Technical and Bibliographic Notes / Notes techniques et bibliographiques

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

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

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

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

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

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

- ☐ Additional comments:/ Commentaires supplémentaires:

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

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

DIVISION COURTS.

CLERKS.

Duties of Division Court Clerks under 4th Sec. of County Courts Amendment Act 1857.

(*Continued from page* 142.)

The order under this section made by the Judge will be placed in the Clerk's hands by the party on whose behalf it has been obtained or by his attorney. The order is the only foundation for the interference of the Clerk. On receiving the order the Clerk should examine it to ascertain the day, hour and place appointed for the attendance of the party (*Garnishee*) named therein. At such time and place the Clerk should attend. If the Garnishee do not attend at the exact hour named, the Clerk should nevertheless remain a reasonable time, say for an hour thereafter, or if the order be to appear before him, the Clerk, between two hours named he should remain for at least half an hour after the last hour named.

Should the Garnishee make default in appearance the Clerk must make an endorsement to that effect on the Judges order. The following form will answer.

Clerks memorandum of non-appearance of Garnishee.

Memorandum. I————, in the within order named attended this —— day of —— 185 , at the place within mentioned; at which time and place the within named —— did not appear before me according to the said order, although I attended at the place within mentioned, in expectation of such appearance, from —— o'clock in the forenoon, till past —— in the afternoon of the same day.

———— Clerk.

Should the Garnishee appear he may either admit or deny the debt. Such admission or denial should be likewise endorsed on the order.

And the prudent course for the Clerk will be to get the party to sign the statement made by him.

The following forms will be suitable:

Memorandum of admission of debt when signed by Garnishee.

Memorandum. On this ——day of —— the within named ——appeared before me according to the within order,* and admitted that he was and is indebted to the within named ——in the sum of ——(*if the whole debt be not admitted, add* "and no more")—(*if the Garnishee be willing to sign the admission, add,* "and signed the subjoined admission in my presence.")

———— Clerk.

I —— within named admit that there is a debt of —— pounds, (*if the whole debt be not admitted, add* "and no more") due from me to the within named ——.

Memorandum where Garnishee denies Debt.

On &c., (SAME *as previous form to the asterisk,**) and disputes the debt claimed to be due from him to the within named.——(" *If the Garnishee bewilling to sign the denial of debt, add* and signed the subjoined denial of debt in my presence.")

———— Clerk.

I dispute the debt claimid to be due from me to———— within named.

————.

At present it seems unnecessary to add more for the Clerk's guidance than this, namely:—

When the proper endorsement is made, the order should be handed to the party or his attorney who prosecutes the order, but if neither be present to receive it and no direction concerning it have been given to the Clerk, it should be transmitted by mail to *the Clerk of the County Court.* Hereafter perhaps we shall have occasion to return to this subject.

BAILIFFS.

Duties of, acting under Executions—Provisions of a late Act.

(*Continued from page* 142.)

Should the Sheriff or any of his officers lay claim to goods seized by a Bailiff, founding such claim on a previous execution, the Bailiff ought to make a demand on the Sheriff to be informed of the precise time *of the delivery* of the writ to him, which demand the Sheriff is obliged to comply with in writing, signed by the Sheriff or any clerk in his office.

If that day be previous to the day and hour when the Bailiff received the warrant to execute, he should withdraw from the seizure in favour of the Sheriff.

On the other hand should the Sheriff or any of his officers make demand upon the Bailiff, the latter should show his warrant to the Sheriff or officer with his, the Bailiffs, endorsement thereon of the time when he received it. So far as the protection of Sheriff and Bailiff is concerned the statute declares, that "such writing purporting to be so signed, and the endorsement on the warrant showing the precise time of the delivery of the same to such Bailiff shall respectively be sufficient justification to any Bailiff or Sheriff acting thereon."

SUITORS.

(*Continued from page* 143.)

Punishment of Fraudulent Debtors—The "Judgment Summons" Clauses in the Division Courts' Act.

1st. Touching his, the debtor's, estate and effects.

2ndly. Touching the manner and circumstances under which he contracted the debt, or incurred the damage or liability, the subject of the action.

3rdly. As to the means and expectations he then had, and as to the property and means he still hath, of discharging the debt, damage, or liability.

4thly. As to the disposal he may have made of any property.

Now, whatever may be the cause, it appears in many cases that creditors suing out judgment summonses have no very definite object in view; they have some vague notion of its efficacy, or suppose that their business is to be done by the Judge; that he is to institute a rigid examination, to "ferret out" grounds for commitment—in fact, that he is to act as counsel for the plaintiff. Such a course would be foreign to the Judicial station; and although a County Judge, if a case of fraud be presented to him, or if from the questions asked he perceives ground for a strict inquiry, which a defendant evinces a determination to evade, may follow up and push home questions—yet plaintiffs should understand that they themselves must come prepared with some tangible ground upon which to examine, and, which they can, support by evidence; yet how common is it for plaintiffs, when asked by the Judge on what ground or point it is they desire to examine the defendants, to say—"he has owed the money for a long time and I want my own," or something to that effect, and no more. But a plaintiff has no right to bring up a defendant in this way unless he can make out some fraud or improper conduct against him, or elicit information as to property existing; and a plaintiff renders himself liable in costs to defendant if he wantonly and without reasonable cause issue a judgment summons.

It is recommended that no defendant be brought up on a judgment summons unless the plaintiff can show or has reason to believe that some of the before mentioned grounds exist, or will be able to show that the defendant earns or might earn something above what is necessary for the support of himself and family.

Being in such a position then, let the plaintiff when the case is called on at Court, state at once that he is desirous to have the defendant examined upon oath, and when he is sworn let him examine, asking such questions as seem necessary to establish the ground he goes upon.

If the plaintiff have witnesses he can then have them examined unless the defendant in his examination has admitted all they could prove. If by the examination or evidence it is shewn to the Judge satisfaction:—

1st. That the defendant in incurring the debt or liability has obtained credit from the plaintiff under *false pretences*, or by means of *fraud*, or *breach of trust*, or has *wilfully contracted* such debt without having at the same time a reasonable expectation of being able to pay or discharge the same.

2nd. Or has made or caused to be *made any gift delivery*, or *transfer* of any property, or *removed*, or *concealed* the same *with intent to defraud creditors.*

3d. Or if it appear that the defendant then has or has had since judgment obtained sufficient means and ability to pay the debt and has not paid it.

Then the plaintiff will be entitled to an order to commit the defendant to gaol for a period not exceeding forty days, as a punishment for his misconduct.

Unless in gross cases of fraud, plaintiffs will find it more to their advantage to ask for an order to pay by instalments and our own experience has led us to believe that such is the surest means of collecting a judgment from a "hard case." If an instalment be not paid the defendant may be brought up from time to time to answer for the default. And those who would brave the consequences of a judgment summons where the amount was ten or twelve pounds, would not be inclined to do so on account of a monthly instalment of fifteen or twenty shillings.

If when the case is called on the defendant do not appear, the plaintiff should request the Judge to make an order to commit him, which the Judge will always do *upon application* to him, not otherwise, if the summons have been duly served and there be no excuse given for the defendants non-appearance.

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

(*For the Law Journal.*—BY V——.)

CONTINUED FROM PAGE 103.

Sale of Goods (continued).

So soon as the sale is over, the Bailiff should with all convenient speed, deliver to purchasers the articles bought by them. In case a lease or term for years, belonging to the person against whom the execution has issued be sold, the Bailiff should perfect the sale by executing a proper deed of assignment to the purchaser, for until this be done the term will remain vested in the lessee: (*Playfair* v. *Musgrove et al*, 14 M. & W. 239; *Doe d. Hughes* v. *Jones*, 9 M. & W. 372.) If the lease be in writing and the Bailiff has obtained possession of the document, he may execute the assignment by a deed endorsed thereon. However assigned, the lease, when in possession of the Bailiff, should be handed over to the purchaser, but there the Bailiff's duty ends, with respect to this description of chattel.

Return of Execution.

Forthwith after the execution is completed, the Bailiff should return the result to the Clerk of

the Court; and it is expressly provided (Rule 12,) that every Bailiff levying and receiving any money shall, within three days after the receipt thereof, pay or transmit the same to the proper officer; *i. e.*, the Clerk of the Court. (D. C. Act, sec. 53.)

Bailiffs should be particular in observing these requirements, for it is their duty to do so. They will also consult their interests by punctuality, for if money made be not duly paid over, it will be the duty of the Clerk to deduct the Bailiff's fees upon the execution, under the provision of the 14th section which by the Bailiff's neglect are forfeited to the fee fund;—and further it is enacted by the 59th section of the Division Courts Act, that if any Bailiff shall neglect to return any execution within three days after the return day thereof, the party having sued out such writ may maintain an action against the Bailiff, and his securities on the security covenant, and may recover therein the amount of the execution with interest, or a less sum in the discretion of the Court, according to the circumstances of the case.

An execution cannot be said to be properly returned till it be handed to the Clerk at his place of business, with a brief statement in writing, signed by the Bailiff, endorsed thereon, showing what he has done upon such execution. This statement will, of course, vary according to the circumstances of each case, but it should in all cases be certain and definite. Usually it is that the defendant has no goods, or that the amount of the execution has been made, or that part of the amount has been made, and no goods as to the residue:—

The following forms would be suitable.

Return of the Goods.

The within named —— hath not any goods or chattels in the —— of —— whereof I can make the debt (or damages) and costs to be levied as the within warrant commands me.

Dated &c. ——— ———,
Bailiff.

Return when money made.

By virtue of this warrant to me directed, I have made of the goods and chattels of the within named —— the debt (or damages) and costs within mentioned, and have paid over the same to the Clerk of the —— Division Court, County of —— as within commanded. ——— ———,

Dated, &c. Bailiff.

Return when part has been made and no goods as to the remainder.

By virtue of this writ, to me directed, I have made of the goods and chattels of the within named —— to the value of ——, and have paid the same over to the Clerk of the within named Court—and I certify that the said hath no more goods or chattels in the —— of —— whereof I may make the residue of the said debt (or damages) and costs or any part thereof as the within warrant commands me.

Dated, &c. ——— ———, Bailiff.

CONTEMPORARY LITERATURE.

THE LATE FRAUDS.

It appears now manifest that the proposed change in the criminal law, making a breach of trust a punishable offence, though clearly necessary and likely to prove salutary will not, without more, effect the purpose of preventing those frauds, of which of late there have been such glaring instances, and which seem generally on the increase. The measures propounded respecting breaches of trust, we have more than once brought under the view of our readers. The Law Amendment Society, at the desire of its president, fully inquired into the subject, and found that the offence was much more frequently committed than had been supposed, and especially among traders of an inferior description. The bill proposed as the result of their investigation, was confined, as Lord Brougham had recommended, to the case of trustees appropriating trust funds to their own use, and thus committing the breach of duty for their personal benefit. His lordship has since given a preference to the measure proposed by Mr. Cox in the *Law Times*;[1] but we incline to prefer the plan of the Society. One thing, however, is apparent, that the Government, according to the announcement of the Lord Chancellor, is resolved upon proposing to extend the Bankers' Act to all trustees, whether receiving payment as agents or not, and surely to this there can be no possible objection. It has lately been urged in the House of Lords, by Lord St. Leonards, that care must be taken to protect trustees from the risk of falling within the scope of the enactment, when they violate their duty without a criminal intent. We conceive that there will be found no difficulty in giving them this protection, if indeed they have it not, in the punishment being confined to those who take property only held by them in their fiduciary character, and employ it for their own profit, and not in the manner prescribed by the terms of the trust. That nothing done under a resulting trust should be within the provisions of the Act, is clear. No one of course can be affected by its provisions who has not either declared a trust or acted as a trustee, and in that capacity received money or other property. The suffering trustees to receive remuneration, is another essential point of all such measures. But though this improvement of our law is of great moment, indeed absolutely necessary to remove from it the stigma under which it now labours—of being the only system in the civilized world which does not treat the greatest of frauds as any offence at all; there yet remain other instances of a scandalous nature, of acts which every man regards as highly criminal, being yet either certainly beyond the scope of our criminal jurisprudence, or so near its outermost verge as to make more than doubtful their falling within the boundary line.

