DIARY FOR APRIL.

1. Wed.. Local School Superintendent's term of office begins.
5. SUN.. *6th Sunday in Lent.*
6. Mon.. County Court and Surrog. Court Term begins.
7. Tues.. Local Trustees to return arrears of taxes due to County Treasurer.
10. Frid.. *Good Friday.*
11. Sat.... County Court and Surrogate Court Term ends.
12. SUN.. *Easter Sunday.*
13. Mon.. *Easter Monday.*
19. SUN.. *1st Sunday after Easter.*
23. Thurs. *St. George.*
25. Sat. .. *St. Mark.*
26. SUN.. *2nd Sunday after Easter.*
29. Wed.. Appeals from Chancery Chambers.
30. Thurs. Last day for non-residents to give list of lands or app. from assessmt. Last day for Local Clerks to ret. occu. lands to Co. Treasurer.

THE

Canada Law Journal.

APRIL, 1868.

LAW ACTS OF LAST SESSION.

It cannot be said to be too late to refer to the law legislation of the Session of the Legislative Assembly of Ontario which closed in the beginning of March last, when the public have not yet been placed in a position, by the publication of the statutes by the proper authorities, to judge of what was then done. But for some, to us at least, unknown reason, the majority of those who are required to obey the law are still unprovided by those who have made them, with the usual means of instructing themselves in what the law, by an amusing fiction, says we knew, marked, learned and inwardly digested on the fourth day of March last.

We have done what we could to supply our subscribers with copies of such of the acts as seemed of the most importance, but this is necessarily only a partial benefit. We trust that it may not be long before a large issue of the first volume of the Statutes for the Province of Ontario may be distributed. Economy in matters of this kind is but short-sighted policy, whilst delay is a great evil.

The difficulties that may arise from want of a prompt distribution of the Statutes, are increased by their having come into operation immediately upon receiving the assent of the Lieutenant-Governor. This remark is particularly applicable to such an act as that relating to executions against goods and lands, for, from what we have already seen, it seems highly probable that many execution creditors have not retained the priority to which they were entitled, merely because they did not know (and could not very well have ascertained in some cases) that an alteration had been made in the law by the act referred to.

A stranger to our laws might have supposed, judging from the mass of Bills introduced during the Session, that the laws of this country were in a most defective state, and that, but for the energy of the new Parliament, the population in general would have been in a bad way. But things are not so bad as that, nor is it every change in a law that is beneficial, and we were glad to notice that as a rule the members, with a few notable exceptions, did not fail to remember that there is now no check in hasty legislation in the shape of a second House.

In addition to the acts published in our last issue, we may notice the Registry act, which makes several changes rendered necessary by the great want of care displayed in the former act. It cannot be said that the present measure is now perfect, but perfection, or anything in the neighbourhood of it, is not to be expected in such a difficult branch of the law as that affecting and affected by the Registration of titles. One great source of difficulty might perhaps be remedied by degrees, by the appointment of thoroughly qualified professional men as Registrars, competent to judge of the many points of real property law that so frequently arise in the conduct of the business of a registry office, and to put a reasonable interpretation upon the act. A proper step has been taken in a different direction by preventing Registrars or their subordinates from acting as conveyancers; a wholesome provision, which we shall be glad to see extended to others outside registry offices, many of whom, though thoroughly incompetent even to do the simplest species of conveyancing, hesitate not to draw special deeds and wills, the form and effect of which would cause much anxious thought and care even to a well educated lawyer.

There is also—An act to amend the Municipal Institutions Act of 1866: an enactment which does not pretend to be anything more than a temporary measure to remedy a few prominent defects in that act; full legislation on the subject is to abide the results of extended enquiries into the municipal system. Also

an act to provide for the organization of the territorial district of Muskoka, and the appointment of a stipendiary magistrate (an office which has been filled by the appointment of Charles W. Lount, Esq., Barrister-at-law, and an act respecting the interpretation and construction of Statutes.

The Act to amend the Common Law Procedure Act gives very extended powers to the judges in certifying for costs, and will we think on the whole operate beneficially to suitors; it would seem however to be open to the objection that it takes away from practitioners a guide they formerly had, as to what court should be chosen wherein to bring certain actions, occasionally a matter of doubt even under the former law. It is presumed, however, that the judges will exercise the wide discretion now given them in accordance with the general rules which have heretofore guided them in matters of this kind. The latter part of the enactment was passed in the interest of sheriffs, and is in the main a matter of justice to them; it will also in many cases act beneficially to judgment debtors, by allowing sheriffs to deal less harshly with them, than they might be inclined to do if leniency on the part of sheriffs might result in the loss of their poundage.

The act respecting overholding tenants, which repeals 27 & 28 Vic. cap. 30, contains a few words especially deserving of notice, as they give a much wider scope to this act, than had the one it repeals. The latter part of the second section extends the operation of the act "*to all other terms, tenancies, holdings or occupations*," as well as to tenancies from week to week, from month to month, from year to year, and at will—thus in effect, apparently, giving a process of ejectment, formerly to be attained only by the ordinary writ of summons in ejectment.

The act as to executions against lands and goods has already been referred to. It yet remains to be seen whether the present enactment, which however promises well, will obviate the evils felt under the former act. The subject is not an easy one to handle, and difficulties may yet arise which this act may not meet, or may even give birth to.

The acts introduced by Mr. Blake, providing for additional examinations of articled clerks—respecting voluntary conveyances—relating to the purchase of reversions—and to settle the law of auctions of estates, are all most desirable, and such as might have been expected from a lawyer of his ability. We have much hope that the act respecting attorneys will materially raise the standard of the profession, so far at least as legal attainments are concerned; and if it has the effect of showing some young gentlemen the advisability of their choosing another profession or business at the outset of their career, so much the better for all concerned.

The act respecting proceedings in Judge's Chambers has not yet been acted upon, though if there ever was a time when some provision to facilitate Chamber business was necessary, the present assize period is that time. It was quite sufficient that the learned Queen's Counsel who has for the time being taken the duties of the Chief Justice, on the Home Circuit, should perform those duties, as he has done, to the entire satisfaction of the profession, without burdening him with matters of practice, which, to decide promptly and correctly on the spur of the moment, requires the daily experience of Chamber practice for years. It was thought, however, as we understand, that there are grave doubts as to whether this act does not go beyond the powers of the Local Legislature, which has nothing to do with the appointment of the judiciary, and that therefore no appointment was made under it.

Of the bills which did *not* become law—and their name in the aggregate was legion—we may refer to the following:

A bill to amend the law of evidence, by allowing parties to suits to testify on their own behalf, is the most important. This proposed measure has been so freely discussed that it is not now intended to refer to it further than to express our opinion that, however proper such a law is in theory, and consonant as it is with our convictions as to what the law ought to be under other circumstances, and however well it may have worked in England, it is not a measure which, in the present state of things would be expedient here; though the time may come when the alteration of existing circumstances of the country, (which however we cannot at present discuss at sufficient length,) would change the balance in favor of the passing of such a measure as was proposed, and, after much careful consideration, rejected.

The following are also amongst the Bills that did not become law—A bill to abolish the Heir and Devisee Commission, and give the like powers to Judges in Chambers, which would facilitate business and save time to applicants—A bill to amend the Act respecting Division Courts, containing some valuable and well drawn clauses, reflecting much credit upon its introducer, Mr. Coyne, but which, as a whole, it was best not to pass—A bill to amend the Act for the Partition of Real Estate, which, by giving Judges in Chambers powers now held only by the full Court, and by simplifying the procedure, &c., would materially increase the benefit of the act; an act of this nature might, we think, be usefully supplemented by numerous forms—A bill to quiet the titles of persons holding lands formerly sold for taxes — about as objectionable a measure, at least so far as one could judge from the copies distributed, as could well be imagined, but which would not have been allowed to pass in its present shape, we venture to say, even if there had been time for the purpose, and irrespective of the question, whether it is desirable or not to preserve tax titles from destruction, owing to defects and irregularities in the sale or otherwise.

