable upon a new risk without a new premium.

But when we come to analyse the transaction, we will find it impossible to carry on the notion of continuing liability. The injury arising from a false certificate of search, undoubtedly falls upon the person who obtains and acts upon it; because the fact which causes his injury, to wit, the undisclosed deed or mortgage precedes his purchase. It is the title *he* purchases which is affected. As it is he who suffers by the unrevealed conveyance of incumbrance, the right of action is personal to himself. It does not run with the land, but passes to his personal representative. If he sell with covenants for title, or for quiet enjoyment, his own liability to his vendee requires him to retain it, to make good his own loss. If not answerable to his vendee because he has given no covenant for title, the rule *caveat emptor* which protects him, also protect the officer who is responsible to him. The action being his own he may also end it by accord and satisfaction or by release.

Carry this further. He can recover for the injury which leads him to accept a worthless title or an incumbered estate. This is clear. His damage is the cost of the worthless title, (the case laid in the declaration) which is the price paid. To-morrow he sells for twice as much: and the next day his vendee sells for three times the first sum, which price will be the real damage. If the first one being paid by the recorder, release him, will that satisfy the injury, or will it be only *pro tanto*, leaving the second to run, and on his payment and release, leaving the third what shall remain? This is a sad jumble of interfering rights, growing out of continuing liability. But it is said the recorder may take up his certificate on payment. But this will not always protect the subsequent purchase, which may have taken place before the discovery of the secret deed or mortgage so that the right of action has vested, if vest it can. A continuing liability beginning like a snowball, increases like an avalanche overwhelming and destroying the unfortunate incumbent of office. Now while he must bring fidelity and diligence to the execution of his duties, the law owes him protection against needless severity and hardship. It is much less hardship to require a new search for every purchaser than to entail upon officers, the accumulated burthens of independent transactions, and adventitious advance of the prices of real estate.

If instead of continuing liability, we proceed upon the ground of successive liability to each new purchaser, the case runs counter to the objections before stated. The officer owes but one duty which is to him who employs and pays him. If a new liability arise, it is because of a new duty which cannot take place without renewed privity and renewed compensation. It encounters a further objection. The new duty at each successive purchase, gives rise to a new cause of action, which runs only from its breach, and cannot occur till the new purchase is made. This may be twenty years after the date of the certificate. But this is repugnant to the statute of limitations which bars actions against sureties in official bonds after seven years from the injury, and that must arise during the official term.

It cannot be the case that a right of action follows the floating certificate down the stream of title, because there is no adequate compensation for this tremendous risk, there is no privity of duty between the officer and those coming after the person procuring the search,

there is a compounding of several injuries, where but one can naturally exist. and because it is clearly harsh, unjust and impolitic.

If any one will have, in addition to the satisfactory evidence which the certificate affords, the personal responsibility of the officer, let him ask for it and pay for it by obtaining a new search. There is good reason for this, a new search may reveal the before undiscovered incubus upon the title, freeing the officer from further liability, and applicant from injury and litigation. Give the officer a locus, and the citizen the means of escape from undesired difficulty.

There is an objection not contained in the grounds of demurrer fatal to this action, if the condition of the bond be correctly set out in the declaration. The only condition recited is to "deliver up the records and other writings belonging to the said office, whole, safe and undefaced to his successor therein, according to law." This covers only the public interest but provides for no protection against private injury. The liability of the sureties is strictly legal, and cannot be extended beyond the terms of the condition.

Judgment for the defendant on the demurrer.

GENERAL CORRESPONDENCE.

Service of papers in County Courts—Toronto agents—When service sufficient—Setting aside.

To the Editors of the Law Journal.

Gentlemen,—Is the service by the plaintiff's attorney, of a notice of trial in an action in a County Court, upon the Toronto agent of the defendant's attorney eight days before the sitting of the court at which the action is to be tried, a sufficient service of notice of trial, or must the service in the County Court be upon the attorney himself?

If the service is not sufficient, has the County Court judge power to set the notice of trial aside, on the ground that service on the defendant's attorney was not effected eight days before court?

Yours truly,

A Subscriber.

St. Catharines, March 23, 1865,

[It seems to us that sec. 61 of Con. Stat. U. C. cap. 22, which is as much applicable to County Courts as to the Superior Courts, answers the question of our correspondent. It enacts that if the attorney of either party do not reside or have not a duly authorized agent residing in the county where the action has been commenced, then service may be made upon the attorney wherever he resides, or upon his duly authorized agent in Toronto. We apprehend that where the attorney to be served resides in the county where the action is commenced, he should himself be served. So if he have an agent in that county. Otherwise, according to the act, the service may be on the attorney wherever he resides, or on his Toronto agent. If the service be irregular, the County Court judge of course has power to set it aside.—Eds. L. J.]

Assessment Act—Liability of goods to distress for taxes—What goods.

To the Editors of the Law Journal.

