DIARY FOR MAY.

1. Sat... *St. Philip & St. James.* Gram. & Com. Sch.
2. SUN. *Rogation.* [Fund app. Co. Tr. to make up books and enter arrears. Articles &c., to be left with Sec. Law S.
6. Thur. *Ascension.*
9. SUN. *1st Sunday after Ascension.*
12. Wed. Last day for service for County Court.
14. Fri... Exam. of Law Students for call to the Bar.
15. Sat... Exam. of Art. Clerks for certificates of fitness.
16. SUN. *Whit Sunday.*
17. Mon. Easter Term begins.
19. Wed. Interm. Exam. of Law Stud. & Art. Clerks.
22. Fri... Paper Day, Q.B; New Trial Day, C.P.
22. Sat.. Paper Day, C.P.; N. T. Day, Q.B. Declare for County Court.
23. SUN. *Trinity Sunday.*
24. SUN. Queen's Birthday. P. Day, Q.B.; N.T.Day. C.P.
25. Tue.. Paper Day, C.P.; New Trial Day, Q.B.
26. Wed. Paper Day, Q.B., New Trial Day, C.P.
27. Thur. Paper Day, C.P.
28. Fri... New Trial Day, Q.B.
30. SUN. *1st Sun. af. Trin.* [Last d. not. of trial Co. Ct.
31. Mon. P. Day, Q.B.; N.T. Day, C. P. Last d. for Ct. of Revision finally to revise Assm. Roll.

The Local Courts'

AND

MUNICIPAL GAZETTE.

MAY, 1869.

PAYMENTS BY INSOLVENTS.

Any person unacquainted with the working of the Insolvent Acts might suppose, without shewing any marked want of common sense, that where a creditor in good faith receives a sum of money from a debtor without knowledge of the fact that at the time of such receipt a writ of attachment had been issued against the debtor, the money so received could safely be called his own. But the law says otherwise, and when we consider it and look at the act, it is clear that such money cannot either equitably or legally be held by this creditor, in preference to the other creditors of the insolvent. The 22nd sub-section of section 3 of the Insolvent Act provides that, "upon the appointment of the official assignee (in compulsory liquidation) the whole of the estate and effects of the insolvent, *as existing at the date of the issue of the writ* of attachment, and which may accrue to him by any title whatever, up to the time of his discharge under this act, and whether seized or not seized under the writ of attachment, shall vest in the said official assignee in the same manner *and to the same extent*, and with the same exceptions, as if a voluntary assignment of the estate of the insolvent had been *at that date* executed in his favor by the insolvent."

Sub-section 7 of section 2 declares the effect of a voluntary assignment to be, "to convey and vest in the assignee the books of account of the insolvent, all vouchers, accounts, letters and other papers and documents relating to his business, *all moneys* and negotiable paper, stocks, bonds and other securities, as well as all the real estate of the insolvent, and all his interest therein, whether in fee or otherwise, and also all his personal estate, and movable and immovable property, debts, assets and effects, which he has or may become entitled to at any time before his discharge is effected under this Act, *excepting only* such as are exempt from seizure and sale under execution, by virtue of the several Statutes in such case made and provided."

These sections are evidently intended to operate to pass all the insolvent's estate to the official assignee on the issue of the writ; the estate thereby becomes, for certain purposes, the property of the assignee, and no part of it, whether cash or goods, can be disposed of by the insolvent, and certainly cannot, in fairness to the creditors in general, be applied to any one or more creditors so as to give them a preference. There is no protection given in the act to payments made by an insolvent after the issue of a writ of attachment, and if there were, it would be inconsistent with the spirit and intention of the act, which is to make an equal distribution of the estate of any one who is found to be unable to pay his debts in full.

It was therefore held in the late case of *Roe* v. *Royal Canadian Bank*, in the Court of Common Pleas, on reasoning such as this, that a payment made by an insolvent, after the issue of a writ of attachment against him, on account of a draft discounted by defendant for him, and which was dishonoured by non-acceptance, was recoverable back by the official assignee, though the defendants were ignorant of the insolvency when they received the money from him.

The money, though paid to a *bona fide* creditor, is nevertheless money belonging to the estate, and must be held by the assignee in his official capacity for the equal benefit of all; and if in reality the money of the creditors in general, the assignee who represents them has a right to recover it by action from the person withholding it.

FEES TO OFFICERS.

We understand that a representation was made to the Board of County Judges at their late sitting, as to the propriety of making some increase to the fees of clerks and bailiffs, or rather making such an alteration in the tariff, as would give them some adequate remuneration for the services they have to perform in the discharge of their duties. Without pretending to prophesy what course the judges may think fit to pursue in this branch of the matters submitted to them, we can safely say that knowing as they do, practically as well as theoretically, the whole working of the system, they will take such steps in the premises as may conduce to its efficiency. For our part we have but one opinion on this subject. Division Court officers do more for less money than any other persons, officials or otherwise, in the Province. They are, as a rule, men of the highest respectability in their different stations, and they have to give large securities for the proper discharge of their duties. They receive nothing approaching adequate remuneration for their services, whilst they are expected to be above reproach. We now, as this is the time, earnestly hope that the Board may find it not inconsistent with the public interests to make a reasonable (and that means a large) addition to their fees, both by increasing the amount of some items in the present tariff, and by giving some remuneration for services for which there is now no provision, some payments for each of the various duties devolving on them.

A correspondent writes a letter on the subject which speaks for itself.

LAW REFORM ACT.

Of the many cases that have been tried at the Spring Assizes throughout the country, many very important ones have been tried without the intervention of jurymen, and, so far we have heard no complaints have been made of the findings of the judges on questions of fact; and there seems to be no reason why they should not be (at least in those classes of cases which are ever likely under the present law to be left to judges as sole arbiters,) as satisfactorily determined by one of the judges of a Superior Court of common law, as questions of fact in a suit have hitherto been by an Equity judge. There may be some minor difficulties in Term, in ascertaining and deciding the exact position of cases tried under the new practice, but anything of this kind will soon be put right. We notice, however, an inconvenience, which, though only felt probably in a slight degree at an Assize with a small docket, becomes serious where, as in Toronto and occasionally elsewhere, several weeks are occupied in the disposal of the business, and the inconvenience is this, that jurors are needlessly kept in Court, and away from their homes or business, whilst cases in which their services are not required are being tried. A simple remedy would be to provide that all jury cases should be tried first. A separate list might be made for them, to come on next in order after the disposal of assessments and undefended issues.

Much greater evils were found during the last assizes as the result of this Act—firstly, the length of time prisoners are kept lying in gaol awaiting trial, very often for offences of the most trifling nature; and secondly, the great waste of time to all parties attending the Assizes, by the trial of all sorts of paltry offences, which could be as well at the sessions, or perhaps by a magistrate. It is all very well that individual convenience should give way to the public advantage, but the advantages to the public must be of a very tangible nature before some of the leading features of British justice—that every person accused of crime shall have a speedy trial, and shall be held to be innocent until found guilty—are overlooked. At one assize, at least, the presiding Judge remarked upon the hardship of keeping prisoners charged with some paltry offence in gaol for months without trial,—accused as one was for stealing a rail off a fence; another for stealing a hammer, &c. In one of these cases the learned Judge sentenced the prisoner after conviction, to one hour in gaol. Here the punishment came first, and the conviction afterwards;—rather hard it would have been if the accused were innocent after all.

Another practical result of the Act is, that County Court cases are tried by Superior Court Judges; and the cases which there is no time for the Judge of Assise to try, are either left for a County Court Judge to finish, or have to lie over for six months. Every day brings up some new difficulty, the result of this hasty attempt to reform what had much better have been left alone than badly done. The remedy is worse than was the disease.

Some one will doubtless try his hand at an amendment of the Law Reform Act next ses-

sion, and he might take a note of these suggestions, amongst others, by the way. Perhaps, however, the most effectual remedy that could be devised for the many defects, known and unknown in this Act, would be to repeal it *in toto*, and replace it with a more carefully prepared measure, dealing only with admitted defects.

DEATH OF JUDGE SMALL.

The Hon. James E. Small, Judge of the County Court of the County of Middlesex, died at London on the 27th instant. He was member of the Executive Council and Solicitor General for Upper Canada from the 30th March, 1842, to 27th November, 1843, and was appointed County Judge on 22nd October, 1849, during the LaFontaine-Baldwin administration.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INDICTMENT—OWNERSHIP OF CHATTELS.—The prisoner was indicted for stealing the cattle of R. M. At the trial R. M. gave evidence that he was nineteen years of age; that his father was dead, and the goods were bought with the proceeds of his father's estate; that his mother was administratrix, and that the witness managed the property, and bought the cattle in question. On objection that the property in the cattle was wrongly laid, the indictment was amended, by stating the goods to be the property of the mother. The case proceeded, and no further evidence of the administrative character of the mother was given, the County Court Judge holding the evidence of R. M. sufficient, and not leaving any question as to the property to the jury:

On a case reserved, *Held*,

1st. That there was ample evidence of possession in R. M. to support the indictment without amendment.

2nd. That the Judge had power to amend under Con. St. C. ch. 99, s. 78.