The legislation of this the first Parliament of Ontario will be regarded with much interest; and upon the whole, we think there is no just ground for complaint that the new Legislative Assembly, principally composed, as it is, of beginners in the science of law-making, has in the matters here alluded to fallen far short of the wisdom of its more experienced predecessors.

ACT FOR QUIETING TITLES.

It was provided by the last general orders issued for the conduct of cases under this statute, that in case there should be any defect in the evidence of title, or in the proceedings, the petitioner or his solicitor should be informed of the same, so that the defect might be remedied, before an attendance before a judge with the petition and papers for approval.

As titles are frequently brought before the Referees in a defective state, or which bring up new or difficult points, it would, we think be desirable to lay before our readers notes of such cases of general interest as the Referees may enable us to publish. They have kindly consented to assist us in this matter, and from the high position which these gentlemen hold as real-property lawyers, their notes will be the more appreciated.

We have through the kindness of Mr. Turner obtained the information transmitted by him in a case now before him, which gives some useful hints, as well to conveyancers as to those of laying titles before the Referees for investigation.

SELECTIONS.

MR. JUSTICE SHEE.

It is with the most unfeigned regret that we announce the decease of Mr. Justice Shee, which took place a few minutes after 8 o'clock on the morning of the 19th inst., at his residence in Sussex-place, Hyde Park Gardens. It is not easy to say of what particular malady he died, but there is too much reason to believe that his illness originated in the unhealthy atmosphere of the court in which he has been presiding. On the 7th inst. he discharged his duties as one of the justices of the Queen's Bench, and delivered judgment in an important case. He had been complaining a litttle previously, but on the following day he was taken seriously ill. He, however, on Monday rallied a little, but on Tuesday he became worse, and his strength gradually ebbed, notwithstanding his robust constitution.

Mr. Justice Shee was the eldest son of Joseph Shee, Esq., of Thomastown, County Kilkenny, and Belmont Lodge, South Lambeth, who was a London merchant, by the daughter of John Darrell, Esq., of Scotney Castle, an old Kent Roman Catholic family. He was born at Finchley in 1804. Being a Roman Catholic, he was educated at Ushaw College, and at Durham and Edinburgh. He married, in 1837, Mary, daughter of Sir James Gordon, Bart., of Gordonstown, the Premier Baronet of Scotland. It is understood that Sir William Shee was a near relative of the late Cardinal Wiseman. He was called to the Bar at Lincoln's-inn, in June, 1828, and joined the Home Circuit, of which he became the most popular leader of any of the many distinguished men which that Circuit produced. Whilst a junior he earned a high reputation for diligence. His speeches in the great *Angel case* are within the recollection of most of our readers, as well as those which he delivered in the *Hudson* v. *Slade case*, in the *Bewick case*, in *Palmer and Roupel's cases*, and though last, not least in the *Seymour* v. *Butterworth case*. He became a Serjeant in 1840, received a Patent of Precedence in 1845, and was made Queen's Serjeant in 1850. He became a justice of the Queen's Bench in 1864. His reputation as a lawyer was proved by the publication of several editions of Lord Tenterden's book on Shipping, the eleventh edition of which he brought

out at the close of last year, as well as by his edition of 1861 of "Marshall on Maritime Insurance." He was M. P. for the county of Kilkenny from 1852 to 1857; he subsequently, at the general election in that year, contested that county again, but was defeated. In 1847 he unsucccessfully contested the borough of Marylebone, and in 1863 stood for Stoke-upon-Trent with the like result. In politics he was a Liberal, and was the first Roman Catholic raised to the English Bench since the Reformation.

There never lived a more painstaking, conscientious, and upright judge. He was most gentle, generous, and kind, even to the youngest member of the profession, both at the bar and on the bench. He was entirely devoid of bigotry, a most eloquent advocate, an honest man, an upright judge, and a truly Christian gentleman.—*Solicitor's Journal.*

Lord Cairns, who has succeeded Lord Chelmsford as Lord Chancellor, is the second son of the late William Cairns, Esq., of Caltra, Co. Down, and was born in 1819. He was educated at Trinity College, Dublin, where he obtained several first honours in classics, but being fellow commoner he did not go in for honours at his degree. He was called to the bar at the Middle Temple in January, 1844, and became a Queen's Counsel and Bencher of Lincoln's Inn in 1856. He entered Parliament, as M. P. for Belfast, in July, 1852, and in February, 1858, on the formation of Lord Derby's second administration, he was appointed Solicitor-General, in succession to Sir Henry Keating. In 1862 he received the honorary degree of LL.D. from the University of Cambridge. In July, 1866, on Lord Derby's return to power for the third time, Sir Hugh Cairns succeeded Sir Roundell Palmer in the office of Attorney-General. In February, 1867, on the resignation of Sir James Knight Bruce (immediately followed by his death), Sir Hugh Cairns was raised to the bench as one of the Judges of the Court of Appeal in Chancery, and was soon after created a peer by the name, style, and title of Baron Cairns, of Garmoyle, in the Co. of Antrim. During his tenure of office as a Judge of Appeal, Lord Cairns has been deprived of his Colleagues on two different occasions—first by the death of Sir George Turner, and secondly by the resignation of Sir John Rolt on account of ill health. Lord Cairns married, in 1856, Mary Harriet, daughter of the late John M'Neile, Esq., of Parkmount, Co. Antrim.

Sir William Page Wood, Vice-Chancellor, who succeeds Lord Cairns as one of the Judges of the Court of Appeal in Chancery, is the second son of the late Sir Matthew Wood, Bart. (M.P. for London, and twice Lord Mayor of the city), by the daughter of John Page, Esq., of Woodbridge, Suffolk. He was born in London in 1801, and was educated at Winchester school and at Trinity College, Cambridge, where he took a wrangler's degree (B.A.) in 1824, and was elected a fellow of that College in the following year. He was called to the bar at Lincoln's Inn in November, 1827, and was created a Queen's Counsel in 1845. He was elected M.P. for the city of Oxford in 1847, and was appointed Vice-Chancellor of the County Palatine of Lancaster in 1849. In March, 1851, he was appointed Solicitor-General, in succession to Sir Alexander Cockburn, who became Attorney-General on Sir John Romilly being appointed Master of the Rolls. He continued in office as Solicitor-General till February, 1852, when, on Lord Derby becoming Prime Minister, he gave place to Sir Fitzroy Kelly. In December of the same year, however, on the return of the Whigs to power, he was appointed a Vice-Chancellor, which office, he has ever since continued to hold. Sir William Page Wood married, in 1830, Charlotte, only daughter of Edward Moon, Esq., of Great Bealings, Suffolk.

The change in the occupant of the woolsack has given Great Britain, for the first time an Irish Lord Chancellor. Since the retirement of the last clerical Lord Keeper, Bishop Williams, in 1625, there have been (inclusive of Lord Cairns) 39 Chancellors, of whom 31 have been English, three—Herbert, Jeffreys, and Trevor—Welsh, and three Scotch—Loughborough, Erskine, and Campbell. The late Lord Lyndhurst, American in origin if not by nativity, and the newly-appointed holder of the Great Seal, makes up the tale. It is a curious fact, as exemplyfying the *etente cordiale* of the bar of Scotland and England, that about 50 years ago the Chief Baron of England was a Scotsman, and of Scotland, an Englishman. May Ireland be as intimately associated with us!—*Atlas.*

PROFESSIONAL SUSCEPTIBILITIES.