[1] Letter to Lord Radnor: *Law Mag. and Rev.*, November, 1856.

The owner of land grants an equitable mortgage upon it, by depositing his title-deeds with his banker, or other lender of money, and to make the matter clear, he gives a memorandum to that effect. He receives the money, and next day conveys the property to some one, who, not seeing the title-deeds, probably gives a price below its value, but indeed may have been assured that there has been sixty years' possession, and that there are no title-deeds. The owner thus commits a gross fraud upon two parties; the lender, whom he compels to get a legal conveyance by a chancery suit, and the purchaser, who has paid his money for a parchment worth absolutely nothing. It is usually said that such cases, if more than one be concerned in them, come within the great drag-net of the law, under the head of "conspiracy to defraud." It would, we believe, be difficult to frame an indictment if only one offender were implicated. It would hardly be held an obtaining money on false pretences. But indeed the gross fraud, the crime, we venture to call it, though the law does not, of concealing a prior mortgage and granting a second, only works a foreclosure; though instances of this kind are of daily occurence, offences perpetated by persons, some of whom, we grieve to say, have belonged to the profession which they disgraced, and had risen high in the legal ranks. Personal property is made in the same way the subject of gross and barefaced frauds, amounting morally, not merely to cheating, but to robbery. The owner of goods sells them, or pledges them again and again; and if he only avoids that which amounts to larceny, and takes care that he shall not be held to obtain money on false pretences, he is only a debtor and not a criminal. Take the instance which has recently occured of a shipowner: he gives, to cover his balance due to his banker or other creditor, some half-dozen vessels in pledge; but the creditor omitting to take due precautions as to the register, the crafty debtor sells all the six, pockets the price, and leaves his creditor's security worth absolutely nothing.

These are, compared with other cases of fraud, equally gross in reality, somewhat in appearance more glaring, because more plain in the statement. But perhaps, the frauds that have a less revolting semblance are on that account the more difficult to guard against, and the more likely to be committed. The parties to a banking or other speculation, finding that they have been unsuccessful, and are in a state of hopeles insolvency, besides committing the more ordinary breach of trust, by appropriating to themselves the funds under their control, and thereby carrying on their individual speculations unconnected with that of the joint concern, endeavour to protract its existence, and to obtain more funds for their own accomodation, by making false statements of the condition of the partnership, representing to some as profitable a concern which they know and to others confess, to be not only unprofitable, but desperate; keep up this delusion by paying dividends out of the almost exhausted capital, and thus draw in solvent parties to become associates in their risks, as well as to contribute towards their funds. It is not to be doubted that a trader, be he banker or merchant, may, without committing any offence even in a moral view, conceal from his customers a momentary embarrassment in his affairs, amounting to a risk of failure, because he may reasonably hope that this cloud shall pass away, and his security be restored, whereas a disclosure might work his ruin, and also injure his creditors at large. But it must always be a question how far he shall carry this concealment, and how long continue to receive money or goods which must be involved in the hazards of his position. But there is all the difference in the world between the mere suppression of the truth, how long soever it may be continued, and the positive affirmation of a falsehood; not merely answering a question, but volunteering a statement that he is solvent and thriving in his trade, when he knows that he is in hopeless, irremediable insolvency, and must be utterly ruined, even after receiving the contribution he seeks. That this is a fraud of the deepest die, and, morally speaking, tantamount to robbery can admit of no doubt. That the law of England at present would regard it as an indictable offence, and punish it as such, is, to say the least of it, far enough from certain. We may, indeed, positively affirm that it would not.

Now, for all such frauds as we have been describing, it appears to be absolutely necessary that specific penal enactments should be provided. In matters of criminal jurisprudence there can be no such thing as declaratory laws. There must be a distinct statutory provision denouncing the practice as an offence, and attaching to its commission condign punishment. We cannot in this case adopt the maxim of Cicero, "sunt animadvertenda peccata maxims quæ difficillimè præcaventur,"* if by *maximè* is to be intended the heaviness of the penal visitation; because regard must always be had to the novelty of the infliction, and to the circumstance of the matter having hitherto so long been treated as not legally, but only morally, criminal. But if it be only meant that such offences are peculiarly deserving of some punishment, as are with difficulty prevented from injuring society by the facilities afforded for their perpetration, and by the tendency of unprincipled persons to commit them—then, doubtless, the great moralist's dictum, anticipating in his earliest orations his future ethical eminence, is well entitled to our respect.

That there may be considerable difficulty in framing statutory provisions with this view, we are far from denying; but we can, on no account, believe that this may not be surmounted. We trust that the same committee of the Law Amendment Society which examined the other and kindred subject of criminal breaches of trust, may speedily apply itself to this enquiry likewise; and it is with the hope of drawing their attention to it that we have put together these remarks. (*Law Mag. and Rev.*, May, 1857.)

ALIBIS.

There is no more curious and mysterious subject in the annals of the criminal courts than the question of *alibis*. Occasionally, and it is to be feared frequently, it comes before a jury under the perplexing and painful aspect of an

* It is singular that he is really speaking of the kind of fraudulent practices which form the subject of this article.—"Tecti esse ad alienos possumus; intimi multa apertiora videant, necesse est. Socium vero cavere qui possumus? Quem etiam si metuimus, jus officii lædimus. Recte igitur majores eam, qui socium fefellisset, in virorum bonorum numero non putarunt haberi oportere."—(*Pro S. Roscia. Amer.* XL.)

issue in which, on directly conflicting statements of opposite witnesses, it has to be determined which side is telling the plain truth, and which is committing flat perjury. But generally it may be hoped and believed that there is no perjury in the case; that the witnesses on both sides are speaking alike what they believe to be true; and that the solution of the enigma is to be found in the common error of mistaken identity.

A case which was tried on the 25th July, 1857, in the Crown Court at Exeter, before Crompton, J, is a striking illustration of this hypothesis. The prisoner was a naval officer, and the son of an admiral; and he was placed in the dock on a charge of having presented at a Plymouth bank a forged order for the payment of money in the name of the Paymaster-General. The order was undoubtedly forged, and it was proved to have been presented at the bank in the presence of two or three clerks, by one of whom it was cashed, and the money handed to the person who presented it. The transaction lasted only three minutes, and does not seem to have attracted much attention at the time on the part of any of the clerks: nor had any one of them any previous acquaintance with the prisoner's person. But subsequently, when the forgery had been discovered, one of the clerks picked out the prisoner from among a number of men on board one of her Majesty's ships and identified him as the man by whom the forged order had been presented. The same clerk and other clerks swore at the trial—not, indeed, positively, but to the best of their belief and apparently without any inward doubt or misgiving—that the prisoner was the man who had presented the cheque. This was the case for the prosecution. For the defence, witnesses of the highest respectability—officers in the navy and friends of the prisoner—were called, who deposed in the most distinct manner that the prisoner had been in their company during the afternoon, and especially at and about the precise time when, according to the case for the prosecution, it was stated that he had been alone in the bank. The cross examinaton, as to the identity of the day, the hour, and the minute, did not seem to be very scrutinising, but enough was elicited to induce the judges to recommend the counsel for the Crown to retire from the prosecution—a recommendation which, of course, was acted on, and a verdict of not guilty was taken accordingly.

The propriety of this course was unquestionable, although it must be held at the same time to involve considerations of great import. It would not have been fair or expedient to have reduced the jury to the necessity of pronouncing on the value of such evenly-balanced evidence. There was it is true, a slight preponderance of direct evidence in favour of the prisoner; but the unbiassed and unimpeachable evidence of the bank clerks although less formally affirmative, and positive could not by conscientious men of common sense be regarded as in any degree less weighty than the evidence for the prisoner. It was just and charitable, and therefore reasonable and expedient, that the prisoner should have the benefit of the inextricable doubt which had been raised and attached inseparably to the case; and fortunately the supposition that in the hurry of business, the witnesses for the prosecution had been misled by the casual resemblance between the prisoner and the actual passer of the forged order, afforded the desirable outlet from the difficulty,

This case, like most others in which the identity of the prisoner as the perpetrator of a crime is questioned, points, as its moral, the danger and injustice of ever convicting any prisoner on mere evidence of identity alone. Where such evidence is given by witnesses who have been previously well acquainted with a prisoner, it may be received perhaps *ex necessitate rei*, although even then with great reluctance, to fix the identity of a prisoner; yet even in such cases the value of such evidence may be reduced to nothing virtually, if the surrounding circumstances raise a reasonable presumption that the witness's attention or perception was attracted insufficiently to the person alleged to have been identical with the prisoner None of us are wanting in personal experience of cases—such as that which Mr. COLLIER cited from his own recent case—in which even our intimate friends are prepared to declare unhesitatingly that they have seen and even talked with us in places and and at times when we know and can prove by other similar evidence that we were far away, or elsewhere and otherwise engaged. A careless glance, an abstracted thought, an inward vision, or a passing hallucination, are the causes of optical delusions far stronger, and quite as unquestionable as that which acted simultaneously on the witnesses for the prosecution in the case we have cited. The singular thing is, that such delusions are known to be produced on several persons at the same moment of time, not only where, as in the case cited, the accidental resemblance of external objects, acting on diverted minds, excites the same sentiment of identity, but even where there is either no external counterpart or object, or none adequate to produce the sentiment; but the impression is created by the same imaginative conception being suggested by different persons by one and the same mental process or fortuitous sympathy, In all such cases juries will do well to take a practical lesson from the laws of metaphysics, and to refuse in all reasonable cases of disputed identity, to convict a prisoner unless his guilt or complicity be established or corroborated by extrinsic evidence. It is seldom that some scrap of circumstantial evidence cannot be adduced to resolve a doubt on such a question; but where it is wanting, it is only common law and common sense that the prisoner should have the benefit of that doubt.—*Law Times*, August 1st, 1857.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law.*
(Hilliary Term, 20th Vic.)

HITCHCHCOCK v. CRONKITE.

Semble, that a partner of the plaintiff, not joined in the action, is admissable as a witness.

This was an action of replevin, tried at Sarnia, before *Draper*, C. J. A witness was called for the plaintiffs, (William J. Mills) who it turned out was a partner with the plaintiff, and therefore ought to have been joined in the action, but was not. His competency was objected to, but the learned judge received his evidence.

A verdict having been found for defendants, *D. B. Read* obtained a rule *nisi* for a new trial.