3rd. That the conviction on the amended indictment could not be sustained, as the Judge had apparently treated the case as established by the fact of the cattle being the mother's property in her representative character, of which there was no evidence; nor was any question of ownership by her, apart from her representative character, left to the jury.—*The Queen* v. *Jackson*, 19 U. C. C. P. 280.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

EXECUTORS AND TRUSTEES.—Executors and trustees may be charged with interest as well as principal in respect of sums lost through their misconduct, though the principal never reached their hands.

Where an executor saw the estate wasted from time to time by his co-executrix and an agent she had appointed, and took no steps to prevent the same, he was charged with the loss.—*Sovereign* v. *Sovereign*, 15 Chan. Rep. 559.

MENTAL CAPACITY — IMPROVIDENT CONVEYANCE.—The owner of land, who had become utterly abandoned to drunkenness, created a mortgage thereon for about one-fourth of its value; and within a year afterwards the mortgagee obtained from him an absolute conveyance of the land, for a very trifling, if any, further consideration than the mortgage debt, in which conveyance his wife joined to bar her dower, and the same was executed by the husband and wife in the presence of their son. The evidence shewed that the grantor from his habits had become incapable of properly understanding business transactions.

The Court under the circumstances, although after great delay in taking proceedings, gave him relief against the deed, although in the meantime three of the persons present at the execution thereof—one of them the son of the grantor—had died; the Court assuming for the purposes of the decision that the parties, other than the son, would have testified to their belief in the sobriety and intelligence of the grantor.—*Crippen* v. *Ogilvie*, 15 Chan. Rep. 490.

PATENT — SIMPLICITY OF INVENTION — PRIOR USE.—The invention of an inclined plane in a certain form and position, as a means or appliance for directing a tool cutter, so as to produce spiral or curved grooves in a roller, was *held* a proper subject for a patent; the simplicity of a new contrivance being no objection to a party's right to a patent for it.

A machinist invented a machine in which an inclined plane was applied for a novel purpose; he contemplated further improving his invention, but meanwhile made use of it in his workshop. Five years or more afterwards he adopted or invented a contrivance which was not new, but which, in connection with the inclined plane, increased greatly the value of the machine; and he then took out a patent for the improved machine.

Held, that notwithstanding his prior use of the original machine, the patent was valid, and that the patentee was entitled to the exclusive use of the inclined plane. [MOWAT, V. C., dissenting.] —*Summers* v. *Abell*, 15 Chan. Rep. 532.

DOWER — DEFICIENCY OF ASSETS. — Where a wife joined in a mortgage, and on the death of the husband there are not sufficient assets to pay all his debts, the widow is not entitled to have the mortgage debt paid in full out of the assets, to the prejudice of creditors.— *White* v. *Bastedo*, 15 Chan. Rep. 546.

ADMINISTRATION BOND—BREACH—PLEADING. —In an action against the sureties in an administration bond, plaintiff assigned as a breach of the condition of the boud set out, and which condition was in exact accordance with the form prescribed by 33 Geo. III. ch. 3, and 22 & 23 Car. II. ch. 10, that although a large amount or value of goods, &c., of the deceased had come to the hands of the administrator, he had not well and truly administered the same according to law:

Held, on demurrer, a bad breach of the condition of the bond; and that the only two modes in which a valid breach of thin condition can be assigned are, non-feasance in not duly collecting and getting in the estate, whereby it is lost or endangered, or malfeasance in wasting the assets collected by the conversion of the same to the administrator's own use, or some other misappropriation whereby the estate is diminished to the prejudice of those entiled to have it forthcoming in the hands of the admistrator to abide the orders of the Court.—*Neil* v. *McLaughlin*, 27 U. C. C. P. 350.

ONTARIO REPORTS.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, ESQ., *Barrister-at-Law, Reporter to the Court.*)

PECK v. MCDOUGALL.

Division Court—Examination of defendant—Commitment—Pleading—Practice.

The plaintiffs demurred to the replication to a plea justifying an arrest under an order to commit, issued by the Division Court for disobedience of an order to pay a judgment debt within a named time. Defendants joined in demurrer and excepted to the plea.

Held, as to the plea—1. That it was unnecessary to state the proceedings before judgment, so as to give the Division Court jurisdiction, the amount stated being clearly within it.

2. That the issue of execution in due course, and its delivery to the plaintiff and return, were sufficiently stated.

Semble, that the issue and return of execution is not, under the Division Courts Act, a condition precedent to the examination of defendant.

It was alleged that when the summons to examine issued the plaintiff resided in the county, but not that he continued so resident at the issue of the summons to commit. *Held*, sufficient, for this would be presumed.

It was not averred that the plaintiff was examined on oath before the Judge, or any other evidence adduced. The warrant set out in the replication, recited that it appeared to the satisfaction of the Judge that he had contracted the debt under false pretences. *Held* sufficient, for it is not necessary in all cases to take evidence on oath, and the Judge might have acted on the plaintiff's admission

Semble, that the omission of the Clerk to enter an order of commitment in the procedure book, could not affect a defence uuder such warrant.

Held, also, that the Judge had power to make an order to pay in nine weeks or for commitment on default; and as a summons and order to commit issued before the plaintiff's arrest, it was immaterial that the first order had not been entered, or that three months had elapsed after it before the warrant issued.

The order to pay or for commitment issued in May. In October, on the return of a summons, an order was made to commit for non-appearance and disobedience of tho order to pay. The warrant of commitment recited that the order of May issued because it appeared to the satisfaction of the Judge that the plaintiff had incurred the debt under false pretences, and that on the return of the summons in October he had not appeared.

Held, that the ground of commitment sufficiently appeared.

Declaration for false imprisonment.

Plea. That before the alleged trespass, to wit, on the 22nd of October, 1864, the defendant recovered judgment against the plaintiff in the Seventh Division Court of the United Counties of Huron and Bruce, for the sum of $50.84, for debt, and $3.30 for costs, and thereupon, the said judgment remaining in full force and unsatisfied, the defendant in due course of law, and by the judgment of the said Court upon said judgment so recovered as aforesaid, issued a warrant of execution against the goods and chattels of the plaintiff, directed to one T, then being a bailiff of the First Division Court of the said United Counties of H. & B., within which Division the said plaintiff then resided, commanding him, &c., (setting out the warrant) which said warrant was subsequently, to wit on the 2nd of May, 1865, returned *nulla bona*.

That thereupon the said judgment still remaining in full force and unsatisfied, and the said plaintiff then being a resident in the said County of Huron, the said defendant, on the 6th of May in the year last aforesaid, sued out of the said Seventh Division Court upon the said judgment a summons to examine the said plaintiff at a time and place therein named, pursuant to the Statute in such case made and provided, which said summons was on the 15th of May, in the year last aforesaid, duly served on the said Leonard Peck; that on the return thereof, to wit at the village of Bayfield, in the County of Huron, aforesaid, as therein mentioned, on the 31st day of May, in the year last aforesaid, the said plaintiff being then present in obedience to said summons, by the award and order of R. C. Esquire, Judge of the said Division Court, then presiding in the said Seventh Division Court, an order indorsed on said summons was made by the said Judge in the words and figures following, that is to say, "The defendant being present is ordered to pay in full in nine weeks from the date hereof, or in default of payment to be committed for 30 days in the common gaol. Dated this 31st day of May, 1865.

(Signed) R. COOPER."

That on the 16th of September, in the year last aforesaid, the said judgment still remaining in full force and unsatisfied, the said plaintiff sued out of the said Seventh Division Court upon the said judgment a summons, under the seal of

the said Court, returnable on the 9th of October, in the year last aforesaid, directed to the said plaintiff, to shew cause why pursuant to the said order he, the said plaintiff, should not be committed to the common gaol of the said United Counties of Huron and Bruce, for not complying with the said order to pay in full in nine weeks or be committed to the common gaol for thirty days, which said order was duly served on the said plaintiff, Peck, on the 29th of September, in the year last aforesaid.

That upon the 9th of October, in the year last aforesaid, John Bell Gordon, Esquire, then being a barrister of Upper Canada, and then presiding in said Seventh Division Court as Deputy Judge, having been pursuant to the Statute in such case, made and provided, duly appointed so to act by the said R. C., he being then ill or unavoidably absent, at the request of the said plaintiff enlarged said summons until the holding of the next Seventh Division Court.

That upon the next holding of said Seventh Division Court, that is to say, on the 4th of December, in the year last aforesaid, the said judgment still remaining in full force and unsatisfied, the said Leonard Peck did not appear in pursuance of said summons, or allege any sufficient reason for not attending, or shew any cause why he should not be committed to the said gaol, whereupon the said R. C., as such Judge as aforesaid, endorsed upon the said summons an order for the committal of the said Leonard Peck, in the words and figures following, that is to say, "Order for committal for thirty days for non-appearance and disobedience of order. Dated the 4th day of December, 1865.