Professional susceptibilities exhibit themselves in such various ways, and are affected or disturbed on such different points that it would be difficult if not impossible, accurately to enumerate and describe them all. There is, however, one kind, the wisdom of which, while appreciating its *raison d'etre*, and understanding the temptation to give way to it, we venture to call in question. We mean that which, regarding professional acquirements and learning as a species of sacred mystery, grudges to the public any explanation or enlightenment concerning them. There is, for instance, among the clergy an obvious impatience at seeing or hearing their dogmas or doctrines handled by laymen. Wherever the sacerdotal cast of character prevails this feeling prevails. For those clergymen who lament public discussion of doctrine and discipline we confess we have but little sympathy In pure theology, no doubt, a clever, trained theologian might trip up a very able lay antagonist; but it is of the last importance that the ultimate

consequences, no less than the present tendencies of dogma and doctrine, should be clearly and authoritatively stated, and fully and fairly laid before the public. Lawyers are commonly of a different mental calibre. With regard to law, nothing is so beneficial to the public generally as that the fact that the law is supreme should be thoroughly accepted, and that the principles, though not the technicalities of certain portions of it, should be universally understood. Lawyers, as a rule, are too sensible to objcet to any efforts in this direction, and the law journals, which are mostly distinguished by their unimpassioned tone, stand aloof, except to correct mistakes made in legal matters in other papers. The kind of articles, full of ability and learning, not unfrequently met with in the daily press on such subjects as bankruptcy, conspiracy, fraud, &c., and other branches of the criminal law, are often of immense assistance in clearing the views and in forming the judgment alike of electors and of legislators, and bear no kind of resemblance to the hand-books written, in popular phrase, to instruct the public rather in the technicaltties than in the principles of the law. Lawyers view these kind of publications either with supreme indifference or with malignant satisfaction, feeling certain that he who reads and acts on them will assuredly be delivered, sooner or later, bound and helpless into their hands. The man who on the strength of this sort of reading, makes his own will, and draws up his own lease or conveyance, always involves himself in practical difficulties which the most ordinary professional man would have instinctively avoided. The effect on an educated man of the study of a really able work on the technical part of law is to cause a solemn determination not to encounter legal difficulties without the best legal advice; and so it is with medicine. But the members of the medical profession are not so constituted as to be open to this kind of consolation. With all the generosity, benevolence, learning and knowledge of the world, which many of them possess in an eminent degree, they have not the *sang froid* which distingnishes lawyers, and as a rule they do not like to have their proceedings and professional mysteries exposed. They argue that the indiscriminate study of medicine leads to worse or more dangerous consequences than that of law. That is doubtful. If a man by meddling in law ruins his position in life, his health generally goes too; while if a man gets on permanently ill terms with his own stomach by dabbling in medicine, it need not injure either his income or his position. An interminable law-suit, with an ever increasing bill of costs, is equal to a malignant cancer; and a wretched trustee, duped and broken in fortune by his own rash self-confidence, is as badly off as a man with a chronic liver complaint. —*American Exchange.*

ONTARIO REPORTS.

ELECTION CASES.

(Reported by HENRY O'BRIEN, ESQ., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

REGINA EX REL. WM. ADAMSON V. JOHN BOYD.

Municipal election—Payment of taxes by voters and candidate—When election commences—No ice to voters of candidates disqualification—Surrender of tenancy.

B. and A. were partners occupying premises as co-tenants under a yearly tenancy on the terms of an expired lease. Before the nomination day for a municipal election they dissolved partnership, B. leaving the business and premises, of which A. remained in possession. A. shortly afterwards went into partnership with S., and the new firm then took a fresh lease of the premises from same landlord.

Held, 1. That B. was not at the time of the election the co-tenant of A., the tenancy having been surrendered by operation of law.

2. That the non-payment of taxes by a candidate before the election disqualifies him.

3. That municipal elections commence with the nomination day, and the disqualification of a candidate has reference to that day.

4. If a candidate claims to be elected by reason of the disqualification of his opponent he must so distinctly claim it at the nomination, and also notify the electors that they are throwing away their votes.

[Common Law Chambers, March, 1868.]

This was a writ of summons in the nature of a *quo warranto*, calling upon John Boyd to show by what authority he exercised and enjoyed the office of Alderman for the Ward of St. David, in the City of Toronto, and why he should not be removed therefrom, and William Adamson be declared duly elected and be admitted thereto, on grounds disclosed in the statement of said William Adamson, and the affidavits and papers filed in support of the same.

The statement and relation of William Adamson of the City of Toronto, wharfinger, complained that John Boyd, of the said city, merchant, had not been duly elected and had unjustly usurped and still usurped the office of Alderman in said City of Toronto, under the pretence of an election held on Monday, the 6th day of January, 1868, at Toronto, for the Ward of St. David, in said City of Toronto, and that he, the said Adamson, was duly elected thereto and ought to have been returned at such election as Alderman for said Ward, and declared that he, the said Adamson, had an interest in said election as an elector and as a candidate for said office of Alderman, and stated the following causes why the election of the said John Boyd to said office should be declared invalid and void, and he, the said Adamson, be duly elected thereto.

1st. That said John Boyd was not possessed of the qualification required by law to enable him to be a candidate for or to be elected to the said office, inasmuch as he, the said John Boyd, had not, at the time of the election, in his own right, or the right of his wife, as proprietor or tenant, a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll of the said City of Toronto, of the value required by law, the said John Boyd having parted with his interest in the leasehold property in which he is apparently assessed as a partner of the firm of "Boyd & Arthurs," long before the time of the said election, and not be-

ing rated for any other real property for a sufficient amount to qualify him as such Alderman.

2nd. That the said John Boyd was further disqualified in this, that he had not on the 23rd day of December last, being the day appointed for the nomination of candidates to fill said office of Alderman, paid all municipal taxes due by him in the Ward of St. Lawrence, in the City of Toronto, in compliance with the requirements of the statute in that behalf, and that there was on that day due from and unpaid by him the sum of $518 40 for municipal taxes on the real and personal property for which he was rated in the Ward of St. Lawrence, and that such taxes were not paid until the 4th day of January, 1868.

3rd. That said John Boyd had not a majority of legal votes at said election, inasmuch as the following persons who voted for said John Boyd were not qualified to vote, not having paid all municipal taxes due by them for the year 1867, in the City of Toronto, on or before the 16th day of December, 1867, as required by statute in that behalf (mentioning fifty-seven names); and that by the striking off from the poll at said election the names of said persons who illegally voted for said John Boyd, the relator had a majority of the legal votes on said poll.

4th. That the relator protested at the time of said election against the votes of the electors being received and recorded for said John Boyd, and publicly notified both the returning officers and the electors that the votes of the electors would be thrown away if recorded for said John Boyd, in consequence of said John Boyd not being legally qualified according to the provisions of the act of parliament in that behalf.

The relator made affidavit that he was a duly qualified municipal elector for the Ward of St. David, in said City of Toronto, and at the last municipal election, held on 6th January, 1868, was a candidate for the office of Alderman for said Ward of St. David, and that he believed the several grounds of complaint, as set forth in the above statement, were well founded.

It appeared from the last revised assessment roll for the Ward of St. David for 1867, that the residence of the defendant was assessed to him as tenant, and to John Smith as owner, for $3,000; and by the last revised assessment roll for the Ward of St. Lawrence, for 1867, the warehouses on Wellington Street were assessed to Boyd & Arthurs as tenants, and to Mr. Todd as owner, for $14,560; and Boyd & Arthurs were further assessed for the sum of $20,000 for personal property, making in all $34,560; upon which the taxes for 1867 amounted to $518 40.

The taxes in the Ward of St. David were admitted to have been paid in time, but the taxes in St. Lawrence Ward were not paid until the 4th January, 1868, after the day of nomination, but before the polling day.

The property in St. David's Ward was in itself a sufficient qualification.