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

Mill's evidence, though he was a partner of the plaintiff, was properly received, we think, because not being a party to the re-

cord, the objection to his evidence seems to be reduced to the ground of mere pecuniary interest, which is no longer an objection. The defendants might have pleaded in abatement, if they knew of Mills being a partner; but it is very possible they did not know it, and there is much force in the argument, that admitting the witness under such circumstances may lead to abuse, for a partner may be intentionally omitted to be joined, in order that he may make his appearance on the trial as a witness. That is true, but still the act must be carried into effect, and I hardly think that such a case comes within the meaning of the exception of persons on whose behalf an action is brought. We need not, however, pursue that question further, for the plaintiff's witness was received, and the verdict is in favour of the party objecting, so that can form no ground for our interfering.

The jury seem not to have credited fully his account of the transaction, and when we look at the whole case, we cannot say that they certainly came to a wrong conclusion.

HAWKINS v. PATTERSON.

Where a judge's order has been obtained to alter the *venire facias* to another assize, it is no objection that the trial took place without the alteration having been actually made.

In this case, *Eccles*, Q. C. moved for a new trial, on the ground that the *nisi prius* record did not authorize the trial, there being no alteration made in the *venire facias* from the previous assizes; and on affidavits.

Upon the affidavits a new trial was granted, and that part of the case is not material to be reported. As to the defect in the record, ROBINSON, C. J., in delivering the judgment of the court, said:—

"There is an order of a judge endorsed, allowing the *venire* to be altered to the assizes in October, but the venire for the previous assizes in May is left as it was, with a copy of the *fiat* for the alteration written opposite to it in the margin. The right day might be inserted at any time according to the judge's *fiat*.

IN RE STODDART AND THE MUNICIPALITY OF THE UNITED TOWNSHIPS OF WILBERFORCE, GRATTAN, AND FRASER.

By-law—Overseers of highways—Statute labour.

A by-law directing that the overseers of highways should bring any person refusing or neglecting to perform statute labour, before the reeve of the municipality, or the nearest J. P. who upon conviction, should impose a fine of 5s. for each day's neglect, with costs, and adjudge that the payment of the said fine and costs, should not relieve him from performance of the labour; and in default of payment, should issue a distress warrant.
Held good.

Phillpotts obtained a rule on defendants to show cause why their by-law, passed on the 15th of April, 1856, No. 18, should not be quashed in part—that is, as to the 6th section thereof—with costs, on the ground that such part is void and illegal, and beyond the power of the municipality to pass.

The by-law moved against was passed for defining the duties of overseers of highways, and determining the fines to be paid by persons neglecting to perform statute labour.

The sixth clause was in these words, "And it is further enacted that the said overseers of highways are hereby directed and required, on the refusal or neglect of any person within their section liable to perform statute labour, to go before the reeve of this municipality, or the nearest justice of the peace, and make oath of the refusal or neglect of such person, whereupon the said reeve or justice shall issue a summons to have the party so offending brought before him, the said reeve or justice, and upon conviction shall impose a fine of five shillings for every day he has refused or neglected to perform the statute labour due by him, with the costs of prosecution, and adjudge that the payment of the said fine and costs shall not relieve him from the performance of the said statute labour, but that the defaulters shall still be required to perform the same, notwithstanding the payment of the said fine and costs; and in default of the payment of the same, the said reeve or justice of the peace shall issue a distress warrant against the goods and chattels of the defaulters, that the amount of the fine and costs may be recovered by sale of the same."

The objections were that there is no provision made by statute 16 Vic. ch. 182 (the assessment act), for enabling municipalities to enforce the performance of statute labour, or to inflict penalties for the non-performance. That no by-law had been passed, authorising a commutation of the labour by paying money in lieu, according to the 36th section of 16 Vic., ch. 182; and that there was no special or other promulgation of this by-law, according to the 155th section of 12 Vic. ch. 81, as amended by 14 & 15 Vic., ch. 129.

Richards showed cause, *Conner*, Q. C., supported the rule.

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

We see no valid objection to the sixth section of this by-law. There is no question about commutation. For all that is shown, all persons in these townships have to perform their statute labour when warned, and this by-law provides only for enforcing the performance of such labour, and in a manner in which the municipality has power by law to enforce it—that is, by fine. This authority is given by 12 Vic., ch. 81, sec 31, sub sec. 28.

We cannot conceive what can have been meant by the last objection taken to this by-law—that it was not promulgated according to 12 Vic., ch. 81, sec. 155, as amended. That provision applies only to a certain class of by-laws very different from this.

Rule discharged, with costs.

THE GREAT WESTERN RAILWAY COMPANY v. ROUSE.

Railway—Assessment of.

Under the 16th Vic., ch. 182, sec. 21, only the land occupied by a railway is subject to assessment, and not the superstructure.
The decision of a county court judge is not final.

This was an action of replevin, brought by the plaintiffs against the defendant to replevy two hundred cords of wood, lying at the Princeton station, in the township of Blenheim, in the county of Oxford, and of the value of £62 10s.; and by the consent of the parties, and by the order of the Hon. Mr. Justice Burns, dated 3rd of February, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court, without any pleadings:—

1. The Great Western Railway Company's line of railway passes through the township of Blenheim, which is a Municipal Corporation under the Upper Canada Municipal Corporations Acts.

2. For the year 1856, the assessor for the Municipal council assessed the railway company thus:

Land in roadway through township $124\frac{75}{100}$ acres...	£1,000	0	0
Station grounds $5\frac{75}{100}$ acres	1,000	0	0
Value of roadway.....	30,000	0	0
	£32,000	0	0

3. That the item of £30,000 is for the superstructure of the road, in addition to the value of the land itself, which is included in the first sum of £1000.

4. That the land itself was assessed according to the average value of land in the locality, and the sum of £1000 expresses such value excluding superstructure.

5. That the railway company appealed to the court of revision of the municipal council, who confirmed the assessment made by the assessor, and from this decision the railroad company appealed to the judge of the county court, who, upon hearing the matter, amended the roll thus:

"Station and buildings.....	£1,000	0	0
Roadway and superstructure.....	21,000	0	0
	£22,000	0	0

6. That the judge, in the item of £21,000, included the land, and also the superstructure, which he reduced to £2000 per mile, instead of £3,000 per mile as set down by the assessor.

7. That the superstructure at £2,000 per mile includes rails, ties, chairs, and gravel for ballast.

8. That the defendant is the regular authorised collector for the municipal council, and has seized the wood to recover £44 3s. 5½d. the amount due by the plaintiffs for their proportion of the year's assessment according to the valuation of £22,000.

9. That the rate, appointment of collector, levy and seizure, have been regularly and lawfully performed, subject to the legality of the assessment in respect of the superstructure.

The questions for the opinion of the court are:

First—Whether the assessment roll shows that the company are illegally charged for superstructure.

Second—Whether the decision of the judge of the county court is final, so as to debar the plaintiffs from now repeating the objection to the assessment and rate in respect to superstructure, and from resisting the payment of the rate imposed in respect thereof.

Third—Whether the assessor having taken into consideration the average value of the land as aforesaid, his duty was at an end, and he could not add thereto the value of the superstructure.

If the court shall be of opinion in the affirmative on the first and third questions, and in the negative on the second question, then judgment shall be entered up for the plaintiffs for one shilling damages, and costs of suit.

If the court shall be of opinion in the negative on either the first or third question, or in the affirmative on the second question, then that the defendant have judgment for a return of the said two hundred cords of wood, to hold to him irreplevisable forever, and his costs of defence.

Irving for the plaintiffs; *Eccles*, Q. C., for defendant.

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

We find nothing in any statute which relates to the question submitted in this case, besides the 21st clause of 16 Vic., ch. 182, and it was admitted on the argument that there is no other enactment on the subject.

The language of that clause is too plain to admit of doubt. The legislature has expressly directed what is to be assessed; and in respect to the roadway, it is the actual value of the *land occupied by the road* which the assessors are to place on the roll, and it is in so many words directed that the value shall be *estimated according to the average value of land in the locality*. That excludes the superstructure, such as the iron rails, bridges, &c., and we have no doubt that was the intention of the legislature.

It is true that by the third clause of the same act the term *land* is made to include all buildings, or other things erected upon or affixed to the land, so as to form part of the realty; but that is a general direction; the subsequent clause (21st) provides in a peculiar manner for the case of railways, and makes it an exception to the general rule. The 26th and 28th clauses of ch, 182 only make the decision of the judge of the county court final in regard to such matters as are to be submitted to him: that is, any alleged over-charge or under-charge, or the wrongful insertion or omission of any persons' name. We think, therefore, that the plaintiffs should have judgment for a shilling damages, for the question is not whether the superstructure upon the roadway has been overvalued, but whether there was any authority for assessing it at all, and upon this point the judgment of the county court is not to be final. It is the act of parliament that must govern.

Judgment for plaintiffs.

Hutchison v. Bowes, McDonell and Cotton.

Limited partnership—12 *Vic., ch.* 75. *sec.* 14.

Where a special partner of a limited partnership has once rendered himself liable as a general partner, under sec. 14, by interfering in the business, he continues so liable, and is not relieved after he has ceased to intermeddle.

This was an action upon three notes, alleged to have been made by defendants under the name and firm of Donald Bethune & Co., payable to the plaintiff or order; and upon common counts for goods sold and delivered, money paid, and account stated. The trial took place at Toronto, before *Hagarty*, J. There was nothing to distinguish the case in substance from that of Bowes and Hall v. Holland, et al., 14 U. C. R. 315, in which it was determined, upon the facts found by the jury, that the defendant Bowes had so intermeddled in the business of the association as to make himself liable under the statute as a general partner, unless the finding of the jury that Bowes had not so intermeddled during the time that these causes of action of the present plaintiff were accruing; that is, since the summer of 1853.

The learned judge held, that if he had before that, by his conduct, rendered himself liable as a general partner, he would not cease to be liable because he had afterwards abstained; and on that direction the jury found for plaintiff.

A. Wilson, Q. C., obtained a rule *nisi* for a new trial, to which *J. Duggan* shewed cause, citing Andrews v. Schott, 10 Barr 47; Coll. on Part., sec. 99.

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

We think the verdict is consistent with the evidence. Upon the testimony of Holland we think it clear the defendant, Mr. Bowes, did not confine himself "to examining into the state and progress of the partnership concerns, and advising as to their management," which he might have done without making himself liable as a general partner, but that he did, as well as the other members of the committee, "*transact business on account of the partnership*," thereby interfering in such a manner as under the 14th clause of the act subjects him to be deemed a general partner.

The committee were nothing less than a committee of management, of which Mr. Bowes was for a considerable time the chairman. They did more than advise, they directed and acted and while they did that they could not escape the consequence of interfering in the transaction of the business by calling themselves an *advising* committee.

We are of opinion also, that there was sufficient evidence of Holland being authorised as general agent to make notes in the name of the firm, and that he was known by the defendants to be in the habit of doing so; and besides, these notes were given for the price of supplies furnished to the boats, for which the plaintiffs would be entitled to recover under the common counts.

The defendant, Bowes, having once rendered himself liable to be deemed a general partner, stands thenceforward upon the same footing as the other general partners, and we think there is nothing in the point of his having ceased to interfere in the business before these goods were furnished, if the fact were so.

Rule discharged.

CHAMBERS.

(*Reported for the Law Journal, by* C. E. English, Esq.)

The Queen v. Rel. of Milton Davis and Alexander Hamilton, against Michael Wilson, Brown and Lawrence Devaney.

Municipal Election—Polling Places—Costs.

It is necessary that electors should have full access to the polling place. The fact that a large number of duly qualified electors could not cast their votes, is a sufficient reason for setting aside an election, if the result would have been affected by the unpolled votes. As to costs, the tendency of modern decisions is not to compel a party to pay costs unless it be shewn that he participated in the improper conduct for which the election is set aside.