R. Cooper, *Judge.*"

And thereupon, to wit on, &c., and under and by virtue of a warrant of commitment duly issued by and upon the authority of said order, and under the seal of said Court, and pursuant to the Statute in such case made and provided, upon said Judgment, directed to the said T., then being a bailiff of said First Division Court, commanding him to take and deliver the said plaintiff to the gaoler of the common gaol of the said United Counties, who was thereby required to receive the said plaintiff, and him safely keep in the said common gaol for the term of thirty days from the arrest under said warrant, or until he should be sooner discharged by due course of law, the said order to commit and the said warrant of commitment being in full force and unrescinded, he, the said T., as such bailiff, by virtue of the said warrant of commitment took the said plaintiff, and delivered him into the custody of the said gaoler of the said common gaol, which is the alleged trespass.

Replication. That before the committing of the trespasses in the declaration mentioned, and before the commencement of this suit, the defendant, on a judgment alleged to have been recovered against the plaintiff in the Seventh Division Court for the United Counties of Huron and Bruce, by application under his hand requested the clerk of the said last mentioned Court to summon the said plaintiff to answer according to the Statute in that behalf touching such judgment debt in the said Court against the plaintiff; that on the 6th day of May, A. D. 1865, the clerk of the said Division Court, in pursuance of the said request of the defendant, issued under his hand and the seal of the said Court a certain judgment summons against the said plaintiff, at the suit of the said defendant, in the words and figures following, that is to say, &c. (setting out the judgment summons verbatim, returnable on the 31st May).

That on the said 31st of May, at the village of Bayfield, the said plaintiff appeared before the Judge presiding at the sittings of the said Division Court then held, ready and willing to be examined according to the statute in that behalf and the exigency of the said summons; that the said Judge before whom the said summons came on for hearing did not examine the said plaintiff according to the statute in that behalf, although he was ready and willing to be examined; and without any witnesses being examined on oath before him on said last mentioned day touching the subject matter of said judgment summons, made an order, endorsed on the said judgment summons, in the words and figures following, (setting it out):

That on or about the said 31st of May last aforesaid the clerk of the said Division Court entered in the procedure book of the said Court, the same being a book kept by the said clerk under the provisions of rule No, 4 of the rules of the Upper Canada Division Courts, the said order for the commitment of the plaintiff for the term of thirty days aforesaid, according to the Statute and rule of the Division Courts in that behalf duly made according to the provisions of the Division Courts Acts for Upper Canada; that more than three calendar months from the entry of the said order for commitment as aforesaid in said procedure book of the said Division Court for the plaintiff's commital as aforesaid, to wit, on the 16th of September, 1865, the said defendant, acting on the said supposed judgment, caused a certain proceeding to be taken against the plaintiff, by causing to be issued a summons in the words and figures following (setting out the summons to commit, returnable on the 9th October):

That on the said ninth day of October, the said plaintiff appeared on the said supposed summons before John Bell Gordon, Esquire, presiding in said Division Court as Deputy Judge, when the said summons was at the request of the platntiff adjourned until the next sittings of the said Division Court, when, in the absence of the plaintiff, the Judge of the said Court then presiding made the following order, indorsed on said summons (setting out the order of commitment):

Whereupon the said defendant, on or about the 4th of December, 1865, caused a warrant of commitment to be issued against the now plaintiff, which was in the words and figures following:

WARRANT OF COMMITMENT.

In the Seventh Division Court for the United Counties of Huron and Bruce.

No. 147, A. D. 1865. Between Peter A. McDougall, plaintiff, and Leonard Peck, defendant.

To Bernard Trainor, bailiff of the First Division Court, and to all constables and peace officers of the United Counties of Huron and Bruce, and the jailer of the common jail for the said United Counties.

Whereas, at the sittings of this Court holden at the village of Bayfield in the County of Huron,

on the 22nd day of October, 1864, the above named plaintiff, by the judgment of the said Court, in a certain suit wherein the Court had jurisdiction, recovered against the above named defendant the sum of $54.14 for his debt and costs, which were ordered to be paid at a day now past. And whereas, the defendant not having made such payment, upon application of the plaintiff a summons was duly issued from and out of this Court against the said defendant, by which said summons the defendant was required to appear at the sittings of this Court holden at the village of Bayfield aforesaid, on the 31st of May, 1865, to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances under which he contracted the said debt which was the subject of the action in which the said judgment was obtained against him, and as to the means and expectations he then had, and as to the property and means he still has of discharging the said debt, and as to the disposal he may have made of any of his property. And whereas the defendant having duly appeared at the said Court pursuant to the said summons, was examined touching the said matters; and whereas it appeared on such examination to the satisfaction of the Judge of the said Court, that Leonard Peck, the defendant, incurred the debt the subject of this action under false pretences; and then thereupon the said Judge ordered the defendant to pay the claim and costs in full in nine weeks or be committed to the common jail for thirty days. And whereas the said defendant did not pay as ordered, and upon application of the plaintiff on the 16th day of September, 1865, a summons to shew cause was duly issued out of this Court, and served upon the defendant, requiring him to appear at the Court to be holden on the 9th of October, 1865, and on application of the defendant, and by consent of the Court, the time was enlarged to the 4th day of December, 1865.

And whereas on the said 4th day of December, 1865, the defendant did not appear as required, nor allege any cause for not so appearing.

Thereupon it was ordered by the said Judge that the said defendant should be committed for the term of thirty days to the common jail of the said United Counties, according to the form of the Statute in that behalf, or until he should be discharged by due course of law.

These are therefore to require you, the said bailiff and others, to take the said defendant and to deliver him to the jailer of the common jail of the said United Counties, and you, the said jailer, are hereby required to receive the said defendant, and him safely keep in the said common jail for the term of thirty days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf, for which this shall be your sufficient warrant.

Given under the seal of the Court, this 4th day of December, 1865.

(Signed) D. H. RITCHIE, *Clerk.* [L.S.]

That the said defendant caused the said warrant of commitment to be delivered to the said Bernard Trainor, who took and arrested the said plaintiff and conveyed him to the said jail, and delivered him to the keeper thereof, and the plaintiff was detained in prison on said warrant for the space of thirty days, which are the same trespasses in the declaration mentioned.

To this replication the defendant demurred, as being no answer.

The plaintiff joined in demurrer, and excepted to the plea on various grounds, which are sufficiently stated in the judgment.

C. Robinson, Q. C., for the defendant, cited *Baird* v. *Story*, 23 U. C. R. 624; *Bullen* v. *Moodie*, 13 C. P. 126; *Tay*, Ev. 5th Ed., p. 1405-8; Division Courts Act, Consol. Stat. U C. ch. 19, secs. 160–168.

John Paterson, contra.

HAGARTY, J., delivered the judgment of the Court.

The first objection is, that the plea does not shew the necessary proceedings before judgment or facts to give the Division Court jurisdiction. 2. That it is not shewn that the necessary time elapsed between the entry of judgment and issue of execution, nor any order for immediate execution, nor that the execution was under seal. 3. That the warrant against goods should have been directed to a bailiff of the Seventh Division Court, and no proper return was made thereto.

We think the judgment is sufficiently stated, and that the prior proceedings need not be set out. We think that when it is stated that the judgment was for a debt in amount clearly within the statutable jurisdiction, we may assume it to be sufficient on exceptions, as these are, to a prior pleading.

The warrant, which the plaintiff sets out in full in his replication, expressly avers that the judgment was recovered "in a certain suit wherein the Court had jurisdiction."

As to the lapse of time before execution, we think it sufficiently pleaded that the execution issued on the judgment in due course of law, and that the delivery of the execution to the bailiff of the First Division Court of the County, within whose division the plaintiff then resided (as averred), and the return thereto, are sufficient.

Sec. 79 speaks of bailiffs executing all warrants, orders, and writs, delivered to them by the clerk for service, whether bailiffs of the Court out of which the same issued or not, and directs that they shall so soon as served return the same to the clerk of the Court of which they are respectively bailiffs.

The objection in the form in which it is taken cannot, we think, prevail; and it may not be necessary to discuss it, as the clauses allowing the examination of a defendant do not seem to make the issue and return of an execution a condition precedent, but merely say, "any party having an unsatisfied judgment or order in any Division Court, for the payment of any debt, damages or costs," may procure a summons, &c. —Sec. 160.

The fifth objection is, that it is not shewn that when the summons of the 16th of September was issued, served or returnable, the plaintiff lived or carried on business in the Counties of Huron and Bruce, under Sec 160.

To this the defendant answers, that he does aver that when the first summons of the 6th of May was issued the plaintiff was a resident of the county, and that till the contrary is shewn he will be presumed to have continued so resident. We think this answer sufficient.

The 9th, 10th and 11th objections were not seriously pressed, and need not be noticed. Section 170 gives very wide powers as to orders for payment.

The fourth objection is, that the plea does not allege that the plaintiff was examined on oath, nor any other evidence adduced before tho Judge. The words of the Statute, section 165, are, "If it appears to the satisfaction of the Judge that the party had when summoned, or since the judgment was obtained against him, has had sufficient means and ability to pay the debt or damages," &c.