The defendant and Arthurs were tenants of the warehouses in St. Lawrence Ward, under a lease from Mr. Todd, for three years, from the 1st day of May, 1863. After the expiration of this lease, on the 1st day of May, 1866, they held over as tenants from year to year, as the defendant alleges, and paid one year and one quarter's rent. During the three months between the 1st of May and the 1st of August, the partnership between them was dissolved, the defendant retiring, leaving Arthurs in possession of the business and of the warehouses in which it was carried on. On the 1st day of August last, a new lease of the warehouses was made by Todd to John Smith and G. A. Arthurs, who, after the dissolution of the firm of Boyd & Arthurs, had formed a new co-partnership, and have ever since carried on business there

In the affidavit of Mr. Todd, attached to the new lease, he said that Mr. Boyd had not then, nor had he since the date of the said lease, any interest either legal or equitable in the said lands and premises, or any part thereof.

In answer to this, Mr. Boyd said that he was neither party nor privy to the lease in any manner to John Smith and George A. Arthurs, nor did he know of the execution thereof, till after the day of the election: that he never surrendered to Mr. Todd the old lease, nor the term thereby granted, nor the term he might in law have in the same and the premises therein mentioned, as co-tenant with the said G. A. Arthurs from year to year.

In a subsequent affidavit, Mr. Todd attached the old lease to it, and said that the said lease having expired on the 1st day of May, 1866, the said John Boyd and George A. Arthurs became and were his tenants from year to year of the said property: that they had not, nor had either of them, given any notice to quit, nor had he given them such notice, whereby the said tenancy would be determined, other than a lease of said property made by him to said George A Arthurs and John Smith referred to in his former affidavit.

Mr. Boyd, in referring to this in his affidavit, said that it was true, and that after the expiration of the said lease, on the 1st of May, he Mr. Boyd and the said George A. Arthurs became and were tenants thereof to Mr. Todd from year to year, and that he has not given any notice to quit the premises in said lease, nor received any such notice from the said Todd. Now it is on a tenancy still subsisting, as the defendant alleges, he claims now to be qualified.

Boyd and the relator were the only two candidates, and the former obtained the majority of the votes polled.

Votes were polled on both sides by electors who had not paid their taxes, and the defendant filed affidavits to shew that there had been some agreement between the candidates that the roll should be taken as it stood, to save any trouble on this head.

The following protest was handed by the relator to the returning officer, and was by him read to the electors present at the opening of the poll and before any vote was recorded for either candidate.

"Take notice that I protest against any votes being taken or recorded at this election for Mr. John Boyd, on the ground that he is not legally qualified according to the provisions of the Acts of Parliament in that behalf. He having no interest in the property assessed on Wellington Street in the names of John Boyd and George A. Arthurs, and the taxes on said property not having been paid.

And I hereby publicly notify the electors that they will be throwing away their votes if they are recorded for Mr. Boyd, and I request that you will inform the electors of this my protest.

"Wm. Adamson.

"Toronto, 6th January, 1868."

"The above protest was read by me at commencement of election.

"John Burns,

"*Returning Officer 1st Division.*"

A similar protest was addressed, to and stated in the same terms to have been read by Robert H. Trotter, Returning Officer, 2nd Division.

Copies of this protest were also shown to have been affixed in and about the polling booths in conspicuous places, but no notice appeared to have been given at the time of nomination, nor did the relator at that time contend that the defendant was disqualified, and that he was the only qualified candidate.

Harman for the relator.

1. The defendant was not qualified. He could only attempt to qualify on the property in St. David's Ward, which was clearly insufficient, and he had not "*at the time of the election*" the necessary freehold or leasehold required by sec. 70 of 29 & 30 Vic. cap. 51, having parted with all interest in the property on Wellington Street, and the former tenancy having been surrendered by operation of law.

2. The defendant was disqualified by not having paid *all* taxes due by him, pursuant to 29 & 30 Vic. cap. 52, sec. 73. These taxes should have been paid *at the time of the election*: *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; 1 L. C. G. 72.

And the election commences with the day of nomination, as is clear from the expressions used in the Act. Sec. 101 of 29 & 30 Vic. cap. 51, defines "the proceedings *at* such elections" (not *prior* to the election) to be, First, a day for nomination of candidates; Second, a declaration at such nomination, if no more candidates than offices are proposed, that such candidates have been "duly elected," and, Third, an adjournment, not another meeting, if there are more, and a poll is required. The case may be argued thus.—In one ward a candidate is elected on the first or nomination day by acclamation; in another ward a candidate is elected on the second or adjourned day by vote, both must have paid their taxes at the time of election, that is to say, at the time not only that they were, but could have been elected, and to decide otherwise would be to give two interpretations to the law, one to meet the case of the candidate elected by acclamation on the nomination day, and another to meet the case of the candidate who having opposition has to wait and stand a poll at the adjourned meeting when the same can be opened.*

3. The defendant had not a majority of qualified voters, inasmuch as the number already specified had not paid their taxes before 16th December preceding the election.

4. It is doubtful whether the relator can under all the circumstances claim the seat; but he is entitled to the costs of these proceedings.—*Reg. ex rel. Tinning* v. *Edgar*, 4 Prac. R. 36; 3 U. C. L. J. N.S. 39; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. R. 104; *Reg. ex rel. Rollo* v. *Beard*, 1 U. C. L. J. N.S. 126; *Reg. ex rel. Blakely* v. *Canavan*, 1 U. C. L. J. N.S. 188; *Reg. ex rel. Hartrey* v. *Dickey*, 1 U. C. L. J. N.S. 190; *Reg. ex rel. Carroll* v. *Beckwith*, 1 Prac. R. 278.

Duggan, Q. C., and *Harrison*, Q. C., shewed cause.

1. The defendant claims to be qualified on a tenancy still subsisting as between him and the landlord. The dissolution between Boyd & Arthurs, as affecting their business transactions, would not divest Boyd of his rights as Todd's tenant. Whatever surrender there may have been of Arthur's moiety, there was none of Boyd's. There is no act of his from which an inference of a surrender by him could be shewn, except his leaving the occupation of the premises, and that really proves nothing; and no act of his former partner could bind him.—Woodfall L. & T. 272, *et seq.*; *Agard* v. *King*, Cro. Elis. 775; *Mackay* v. *Macreth*, 4 Dougl. 213; *Doe* v. *Ridout*, 5 Taunt. 519; *Mollett* v. *Brayne*, 2 Camp. 103; *Thomson* v. *Wilson*, 2 Starkie, 379; Shep. Touch 272; Arch. L. & T. 83; *Carpenter* v. *Hall*, 15 C.P. 90.

The roll is however conclusive as to property qualification (the language being even stronger in this respect with reference to candidates than voters, see secs. 70 and 75), and the Courts will as far as they can uphold the qualification in favor of the sitting member. — *Reg. ex rel. Blakely* v. *Cameron*, 1 U. C. L. J. N. S. 188; *Reg. ex rel. Chambers* v. *Allison*, *Ib.* 244; *Reg. ex rel. Ford* v. *Cottingham*, *Ib.* 214; *Reg. ex rel. Tilt* v. *Cheen*, 7 U. C. L. J. 99; *Reg. ex rel. Laughton* v. *Baby*, 2 U.C. Cham. R. 130.

2. There is no affirmative declaration that the candidate must have paid all his taxes before the election, only that non-payment disqualifies him from being a member, and he does not become a member of the Council until he takes the oath of office.

The defendant paid his taxes before the election, which commences not with the nomination but with the recording of the votes and the choice by the electors between two or more candidates.

It is sufficient in any case that he has paid his taxes in the ward in which he lived, otherwise it would follow that he must have paid his taxes in a different municipality, which the statute could not contemplate.

3. The names of the voters must be received as they appear on the lists, and there is no machinery to carry out the provision disqualifying voters who have not paid their taxes, and if a new election is ordered the same lists must be used.

The persons whose names appeared on the roll were accepted by both candidates as qualified voters so far as payment of taxes was concerned, and though an elector might not perhaps be bound by such an agreement, the candidate would: *Reg. ex rel. Charles* v. *Lewis*, 2 Cham. R. 171.