This matter came on to be heard on 16th February, 1857. *Mr. Start* of Hamilton, for defendant Devaney—as to defendant Brown the matter was delayed on account of his illness for three weeks from that day. *Mr. Ferrie* of Hamilton, and *Paterson* for Relators.

The Relators by their statement, filed 30th January, 1857, complained that defendants had not, nor had either of them been duly elected to the office of Aldermen for St. Andrews Ward in the City of Hamilton. The Election was held on Monday and Tuesday, 5th and 6th January, 1857. They stated they were interested in the election as candidates for the office of Aldermen for the ward; and shewed the following causes why the election of the defendants should be declared void:—

First.—That the Election was not conducted according to law, as the place appointed for taking the votes was wholly unfit for the purpose, in consequence of which a large number of the voters in the ward necessarily remained unpolled.

Second.—That the returning officer took an unnecessary length of time in searching for, receiving and recording the votes tendered at the election, in consequence of which a large number of the votes in the ward necessarily remained unpolled.

Third.—That the entrance of the polling place was continually obstructed by a mob of persons who forcibly prevented the access

thereto of duly qualified voters, in consequence of which a large number of the votes of the ward necessarily remained unpolled.

Fourth.—That many persons duly qualified and entitled to vote at the election, whilst exercising their right were assaulted and maltreated in presence of the returning officer, without receiving any protection from him, in consequence of which many voters were deterred by fear from tendering their votes.

Fifth.—That the returning officer—although requested so to do—neglected to keep the entrance to the polling place clear from obstructions, that it remained continuously obstructed by parties in the interest of the defendants, in consequence of which a large number of the votes of the ward remained unpolled.

Sixth.—That the entrance to the polling place at the election was continuously obstructed by a mob of persons in the interest of defendants, who used force and violence to prevent access of the voters of relators to the poll, in consequence of which a number of persons duly qualified to vote at the election, who would have voted in favour of relators and against defendants as Aldermen, were forcibly prevented from voting at the election.

Seventh.—That a mob of persons in the interest of defendants, violently and forcibly assaulted and maltreated several persons duly qualified to vote at said election, and who voted thereat in favour of relators, in consequence of which many persons duly qualified to vote, and who would have voted at the election in favor of relators were deterred by fear from voting thereat.

Richards, J.—I have read and considered the affidavits filed on both sides, their great number,—about 50—prevents anything like an abstract being made of them. The general tenor of the affidavits filed on the part of the Relators is, that the friends or supporters of the defendants took possession of the poll and the avenues leading thereto, and kept possession thereof during the whole election, and by violence in some cases amounting to assaults and breaches of the peace, preventing and hindering the Relators' voters from coming forward to vote, and that some of their voters were assaulted after having voted. That thereby many of their voters were deterred and prevented from coming forward. That some of them who make affidavit to that effect, were unable to vote after making great exertions to do so, in consequence of being violently prevented by the crowd, some of whom were voters and some not.

That those persons who came forward to vote for defendants, were allowed by the crowd or mob, as it was sometimes called, to pass in to vote, little or no obstructions being offered to them, whilst those voters who were known to be the friends and supporters of the Relators were hindered from coming forward, and that most of those who were able to poll their votes succeeded in doing so by using determined and vigorous efforts to force their way through the crowd which strove to keep them back.

The affidavits filed on behalf of defendants, stated that there was no obstruction of the poll. That the returning officer was continuously employed from the time he commenced taking votes on the first day, until the adjournment at the proper hour—that he was similarly employed from the opening of the poll on the second day until the legal hour of closing. That there was a good deal of "emulation" for priority of voting, but that there was no interference or obstruction in actual, voting regularly and continuously both on the first and second days. That on the second day the Hall as always clear and unobstructed, for the voters who came in as fast as the returning officer could dispose of them. That they saw nothing to disturb or endanger the election beyond the invariable concomitants of a contested election, such as denunciatory language, cheering, shouting, jostling for priority, &c. The returning officer says all of this was excluded from the Hall when the votes were taken on the second day, and only happened, if at all, on the streets in which the Hall is built. Some of the affidavits were to the effect that the parties making them were detained an hour in order to vote for defendants—that the detention was caused by the number of persons pushing forward to vote. That every person was allowed to vote in his turn, and that the proceedings on the second day were orderly and quiet, and that every one had the same facilities to reach the Poll.

The election was held in a hall about twelve feet wide and thirty feet long—on the first day the returning officer received the votes at the extremity of the hall. As this crowded the voters, on the suggestion of Relators, the votes on the second day were taken near the entrance, about which the way was kept clear. It does not appear that on the first day there was any mode of egress for the electors who had voted, except by pushing back through the crowd who were striving to get forward to poll their votes. This under ordinary circumstaces would doubtless create disorder and confusion.

The list of voters of the ward furnished the returning officer was not alphabetically arranged, and this omission necessarily caused great delay, when it became necessary to refer to that list in order to ascertain if any person whose vote was objected to was named on the roll or list. On referring to the 25th section of the Assessment Act, 16 Vic. c. 182, I find it is the duty of the clerk, on the receipt of the Assessment Roll from the Assessor, to make a copy *arranged in the alphabetical order* of the several names to be put up in a convenient place within the municipality, and to be maintained there until the meeting of the court of revision. If this course had been pursued in Hamilton, I do not see why the list of voters handed to the returning officer was not arranged alphabetically. I should think it would be much more convenient for all parties that it should be so arranged, and in a populous ward or township where a contest was anticipated. I should suppose the returning officer himself would so arrange it to facilitate a reference to it when required. On the first day of the election they commenced taking votes about half-past one o'clock p.m., and at the close of the poll on the first day, the votes stood for Davis, 24, Hamilton, 23, Brown 50, Devaney, 46,—72 votes having been polled that day.

On the second day about one o'clock, Relators retired under protest; at that time the votes stood for Davis, 72, Hamilton 66, Brown, 126, Devaney, 113.

At the close of the poll at 4 o'clock in the afternoon, the numbers were Davis 76, Hamilton 71, Brown 187, Devaney 166—,one hundred and eighty-four votes having been polled the second day; the whole number of votes offered was 297, of these were rejected 40, leaving of votes actually polled 257.

It is stated that the delay in opening the poll on the first day, arose from the long speeches made by the Relators and their friends.

It is further stated by defendants that much time was taken up unnecessarily by the counsel for the Relators, scrutinizing the votes offered, and that this delayed the taking of the votes rather than any mob or combination of persons in defendant's interest.

The Relators urge that the Returning Officer was an unnecessary time in examining the voters list, &c. He denies this, stating he acted impartially, that he has been returning officer for several years in that ward when the elections have been warmly contested, and that more votes were polled at the election complained of than at any previous election.

The arrangement for the first day's polling seems to me to have been very imperfect and would suggest to violent and most over-scrupulous supporters of candidates, the feasibility of the plan which the Relators contended was adopted to prevent their supporters from voting, and if by so doing on the first day they were able to get their candidates ahead, any voting after that, by voters would have little influence on the result of the election, unless the strength of the party first getting the majority would soon be polled out. The delay complained of in examining the votes would of itself fill up the time until by law the returning officer would be compelled to close the poll.

By the 157 sec. of the Municipal Corporation's Act, the Returning Officer possesses large powers for the preservation of peace and order at elections, and he may summarily punish notorious and disorderly persons. He ought to exercise these powers whenever it becomes necessary that it should do so. The Returning Officer in this affidavit with regard to this election, emphatically denies that he was guilty of any partiality.

I have not been pressed by either party to call upon him to explain his conduct, and must take it for granted that any act which may have been done by him, or anything which he omitted to do and which he ought to have done which may have had the effect of preventing a fair election, has resulted rather from want of due

reflection and consideration than from a design to favor any one. Still, as I have intimated, it does seem to me extraordinary if a warm contest were anticipated in a populous ward, why proper arrangements should not have been made not only to keep the poll free about the entrance or door, but to preserve free access to it from all quarters. Then why was not the list of voters alphabetically arranged either by the officer who had charge of the roll or by the Returning Officer himself? The Returning Officer may say it is not his business to make out this list, perhaps it is not; but if he desire to perform his duties creditably to himself and with advantage to the public, whose servant he is, he should see that what is necessary for that purpose is done.

The statement as to the obstruction of voters on the part of the Relators is clear and distinct—some of the witnesses stating they could not vote, and that others could not, and that they were restrained by fear from doing so. The answer to the statement is, that they had as good an opportunity for doing so as defendants friends if they had chosen to stay on the ground and take their turn.

I have not seen however any statement that any Elector who wished to vote for defendants was not able to do so, whilst it is manifest that there were many who wished to vote for Relators that were not permitted to do so.

The very first principle connected with all Electors is, that they should be free: if they are not how can there be any election or choice? If a minority of the Electors can take possession of the poll, or get forward and by force or fraud prevent the opinion of the majority from being expressed by their votes, I cannot see how that can be considered a fair election.

The law certainly contemplated that free access to the polls should be had by all electors. In the 159 sec. of the Municipal Corporations Act, the poll is not to be closed before the hour of four of the second day, unless the Returning Officer shall see that all the Electors intending to vote have *had a fair opportunity of being polled*, and one full hour at one time shall have elapsed, and no qualified Elector shall during such time give or tendered his vote, *free access being allowed to Electors for such purpose.*

This clearly shows that the Legislature contemplated that the electors should "have a fair opportunity of being polled," and that free access should be allowed to them to the polls for that purpose. The evidence in this case does not satisfy me that *all* the electors in this ward had that opportunity, and that free access. On the contrary, I think many of them had it not. Whether this arose from the slowness of the Returning Officer in taking the votes, or from the obstructions put in the way of voters coming forward to vote, or from any of the other causes suggested in the affidavits filed, I am of opinion that the fact that a large number of duly qualified electors could not cast their votes is a sufficient reason for setting aside an election, if the result were influenced by the unpolled votes.

The next question there is, can the result of the election be said to be affected by this want of free access. It is stated in one of the affidavits that the number of voters in the ward is estimated to be between five and six hundred, which is believed to be correct. On looking over the list of voters, from a rough estimate I should think the number would exceed seven hundred, but of course they might not all be voters in this ward.

If we take 500 as the number of voters in the ward, there were only 257 votes polled, leaving nearly 300 votes unpolled.

Had the 300 unpolled electors free access to the poll? If not, can I say that if those of them who had desired to vote had been allowed to do so, that it would not have influenced the result? I think not.

It may be contended that 500 votes could not be polled in the time permitted by law. I am not satified it cannot be done if all parties really desire it. Mr. Ambridge, in his affidavit, says he has been Returning Officer for the last five years in St. Mary's Ward in Hamilton, and that he has on several occasions taken from 250 to 400 votes during the two days on which the municipal elections have been held, and has no doubt 500 could be polled if free access could be had to the poll, and there were no obstructions. I have seen over 500 votes polled in two days at a Parliamentary election, and there were intervals of a considerable length during the two days wherein no votes were polled, but at these elections the Poll opens each day at 9 a.m. and closes at 5 p.m.

On the whole then, as to the defendant Lawrence Devaney, I am of opinion the election should be set aside and a new election had.

As the defendant Brown has not yet been heard, of course as to him I express no opinion.