Now here the warrant professes to commit the plaintiff because it appeared to the satisfaction of the Judge that the plaintiff had contracted the debt under false pretences. We are not prepared to hold that it would be absolutely necessary in all cases to take evidence on oath. We can readily suppose a case in which, when a debtor is brought up for examination, a writing purporting to be signed by him might be produced, which, if genuine, clearly proved by his own admissions that he had contracted the debt by false pretences, or that he had done something of which his creditor accuses him, or shewing that he had abundant means to pay if he pleased. If the Judge shewed him the writing, and he then admitted he had written it, and did not explain it or ask to be examined on oath, which his replication does not assert) to explain or contradict, we do not see why the Judge might not accept and act on his admission, as he might in dealing with any admissions made in Court on the trial of the suit between him and his creditor. We do not lay down any rule for general application on this point, we merely take the case as it appears in the pleadings.

We think this objection fails.

The sixth objection is, that the plea does not shew that any order for commitment was ever entered in a book prescribed by rule of the Division Courts to be kept by the clerk, called a Procedure Book; and the replication avers that the order of the 31st May was then entered in the procedure book. and that more than three calendar months thereafter the plaintiff issued the summons of September 16th.

Sec. 42 of the Statute, directs the clerk to note all summonses, orders, judgments, &c., in a book, which is made evidence in certain cases.

And rule 55 of the rules made under the Statute, says that, "Warrants for commitment, whenever issued, shall bear date on the day on which the *order* for commitment was entered in the procedure book, and shall continue in force for three calendar months from such date, and no longer; but no *order* for commitment shall be drawn up or served."

Were it necessary to decide the point, we should hesitate before we should hold that the omission of the clerk to enter an order of commitment in the procedure book, destroyed the validity of the warrant, and made the party applying for it a trespasser. It seems, however, quite unnecessary on these pleadings to decide such a point.

On the 31st of May the plaintiff was ordered to pay in nine weeks, or be committed for thirty days. This order was duly entered. We think the Judge, under the wide powers of the Act, especially in section 170, had power to make an order to pay in that time. There was no attempt made to enforce that order without further opportunity to shew cause being given to the plaintiff.

On the 16th of September, the summons to shew cause was issued for non-compliance with the former order, and on the 9th of October the plaintiff appeared thereto and obtained an enlargement to the next sittings of the Court, when, as he did not appear or shew cause, an order was made for his committal for non-appearance and disobedience of order.

There is no averment that this order was not duly entered in the procedure book, and the objection as to the lapse of three months from the order of May falls to the ground; nor can we hold it necessary that the plea should aver that it was so entered. In this view the eighth objection also fails, as to the order of May having expired.

The remaining objection is the seventh, that the order and warrant do not sufficiently shew the grounds of commitment, nor on which of the said orders the warrant was issued. and that if on the order of May the grounds of committal do not conform thereto.

We think the objection fails. The warrant recites the order of May, and that it appeared to the satisfaction of the Judge that the plaintiff had contracted the debt on false pretences, and therefore there was an order to pay in a given time or be committed. That payment was not made, and the summons to shew cause issued in September, and the default to appear thereon.

Judgment for defendant.

ELECTION CASE.

(*Reported by* HENRY O'BRIEN, Esq., *Barrister-at-Law, Reporter to the Court.*)

REG. EX REL. CORBETT V. JULL.

Municipal election—Improper conduct of returning officer—Election by acclamation.

At a meeting called to receive nominations for municipal Councillors, one party, as they alleged, made their nominations at 12 o'clock, or a few moments after, in the presence of only two or three persons, and without any effort on the part of the returning officer to call in the people outside the place of meeting. The returning officer did not enter the names of the candidates in his book, and gave evasive answers to some of the other party who came in afterwards as to whether any nominations had been made or not, and led some of the electors present to think that there was an hour or so to make nominations, when in fact there was less than half that time. At 1 o'clock the returning officer, without making any preliminary statement that certain persons had been nominated, and without asking whether there were any other candidates to be nominated, declared that the persons nominated at the opening of the meeting were duly elected by acclamation. The other side, who were waiting, as they alleged, to make their nominations after the other party, under the impression that no nominations had as yet been made, protested against this, and desired to nominate the opposition candidates, (of whom the relator was one,) which the returning officer, however, refused to receive as being too late.

Held, 1. That the election must be set aside, and a new election ordered.

2. That the relator was a candidate and voter within the meaning of sec. 103 of municipal act, and that the returning officer could not by his illegal acts divest him of his rights in that respect.

3. That the names of the candidates should have been submitted to the meeting *seriatim* after the hour had elapsed, and an opportunity given to the electors present to express their assent or dissent, without which there

could not be said to have been an election by acclamation.

4. That the returning officer had acted improperly and contrary to the spirit of the law, and was therefore ordered to pay the costs.

[Chambers, Feb. 26th, March 8th, 1869.]

This was a *quo warranto* summons on the relation of John Corbett against Thomas Jull, as reeve of the village of Orangeville, and Thomas Jackson, Peter McNabb and Joseph Pattullo, councillors of the same village, to have their elections respectively declared invalid and void, for the following causes:

1. That the said election was not conducted according to law, in this, that the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, or any or either of them were not duly proposed and seconded according to law, nor were the said parties duly proposed and seconded at the place appointed for such by the returning officer, nor were the said parties proposed and seconded within the time required by law.

2. That the said Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, were not duly or legally elected or returned in this, that the said parties were not duly proposed within the proper time or at the proper place, nor were they proposed according to law.

3. That the returning officer did not wait for one hour after the last candidate had been duly proposed and seconded as is required by law so to do, but improperly and illegally declared the said parties duly elected councillors for the year 1869.

4. That the returning officer acted unjustly and illegally in conducting the said election, in this, that he told several intending candidates and electors that he had an hour to come and go on—meaning thereby, that it would be an hour before he closed the proceedings, and about fifteen minutes afterwards declared the defendants duly elected reeve and councillors respectively.

5. That the returning officer conducted the said election unjustly and illegally.

6. That the proceedings made necessary by law to the validity of said election were not observed by the returning officer at said election to the prejudice of the electors of the village of Orangeville.

The relator claimed an interest in the election as a candidate for the office of councillor, and who tendered his vote at said election for both reeve and councillors.

The defendant, Peter McNabb, disclaimod on the 28th January, 1869.

The returning officer was made a party to the cause and answered with the other defendants.

A number of affidavits were filed on both sides, but the further facts will be sufficiently understood from the judgment.

McMichael for the defendants shewed cause.

1. This is not a case within the Act. The relator is not a candidate as he was not nominated; and is not an elector as he did not vote or tender his vote: sec. 130, Municipal Act; *Reg. ex rel. White* v. *Roach*, 18 U. C. Q. B. 226; *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg* v. *Bell*, 4 U. C. L. J. N.S. 93. There may be a remedy at common law by full court, but not under these proceedings. It was the fault of the relator and his friends that they did not make any nominations they chose, and they cannot now complain that they did not do so.

Harrison, Q.C., for the relator. The new procedure is in place of the common law remedy: see *Roach's case ante*; and this proceeding is not touched by the cases cited, which speak of electors not taking the trouble to propose candidates, and evincing a carelessness as to their interests. But, here the relator's party were *waiting* and ready to make their nominations, but were deceived by the returning officer as to the position of affairs. If a returning officer can act thus, he can in effect abrogate the statute and destroy the rights of electors.

JOHN WILSON, J.—The preliminary and first question is whether under the circumstances disclosed, the relator was entitled to his seat under our statute, and secondly, whether there was such an election in fact, as can be sustained.

The clerk of the municipality of Orangeville is Francis Grant Dunbar. He is the clerk of Joseph Pattullo, attorney-at-law, one of these defendants. On the 3rd December, 1869, Mr. Dunbar, as clerk of the corporation, published the usual notice, that a public meeting of the electors of the village of Orangeville, would be held at Bell's Hall, the place where the then last election had been held, on Monday the 21st of December, 1868, at the hour of 12 o'clock noon, for the purpose of nominating a reeve and councillors for the said village.

It is stated by a number of deponents, and not denied by any of the defendants, that a contested election was anticipated, and the village had been canvassed with a view to an election. There are, as is usual, contradictory statements as to what occurred during the hours between the opening and close of the proceedings, and as to when the proceedings were opened and closed, but I think there is no fair ground for saying, that the proceedings commenced after, but sharply after 12 o'clock noon. Without discussing every controverted point in these proceedings, I shall be able to dispose of both points chiefly from the statements of the returning officer, and one of the affidavits in reply. The returning officer on oath says, "before leaving the office of Mr. Pattullo (for the purpose of holding the nomination), I borrowed Mr. Pattullo's watch for the occasion. At a few minutes before 12 o'clock noon, I left the law office of Joseph Pattullo, Esquire, and went to the hall named in the proclamation, and shortly after entering said hall, I looked at my watch, and waited until 12 o'clock, when rising to my feet, I formally opened the nomination by announcing to those then present that it was now 12 o'clock, and that I was prepared to receive nominations for reeve and councillors for the ensuing year, and that if no more than the necessary number of candidates for the several offices were nominated within an hour after the last nomination, I would close the nomination and declare those nominated duly elected by acclamation."

I may here refer to a fact, on which the returning officer offers no explanation. He had a book, but I hear of no entries in it of nominations. He was sitting, according to the sworn statement of McCarthy, between 12 and 1 o'clock, with a book before him, open, but blank. Blank, the relator contends, that the electors might be

mislead by the concealment, which he was practising upon them.