Gentlemen,—A. occupied B.'s town lot, paying for the use of it simply the taxes. In August last A. (after having the lot assessed in his name) removed, carrying with him everything moveable thereon.

Now, the collector says he has no authority to seize A.'s property in other parts of the municipality, because the removal took place before he received the roll. Can he seize?

An answer in your April number, if possible, will oblige

Several Readers.

Collingwood, March 23, 1865.

[In case any person neglects to pay his taxes for fourteen days after demand, the collector is empowered to levy the same with costs by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession, wherever the same may be found within the county within which the local municipality lies. The fact of removal from the lot assessed, before or after the receipt of the roll by the collector, does not in any manner, so far as we understand the act, affect the right of the collector to distrain, so long as the goods and chattels liable to distress are within the county, and in the possession of the person who ought to pay the taxes at the time of the distress.—Eds. L. J.]

Equity jurisdiction of County Courts—Tariff—Amendment.

To the Editors of the Law Journal.

Gentlemen,—There is one thing to which your attention, as well as that of the profession generally, ought to be called, and that is, the miserable tariff provided for costs on the Equity side of the County Court.

The effect of that tariff is to destroy all equity practice in this court. The fees pro-

vided are not so good as the fees of a suit in the Division Court. I do not know what was the object of thus placing these fees so very low, but I do know that the result of it is to work an injury to the country by preventing the doing of any business on that side of the County Court. I can scarcely believe that this was the design, but such is the effect. If the fees were upon the same scale as those on the Common Law side of that court, no one would complain.

I hope, Messrs. Editors, that you and other members of the profession will use your influence to bring about a much desired change in the tariff of fees on the Equity side of the County Court.

Equitas.

March 30, 1865.

[It has often been a subject of remark, that if those who framed the Equity tariff had desired to nullify the Act giving equitable jurisdiction to County Courts, they could not better have accomplished that purpose than they appear to have done by a tariff which pleases none and displeases all. Either from this or some other cause, the act has become almost a dead letter. It was an act of good promise, and we are sorry to find it so much neglected. The cause may be, and probably is, the tariff, which our correspondent describes in befitting terms. He has done well publicly to call attention to it, and we trust that he has not done so in vain. Let practitioners agitate the matter, and the remedy, we have reason to believe, will be found.—Eds. L. J.]

Profession of the Law—Numerical increase—Remedy proposed.

To the Editors of the Law Journal.

Gentlemen,—A good deal has lately been said in your journal about the necessity of adopting some plan to discourage the present rapid increase in the numbers of the legal profession in Upper Canada. That something ought to be done, is felt by all; but what that something is, is the question.

It appears to me that, so far, the attention of your correspondents has been directed to the adoption of the best method to prevent the increase of barristers alone. Here is where they err. The object should be to prevent the immense increase of attorneys. Where there is one barrister, there are very nearly ten attorneys. The attorneys do all the business of bringing suits, and it is they alone who are responsible for the evils of which the public complain.

I think I can suggest a very easy remedy. Compel all persons, before they enter upon the study of the law, to go up and pass the same examination, and to pay the same fees, as are now required from those who are entered upon the books of the Law Society, and who desire to be admitted as barristers; and compel all to pass a similar examination, and to pay such fees, as are provided for call to the bar; and I venture to say that the result will be all that can be desired.

At present any one, no matter how unqualified or unfit, can become an attorney-at-law, by serving five years under articles, and passing the simplest kind of examination—so simple as to be almost useless. Raise the standard of examination, and make all submit to it alike. If that be done, there will be fewer members of the profession of the law.

A Subscriber.

March 30, 1865.

[We can do no more than submit the foregoing for the consideration of those whose duty it is to deal with the matter in hand. One thing is plain, and that is that the desire for a change of some kind is very general. Much will depend upon the wisdom of those who shall have the direction of it. It is to be hoped that the change will be for the better.—Eds. L. J.]

REVIEWS.

A Synoptical Index of the Consolidated Statutes of Canada and of Upper Canada, with Notices of the later Acts which affect them, including the Session of 1864. By John Webster Hancock, LL.B., Barrister-at-Law, Berlin, C. W., Author of a System of Conveyancing, &c. Toronto: Published by W. C. Chewett & Co., and for sale by Rollo & Adam, and all booksellers. 1865. Price $5.

We look upon this as the most useful legal compilation that has recently been published in Canada. We have been expecting it a long time, and had nearly despaired of ever seeing it.

Much was done towards aiding the administration of justice when the Legislature, in 1860, caused the Public Statutes of Canada and of Upper Canada to be consolidated in

separate form. But a consolidation however good, with an imperfect index, was to us as a casket without a key. Though the work of the consolidation of the statutes was all that could be desired, the index to each volume was execrable. So bad have we found it that in many instances we have had to consult the repealed Statutes in order to get information in the Consolidated Statutes, which a good index should have afforded at a glance. We have never ceased to think that those concerned in the consolidation of the Statutes were greatly to blame in not securing the services of a proper person to index the result of their labors.