The roll is conclusive.—Sec. 101, ss. 5; *Dundas* v. *Niles*, 1 Cham. R. 198; *Reg. ex rel. Chambers* v. *Allison*, 1 U. C. L. J. N.S. 244.

More votes are however attacked by the defendant than by the relator on this ground, and a scrutiny must be had as to that.

* *The Queen* v. *Cowan*, 24 U. C. C. B. 606.—Eds. L. J.

4. The defendant should not be visited with costs if the election is simply set aside and a new election ordered, as the relator would then only succeed as to part. — *Reg. ex rel. Clark* v. *McMullen*, 9 U. C. Q. B. 467; *Essex Election Case*, 9 U. C. L. J. 247; *Reg. ex rel. Swan* v. *Rowat*, 13 U. C. Q. B. 340; *Reg. ex rel. Gordanier* v. *Perry*, 3 U. C. L. J. 90; *Queen* v. *Hiorns*, 7 Ad. & El., 960.

J. H. Cameron, Q. C., *Harman* with him, *contra*.

1. As to the question of the surrender, the same was completed in law, from the absolute abandonment of the premises by Boyd, and his removal to new premises with his new partner, any question of liability between Todd, the landlord, and himself as to a yearly or any other tenancy being absolutely concluded when Todd granted a new lease to Smith & Arthurs as the successors of Boyd & Arthurs. One test was, could Todd maintain an action for rent against Boyd after the granting such new lease, and could not Boyd set up such new lease as a conclusive answer and defence? Undoubtedly he could. *Nickels* v. *Atherstone*, 10 A. & E., N. S. 944, is a direct case on the point. Lord Denman, C. J., in this case says, "If the expression 'surrender by operation of law,' be properly 'applied to cases where the owner of a particular estate has been party to some act, the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate had continued,' it appears to us to be properly applied to the present. As far as the plaintiff the landlord is concerned, he has created an estate in the new tenant which he is estopped from disputing with him and which is inconsistent with the continuance of the defendant's (the former lessees) term. As far as the new tenant is concerned the same is true. As far as the defendant, the owner of the partnership estate in question, is concerned, he has been an active party in the transaction, not merely by consenting to the creation of the said relation between the landlord and the new tenant, but by giving up possession, and so enabling the new tenant to enter."

2. *Reg. ex rel. Rollo* v. *Beard*, *ante*, is conclusive that the candidate must be qualified as a member at the time of the election, which it is clear commences with the nomination.

3. As to costs, *Reg. ex rel. Tinning* v. *Edgar*, *ante*, is almost exactly parrallel with this case as entitling the relator to costs.

The other grounds taken in moving the writ were also enlarged on.

John Wilson, J.—Assuming that there was a tenancy from year to year, was it not surrendered before the election, and on the 1st of August last, by operation of law and the acts of the defendant, on his own showing.

Boyd & Arthurs dissolved their partnership, when does not appear, but certainly before the 1st day of August last. Arthurs is left with the business and business premises. Boyd retires, pays no further rent, retains no further possession, and is so much a stranger that he swears he was no party to the lease to Smith & Arthurs, or ever heard of it till after the election. Is he, after all that has taken place, co-tenant with Arthurs in these premises? Can he now go to Arthurs and claim possession as his joint tenant? If he cannot, he is not *bona fide* possessed as tenant, so as to qualify him as Alderman under this Municipal Act.

On the reasoning in the case of *Nickells* v. *Atherstone*, 10 Q. B. N.S. 944, is the defendant not precluded from saying he is still co-tenant with Arthurs? Have not all parties estopped themselves from setting up the yearly tenancy now contended for? Todd cannot be allowed to say this yearly tenancy between Boyd & Arthurs exists, for he has made a lease under seal to Smith & Arthurs. Arthurs cannot say it subsists, for he is a party with Smith to the new lease. By operation of law as to these parties the tenancy from year to year has merged. Can Mr. Boyd claim that it is still existing? Can he go to his late partner and say I am joint-tenant with you? I think not; for on his own showing he left his partner Arthurs, and formed a co-partnership with Mr. Munroe in another place, as wholesale grocers. He left his partner to do as he pleased with the business and the warehouses in which it was carried on, and without doubt knew at least that Arthurs was carrying on the same business which he had left, with his new partner Smith. Has Boyd any more right to assert an interest in the warehouses than he has in the goods, which before his retirement had been the goods of Boyd & Arthurs?—See *Matthews* v. *Sawell*, 8 Taunt. 270; *Thomas* v. *Cook*, 2 B. & Al. 119; *Walker* v. *Richardson*, 2 M. & W. 882.

I think therefore the defendant was not at the time of the election the co-tenant of Arthurs, and without this he had not the property qualification to be chosen Alderman.

As to the second ground, that the defendant had not paid all his taxes before the election, it is admitted the defendant paid his taxes after the nomination and before the polling day; and the question is, when is the election?

The relator contends that it is the day of nomination; the defendant says it is the polling day.

That the day of nomination is the day of election seems clear. The polling day is but an adjournment of the election. The words of the act seem to put it beyond a doubt, for it declares that the proceedings at elections shall be—a nomination on the last Monday but one in December, when, if only one candidate, or one candidate for each office, be nominated, after an hour, he shall be declared elected; but if more, and a poll be demanded, then the Returning Officer shall adjourn the proceedings until the first Monday in January; but, by sec. 73, a candidate is disqualified who has not paid all taxes due by him.

To hold that the day of polling is the day of election would enable a candidate to offer himself who was disqualified, and who, if the only one, might be declared elected, contrary to the letter and spirit of the Act.

I think therefore that the day appointed for the nominaton is the day of election, and the disqualification of a candidate has reference to that day, in analogy to the holding of the learned judge in *Reg. ex rel. Rollo* v. *Beard*, and I think to hold otherwise would be at variance with the spirit of the Act.

The relator, in the first instance, claimed to be entitled to his seat; but this is not seriously urged, for he gave no notice on the day of nomination that the defendant was not qualified, or that he claimed to be elected as the sole candidate by reason of the non-qualification of Boyd. In *Reg. ex rel. Forward* v. *Detlor* (ante p.), I lately held that a candidate who claims to be elected by reason of the disqualification of his opponent must distinctly so claim it at the nomination, and at the poll give notice that the electors are throwing away their votes; and he cannot be declared entitled to the seat if his conduct be equivocal, so as to mislead the electors. He cannot go to the polls, taking his chance of election, after deterring voters, and then fall back and claim his seat on grounds which by his going to the polls he has waived.

I therefore adjudge the election of John Boyd, as one of the Aldermen of St. David's Ward, in the City of Toronto, to be invalid; and I direct a writ to be issued according to the statute, to remove the said John Boyd from such office; and I further direct that a writ be issued for the purpose of a new election being held for the election of an Alderman for St. David's Ward, in the room of the said John Boyd.

I also direct that Mr. Boyd shall pay the costs of these proceedings, so far as they relate to the invalidity of his election for want of a property qualification.

Reg. ex rel. Bugg and Moulds v. Bell.

Contested Election—Election by acclamation—29 & 30 *Vic. cap.* 51, *sec.* 130.

Where a candidate is declared elected on the nomination day, as being the only candidate proposed, his election cannot be questioned on a *quo warranto* summons under above act, there being no other "candidate at the election or any elector who gave or tendered his vote thereat" who could by law be a relator.

[Common Law Chambers, March 14, 1868.]

This was a writ of summons in the nature of a *quo warranto* to set aside the election of the defendant, who was elected as one of the aldermen for St. Andrew's Ward, in the city of Toronto, at the municipal election on 23rd December, 1867.

The defendant was the only candidate proposed and seconded at the nomination; and was declared duly elected, pursuant to sec. 101, ss 3, of the Municipal Act.