I now read the returning officer's further account of his own proceedings on oath. "I then took my seat at the table, and George Bell, a duly qualified elector ascended the witness box and nominated Thomas Jull for the office of reeve, which was seconded by Thomas Hunter. Bell then nominated Mr. John Anderson as councillor, and the said Hunter seconded the nomination. James Ferguson, another duly qualified elector, then nominated Thomas Jackson as councillor, seconded by Hunter; said Hunter then nominated Joseph Pattullo, seconded by Thomas Jackson; Thomas Jackson then nominated Peter McNabb, seconded by James Ferguson, all of which were made publicly, openly and audibly, and as required by law after and at the hour of 12 o'clock: that no other nomination or nominations for the offices of reeve and councillors was made within the hour, and I declared Thomas Jull, John Anderson, Thomas Jackson, Peter McNabb and Joseph Pattullo, duly elected reeve and councillors respectively for the village of Orangeville for the year 1869."

He says "I never spoke to any of said candidates or any other person or persons about the nominations before entering the hall," and he denies any conspiracy or arrangement to keep the nominations quiet and secret until the lapse of an hour and that he received the nominations in good faith, and that the election was conducted strictly within the law so far as he was able to understand it. He says, "I neither omitted or exceeded any part of my duty as returning officer, and the said nominations and election were fairly and impartially conducted, and any person had ample time and opportunity, and the full allowance made by law to do so: that I was ready and willing to receive nominations from the time I opened the nomination until the declaration, and I did receive all that were offered, and if any intending candidate was not nominated he was himself to blame for not procuring his nomination within the time required by law."

The relator by his affidavits charges upon the defendants, that they conspired to carry the election by means of opening the proceedings before 12 o'clock, and making their nominations when none of the electors, excepting those necessary to make the nominations were present, and by concealing from the electors and other candidates that nominations had been made; and that this was done while the new candidates were waiting for the nomination of the old ones, as they supposed, that they might then make their nominations: that the returning officer by evasive and false answers to questions as to the state of proceedings, kept them off their guard for an hour, and then suddenly declared the defendants duly elected by acclamation without giving the electors an opportunity of nominating their candidates, and when they instantly rose to remonstrate and make them, he refused to hear them.

Maitland McCarthy says "I am a duly qualified elector of the village of Orangeville, and as such, went to Bell's Hall for the purpose of nominating candidates for reeve and councillors for the municipality of the said village; that I arrived there about twenty-five minutes after 12 noon, that on entering the hall I met the returning officer and Thomas Jull, who was afterwards declared reeve, in conversation close by the door of the hall. Jull soon after left the hall and the returning officer returned to his seat. I went to the returning officer's table and looked at the paper before him, and seeing it blank, asked him if he had received any nomination yet, to which he replied, 'I have not received any.' No nominations were made after I got to the hall. About fifteen minutes to one, Thomas Jackson came into the hall, and shortly after the returning officer left his seat and went to Jackson who was then close to me, and in my hearing asked Jackson, "are they not coming down?" remarking, "it is time," upon which Jackson left the hall, and about one or a little after, Jull, Anderson, Pattullo and some others entered, and almost immediately after the returning officer stood up and declared Jull duly elected reeve, and Anderson, Jackson, McNabb and Pattullo, councillors. I protested as strongly as possible against the extraordinary conduct of the returning officer, after being informed by him not half an hour before that he had received no nominations, and I then nominated a person as a candidate for councillor which was duly seconded, but the returning officer refused most positively to accept such nomination or any other, although several were made, stating he did not care for the electors or the council. That on leaving the hall, I met Jackson who had just been declared elected; I told him if he wished to wash his hands of such a corrupt work, he had better go back and repudiate all connexion with it and decline to accept office in such a way. Jackson replied, that he had nothing to do with it, and did not know anything of it, and had told them he would much sooner remain at home.

Various other affidavits were filed on both sides, but they did not materially alter the complexion of the case.

The conducting of an election is analogous to any public meeting where the object sought is a fair expression of opinion on any question proposed. A resolution is said to be carried by acclamation, when, after it has been proposed and heard, it receives no opposition, but is carried by the consent of the meeting, expressed or implied from its silence, but in no case can it be correctly said to pass by acclamation, where it has not been proposed or not understood.

The law in regard to elections, assumes, that when the election of any officer is carried by acclamation, the electors are fully and fairly informed of what they are assenting to by acclamation. They cannot assent to what is not submitted to their choice or present in their minds. A nomination is a resolution submitted to the electors, that the party named is a candidate for their suffrage, for an office named, but the legislature to present surprise requires that not less than one hour shall elapse between the submission of the last nomination and the putting of the question with a view to its being passed by acclamation. In the mean time the vote is in abeyance. The statute does not mean that, the returning officer, if no other nominations are made, shall simply declare those who had been proposed duly elected, it means that these nominations shall be put *seriatim* to the electors and then votes taken upon them. The law prescribes no form of words, but it requires

that the proposition should be explained so as to be understood by men of ordinary understanding. Now this election is said to have been carried by acclamation. When was the acclamation? Was it when the movers and seconders were present, and perhaps one or two more when the nomination was first submitted? Certainly not. Was it when the declaration was made? Certainly not, for no one heard then who had been nominated, nor was it at any other time submitted to the electors as a question to vote upon—no opportunity was given to say or not to say, if it was carried or not carried. They had then no knowledge of *what* was carried by acclamation. Did the electors generally know that the simple declaration of the returning officer was to imply their consent and bind them to the election? Certainly not, for some of them indignantly protested against its injustice and commenced to make other nominations. When the hour had expired, it would have been proper for the returning officer to have called the attention of the electors then present to the fact of the expiration of the time, and to have announced that Thomas Jull had been nominated at twelve o'clock, or soon after as the fact was, by George Bell as reeve, seconded by Thomas Hunter, and that if no other nomination was made, he should assume him to be elected by acclamation, and declare him elected accordingly. If, after a reasonable pause no other nomination was made, the declaration of his election should have been announced. And so with the other nominations *seriatim*. They ought not to have been submitted together, for it would thus become a compound question and embarrass the electors.

By requiring an hour to elapse between the nomination and the proceeding to close the election, in case of no further nominations, the Legislature meant to protect the electors against haste and surprise, and in no case does the law require so strict an adherence to its letter as to defect its object and spirit.

It is the duty of a returning officer to stand indifferent between contending parties; to have no interests to serve for either or for himself; to approach his duty with the simple desire to do strict justice, to be ready and willing to give reasonable information as to the state of his proceedings, to conceal nothing, to evade no proper enquiry, to mislead no one by his silence, or exhibit any thing calculated to deceive, and he ought not to make a pretence of strictly following the letter of the law to defeat it.

Leaving out of the question all disputed facts, and taking the returning officer's own account of his proceedings, and acquiting him and defendants of any conspiracy or pre-arrangement to preclude the other party, and carry the election as it was carried, (and I think they are all entitled to their full acquittal on that score), did the returning officer honestly and fairly do his duty? Was it fair to have opened the proceedings till it was beyond question whether it was really twelve o'clock? Was it fair to open the proceedings in presence of two or at most three electors and make no effort to let it be known outside that he was about to open his proceedings? Why were not his proceedings entered in his book as a deliberate act and as his duty required? His attention was called to the impression which his apparent blank book created, by several of the deponents. He passes this unnoticed, and I may fairly assume there was no entry made at the time. He took the trouble to tell Mr Jull when he came in, that he, at least had been nominated. Why did he not tell some of the other party? Why speak to Mr. Jackson and say to him what he does not deny he did say? Why so much anxiety about his watch and the time? Why, when asked by Kelly if any nominations had been made, did he answer, "Yes, lots of them?" Why not say who had been nominated, and why did he give an answer that at least was evasive? He says he does not remember McCarthy asking him if any nominations had been made, nor does he believe he did so, but he remembers his asking, "Have proceedings commenced?" and his replying, proceedings had commeneed at twelve, and that he would close the nomination one hour from the last nomination. Why did he not deign to tell him what he told Mr. Jull, that he Jull had been nominated reeve at the opening of the proceedings?

He denies what Fead asserts, but he says among other things that Fead said, he had closed the nomination on his account. To this the returning officer says, "I observed that it would teach him a lesson, meaning that if ever he offered himself as a candidate, he would cause himself to be nominated within the proper time." How was it his duty to teach by his proceeding a candidate or the electors a lesson? Does not this answer imply the character in which Fead stood as an intended candidate whom the returning officer had taught a lesson by something he had done. Was it fair to make no announcement at any time as to how the proceedings stood until by his declaration he had precluded any further nominations? Can any one say that justice was done to the electors on this occasion? On reading all the affidavits and all the explanations, I confess I arrive at the conclusion, that the election was arrived at by conduct of the returning officer not in accordance with law and contrary to justice.

The defendants contention was, that this was not a case to which our statute applied, that it was one under the statute of Anne, because they say, the relator was not a candidate or voter, within the meaning of sec. 103 of the Municipal Act. I think he was. The relator was known to be a candidate, was there to be proposed, was in fact proposed, although after the declaration by which the returning officer assumed to preclude him. It cannot be permitted that a returning officer shall by his own illegal act divest a relator of his *status* as a candidate, nor can the defendants who adopt that act, strip him of the character which gives him right to maintain his *quo warranto* against them.