As to the question of costs I have more difficulty. I think the tendency of modern decisions is not to compel a party to pay costs unless it can be shown that he participated in the improper conduct for which the election is set aside; the defendant Devany denies such participation expressly, and I do not in consequence feel warranted in directing him to pay costs. If, however, an election at some future period should be set aside because the electors had not had free access to the Polls, and a candidate, after proceedings had been instituted to avoid the election, should persist in his right to hold his seat, it would be a subject for consideration whether the rule ought not to be laid down that he should pay the costs. In this case I am not prepared to direct the defendant Devany to pay the costs.

In the event of a new election being ordered, it is to be hoped that the proper preliminary arrangements will be made to facilitate the approach of the electors to the polls, and to hasten the mode of ascertaining if a party offering is really entitled to vote.

As there seems to have been an understanding that the affidavits should apply equally to all the defendants, Mr. Read now appears for Brown and refers to these affidavits, and the same judgment will be given as to defendant Brown.

The election will be set aside, without costs, and a new election ordered.

In re J. R. Jones v. J. Ketchum, Jr.

Attorney's Bill—Taxation and Revision—Unprofessional Charges.

An Attorney's Bill settled for more than twelve months will not be ordered to be taxed, and, if taxed by mistake, taxation will be set aside as irregular.

Items charged in an Attorney's Bill not appertaining to the business of an Attorney cannot be taxed by the master, but must be determined as an ordinary business transaction.

A Revision of Taxation will be granted when the master, upon a reference to him under the order of a Judge directing taxation of an Attorney's Bill "for fees and disbursements in his professional business," has allowed charges in the Bill for business not appertaining to the office of an Attorney.

(June 22, 1857.)

The facts of the case sufficiently appear in the Judgment.

McLean, J.—This is an application for a Revision of Taxation. On the 6th of April, an order was made by the Chief Justice, directing Mr. Jones to render his Bills of Costs with dates for fees and disbursements in his professional business, for and on account of the said Jesse Ketchum, and that the same be referred to the master to moderate and tax.

The Bills being rendered in pursuance of this order an appointment was made by the master, on the 11th May, for taxation on the 12th, at 10 o'clock. On the 12th the time was enlarged by consent of parties till Thursday following, and on the 16th May the master proceeded with the taxation; and, as appears by the affidavits now filed, would not allow a further enlargement without the consent of Mr. Jones, though urged to do so with a view of procuring original documents, the charges for which was disputed on the part of Ketchum.

By the master's allocatur a sum of £57 4s. 4d. was found to be due to Mr. Jones on the Bills of Costs taxed, including in that amount, according to the Bills filed, charges for services not wholly of a professional character, such as receiving and keeping possession and taking care of a house, the examination of sundry accounts between Ketchum and other parties, and various other items not necessarily belonging to the business of an Attorney, and including also a sum taxed in a suit alleged to have been long since settled and satisfied by Ketchum with Mr. Jones. I am now asked to order a Revision of Taxation, and to direct the master to strike out all charges not strictly professional, as well as that which relates to the Bill of Costs alleged to have been rendered to

Ketchum, and paid or satisfied by him; and affidavits are filed with a view of shewing that the charges for drawing deeds and leases and other instruments are extravagant and should be reduced in amount.

In rendering his Bills of Costs Mr. Jones has not confined himself strictly to the order of the Chief Justice, for that applies only to Bills of Costs "for fees and disbursements in his professional business," but having included various items not connected with such business the master has exercised his judgment on all that was submitted, and has given his allocatur, as if the whole were for professional services.

The Statute 2 Geo. II. cap. 23, sec. 23, provides that a Bill delivered may, upon application, the party charged, to *the Court in which the business*, or the greater part thereof in, amount or value, shall have been transacted, and *upon submission* to *pay the whole sum* that upon taxation *shall be allowed*, be referred for taxation to the proper officer, although no action or suit shall be then depending; and if upon due notice either party shall not attend, the officer may proceed *ex parte;* payment of the sum allowed to be a discharge, and in default may be enforced by attachment or other proceedings; and, independently of the powers given by this Statute, it is said in the case of *Wilson* v. *Gutteridge*, 4 D. & R. 736, that the Courts have an inherent jurisdiction at Common Law to tax the Bills of Attorneys, practising in them; and this doctrine is sustained to some extent, though certainly not conclusively by the case *Watson* v. *Paston*, 2 Tyr. 406, 2 C. & J. 370, 1 Dowl. 556 but in the case of *Dayley* v. *Kentish*, 2 B. & Ad. 411, Tenteden in delivering the judgment of the Court, on an application to tax the Bill of an Attorney against an ordinary client, the Bill containing no taxable item, said, "We have referred to the other judges on this case, and no much doubt is entertained on the point that we cannot send the Bill to be taxed.

Then in the case of *Weymouth* v. *Wright* (1836), 3 Scott, 764, C. J. Tindal referring to the case of *Dayley* v. *Kentish*, says, "The result of the conference of the Judges on that case was that they almost unanimously concluded that the Courts had no authority independently of the Statute to direct the taxation of Attorney's Bills, unless under special circumstances as when the Attorney has been guilty of fraud."

In the case *ex parte King* 3 N. & M. 437 (1834), an application was made to refer Bills of Costs for Taxation, which related to business done by an Attorney in effecting mortgages on property, and which contained a charge "for preparing and engrossing a Warrant of Attorney as a collateral security." It was argued that this was a taxable item, and being included in the same account with other items not taxable that the whole became subject to taxation. *Littledale, J.*, said, "The Court has no *general* power to order a Bill to be taxed, and this had been frequently decided."

In another case *ex parte* Bowliss' Trustees (1835), an application was made to refer to the Prothonotary for taxation an Attorney's Bill for preparing a settlement and certain conveyances. The Bill contained charges for searches and disbursements at the Warrant of Attorney office, and it was contended that the item rendered the Bill taxable, Lord C. J. Tindal, in delivering judgment, said, "In every case of conveyancing there must be searches for judgments and incumbrances, and it seems to me that charges for such searches were not intended by the Legislature to be included in the terms 'fees, charges, and disbursements *at law* or *in equity*.' *Wilson* v. *Gutteridge* has been expressly overruled on several occasions. I cannot hold that the mere going to the Warrant of Attorney's office, and then making searches is a *proceeding in a suit*. Consequently I think we have no authority to interfere."

In re Lord Cardross, 5 M. & W. 544, it was decided that an application by a client for the delivery of an Attorney's Bill of Costs, containing *taxable* items, must be made in a Court in which *some* of the business was done. And Parke, B., in delivering judgment, says, that the Courts have by construction limited the qualification imposed by the Statute 2 Geo. II. cap. 23, and now hold that if any of the business were done in the Court to which the client applies it will suffice. But he says, in reference to the case of Lord Cardross, "there is no business done in this Court," and from this it must be inferred that in his opinion Bills must be for business done in Court, in order to entitle the Court to refer them for taxation under the Statute. In that case the rule laid down In re Aitken, 4 B. & Al. 47, was recognised as correct—that the Court will interfere to compel an Attorney to do that which in justice he ought to do, when the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client.

Though the Court will thus interfere from its Common Law jurisdiction to compel an Attorney to do what is right, the weight of the most recent authorities I think establishes satisfactorily that the Bill or Account of an Attorney will not be ordered to be referred to the master for taxation unless it contain some taxable items, and that an Attorney may recover for services rendered in any matters not so taxable, without rendering a Bill a month previous to the commencement of an action. And it appears to me that the power to refer an Attorney's Bill for taxation, till the passing of the Provincial Statute 16 Vic. cap. 175, sec. 20, must have been derived entirely from the Act 2 Geo. II. cap. 23, sec. 23, which relates only *to business done in Court*. Our Statute is similar in its provisions to the 2 Geo. II. cap. 23. It restrains, except under special circumstances, any action from being brought until the expiration of one month after the delivery of an Attorney's Bill for fees, *charges*, or *disbursements*, and it provides that upon the application of the party chargeable with such Bill within such month any Judge of the Superior Courts of Law or Equity, or any Judge of a County Court may refer *such* Bill, and the demand of an Attorney to be *taxed and settled* by the proper officer of *any* of the Courts in which *any* of the *business charged for in* such Bill may have been done; but no such reference can be made after a verdict shall have been obtained or Writ of Enquiry executed, except under special circumstances to be proved to the satisfaction of the Court or Judge to whom the application for such reference shall be made. The 23rd section provides that the payment of any Attorney's Bill shall in no case preclude the Court or a Judge from referring such Bill for taxation, if the special circumstances of the case appear to enjoin it upon such terms as shall seem right, provided the application for such reference be made within twelve months *after payment*.

From this latter provision it appears to be the necessary inference that the Court or Judge cannot direct a reference to be made when twelve calendar months have elapsed after the payment of a Bill of Costs, however special the circumstances, and if so then the reference of a Bill of Costs in the suit of *Ketchum* v. *Duffy*, which appears to have been paid and settled upwards of twelve months, and the taxation under such reference must be irregular.

With respect to that Bill and its taxation there are several affidavits filed on the one side stating that a Bill was delivered as required by the party chargeable, with the payment, and on the other shewing that Bills were only required of the items contained in a more recent general account, and that the payment and settlement of the costs in the suit of *Ketchum* v. *Duffy*, was unknown to Mr. McIntyre, who was employed to procure the Bills of Costs for taxation.

These affidavits are proper to be laid before the master for his guidance, and should he find that the costs in that case have in fact been paid and settled more than twelve months, he will scarcely feel at liberty to open the matter on taxation at the instance of either of the parties.

In the application for a Revision of Taxation I am asked to give specific directions to the master in reference to particular items of the Bills or accounts taxed; but this I do not feel called upon to do until he has exercised his judgment, after seeing the affidavits now laid before me. I will only add that with respect to the taxation of items in a Bill which are not strictly taxable, as for fees, charges, or disbursements, for business done by an Attorney or Solicitor in Court, or in some cause depending in Court. Such taxation, in my opinion, will not be binding on either party, and that for such services parties must be guided, as in other cases between individuals. Under all the circumstances of this case I think it should be referred back to the master to revise his taxation on the affidavits and papers now produced.

Order granted.

COUNTY COURTS, U. C.

In the County Court of Essex.—A. Chewett, Esq., Judge.

Reynolds v. Offitt.

Title to land in question—Jurisdiction ousted.

Plaintiff Declared against Defendant, Lessee, for removing and spoiling a Tenement, &c.,* let to Defendant, and in 2nd count, for converting the materials of the building to his own use.

1st Plea.—That before removal defendant acquired the freehold of tenement by purchase.

2nd.—That before removal defendant acquired the soil by purchase on which the *tenement* was erected, and removed same after due notice to plaintiff because it encumbered defendants land and soil.

3rd.—That the building was not plaintiff's, as alleged.

Demurrer that defendants first and second pleas are bad in substances stating some matters intended to be argued—and takes issue on third plea.

The Court was of opinion that the pleas demurred to having been pleaded under the 13 sec., 8 Vic., chap. 13, with the proper affidavits did under the 5th sec. of the same Act and the 20 S. of Co. C. P. Act, 1856, bring the title to the land in question, *i. e.*, "*That* no plea whereby any title to land or to *any* thing relating to lands or Tenements (among other things) shall be brought in question, shall be received by the District Court without an affidavit thereto annexed, that such plea, &c., is not pleaded vexatiously, or for the purpose of excluding the Court from having jurisdiction, but that the same does contain matter that the defendant believes necessary to enable him to go into the merits of his case."—And that the Court was ousted of its jurisdiction as to the whole case, and could not even hear the *demurrer* which brought the soundness of the plea in question.