The statement of the relator complained of the usurpation of the office by defendant, and stated, in effect:—That the said Robert Bell was not duly elected, and usurped the office of Alderman of St. Andrew's Ward on pretence of an election held on Monday, 23rd December, 1867; that relators had an interest in said election, as electors of said ward and of other wards, the relator, John Bugg, being an elector who gave his vote at the last annual election for aldermen in said city; when the said Robert Bell was declared elected as such alderman, and the relator, W. Moulds, being a duly qualified elector, present at and who in so far as his vote could be tendered or taken, voted or tendered his vote at the nomination or election of said Robert Bell; and they shewed the following causes why the election should be declared invalid:

1. That the election was not conducted according to law, in this, that at the annual meeting for nomination, &c., held in Ward of St. Andrew, at noon (or thereabouts) on Monday, the 23rd December last, the Returning Officer having called upon the electors there present to nominate a fit and proper person, &c., the said Robert Bell was proposed and seconded; but that the Returning Officer, without waiting the time required by law to allow other nominations to be made, closed the said meeting of electors before the expiration of one hour from the opening, &c., and declared said Bell duly elected.

2. That said Bell, neither when he was so elected or when he accepted office, had the necessary property qualification as a freeholder or leaseholder.

3. That said Bell had not at the time of election and acceptance of office, in his own right or right of his wife, &c., a legal or equitable freehold or leasehold, rated in his own name on the last revised assessment roll, to the amount of at least $4,000 freehold or $8,000 leasehold, as required, &c.

4. That said Bell had mortgaged his interest in the property on which he qualified for the sum of $3,179, to the Canada Permanent Building Society, as appeared in the registry office, and that said mortgage was not discharged.

5. That said Bell qualified on property partly freehold and partly leasehold, rated as follows: leasehold $7,466, freehold $800, while the incumbrances amounted to $3,179.

J. H Cameron, Q. C. (*Harman* with him) showed cause.

1. The election cannot be inquired into under the 130th section of the Municipal Act. The act requires that the relator should be a person who was either a candidate, or an elector who voted or tendered his vote at the election of the alderman complained against; and as the party here sought to be unseated had been elected by acclamation and without a contest, the relators could not be, and in fact were not, entitled to the writ, they being neither candidates nor electors who voted or tendered their votes. This point has, however, been already settled in favor of this contention by *Reg. ex rel. Smith* v. *Roach*, 18 U. C. Q. B. 226, and *In re Kelly* v. *Macarow*, 14 U. C. C. P. 457.

2. The statement that the poll was not kept open for the hour, required by the act, was based upon the affidavit of the relator Moulds, uncorroborated by other evidence. But this was met by positive affidavits by the Returning Officers, contradicting his assertion, who swore that the proceedings commenced at noon precisely, and were not closed until after one o'clock, and by other persons in corroboration.

3. The relators are not in any event qualified as such to be heard, not having paid the taxes due by them on the 16th day of December, as required by section 73, in support of which sundry affidavits were filed by the collectors of the several wards in which they were in such default.

4. As to the property qualification of the defendant, affidavits were filed from the city clerk, and the Secretary of the Building Society, as to the property on which the defendant qualified and the mortgage thereon, shewing that the former was under and the latter overstated, and on which it was argued that the defendant was amply qualified; and further, that there was

nothing in the act which required the property on which a civic qualification is based to be unincumbered, all that was required was that he should be assessed for and pay taxes for property worth $4,000 freehold or $8,000 leasehold.

Hodgins for the relators.

The words "elector who voted or tendered his vote at the election," should be interpreted as meaning, at the annual election of aldermen within the municipality.

The interpretation contended for by the defendant would leave no redress in cases where a candidate is elected by acclamation; and that part of the statute which requires a property qualification might in such case be evaded.

Hagarty, J.—This case seems to me to be governed by *In re Kelly* v. *Macarow*, and I shall decide it against the relators upon the authority of that case. If the electors do not think it worth while to contest an election in the ordinary way, it may properly be considered that the Legislature did not mean to give them a right to contest it by an application of this kind. As to the point raised, that the proceedings at the nomination were not kept open for a full hour, the objection is most loosely made and is amply contradicted.

Summons discharged with costs.

Reg. ex rel. Boyes v. Detlor.

29, 30 *Vic. cap.* 51, *sec.* 73—*Disqualification of candidate.*

Held, that a County Clerk is disqualified under sec. 73 of 29 & 30 Vic. ch. 51, from sitting as mayor of the same or any other municipality.

[Chambers, January 23, 1868.]

This was a *quo warranto* summons to set aside the election of the defendant, who claimed to have been duly elected mayor of the Town of Napanee.

The defendant was clerk of the municipality of the United Counties of Lennox and Addington at the time of his alleged election as mayor, and it was contended that being such clerk he could not legally take a seat as mayor of that or any other municipality, being disqualified under sec. 73 of 29 & 30 Vic. cap. 51.

C. W. Paterson shewed cause. The disqualification only applies where the same person attempts to fill both offices in the same municipality; and the former act (22 Vic. ch. 57, sec. 73), still in force in this particular by virtue of sec. 428 of 29 & 30 Vic. cap. 51, and the defendant would not have been disqualified under the former act.

Moss contra. The disqualification is general, and the statute is clear on the point, and differs from the former act, for here all the officers who are disqualified for election are particularised. The reason of the statute is obvious, for there might be disputes between the different municipalities which would render the holding of these offices by the same person incompatible. There was a mischief under the former act which this is intended to remedy.

John Wilson, J.—The question is, whether by the 73rd section of 29 & 30 Vic. cap. 51, the defendant is disqualified as a member of the municipal corporation of Napanee. The words of that section, as regards this defendant, are, "no clerk of any municipality shall be qualified to be a member of the council of any municipal corporation."

The words of the old statute, Con. Stat. U. C. cap. 54, sec. 73, are, "no officer of any municipality shall be qualified to be a member of the council of the corporation." The defendant contends that he was not disqualified under the former act, and the new act is to be construed as the old one.

If this case had occurred under the old act I should have held this defendant disqualified, for the language seemed very clear, that no officer of any municipality shall be qualified to be a member of the council of the particular corporation.

But under the last act no clerk of any municipality shall be qualfied to be a member of the council of *any* municipal corporation. The evident intention of the legislature was, among other things, to exclude persons who might be placed in a false position, by reason of holding two offices; and no man should, if it can be avoided, be placed in a false position.

It requires no great foresight to see that a man, being a subordinate in the municipal corporation of a county, and the head of the corporation of a town or city in that county, would have conflicting duties to perform, and would represent conflicting interests if he held these offices. To allow the defendant to be mayor while he held the office of clerk of the municipality of the county, would be contrary to the express words of the statute, and at variance with its spirit.

The office is adjudged vacant, and there will be a new election with costs to the relator.

Reg. ex rel. Forward v. Detlor.

Municipal election—Notice to electors of disqualification of a candidate.

Held, 1. When voters perversely throw away their votes the minority candidate has a right to the seat.

2. When a candidate claims the right to be elected at the nomination owing to his opponent's disqualification, his going to the polls waives such right.

3. A candidate should, under such circumstances, beside claiming the seat at the nomination, also notify the electors at the polls that they are throwing away their votes by voting for the disqualified candidate.

[Chambers, January 25, 1868.]

This was a *quo warranto* summons similar to the last, but it was further contended by the relator, who had been an opposing candidate, that he was entitled to the seat instead of the defendant. The question of his disqualification was admitted to have been established by the decision in the case above reported; and the arguments of counsel were directed to the question whether the relator was entitled to the seat.

Holmested for the relator. The objection was clear on the face of the statute, and as there was therefore no other qualified candidate than the relator before the electors, it was unnecessary for him to give any notice to electors at the polls,—electors could not then nominate another candidate.