But the other defendants with full knowledge of all he did, adopted his declaration as an election by acclamation, and, excepting McNabb, who disclaimed, they took their seats.

I feel compelled to declare the election void, and I award the relator costs against the returning officers, and the defendants who have maintained their right to the seats.

COUNTY COURT CASES.

Bailey v. Bleecker.

(In the County Court of the County of Hastings, before His Honor Judge Sherwood.)

Trespass—Jurisdiction—Title to land—Ousting Jurisdiction.

One H. sold to defendant timber standing on his land, and afterwards conveyed and gave possession of the land to plaintiff. The defendant proceeded to take off the timber. *Held*, that the title to land was not in question, and that trespass to land would lie in the County Court.

This was an action of trespass. The declaration contained two counts: 1st. trespass to the N. W. ¼ of lot 26, in the 13 con. township of Huntingdon. 2nd. That defendant converted to his own use and possession certain trees of the plaintiff's.

On the trial the plaintiff after proving that defendant entered on the N. W. ¼ of lot 26, in 13 con. of Huntingdon, and cut down and cut into saw logs a certain number of trees and took them away, put in a deed from one Hicks to the plaintiff of this portion of lot 26. He also gave evidence that plaintiff had also used acts of ownership over it, by taking off building timber, staves, and waggon spokes; and that there was a fence between this and the remainder of the lot occupied by Hicks. The plaintiff finding his evidence applicable to lot 6 instead of 26 mentioned in the declaration, asked leave to amend and the defendant's counsel asked leave, if leave to amend, granted to plead anew, which was granted, on condititon that he should be at liberty to do so. The plaintiff's counsel declined the amendment on these terms. On the part of defendant, his foreman swore that he purchased the timber from Hicks, and paid him for it. The lot was shewn from the evidence to be a wild lot, not enclosed

At the close of plaintiff's case, defendant's counsel moved for a nonsuit on several grounds which were overruled. The case went to the jury, and verdict for plaintiff.

In last term defendant moved for a new trial on the grounds: 1st. that plaintiff did not prove that he ever possessed the land on which the alleged trespass was committed, *nor any title thereto.*

2nd. That the judge permitted plaintiff to produce and prove the consideration of a deed from one Hicks to plaintiff, without which no right of action could have been made out in plainiff. He also asked for a stay of proceedings, on the grounds that the title to lands came in question, and that on production and proof of the title from Hicks' title was at once brought in question.

Sherwood, Co. J.—It appeared in evidence that Hicks was in possession of the whole of lot number 6, as much as any person could be in possession of a wild lot, and that while in such possession, he conveyed the north-west quarter, on which the trespass was committed, to the plaintiff. This appeared to me at the trial (and I have seen nothing since to change my opinion), to give him a sufficient possession, taken with the acts of ownership exercised by himself to enable him to maintain this action. He proved a *prima facie* title, which was not in any way controverted by the defendant.

The question of jurisdiction is an important one, and on the whole, I cannot say, I am free from doubt. The County Court Act gives to that Court, jurisdiction in any action except the cases referred to in the 16th sec.; and the first of them is where the title to land comes in question.

In order to the proper decision of this case, we must enquire if the title to land is here brought in question.

It is laid down in the books that the mere assertion of a title without proof of it, is not to be taken by a court as ousting it of jurisdiction In the present case no evidence of title in the defendant was given. It is true that evidence was given, that the foreman of the defendant purchased the standing timber on the lot in question from Hicks. There was nothing to shew that he, after his conveyance to the plaintiff, had any title in it. The mere fact of a person having sold the timber to the defendant, whether he once owned the land on which it stood, or not, is not evidence of title. The counsel for the defendant did state that the land had been conveyed to the plaintiff by Hicks, his stepfather, to enable him to vote at an election, but no evidence was given to substantiate it. It is doubtful if there had been evidence to that effect, if it would have been evidence of title.

The County Court Act seems to me to authorize this court to try trespasses to land, as well as other suits in which the title does not come in question. I think that no further than by the assertion of the want of title in the plaintiff by the defendan the title came in question, and I do not consider that sufficient to oust this court of jurisdiction.

The defendant is entitled, I think, to judgment, on the issue to the first count. The verdict should be amended to correspond, as it was a mistake for it to be taken as general I discharge the rule on condition of this being made a part of the rule.

ENGLISH REPORTS.

COMMON PLEAS.

Chorlton v. Lings.

(*Continued from page* 63.)

Mellish, Q. C. (*R. G. Williams* with him), for the respondent.—This is a case where the lady claims to vote for the borough of Manchester. That borough was created by the Reform Act of 1832. Now, my learned friend admits that the phraseology of that Act cannot be strained so as to include women among the electors to whom the franchise is given for the first time by that Act. Therefore, so far as the borough of Mancaester is concerned, and, therefore, so far as the present case is concerned, the contention of my friend must rest on the construction of the Representation of the People Act of 1867.

Now it is admitted that, when that Act was passed, the common opinion was that women had not the right to vote, and therefore that Act was passed in view of that opinion. But I contend that the opinion which has prevailed for so long on this subject, both among lawyers and among ordinary persons, is strictly in accordance with the common law. In the first place, this common opinion is proof of what the common law is, in the absence of any proof to the contrary. Of course there may exist strong evidence which will rebut this presumption, but I submit that no such evidence has been adduced to-day by my friend.

There are two questions as to section 3 of the Act of 1867. First, does "man" include woman; and, secondly, is sex an "incapacity"? I can't see that, without Lord Romilly's Act, my friend has any case, though he seemed to think but poorly of the assistance he was to derive from that Act. Now the Act to be construed is not Lord Romilly's Act, but the Act of 1867. If your Lordships can gather in any way permitted to the judicial mind that the Legislature did not intend to include women by the Act of 1867 your conclusion cannot be affected by any difficulties of construction consequent on Lord Romilly's Act. Now, if the Legislature had intended to make this change, would they have done it in this way, this very vague and uncertain way. The 56th and 59th sections of the Act of 1867 throw some light on this point. By these sections, the two Acts of 1832 and 1867 are to be construed together. How can we possibly read these Acts together if Lord Romilly's Act, which was passed in 1850, is to be applied to interpret the one Act and not the other.

The word "man" no doubt itself admits of two constructions (1) in opposition to angels and beasts, and (2) in opposition to infants and women. If it is used in the latter sense in section 3, the contention is at an end. Surely that is what it does mean. If you take it in connection with the Reform Act of 1832 how could it mean anything else. By "male person" in the Act of 1832 the Legislature clearly meant this, and it must therefore have meant the same in section 3. For example, section 27 of the Act of 1832 applies to males only, but to males in warehouses, &c. Whereas the Act of 1867 applies to dwelling-houses only. So, if section 3 were held to include women, we should have an absurd inequality; sex would in some instances operate as an incapacity, and in some instances it would not. Now clearly the Legislature could never have deliberately intended this. Consider the Mutiny Act, 30 & 31 Vict. c. 152. The expression there is that so many thousand "men" shall be raised. Would that authorize a recruiting serjeant to enlist women? I submit not. Yet this is since Lord Romilly's Act.

But if we leave the consideration of the late Act, and examine what the state of the law was anterior to its passing, I must say I rely equally with my friend on the phraseology of the early statutes. He says truly that the words in those statutes are very general, and in each case capable of including women as well as men. Quite so, but as a matter of fact such a construction as that contended for by my friend never was put on any of those statutes, as is sufficiently proved by the uniform practice that women did not vote at elections as far back as legal memory goes. For I contend that my friend has made out no case that they ever have voted in ancient times, and to that point I am coming in a moment. The statute 8 Hen. 6, c. 7, was a restraining statute. But I admit that that statute did not take away any franchise from women. If women had a right to vote before that statute they have it still if they are forty-shilling freeholders. And as to the latter statutes I equally concede to my friend that no rights were taken from women by them, for they are not disabling Acts at all. Now, I submit that whatever may have been the correctness of the opinion that women have not the right to vote at elections, at at any rate all the authorities show that in point of fact from the time of Coke to the present day women did not vote. What is the evidence with which my friend meets the presumption raised by this concurrent testimony? How does he seek to rebut the great opinion of Lord Coke? His authorities are very ambiguous. As to women being suitors to the county court, the fact of their being bound to come to the county court does not prove that they went there as suitors. Others than suitors we know were bound to go. The extracts from Prynne only show that in four or five cases women seemed to have signed the indentures. Now, if it be as my friend contends we have a married woman appointing an attorney, and that attorney voting for her, as will appear on looking at the returns. In these cases the women were probably the patrons of the borough, and in one case it is not certain that she was not the returning officer. You have thus three or four ambiguous signatures against the uniform usage and opinion of the last 300 years.