Mountney v. *Collier*, 16 L. & Eq. 232, and *Marsh* v. *Dewes*, 20 L. & Eq. 356, show the same, and in *Lilley* v. *Harvey*, reported in 11 *Law Times*, in Q. B., 273, the Court said where there are *special pleadings*, and the question is raised upon them as to the *title to land*; the Judge can go no farther, and in 7 U.C. Rep. 548, *Trainer* v. *Holcomb*, that when the title to land comes only *incidentally* in question, the judge must stop.

* The word *tenement* in general not only includes *land* but every modification of right concerning it, to which the law has attributed a *substantive* though *invisible* being. It has also a popular meaning signifying a *habitable building* with its appurtenances; 1 B & C, 630.

TO CORRESPONDENTS.

J. Eastwood.—Your communication is answered under title "Correspondence."

G. M.—Will find the information he asks for in Vol. I. of this Journal, p. 181.

H. T.—There are yet some copies of Vols. 1 and 2 of this Journal—for sale by Messrs. Maclear & Co., Toronto, our Publishers.

A "J. P."—The parties may, we think, lawfully compromise.

Judge C., Penetanguore.—Your letter received too late for this number, will receive attention in our next.

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

We do not undertake to return rejected communications.

Matter for publication should be in the hands of the Editors at least two weeks prior to the number for which it is intended.

Editorial communications should be addressed to "*The Editors of the Law Journal, Toronto.*"

Advertisements, Business letters, and communications of a Financial nature, should be addressed to "*Messrs. Maclear & Co., Publishers of the Law Journal, Toronto.*"

Letters enclosing money should be *registered*;—the words "Money Letter" written on an envelope are of no avail.

Correspondents giving instructions with reference to the Law Journal, should be careful to give *the name of their Post Office*. When a change of address is made, the old as well as the new Post Office should be given.

FINANCIAL MATTERS.

Parties in arrears for the Law Journal will particularly oblige the Proprietors by remitting the amounts due to them immediately. The aggregate of the sums now outstanding and unpaid is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time very seriously affects the Proprietors of the Journal. We expect, therefore, that our friends will pay *prompt* attention to this notice.

PUBLISHERS' NOTICE.

Mr. Thomas, *of our Establishment, purports making a tour in the Western portions of the Upper Province during the present month, and will take the opportunity thus afforded of soliciting subscriptions, and making collections, for this Journal.*

TERMS AND ADVERTISING CHARGES.

The Terms are 20s. per annum, if paid before 1st of March in each year; 25s. if paid after that period.

The Advertising Charges are:—

Card for one year, not exceeding four lines	£1	0	0
One Column (80 lines) per issue	1	0	0
Half a Column (40 lines) per issue	0	12	6
Quarter Column (20 lines) per issue	0	7	6
Eighth of a Column (10 lines)	0	5	0

NOTICE.

The Upper Canada Law Journal, when mailed from the Office of the Publishers, is not liable to postage.

THE LAW JOURNAL.

SEPTEMBER, 1857.

THE EXPENSES OF THE ADMINISTRATION OF JUSTICE IN CRIMINAL MATTERS.

The Municipalities and their Rights in the Premises.

Previous to the year 1846, the expenses of the administration of criminal justice in Upper Canada were paid by local taxation, while in Lower Canada they were paid out of the public funds of the Province. A state of things so strangely anomalous, and at the same time so unjust towards Upper Canada, could not fail to engage public attention. Under any circumstances the General Funds of the country ought to bear all the expenses of the establishment of Courts of Justice, and the costs incurred in the prevention and punishment of crime. Every individual in the community, is entitled to the protection of the law against criminal wrong—all localities are alike interested in this particular, and none should be required to pay by local taxation for the requisite legal machinery. The fact of this principle being maintained as respected Lower Canada, and ignored as respected Upper Canada, was recognized as a special ground of injustice. Why, it was asked, should sheriffs, clerks, constables, &c. be paid in the several counties in Upper Canada by local taxation, while in Lower Canada the people are freed from taxation, and the public fund supplies the money to pay such officers. The subject we say engaged public

attention, and resulted in the Act 9 Vic. ch. 58, which provides for the future payment of the expenses of criminal justice in Upper Canada, out of the public funds of the Province.

It does not fall within our province to examine the expediency and political necessity for this Act. We purpose merely to draw attention to the Law as it stands, and the administration of it which rightly or otherwise, has caused much dissatisfaction to the County Municipalities in Upper Canada. If the act has not been fairly construed, a partial remedy exists without fresh legislation. If it have received the liberal and beneficial construction it is entitled to, the legislature alone can grant adequate redress to the people of Upper Canada.

Before proceeding to examine the Act, we would observe that there are certain fixed principles which must guide in the exposition of a written law, and that neither the Government nor the Courts of Justice may depart from the rules of interpretation which the law has firmly established. It is neither the province nor the right of a Judge, (much less the head of a department), to determine on his individual private views. The judicial mind in which the law is said to repose is quite distinct from his personal conscience. The party undertaking to determine the scope and effect of a statute, and with power to act on such construction, assumes the office of a Judge; so let it not be said that the principle will not apply to the heads of departments, or the public functionaries—they are bound by the same rules which prevail in the Courts—they must pursue precisely the same process in arriving at the meaning of the Legislature. An absolute power to pronounce, would be manifestly unconstitutional and dangerous in the highest degree—it does not exist. With the aid then of the recognized principles of construction, we proceed to examine the Act in detail.

The Statute is entitled "An Act *for defraying the expenses* of the Administration of Justice in criminal matters, in that part of the Province formerly Upper Canada." The preamble reads thus, "Whereas it is expedient to provide that the expenses of the administration of criminal justice in Upper Canada, now paid by local taxation, shall in time to come be paid out of the public funds of this Province, under the provisions hereinafter made."

"That the expenses of *the administration of criminal justice, &c.*" * *

We do not pause to consider the meaning of the word "*administration*" in the connection here used,—it always has the same signification—the act of administering, conducting, dispensing.

"Administration of *criminal justice.*" These terms are commonly and appropriately used in contradistinction to administration of justice in *civil* matters, and it is submitted are so employed here. Jurisprudence is divided into two great departments—comprehending matters *criminal*, and matters *civil*—he one treating of and embracing the relations of men to the supreme power in the State, and to each other in those things which concern the State—the other—the relations of men to each other—in other words—*Public* wrongs and *private* wrongs, crimes, and civil injuries. Public wrongs or crimes "are a breach and violation of the public rights due to the whole community, considered *as a community* in its social aggregate capacity." Private wrongs "are an infringement and privation of the civil rights, which belong to individuals considered as *individuals.*" Public wrongs or crimes fall within the *first* department—private wrongs or civil injuries within the *second.* The main object of law is the prevention and punishment of crime, and this is comprehended in the terms—"administration of criminal justice." The power to prevent as well as punish crime is given to inferior tribunals, or to particular functionaries, as well as to the Superior Courts of criminal jurisdiction, and when exercising this power these tribunals or functionaries are engaged in the administration of criminal justice.

"*Now paid by local taxation.*" As before remarked, all these expenses were before the passing of the act, 9 Vic. paid out of the County funds under the act of 1792, U.C. adopting the body of the English law, or under some act of the Parliament of Upper Canada or of this Province, making some special provision concerning them. The words, "now paid by *local taxation*," are evidently not intended as descriptive of the particular kind of expenses which are before accurately and plainly stated, but merely as a statement of fact in connection with the after alteration or remedy,—"shall in time to come be paid out of the *public funds of this Province.*"

The Legislature announced the remedy designed,

by declaring that Municipalities should no longer be compelled to tax themselves to pay for the administration of criminal justice,—that in time to come, it should be paid for out of the public funds. The words, *local taxation* and *public* or *general* funds, are manifestly suggestive of designed contrast in terms by the Legislature. In the *enacting part* of the first section, the same terms are employed, and rejecting the portion, making temporary provision for the years 1846 and 1847, the clause may be read thus:—"That the *whole* of the expenses of the administration of criminal justice shall, during every year after 1847, be paid out of the consolidated revenue fund of this Province, and so much of any law as may be inconsistent with this act is hereby repealed." No sentence or form of words can have more than one *true* sense,—to have two meanings is equivalent to having no meaning. And can we ask any other interpretation to be given to this enactment than that all lawful fees—all necessary expenses legally incurred in the prevention of crime, in the arrest, prosecution, and trial of criminal offenders before Courts and Functionaries thereto authorized should be paid out of the General Revenue fund? If we go beyond the bare words and seek to penetrate further into the intent . the Legislature, this interpretation will have additional support from the reason and objects of the law to which we before briefly referred.

The second section provides for the audit of accounts, and does not affect the question as to the scope of the act, but the third section it seems, is considered by the department of public accounts to limit the enactment in the first section. Acting upon this, that department has assumed the right to reject certain expenses in the administration of Justice, and to throw the payment thereof upon the Municipalities. It would appear that the admission and rejection of items is arbitrary; at all events, it is difficult to perceive where a sound discretion has been exercised, or what principles have guided to a conclusion. The observations submitted by the Inspector-General for the guidance of the Boards of Audit are, it is said therein, "believed to be conformable to the views of the Law officers of the Crown" upon the Act. If so we venture to assert, that these views are erroneous. We cannot suppose that the Act has ever been taken up as a whole, and the opinion of any Law officer of the Crown had upon it, and we strongly incline to think that "the Law officers of the Crown", would not be prepared to father the observations in question, or give it as their opinion, that a correct interpretation has been pronounced by the Inspector General's department. Opinions probably have been hastily given on *isolated* items, and may be, for aught we know, correct enough, but the document before us, of itself proves that no general principles have been laid down for the guidance of the department. We do not desire to find fault with the officers or the department; the fault lies in the system,—but we desire to show wherein we believe, justice has not been done to the Municipalities, in order that a remedy of some kind may be applied.

Let us look for a moment at the third section—it is as follows:—"The several heads of expenses mentioned in the schedule to this Act, shall be deemed expenses of the administration of justice within the meaning of this Act." It does not say the several heads, &c., *and no others*, but merely that certain specified *heads* shall be within the Act.

Qui hæret in litera hæret in cortice, is a sound maxim, but suppose we put aside for a moment considerations of a general character that should weigh in construction, and look at the *words* of this third section, we will in them find nothing repugnant to the broad and comprehensive terms of the first section, which as we before said, includes *all* expenses connected with the administration of criminal justice. So far from controlling or limiting the terms in the first section, it may with more show of reason be contended that the words of the third section *enlarge* their operation, and actually bring within the scope of the act certain expenses not properly belonging to criminal justice. There are no less than six items in the schedule authorising payment for certain services rendered in connection with Division Courts—Courts of purely *civil* jurisdiction. These would not come within the Act but for the third section, for certainly in no sense are they expenses connected with the administration of *criminal* justice. The third section, may, however, with more show of reason, be said to limit the *amount* payable without restraining the subject matter embraced under the general terms, "Administration of criminal justice;" and it certainly appears to do so in the case of the Gaoler's salary, "a proportion" only being chargeable against the General Revenue. But to our mind it is quite evident that the schedule,

if not intended to enlarge the subject matter, was for the purposes of illustration merely, and at all events it must be taken in connection with the main express enactment, that *all the expenses* of the administration of justice in Upper Canada, shall be paid out of the General Revenue. If any argument were necessary to fortify this obvious view, it might be found in the last item in the schedule,—"Together with all other charges relating to criminal justice, payable to the foregoing officers specially authorized by an act of the Legislature, and heretofore payable out of District funds." This includes nearly every item for which the municipalities have contended.