There was collusion on the part of Boyes, the former relator, and the defendant, and therefore the judgment in his case was no bar to

this application, and Boyes was not qualified as a relator in that case, having voted at the election for one Williams, who was not in fact a candidate and had not gone to the polls.

He cited *Reg. ex rel. Metcalfe* v. *Smart*, 10 U. C. Q. B. 89; *Reg. ex rel. Tinning* v. *Edgar*, 3 U. C. L. J., N. S., 39; *Reg. ex rel. Richmond* v. *Teggart*, 7 U. C. L. J. 128; *Reg. ex rel. Dexter* v. *Gowan*, 1 Prac. Rep. 104.

McKenzie, Q. C., *contra*.

J. Wilson, J.—I think Boyes was qualified as a relator under the statute.

If voters perversely throw away votes the minority candidate has a right to his seat, but the facts here do not shew that they did, as the electors might reasonably have thought that all the candidates were qualified. The relator should have gone further and told the electors at the polls that defendant was not qualified, and warned them not to vote for him.

The candidate with the largest number of votes should of course be elected, if possible, and, under all the circumstances, I do not think the relator should have the seat, for he waived his first protest by going to the polls. If a candidate claims to stand on his rights he must do so, and not waive them by afterwards going to the polls. He must elect his position and stand by it.

It was not suggested in the first case that there was another case pending on precisely the same grounds, or they would have been both disposed of at the same time, but the judgment in both will be the same.

As to costs. I do not think the first application was, so far as Detlor was concerned, collusive, and if not he should not be visited with costs of both applications. In this case each party must pay his own costs.

COMMON LAW CHAMBERS.

(*Reported by* Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.*)

Brand v. Bickell.

Insolvent Acts of 1864 *and* 1865—*Sale of goods—Interpleader.*

When a sale has been had under an execution against a judgment debtor, who after the sale makes an assignment in insolvency, the proceeds of the sale are not vested in the official assignee, but go to the judgment creditors. A Sheriff has a right to an interpleader in such a case, where proceeds claimed by the official assignee.

[Chambers, January 15, 1868.]

On the 30th December last, the Sheriff of the United Counties of Northumberland and Durham obtained from the Chief Justice of the Common Pleas an interpleader summons, calling upon the plaintiff (the execution creditor) and one Robert Elias Sculthorp, the claimant of the proceeds of the sale had under a writ of *fi. fa.* issued herein, to appear and show cause why they should not maintain or relinquish their respective claims.

The summons was returnable on 3rd January, when it was enlarged till the 8th January, on which day the Sheriff filed an additional affidavit showing that, since the service of the summons, the defendant (the execution debtor) had made a voluntary assignment to one E. A. McNaughton, an official assignee, at Cobourg under the Insolvent Act of 1864; and that he (the sheriff) had been served with a notice of claim by or on behalf of the official assignee, who also claimed the proceeds of the sale; upon which Mr. Justice Morrison, then presiding in Chambers, enlarged the summons for a week, at the same time ordering notice of the enlargement to be served on the official assignee, to enable him to appear and sustain or relinquish his claim, which was accordingly done.

On the 15th January, the summons again came up for argument before Mr. Justice Adam Wilson, when it was agreed between the parties that his Lordship should dispose of the claims summarily, and not order an issue. It appeared, from the affidavits filed by the Sheriff, in addition to the above facts, that the sale under the writ of *fi. fa.* herein had taken place on the day of December last; and that he realized thereon the sum of $230. That on the day of December, the day before the sale, a writ of *fi. fa.* (goods) against the same defendant, at the suit of the said Sculthorp, the claimant herein, had been placed in his hands; and that the said Sculthorp had, since the sale, served him with a notice that he claimed the proceeds of the said sale under his execution, on the ground that the judgment on which plaintiff's execution was issued had been released.

——— appeared for the claimant Sculthorp, and filed a verified copy of a release executed in 1865, by the plaintiff and others, releasing the defendant from all claims whatsoever that they or any of them had against him (the defendant), and contended that if the judgment was a good and valid release, the plaintiff was not entitled to issue execution upon it, or to take any steps whatever to enforce it, and that therefore the claimant was as against the plaintiff entitled to have the proceeds of the sale applied in his execution, which was not in any way impeached.

Then as to the claim of the official assignee, he referred to the Insolvent Act of 1864, sub-sec. 7 of sec. 2, and sub-sec. 22 of sec. 3, and to the sections 12 & 13 of the Act of 1865, amending the same; and contended that under sec. 12, as a sale of the goods had actually taken place under an execution, the proceeds thereof were not vested in the official assignee by virtue of the assignment, as it had been made subsequent thereto, and that therefore the official assignee was not entitled to the proceeds; and in support of this contention cited, in addition to the above mentioned acts, *Converse* v. *Michie*, 16 U.C. C.P. 167, and *White* v. *Treadwell*, 17 U. C. C. P. 487.

A. H. Meyers for execution creditor. The proceeds of the sale are claimed by the official assignee, under the Insolvent Act of 1864, and the Sheriff has no right to make this application. The act of 1865 respecting interpleading does not apply to such a case as this. The release had never been acted upon or considered as releasing the judgment by the plaintiff.

Donald Bethune, for the official assignee. The Sheriff is not properly in court, and the official assignee is entitled to receive the proceeds of the sale; all the assets of the insolvent, of every kind and description, are vested in the assignee, and section 12 of the Act of 1865 does not exempt the money in dispute herein, even although the

sale had taken place before the assignment; and at all events the claimant is not entitled to it, as it had not been made under his execution; and if the plaintiff is not entitled to it under his execution, it must go to the assignee.

Adam Wilson, J.—I must overrule the objection taken that the Sheriff is not properly before me, or entitled to make this application. This is one of the cases to which the Act of 1865, amending the Interpleading Act, was intended to apply.

In the face of the release filed by the claimant, I cannot see what right the plaintiff has to claim the money at all. He has released his judgment, and there is therefore nothing due upon it. The claimant's execution was in the Sheriff's hands before the sale took place, and I think he is entitled to have the proceeds of the sale applied on it.

I also think that he is entitled to it as against the official assignee; for section 12 of the Act of 1865 says that "the operation of the 7th sub-section of section 2, and of the 22nd sub-section of section 3, of the Act of 1864, shall extend to all the assets of the insolvent of every kind and description, although they are actually under seizure, under any ordinary writ of attachment, or under any writ of execution, so long as they are *not actually sold* by the sheriff or sheriff's officer, under such writ." In this case the goods were *actually sold*, and therefore I think the official assignee is not entitled to the proceeds. I will therefore order that the plaintiff and the official assignee be barred from all claim thereto, that the sheriff do pay over the proceeds to the claimant Sculthorp, and that the plaintiff do pay to the sheriff, claimant and official assignee, their costs of this application.

Order accordingly.

James v. Jones.

The fees on a reference to a County Judge from the Superior Court, such as an examination of a judgment debtor, must be paid in the proper stamps and not in cash.

[Chambers, Jan. 24, 25, 1868.]

S. M. Jarvis moved absolute a summons to commit defendant for unsatisfactory answers, on an examination before the County Judge of Leeds and Grenville. He filed the examination and judge's certificate.

Osler objected that the examination was not stamped with the stamp required by Con. Stat. U. C. cap. 15 (County Courts Acts), which states in what manner and to whom the fees of the judge should be applied. He referred to a case of *Waddell* v. *Anglin*, noted in 3 U. C. L. J., N. S., 141, in which Mr. Justice Adam Wilson held, "that deputy clerks of the Crown had no right to retain the fees for examination to his own use, because he is not specially authorised to do so, and that the examination taken must bear the necessary stamps for the necessary amount, chargeable for the same under the statute."

John Wilson, J., upheld the objection, and discharged the summons with costs.

Summons discharged with costs.