It does not appear, indeed, except in the case where the woman's was the only signature, that the returns were disputed, and in that case the return was held bad. There is nothing to show that superfluous signatures would vitiate the return. In the case of *Olive* v. *Ingram* the dicta are more for me than they are against me, as will be seen by reading the judgment. Lee, C. J., it is true, gives contradictory opinions in different parts of his judgment, but in the conclusion he is in my favour. Therefore, in that case the authority of the judges and the ground of the decision are in my favour. How, then, can you, in such a report as 7 Mod., attach any importance to the alleged production of a MS. case.

There is a unanimous decision of the Scotch Court of Session of Otober 30, 1868, in my favour though Lord Romilly's Act applies to Scotland. As to my friend's observations on the fitness of women for the franchise, I wholly decline to follow him into that question.

Colerige Q. C., in reply.

Cur. adv. vult.

The judgments were delivered on November 9. Those of BYLES and KEATING, JJ., were written, and are given here *verbatim*. Those of his Lordship and of WILLES J., are taken from the short-hand writer's notes of what they said

[We have only space for the judgment of the Chief Justice.—ED. L. C. G.]

BOVILL, C. J.—It is quite unnecessary to consider the question, whether it is desirable that women should posses the franchise of voting at the elections of members of Parliament. What we have to determine is, whether by law they now possess that right. In the present case, it is agreed, the right of the appellant to be placed on the list of voters for the borough of Manchester must depend on the construction to be placed on the Representation of the People Act, 1867. Under that statute two questions arise, one whether women are included under the words "every man," and the other, whether women are subject to legal incapacity. If women are not included in the terms of the Act, or are so incapacitated, our judgment must be in favour of the respondent.

On the question of whether they are incapacitated Mr. Coleridge, on the part of the appellant,

contended that women had a right to the franchise at common law, that nothing has taken it away from them, and that they were therefore not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that the present appellant was entitled to the franchise as a common law right, and he fully argued that question.

The appellant has failed to produce before us any reported decision of any Court in favour of the right of women to the exercise of the franchise, in voting for members of Parliament, with the exception of the notes of cases which are referred to in 7 Mod. Mr. Coleridge was obliged to admit that for several hundred years no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law.

It is true that a few instances have been brought before us where in ancient times—namely, in the reigns of Henry II., Henry V., and Edward VI, women appear to have been parties to returns of members of Parliament; and, possibly, other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature, and, indeed, it is mentioned by Selden in his England's Epinomis, c. 2, s. 19, that they did so. But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several centuries. What has been commonly received and acquiesced in as the law, raises a strong presumption of what the law is. At least those who question it have the burden of proving that it is not what it has been so understood to be.

The statute 52 Hen. 3, c. 10, in relieving women from attending at the sheriff's tourn does not prove that they were entitled to or did vote at the elections. Neither is this shown by the names of women being included in the roll of burgesses and freemen of the borough of Lyme Regis as mentioned in 2 Luders. The records that were produced of the time of Philip and Mary show that dame Elizabeth Copely was a party to an indenture as returning officer, and that may possibly be the explanation of the previous return in the reign of Edward VI.

The same observation applies to the case of Lady Packington joining in an election for Aylesbury, as appears from 7 Mod. 268. The precept was directed to her as lady of the manor to return two members of Parliament. With regard to the two cases mentioned in the report of *Olive* v. *Ingram*, 7 Mod. 263, they appear to have been cited from a MS. by Hakewell. The statement of them varies in different parts of the report, and though the argument was several times adjourned it does not appear that anything satisfactory was discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange, and I think that very little weight is to be attached to them. If there was any such decision—and one of the cases is said to have been decided in 14 James 1—it is difficult to understand why no further notice or trace of it is to be found or why it should not have been acted upon.

At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns produced to us were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, and whether they come within the description of particular statutes does not materially affect us in this case. On the other hand Lord Coke, 4 Inst. 5, treats it as clear law, in the time of James 1., that women were incapacitated from voting, and in the case of *Olive* v. *Ingram* (temp. 12 Geo. 2) the majority at least of the judges, notwithstanding the two cases referred to, seem to have been of the same opinion.

In the work (published in 1812) of Mr. Serjeant Heywood, who was well acquainted with election law, women are classed among those who are incapacitated from voting. The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognised in the Act of 1832, by the Legislature when it conferred the franchise on "male persons."

There can be no doubt that at the time of the passing of the Act of 1867 the common understanding both of lawyers and laymen was that women were incapacitated from voting, and the Legislature must, I think, be presumed to have acted under that impression.

The 56th section of the Act of 1867 also expressly preserves all laws, customs, and enactment then in force.

Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise nothing has occurred to take it away. But the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed, and considering that no reported decision or authority can be produced in favour of the right, that there are the opinions against it to which I have referred, and that there has been such long and uninterrupted usage to the contrary, I have come to the conclusion that there is no such right, and that women are legally incapacitated from voting within the meaning of section 3 of the Act of 1867.

Assuming, however, that the claimant was not legally incapacitated within the meaning of the late statute, the question then would arise, whether the franchise has been conferred by that Act and by force of the provisions of Lord Romilly's Act? This depends upon the construction to be placed upon the language of the Legislature in section 3 of the Act of 1867. It enacts that every "man," with certain qualifications, shall be entitled to the franchise.

In the Act of the 13 & 14 Vict. c. 21, s. 4, it is enacted that all words signifying the masculine gender shall be taken to include females, the singular shall include the plural, and the plural the singular, unless the contrary as to the gender or number is expressly provided. Now, in construing the third section of the Act of 1867 regard must be had to the whole of the enactment with a view to ascertaining whether the word "man" is there used in the sense of a person, or is equivalent to the expression "male."

By the 56th section of the Act of 1867 it is provided that the franchises conferred by the Act shall be "in addition to and not in substitution for, &c., &c."

By the 59th section it is enacted that the Act, so far as is consistent with the tenor thereof, is to be construed as one with the enactments for the time being in force relating to the Representation of the People and with the Registration Acts. By the Reform Act of 1832 the occupation franchise in boroughs is expressly given to "male persons" who shall be qualified as therein mentioned.

By section 33 of the Act of 1832 it is enacted, "That no person shall be entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough, save and except in respect of some right conferred by this Act, or as a burgess and freeman, or as a freeman and liveryman, or in the case of a city or town being a county of itself, as a freeholder or burgage tenant as hereinbefore mentioned."

It is quite clear that women would not become entitled to the franchise under that Act. Now the two Acts are to be construed as one, and therefore we should endeavour, as far as possible, to put such a construction upon the latter Act as will make it consistent with the provisions of the former statute.

There is no doubt that in many statutes "men" may be properly held to include "women," whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex. We must look at the subject-matter, and at the general scope of the provisions of the later Act, as well as at its language, in order to ascertain the meaning of the Legislature. I do not think, from the language of the Act, that there was any intention to alter the description of the persons who were to vote. I should rather conclude that the object was to deal with their qualifications. If so important an alteration of the personal qualification was intended to be made as to extend the franchise to women who did not then enjoy it, and in fact were excluded from it by the terms of the former Act, I can hardly suppose that the Legislature would have made it by using the term "man." Indeed, in the very next Act, where it was intended to extend the Factory Act, females are expressly included.

The conclusion at which I have arrived is that the Legislature used the word "man" in the same sense as "male person" in the former Act, and that the word was intentionally used in order to designate expressly the male sex, and that it amounts to an express enactment and provision that every man, as distinguished from every woman possessing the qualifications, was to have the franchise.

In that view Lord Romilly's Act does not apply to this case, and does not extend the meaning of the word "man" so as to include women.

On this part of the case the decision of the Scotch Court of Session is also in point, and in that decision I entirely concur.

On both grounds, therefore, first, that women were legally incapacitated for voting for members of Parliament; and, secondly, that the section is limited to men and does not extend to women, I think that women are not entitled to the franchise, and that the decision of the revising barrister must be confirmed in this case and in the other cases which depend upon this case. But it is not a case in which costs should be given.

CORRESPONDENCE.

Division Court officers—Increase to fees.

To the Editors of the Law Journal.

Gentlemen,—The petition for an increase of the fees of officers of Division Courts, which was presented to the Parliament of Ontario during its first session by John Coyne, Esq., M.P.P. for Peel, backed by a personal application to the Hon. J. S. Macdonald, has not been altogether useless or disregarded, and the clerks and bailiffs may now fairly indulge a hope that the injustice under which we have so long suffered will be removed, at least to some extent; it would be expecting too much to expect anything perfect in this world. As the Board of County Judges will probably soon meet, I would like to publish where it may be seen a true and unvarnished tale of one day's work done by me, and my remuneration for the same:

Work.	*Paid.*
Entered Bailiff's returns on eight executions	00
Made returns to three transcripts with the necessary entries in F. P. Book	00
Wrote three letters, one with each transcript	00
Returned two foreign summonses, and made entries thereof in P. Book	00
Wrote one letter with same	00
Received three payments of money (one of them partly by cheque) involving nine separate entries	00
Attended the Post Office with the letters....	00
Attended at the Bank with the cheque	00
Issued one execution.....	30
Spent four hours in making out a return for the Bureau of Agriculture (it took about four days altogether).....	00

Books, stationery, &c., of course I had to pay for myself. I wonder how much of the 30 cents I had to support my family on for the day? Is it any wonder that men complain bitterly, who for so much work get so little pay?