The Act 4 & 5 Vic., cap. 10, exhibits the necessary authority and the rules made by the Judges thereunder, fixed the *amount* of charge that may be allowed, the Legislature preferring to throw upon the Judges the work of making a schedule to their Act. Before the 9 Vic. officers demanded and received fees under the authority of the Act 4 & 5 Vic., and the Statutory rules, and yet it appears that a fact of such public notoriety, has not yet found its way into the Inspector-General's Department.

Now let us take a glance at the "observations" from the Inspector General's department, to which we have before referred.

"Returns of convictions by Magistrates;" 4 & 5 Vic. cap. 12, sec. 4, fees £1 each.	Not chargeable to the Government; nor the expense of publication; nor is the fee of 5s. for copy of Return to Inspector-General.

The rejection of this charge by the Government, is palpably incorrect—for it is distinctly "authorized by an act of the Legislature, and payable out of the County funds." The 4 & 5 Vic., ch. 12, sec. 4, after requiring the Clerk of the Peace to publish and put up in the Court house the returns of convictions made by Magistrates, enacts that "for every schedule so made and exhibited by the said Clerk of the Peace, *he shall be entitled to the fee* or sum of £1, besides the expenses of publication; *in his accounts with the said District to be paid by the Treasurer thereof.*" The 5th section requires such Clerk of the Peace to send a copy to the Inspector General. We cannot even surmise on what ground this item is disallowed—more particularly as its object is to establish a check on the fines, &c., received, which for the most part belong to the General Revenue. On this item alone, the Municipalities of Upper Canada lose probably £700 yearly!

Under the head of "Constable,"

"Mileage" generally, "Arrest under warrant," fee 5s; "Serving Summons or Subpœna," fee 1s. 3d., &c.	These charges and the expenses appertaining thereto will be admitted as chargeable against the Government only in cases of the following description of offences, viz.—"Offences tried or to be tried at the Court of Oyer and Terminer, or at the Court of Quarter Sessions (cases connected with criminal justice), but not to cases falling under the jurisdiction of Justices."

If by the cases referred to as falling "under the jurisdiction of justices," it were meant to designate disputes between master and servant, or other semi-civil cases, there might be some ground for question as to allowance, but as a fact the expenses in all cases summarily disposed of before magistrates are rejected in the Inspector Generals's office. Take cases involving breaches of the peace, &c. If these are not criminal cases, what are they? They were originally punishable only on indictment; they may be so proceeded with still. Their character is not changed by reason of a summary and cheap mode of trial before Justices being allowed. It is impossible to estimate the loss on this item; but the pernicious effect of the rejection is clear enough. It is to weaken the hands of the magistracy on the one hand, or, on the other, to induce them to send every trivial case to the Sessions or Assizes for trial on indictment, to the great loss and inconvenience of prosecutor, witnesses, and jurors, and often to the too severe punishment of offenders. Common minds would be ready to imagine that, however numerous the *modes for trial* of an offence, the character of the charge would remain unchanged. Acts of last Session enable magistrates to try cases of larceny, and also to try juvenile offenders charged with crime. A vast number of cases will in this way come before magistrates; and as the expenses of cases disposed of before magistrates are not paid out of the general revenue, there is a certain temptation to relieve the County funds by making them cases for trial on indictment—in fact, a premium for not exercising a beneficial jurisdiction conferred on magistrates for the public good.

Under the head of the maintenance of criminal prisoners, one half of the expenses of washing and cleaning jury rooms (wonderful liberality!) is allowed; but fuel and light for the Court-house are "not chargeable to Government, as it is considered such expenses should be borne by the Municipal Council." There is warrant

of law for keeping a jury without fire when they retire to consider their verdict; but Judges, and juries, and the public are not expected to sit during a long criminal trial in a Canadian winter without fire, and candles, if nothing better than "dips, ten to the pound," will occasionally be required. So, notwithstanding the official "pronounciamento," we continue to think fire and light within the meaning of "expenses of the administration of criminal justice." But we need not further examine details—*ex pede Herculem.* Our readers will easily judge of the tenor of the whole from the items specified.

Under "general remarks" it is stated:

"Fees for services, although provided for by the tariff established by the Judges, are not chargeable to the Government unless specified in the Schedule to the Act 9 Vic. cap. 58, but are as formerly payable by the Municipal Council or otherwise."

This illiberal and unwarrantable construction lies near the basis of the whole fabric of injustice to Upper Canada. We have already shown that it is erroneous. It appears to have entirely escaped the attention of the department that the Judges' rules have statutory effect—are, as it were, a schedule to the Act, under the authority of which they were framed. The rules themselves declare that *it is to be understood*—

"That besides the fees set down in this table, the several officers will be entitled as heretofore to receive fees for other services rendered by them respectively, which are not mentioned in this table, wherever specific fees for such services are fixed by any statute;"

That the last item in the schedule covers other charges besides those specified in the schedule, is very clear—the words, we will repeat them, clearly show it—

"Together with all other charges relating to criminal justice payable to the foregoing officers, especially authorised by an Act of the Legislature, and heretofore payable out of the district funds."

It will be seen that the subject has been examined from a strictly legal point of view. We have not urged as a ground for change, that while Lower Canada draws over £80,000 annually for the administration of justice, Upper Canada receives less than £40,000 that—Crown witnessses are paid for their loss of time in Lower and not in Upper Canada—that there they receive monies to build their Court Houses, which we do not—that the General Revenue is taken for many other like expenses which we pay by local taxation—and that in every instance, the rule for payment out of the General Revenue, as applied to Lower Canada receives a liberal construction; as applied to Upper Canada, a narrow one. This is another point of view from which the subject may be regarded. Our criminal jurisprudence is the same. There should not be any distinction as to the mode of supporting the machinery of "criminal justice" in different sections of our common country.—The writer has, at various times within the last eighteen months been called upon to examine this subject editorially. The best excuse he can offer for not doing so hitherto is, that those most interested—the Municipalities—have not taken any definite combined step to obtain justice. The Statute, we believe, has not received the liberal construction it ought. We have endeavoured to show that the legal rules of interpretation have been violated in the interpretation put upon it; and there, for the present, we must leave the matter.

BREACHES OF TRUST.

It is vain to hope for perfection in anything of human institution and yet we yearn for perfection in that of the law. When we survey the magnitude of the interests at stake—being nothing less than the salvation of society itself—we grieve to have forced from us an admission that it, like other human institutions, is imperfect.

Since law is made for the good government of society, it must be suited to the circumstances of society. Since society is progressive, and daily becoming more complex in its parts and more stupendous as a whole, the law must strive to keep pace. Just so much as water is necessary for the subjection of fire, just so much is a criminal code necessary for the subjection of crime. If the supply of the aqueous element is too slender the evil which it is sought to overcome only rages with the more ungovernable fury. So if the criminal code of a country is not of sufficient capacity to embrace all offences against society, the offences not embraced increase and multiply till their very hideousness causes wide spread alarm.

It is an offence against society for one man without the consent of the owner to misappropriate the funds or other property of another man. The offence is not lessened because the property misapplied was *entrusted* by the one to the other. On the contrary, such a plea, instead of being a palliation, is an aggravation of the moral wrong committed. The temptation to commit the offence is singularly great, and in consequence the frequency of the offence singularly common. But is not this offence branded

as swindling or as robbery? Is not the perpetrator a robber in fact and a felon in law? Is he not an outcast of the law, visited with all the strength of insulted justice? Nothing of the kind. If we search through law books under such titles we shall search hopelessly for the punishment of such an offence. It is only to be found under the mild und assuaging title of "breach of trust." A few years ago a silly grocer's clerk who applied his master's money to his own use was a great, if not the greatest of felons. To-day, what do we find? Defalcations and frauds unparalleled in the history of the world—thousands and tens of thousands coolly appropriated by men whose extravagance in life is supported by dishonesty till death.

If an old woman take her neighbor's goose, she is branded as a thief, prosecuted as an outlaw, and punished as a felon. But the refined scoundrel who makes use of his position in Society and his attainments in education to steal—we shall say steal, though the law does not say it—to steal the value of hundreds of thousands of pounds, simply commits a "breach of trust." Why should not such an one be punished with as much certainty and severity as the starving beggar or the houseless, vagrant? Why not punish him more severely, as the magnitude of his offence is great and the danger of his example very great? Not to do so is to hold out a premium for the commisssn of great offences, while those of petty import are visited with pains and penalties.

During a recent investigation in the City of Toronto we had the sorry spectacle of a man, upon whom suspicion of a grave crime rested, boasting in Court that he had counselled one equally suspected of the success of a noted bank swindler in New York, who, by increasing the amount of his peculation, ensured his escape from the grasp of the law. Is this not the baneful influence of bad example overspreading the land because of defective laws? Men who would not steal a goose, because it *is* a felony, fear not to pocket thousands of the money of others, because it is *only* a breach of trust. The moral sense of right and wrong is in this way blunted by the impotency of the law.

Our moral perceptions when in a normal state show us that it is wrong to use the property of another without his consent as our own. But a knowedge of the law makes us aware that though wrong it is not unlawful—that is to say,—not punishable as a crime.

When we find men in positions of trust not only abusing their trust, but indulging in wild expenditure by the commission of acts grossly dishonest, hoping that they will not be discovered, and knowing that if discovered there is no danger of occupying the felon's dungeon—when we witness these things every day and everywhere we are compelled to demand an amendment of the law. Let the law be extended, and the offence be called by its true name—felony—and then shall we find men choose rather the imputation of poverty than of crime.

We believe that if breaches of trust, when wilful and for the benefit of the party offending, are not made crimes, frauds the most astounding will flap their wings in the very portals of our Courts of Justice.

We affirm the principle that law must expand as society expands and crimes essays to increase. How is the law at present? It is prim with nicety, and characterized for the finest distinctions that the mind can well conceive.

1. *Larceny* is the felonious taking of valuable property from the *possession* of another *without his consent and against his will.*

2. *False pretence* is the obtaining of valuable property from the *possession* of another, *with his consent and will,* by means of some artful device.

3. *Embezzlement* is in general the misapplying, *without the consent and against the will of the owner,* of property *received* from third parties by persons in situations of trust *for the use of the owner,* but which had never been in the owner's *possession.* With respect to bankers and others entrusted with valuable securities for a special purpose, the rule is slightly extended.

4. *Breach of trust* is the *misusing* of that property which the owner has without any *fraudulent seducement* and *with his own free will and consent* put or permitted to be put into the *possession* of a trustee, agent, or servant.

Here are four descriptions of offence, three only of which are punishable as crimes. The first, and the only one punishable at common law, is that of larceny. To meet the exigencies of society the second, and third, have been made crimes by statute. To meet the exigencies of society we are of opinion that the time is come for making the fourth, also a crime by statute. No one who reads the newspapers of the day—no one who reflects upon what he reads—can deny the propriety of this position. There may be some difficulty experienced in framing a remedy which will be neither too severe nor too lenient; but as regards leniency, surely no remedy can be *less* lenient than *no* remedy at all.