It is not every man who can compile a good index. Even the best authors are sometimes the least able to do so; but most certainly the gentleman who prepared the index of the Consolidated Statutes was wholly unequal to the task—and the badness of its execution has been the cause of incalculable loss of time to those obliged to consult his (so-called) index.

What the Legislature ought to have done as a public work is now well done by private enterprise. We have carefully inspected Mr. Hancock's Index, and have so far been much pleased with the result. We look forward to considerable saving of time whenever necessary to consult the Consolidated Statutes of Canada or of Upper Canada, or statutes since passed affecting them, up to 1864 inclusive. We shall cease to approach the Statutes with dislike. The work does as much credit to the enterprising law publishers as it does to the careful and reliable author. The price, $5, is really nothing to a man in respectable practice. The time saved in one week—perhaps in one day—by the use of it will be more than compensation for the expenditure. The volume contains nearly 500 pages octavo, well printed, and is substantially bound.

All who have occasion to make use of the Consolidated Statutes either of Canada or of Upper Canada should be provided with a copy of this Index. Indeed, the Legislature should be called upon to make reparation for its past omission either by purchasing a large edition of the work before us for gratuitous distribution to magistrates and others entitled to receive, and who have received gratuitously, the Consolidated Statutes, or by making an appropriation which would enable the author to dispose of his present edition at a reduced price, so as to be within the reach of all to whom the Index is necessary in the discharge of professional or public duty.

The American Law Register. Philadelphia: D. B. Caufield & Co. Chicago: H. N. Hibbard & Co.

It is with great pleasure that we number this well known and able periodical among our exchanges. It has now been in existence for thirteen years, and has acquired a reputation which entitles it to rank among Law periodicals. The Editors are men of mark, viz., Hon. Isaac F. Redfield, Boston; Prof. Theodore W. Dwight, New York; Prof. Amos Dean, Albany, N. Y.; Hon. John F. Dillon, Davenport, Iowa; John A. Jameson, Esq., Chicago, Ill.; James P. Mitchell, Esq., Philadelphia. The number before us (April, 1865, or No. 7, vol. 4, N. S.; old series, vol. 13) opens with a well written paper on "Usury," which we may hereafter, with the permission of the Editors, transfer to our columns for the information of our readers. Then follow recent decisions in the Superior Courts of Iowa, Vermont, Pennsylvania and Nova Scotia, the latter being a decision on the question as to sufficiency of tender of payment in United States treasury notes, to satisfy a money demand under a lease made in Nova Scotia, payable in "dollars and cents of United States currency." It being shewn that the lease was made on the 4th May, 1860, two years before the act of Congress was passed making treasury notes a legal tender, the court very properly held the tender insufficient. Such was the ruling of our Court of Common Pleas (13 U. C. C. P. 350). But had the contract been made after the act of Congress, and at a time when treasury notes became a legal tender, and been payable either in "dollars and cents of United States currency," meaning simply United States money, or been payable in "dollars" at some place in the United States, we apprehend the *lex solutionis* would be held to govern, and treasury notes be a legal tender. Such is the conclusion which we draw from our own cases of *Niagara Bridge Company* v. *Great Western Railway Company*, 22 U. C. Q. B. 592; *Crawford* v. *Beard*, 13 U. C. C. P. 35; same case, 14 U. C. C. P. 87; *Grant* v. *Young*, 23 U. C. Q. B. 387; *Wood et al.* v. *Young*, 14 U. C. C. P. 250.

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APPOINTMENTS TO OFFICE.

POLICE MAGISTRATE.

JAMES WEYMS, Esquire, to be Police Magistrate, Town of Brantford. (Gazetted April 22, 1865.)

NOTARIES PUBLIC.

DAVID SMART, of Port Hope, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

EDWARD TAYLOR DARTNELL, of L'Orignal, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

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JOHN EDWIN FAREWELL, of Oshawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

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GEORGE PALMER, of Guelph, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 22, 1865.)

CORONERS.

THOMAS JOHN YORK, Esquire, M.D., Associate Coroner, County of Wellington. (Gazetted April 1, 1865.)

ALEXANDER JAMES McMASTER, Esquire, M.D., Associate Coroner, United Counties of York and Peel. (Gazetted April 1, 1865.)

CHARLES TAIT SCOTT, Esquire, Associate Coroner, United Counties of Huron and Bruce. (Gazetted April 1, 1865.)

GEORGE WILSON, Esquire, M.D., and DAVID HOWARD HARRISON, Esquire, M.D., Associate Coroners, County of Perth. (Gazetted April 22, 1865.)

JOHN CASCADEN, Esquire, M. D., Associate Coroner, County of Elgin. (Gazetted April 22, 1865.)

EDWARD HORNIBROOK, Esquire, Associate Coroner, County of Perth. (Gazetted April 22, 1865.)

TO CORRESPONDENTS.

"A Subscriber"—"Several Readers"—"Equitas"—"A Subscriber"—under "General Correspondence."