What the Bureau of Agriculture wants of the annual return (not paid for of course, and now insisted on from Clerks of Division Courts) I cannot imagine, unless there is a prospect of a demand for scare-crows, and the Bureau wants to calculate how long at the present rate of our remuneration it will take to bring Division Court officers and their families to the necessary degree of leanness and rags to enable them to discharge the duties of the (about as well paid) office of scare-crow.

Trusting that this is the last letter I will ever have to trouble you with on the subject of poor pay, for myself or any one else,

I am, gentlemen,
Your obedient servant,
CHER.

Sale of Liquor without License—Procedure.

HILLSBORO', PLYMPTON, May, 1869.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—I beg to lay the following before you, and to request if possible you would give an answer in your next issue.

The inspector of tavern licenses received information from A. that on the 15th of April, B. sold liquor without license. B. was summoned to appear before the inspector on the 30th; he did so, but as the informer did not appear, and there was only one witness present, the case was adjourned to the 7th of May, when all parties appeared except the informer, who in fact had left the country. The witnesses, three as respectable men as any in the community, swore they had not been at the tavern (and two of them not in the village), on the 15th. The magistrates were rather taken aback at this, and cross-examined them well, but were *now* informed by some other person that there was a mistake in the information, and that it should have been the 13th. However, the justice of the peace said a couple of days made no difference, and they adjourned the trial to the 7th June, when they expect to have the informer present, as they consider his oath quite sufficient to convict on, and they almost told the witnesses that they did not believe them. Can they now alter the date in the information, and go on with the case, as the twenty days required by the 32 Vic., cap. 32, sec. 25, have passed? They say they can if they like adjourn the case from time to time for years, and compel the witnesses to attend (and they have from ten to fifteen miles to travel). Are the witnesses entitled to fees? The magistrates say not.

Again: M. was brought up at same time by same informer for selling without license: a mistake also in the date—witness subpœnaed, &c. One of the most respectable farmers in the neighbourhood swore he neither paid for liquor, saw it paid, or had any reason to believe it was paid, as M. had asked him in and treated him. Decision same as in other case.

AN OUTSIDER.

[The procedure under the act referred to is to be governed by Con. Stat. Can. sec. 103, which provides, that a variance between the information and evidence as to the time the offence was committed, shall not be considered material, but the magistrate may, if he think fit, adjourn the proceedings till a subsequent day so as to prevent injustice. That rule would, we suppose, apply to the case put by our correspondent.—EDS. L. C. G.]

Division Court Clerks buying juagments.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

CLINTON, May 21, 1869.

GENTLEMEN,—I request to know if clerks of Division Courts are allowed to purchase judgments recovered in their courts. There are a good many of the profession of opinion that they can. By answering at your convenience will oblige, LEX.

[We think such a proceeding ought not to be permitted. There may be no special statutory provision forbidding it, but clerks would do well to avoid such an objectionable proceeding.—EDS. L. C. G.]

REVIEWS.

AMERICAN LAW REVIEW. April, 1869. Little, Brown, & Co., Boston, U. S.

The April number of this valuable legal Magazine has been received. The principal articles are, Bluntschili's International Law; The Legal Qualifications of Representatives, and a discussion on the law of Copyright. There are also the usual Digests of Cases in the American Courts, Summary of Events, Notice of Law Publications, &c. It notices that our namesake, the *Canada Law Journal*, in Lower Canada, has ceased to exist. Whilst we regret that it should have been found necessary to discontinue that publication, we cannot refrain from congratulating the *Review*, that the confusion caused by two publications in this country bearing the same name, is at an end.

BENCH AND BAR. Chicago: April, 1869.

This is the name of a new legal publication intended for the present to appear quarterly, and which will be mailed free of cost to such gentlemen of the profession as will forward their names to the publishers. It is thought

that by this gratuitous distribution a larger class of readers will be reached than by affixing a subscription price. From our experience of journalism, we should think this will be found very likely. The class amongst the profession, at least in this country, that prefer a *gratuitous* distribution in this respect is very large, in fact their appreciation of the system is so great that they entirely ignore any silly promises to pay they may have made in a moment of weakness We expect, therefore, that the *Bench and Bar* will have a very extensive circulation in Ontario. We shall be happy to supply its publishers with a list of several hundred lawyers that its terms would exactly suit, particularly if the postage is prepaid. We would suggest that the publishers should, in addition, give to each of such "subscribers" an annual bonus of three to five dollars a year, payable in advance: this would tend to ensure the ultimate success of the undertaking.

In the case of the very nicely got up publication before us, the intention is probably to make it a sort of advertising medium for the publishers. But however that may be it seems to be edited with much ability. By the bye, Chicago can now boast of two novelties in the way of legal journals, the one before alluded to, and another published by the wife of one of the judges. The liberality and gallantry of our brethren south and west of us will perhaps make the latter even a greater success than the former.

CHICAGO LEGAL NEWS.

This comes to us in an enlarged form. The energy and spirit with which the editress conducts this paper is truly appalling. She has secured the success of her novel undertaking.

PITTSBURGH LEGAL JOURNAL.

This is also increased in size under the auspices of a company, including amongst its members a number of the bar of the neighboring country.

APPOINTMENTS TO OFFICE.

(CANADA GAZETTE.)

PRESIDENT OF THE COUNCIL.

THE HON. JOSEPH HOWE, as President of the Privy Council of Canada, vice the HON. A. J. FERGUSON BLAIR, deceased. (Gazetted February 6, 1869.)

COUNTY JUDGES.

GEORGE DUGGAN, of Osgoode Hall and of the City of Toronto, in the Province of Ontario, Esq., Barrister-at Law, to be the Judge of the County Court of the County of York, in the said Province of Ontario. (Gazetted Feb. 20, 1869.)

(ONTARIO GAZETTE.)

BOARD OF COUNTY JUDGES.

JAMES ROBERT GOWAN, Judge of the County Court of the County of Simcoe; STEPHEN JAMES JONES, Judge of the County Court of the County of Brant; DAVID JOHN HUGHES, Judge of the County Court of the County of Elgin; JAMES DANIELL, Judge of the County Court of the United Counties of Prescott and Russell, and JAMES SMITH, Judge of the County Court of the County of Victoria, Esquires, to be the Board of County Judges, constituted under the Act, Statutes of Ontario, 32 Vic. cap. 23, and for the purposes therein mentioned. (Gazetted March 27, 1869.)

CLERK OF EXECUTIVE COUNCIL.

JAMES ROSS, of the Town of Belleville, Esquire, to be Clerk of the Executive Council of the Province of Ontario, in the room and stead of JOHN SHUTER SMITH, Esq., resigned. (Gazetted March 13, 1869.)

REGISTRARS.

JAMES WEBSTER, of the Town of Guelph, Esquire, Barrister-at-Law, to be Registrar of the County of Wellington, in the room and stead of JAMES WEBSTER, Esq., deceased. (Gazetted March 13, 1869.)

WILLIAM HENRY EYRE, of the Township of Hamilton, Esquire, to be Registrar for the west riding of the County of Northumberland, in the room and stead of the HON. GEORGE STRANGE BOULTON, deceased. (Gazetted March 13, 1869.)

NOTARIES PUBLIC.

JACOB PAUL CLARK, of Brampton, gentleman. (Gazetted January 23, 1869.)

JAMES EDWARD ROBERTSON, of the City of Toronto, Barrister-at-Law. (Gazetted February 20, 1869.)

ALBERT G. BROWN, of the Town of St. Catharines, Esquire, Barrister-at-Law. (Gazetted March 6, 1869.)

WILLIAM ALLAN McLEAN, of the City of Toronto, gentleman, Attorney-at-Law. (Gazetted March 13, 1869.)

ROBERT McGEE, of the Village of Oshawa, gentleman, Attorney-at-law. (Gazetted March 20, 1869.)

DANIEL BLACK CHISHOLM, of the City of Hamilton, Esquire, Barrister-at-Law. (Gazetted April 3, 1869.)

CORONERS.

FRIEND RICHARD ECCLES, of the Village of Arkona, Esquire, M.D., to be an Associate Coroner in and for the County of Lambton. (Gazetted February 13, 1869.)

CHARLES R. STEWART, of Haliburton, Esquire, in and for the County of Peterboro'. (Gazetted February 20, 1869.)

JACQUES C. T. BEAUBIEN, of Ottawa, Esquire, M.D., in and for the City of Ottawa. (Gazetted Feb. 20, 1869.)

CHARLES ROBINSON, of the Township of Chinguacousy, Esq., M.D., in and for the County of Peel. (Gazetted March 20, 1869.)

WILLIAM RICHARDSON, of the Township of Nelson, Esq., M.D., in and for the County of Halton. (Gazetted April 3, 1869.)

THOMAS HOSSACK, of the Village of Lucan, Esquire, M.D., in and for the County of Middlesex. (Gazetted April 10, 1869.)

JOHN COVENTRY, of the Village of Wardsville, Esq., M.D., in and for the County of Elgin. (Gazetted April 10, 1869.)

JOHN BARE, of the Township of Melancthon, Esq., M.D., in and for the County of Grey. (Gazetted May 8, 1869.)