We shall watch with anxiety the movement now going on in England under the combined direction of Sir Richard Bethell and Lord Brougham. Better is it to have a measure imperfect in details than no measure at all. Several of the United States are in advance of England in this particular, and their laws though not all that is desirable are found to work beneficially. The law of France is also in the

same respect in advance of that of England. We are unable to see much difficulty in enacting that persons occupying positions of trust, wilfully abusing their trust for their own gain and benefit, shall be punished by imprisonment in like manner as the clerk who, receiving money for his master, prefers to pocket it instead of putting it in his master's till. We, however, recommend the entire subject to the attention of our readers, earnestly hoping that by the efforts of some of them, a most scandalous defect in our laws may be remedied.

We direct attention to the case of *Jones* v. *Ketchum*, reported amongst our Chamber Cases of this issue. The points decided in it, as to when and under what circumstances the Courts will refer Attorneys' Bills for taxation, and the duty of the master upon such references are of no ordinary interest.

Now that the world is startled by the perpetration of astounding frauds in England, France, the United States and Canada,, it is time for people to look well to their laws. That the English criminal law is defective is a mater of notoriety—that our law is equally so cannot be concealed. In another place we give in addition to our own editorial remarks, an article from the English *Law Magazine and Law Review*, headed "The Late Frauds."

We insert in other columns a short and instructive article on the subject of Alibis, copied from the *Law Times*.

We have watched with much interest, the progress of the Consolidation Bills in England. Until very recently everything augured well for their success; but now we learn that some of the bills, though introduced, have been dropped by the English Government. The cause assigned, is that a coterie of members bent on codification and not consolidation, in order to prevent the success of a rival scheme, determined to obstruct the Consolidation Bills. With opposition of any kind, resulting in amendments, consolidation would become the work of a century, instead of a session. We hope better things for our Consolidation measures when introduced.

A measure has passed the English House of Commons, the effect of which will be to throw open the Ecclesiastical Courts to the entire profession, by destroying the exclusive privileges of proctors.

The Chief Justices and Judges of the Superior Courts have, pursuant to Co. C. P. A., 1857, framed rules for Pleading and Practice in County Courts. They are published, and may be had from Maclear & Co., Toronto. Price, 2s. 6d.

MONTHLY REPERTORY.

CHANCERY.

L.J. PEARL *v.* DEACON. *July* 16.

Principal and Surety—Discharge.

A surety joined in a note to secure one half of a debt due from a tenant to his landlord, the debt being also secured by a bill of sale of the debtors furniture. The creditor afterwads took the furniture under a distress for rent.

Held, that the creditor thereby discharged the surety to the extent of one half of the whole distress.

V.C.W. THE BRITISH EMPIRE STEAM SHIPPING COMPANY *v.* SOMES. *June* 2, *July* 21.

Discovery—Common Law Procedure Act, 1854, *sec.* 3—*Compulsory reference to Arbitration—Production of Documents.*

The defendants to an action brought to recover from them the excess upon a bill paid under pressure, obtained on order under the Common Law Procedure Act 1854, sec. 3, for a compulsory reference to arbitration. The plaintiffs had filed a bill for discovery as to matters relating to alleged overcharges in the account of the defendants in aid of the arbitration. Demurrer to this bill over-ruled, the compulsory arbitration provided by the Common Law Procedure Act, being like other legal proceedings which Courts of Equity will aid by discovery, and not in the nature of a reference to a tribunal agreed upon by both parties.

Upon motion for production of documents.

Held, that the plaintiffs were not entitled to see the accounts of the prices actually paid by the defendants to their workman in reference to the work, in respect of which the bill in dispute had been sent in, but that the plaintiffs were entitled to see the returns as to labour done and materials used.

V.C.W. SYMPSON *v.* PROTHERO. *July* 23.

Solicitor and Client—Common Law Procedure, Act 1854, *sec.* 65

By an order made in a suit, £600 is ordered to be paid by C. D.. to E. F. A. B. who has acted as Solicitor in the suit for E. F., claims a lien upon this money for his costs and serves C. D, with notice not to part with it. Subsequently to this notice an order is obtained at Common Law, directing C. D., as Garnishee to pay the £600 to G. H., as judgment creditor towards satisfying a judgment debt due from E. F.

Held, that A. B. did not thereby lose his lien.

V.C.K. WILSON *v.* LESLIE. *July* 16, 20.

Defaulting Executor—Deposit by of property belonging to Testator for debt of Executor—Debtor and Creditor.

R. B. L. a surviving executor, entitled as next of kin and personal representative of W. L. a decease Co executor, deposits a lease belonging to his testator with creditors for a private debt of own. W. L. is an appointee under a power created by the will of the testator. In an administration suit R. B. L. is found to be a defaulting executor; and a bill being filed to recover the lease by parties interested under the testator's will.

Held, that R. B. L.'s interest as personal representative and next of kin of W. L. is not liable for R. B. L's. default, that the lease must be brought into Court with an inquiry as to what was due from the estate of the deceased executor W. L.

COMMON LAW.

EX. COLLETT *v.* FOSTER. *June.* 9.

Attorney and Client—Responsibility of Client for irregular process.

An Attorney retained to enforce a judgment, issued *a Ca. Sa.* when the debt was reduced below £20, under which the defendant was arrested. The *Ca. Sa.* was set aside and defendant ordered to be discharged.

Held, that the plaintiff on whose behalf the writ issued was liable for the arrest and imprisonment that followed upon it.

EX. COOPER *et al v.* WOOLFIT. *May* 4.

Emblements—Right of Executor to—Title of devisee to emblements.

The devisee of land is entitled to the emblements unless they are expressly bequeathed by the will to another. A mere bequest of all the testators residuary personal estate to his executors, does not entitle them to the emblements as against a devisee of land.

EX. HORNTON *v.* BOTT. *May* 28.

Discovery—Ejectment—Title of Defendant Stat. 17 *and* 18 *Vic. Ch.* 125, *Sec.* 51.

A plaintiff in ejectment is not entitled to a discovery of the defendants title.

EX. KRULL *v.* HOOPER. *June* 12.

Insurance Voyage Policy—Insurance of Salvage Implied Warranty of seaworthiness.

The interest of salvors in a ship and cargo, was insured on a voyage from T. a foreign port to England, by a policy containing these words. "The vessel having been abandoned by her original crew and taken into T. by the sailors on whose interest the said insurance is effected."

Held, that the policy was subject to an implied condition of seaworthiness.

Q. B. WHEELTON *v.* HARDESTY. *May* 4, 5, 7. *July* 4.

Life Insurance—The life and his referees not the agents of the assured —Effect of Company's prospectus—Evidence.

Where a person insuring the life of a third party is, on negotiating the insurance, required merely to state his belief in the information furnished by the life and his referees, and the truth of such information is not made the basis of the contract, the person insuring is not affected by fraud of these parties in furnishing information, it not appearing either that he was aware of this fraud, or that they were employed by him as agents in affecting the insurance. In the prospectus usually issued by an insurance Company to its customers, it was stated that any insurance should be unquestionable, unless fraud was practised in obtaining it.—*Held*, (per WIGHTMAN, ERLE, and CROMPTON, J.J., *dissentiente*, LORD CAMPBELL, C. J.,) that this included fraud of the life and his referees, and was not confined to fraud of the assured *quære*, how far a policy ought to be controlled by such a prospectus.

The mere fact, that a prospectus has been usually circulated by a company, affords no evidence from which a jury is entitled to infer that, it has come to the knowledge of, and has been acted upon by a party insuring, and positive evidence must be given that it has actually come to his knowledge—(*dissentiente* LORD CAMPBELL, C. J.)

Q. B. FRASER *v.* GORDAN. *June* 23, *July* 4.

Bills of Exchange—Endorsee against drawer—Agreement with third party to give time to acceptor—Principal and Surety.

It is no answer to an action against a surety that in pursuance of a binding agreement with a third party time has been given to the principal debtor, and therefore the drawer of a bill of exchange is not discharged by an indorsee agreeing for good consideration with a stranger to give time to the acceptor, and giving time accordingly.

Q. B. FREHERNE *v.* GARDNER. *June* 9, *July* 4.

Costs—Allowance of the defendent where there is a distributive issue and he has succeeded in reducing plaintiff's claim—Taxation.

In an action to receive a number of items alleged to have been over-paid to the lord and steward of a manor in respect of admittances to copy-hold, the declaration consisted of the common counts, to which there was one plea of "never indebted;" and the plaintiff at the trial had a verdict by consent, subject to the opinion of the Court on a special case which raised several questions of principle. These were decided by the Court partly for the plaintiff and partly for the defendant; and the amount to which the plaintiff was entitled having been to the master, the plaintiff ultimately recovered something in respect of each item, but an amount in the aggregate smaller than he had originally claimed. Held, that the taxation of the master was right in distributing the costs, and allowing costs to the defendent, where he had in part successfully resisted any claim of the Plaintiff.

CORRESPONDENCE.

Mr. J. Eastwood, Division Court Clerk, Saugeen, writes as follows:—

Saugeen, August 6th, 1857.

After a careful perusal of the *Law Journal* since its commencement, I am unable to find a solution of a difficulty under which I am labouring.

At the instance of P. the plaintiff, an attachment was issued by a J. P. and directed to a constable, who seized a horse and clock belonging to D. the defendant, and delivered them to the Clerk of the Division Court. P. then furnished a Supersedeas Bond upon which the property was restored to him. The cause came on for trial and by consent of the parties, was referred to arbitration. The arbitrators gave an award for the whole amount claimed, which award was duly entered in the Procedure Book. *Before* execution issued, D. absconded taking the horse with him, but leaving the clock and *other* property, all of which except the clock was seized by virtue of two attachments, issued by a J. P. While in possession of the constable, and *before* delivery to the Clerk, an execution was issued against the goods and chattels of D. and a levy made on the clock, leaving the other property untouched. The question now arises, can the *other* property be seized and sold by virtue of the *execution*. I apprehend *not*, as P. is protected from loss by the Supersedeas Bond. Am I right? The *other* property has since been delivered to the Clerk. An answer to my query in the *Law Journal*, will much oblige.

[We think you are right. The condition of the Bond on Supersedeas is that in the event of judgment being recovered, the amount thereof, or the value of the goods shall be paid or the property itself restored to *satisfy the judgment*. None of the conditions appear to have been complied with and such remedy as P. has, appears to be on the Bond. The question, however, might be raised for the disposal of the Judge on Interpleader. Perhaps we should add that the original suit being referred to arbitration, if not with consent of the bail may affect *their* liability on the Bond.]—EDS. *L. J.*

APPOINTMENTS TO OFFICE, &c.

ASSOCIATE CORONERS.

ROBERT HENDERSON, Esquire, to be an Associate Coroner for the United Counties of Peterborough and Victoria.—(Gazetted, 29th August, 1857.)

JAMES STIMSON, of Plattsville, County of Oxford, Esquire, M. D., to be an Associate Coroner for the County of Oxford.—(Gazetted 5th September, 1857.)

NOTARIES PUBLIC.

JOHN SIMONS, of Toronto, Esquire, Attorney at Law. JAMES McFADDEN, of St Mary's, Esquire, Attorney at Law. SHUBAEL PARK, of Hamilton, Esquire, Barrister at Law. CHARLES RICHARD ATKINSON, of Chatham, Esquire, Attorney at Law. RICHARD LEONARD MARSH, of Bridgetown, County of Kent, Gentleman; and ERNESTUS CROMBIE, of Toronto, Gentleman, to be Notaries Public for Upper Canada.—(Gazetted 5th September, 1857.)

Printed and Published by MACLEAR & Co., 16 King Street East, Toronto.