NOTES OF CASES UNDER ACT FOR QUIETING TITLES.

(*Before* R. J. Turner, Esq., *Referee of Titles*)

Re Gordon.

Defective materials—Title by possession—Search for, and evidence as to missing deeds—Certificate subject to dowers—Notice to parties interested—Mutual Insurance Companies' policies.

The following statement of the defects appearing in the petitioner's case was transmitted to his solicitor by Mr. Turner:

The most important part of this title is that which precedes the conveyance, "Forsyth to Peters," and this appears to be the "gap" which has chiefly occasioned the petition, yet it is that part which as far as can be judged from the papers has received the least attention, indeed there has hardly been an attempt to meet the difficulty which it presents.

1. As to a title by possession, the only evidence is that W. was once in possession; thedate is not given, and not a word is to be found as to the possession since that time.

It may be observed that twenty years possession is not sufficient unless it is shewn that the circumstances are such as to bar the persons, who but for such possession would be the owners. But here there is no evidence whatever as to who these persons were when this possession commenced or since. Were they *sui juris*, and in the country? Did they know of the possession? Did time commence to run against them?

2. Then as to the paper title. It does not appear that any search whatever has been made for the missing deeds. At least as much evidence as is necessary to let in secondary evidence at law is necessary under this act, a certificate under the act having a much greater effect than a judgment at law. But there is no evidence whatever, not a tittle, that there ever was a deed from the patentees to any one, or from any one to Mr. Forsyth.

Why has no application been made to him or his attorney, as to how he came to execute a conveyance? what title he had? from whom he got it? whether the title was looked into on his behalf before he purchased, if he did purchase, and with what results? what deeds, if any, he got, and what has become of them? when he had them last, or what is the last information he had about them?

3. His grantee, Peters, has made an affidavit but it contains not a single word on this subject, and the same enquiries should have been made of him as have been suggested in regard to Forsyth.

4. And so with every subsequent owner and mortgagee. For all that appears, every one searched, and either personally or by his attorney or agent knows the particulars of the title. And every owner and mortgagee, before those now interested, may have had the missing title deeds, and one or other of them may have the deeds now, if they ever existed. It is incredible that a valuable property should have passed through so many hands without any investigation of the title or reference to deeds antecedent to the deed to Peters.

5. It does not appear that any enquiry has been made for the patentees or their family. Some of them might know whether the property had been conveyed, and to whom, for all the papers show that the family may be well known and easily to be seen. If not, what search has been made for them? Sometimes a clue to parties is obtained by searching for their wills. Has this been done?

6. If the title is cleared of the other difficulties the certificate can only be granted subject to the dower, if any, of the wives of all these former owners, and of ——, unless the petitioner considers it worth while making further enquiries to ascertain the facts as to whether the wives are alive or not.

7. Notice of the application for the certificate should be given to M. and W., to whom deeds are registered, though no right of the grantor to convey to them at present appears. Copies too of the memorials of deeds to them, and of the deed to S. and others, must, by the express terms of the statute, be produced, as the petitioner has not the original deeds.

8. No certificate by the sheriff that he has not sold the property under execution has been produced.

9. Two Mutual Insurance policies are produced, but there should be some evidence that they are the only ones under which there would be a lien on the property.

10. There is no proof of payment of taxes for 1866 and 1867.

ENGLISH REPORTS.

CROWN CASES RESERVED.

REG. v. GEORGE BULLOCK.

Malicious injury to cattle—24 & 25 Vic. c. 97, sec. 40—Proof of wounding—Instrument.

It is not necessary in order to prove a wounding within 24 & 25 Vic. cap. 97, sec. 40. to show that injury done to the cattle has been caused by any instrument other than the hand of the prisoner.

[C. C. R., Jan, 25,—16 W. R, 405.]

Case reserved by the chairman of the Quarter Sessions for the County of Gloucester.

George Bullock was tried before me on an indictment which charged him with maliciously and feloniously wounding a gelding, the property of James Ricketts. The prisoner pleaded not guilty.

On the trial it was proved that the prisoner, who was sent by his master with a cart and horse to fetch stone from a distant field on the 20th of December last, at half-past one p.m., returned about four p.m., bringing back the horse with his tongue protruding seven or eight inches, and unable to draw it back into his mouth. The veterinary surgeon who examined the horse the following day proved that he found the roots and lower part of the tongue much lacerated, and the mouth torn and clogged with clotted blood; the injury he considered might have been done by a violent pull of the tongue on one side. He was obliged to amputate five inches of the tongue and the horse is likely to recover. The prisoner's statement was that the horse bit at him and he did it in a passion. There was no evidence to show that any instrument beyond the hands had been used. The prisoner's counsel contended that no instrument having been proved to be used in inflicting the injury, the prisoner could not be convicted under the 24 & 25 Vic. cap. 97, sec. 40. For the prosecution it was maintained that under the statute it was not necessary to show that the injury had been caused by any instrument other than the hand or hands of the prisoner. The prisoner's counsel, on the point being reserved, declined to address the jury, and a verdict of guilty was found by them.

I respited the judgment and liberated the prisoner on recognisance, in order that the opinions of the justices of either bench and the Barons of the Exchequer might be taken on the question—whether the prisoner was properly convicted of the wounding, there being no evidence to show that he used any instrument other than his hand or hands?

No counsel appeared for the prisoner.

Sawyer for the prosecution.—This was a wounding within the meaning of 24 & 25 Vic. cap. 97, sec. 40. COCKBURN, C. J.—This indictment was simply for wounding?] Yes. There was no count for maiming, as there is authority that such a count could not be sustained where there is no evidence of a permanent injury: *Reg.* v. *Jeans*, 1 C. & K. 539. That case was upon statute 7 & 8 Geo. 4, cap. 30, sec. 16, which in terms is substantially the same as the present section; but it is no authority that such an injury as this is not wounding. There the point seems not to have been argued by the counsel for the prosecution, and the decision only goes to show this injury would not be a maiming: *Reg.* v. *Owens*, 1 M. C. C. 205; and *Reg.* v. *Hughes*, 2 C. & P. 420, are there cited by the counsel for the prisoner to show that an instrument is necessary to constitute a wounding; but the former case only shows that pouring acid into the ear of a mare by which her sight was destroyed is a maiming; and in the latter case, biting off the end of a person's nose was held not a wounding within 9 Geo. 4, cap. 31, sec. 12, where the words are "stab, cut or wound any person." In *Jenning's case*, 2 Lewin's C. C. 130, where the prisoner with his teeth bit off the prepuce of a child three years old, it was held not a wound within 1 Vic. cap. 85, sec. 4; but there also the words of the Act are "stab, cut, or wound," and very different from those of the section on which this indictment is framed.

COCKBURN, C. J.— You have satisfactorily accounted for the decisions referred to; but no difficulty exists in the present case as this statute makes it felony, unlawfully and maliciously to "kill, maim, or wound" any cattle, and we may interpret the word "wound" in its ordinary acceptation, which means any laceration which breaks the continuity of the internal skin. It may not manifest so much malice on the part of a man if, in his passion, he uses his fist only; but it is within the words of the statute, and it is probable that in altering the words of this statute the Legislature may have intended to get rid of the difficulty.

The rest of the Court concurred.

Conviction affirmed.

QUEEN'S BENCH.

Weekes v. Wray.

Practice—Order to proceed—"Three days after service"—How time to be reckoned—C. L. P. Act, 1852, sec. 17.

A plaintiff obtained an order to proceed "three days after service of a copy of the order at defendant's residence, as if personal service of the writ of summons had been effected upon the defendant," and signed judgment on the third day.

Held, that this was irregular, as the order must be taken to give the defendant three days in which to appear.

[Q. B. Jan. 27,—16 W. R. 399.]

This was an application for a rule calling on the defendant to shew cause why an order setting aside proceeding herein for irregularity should not be set aside.

The facts appeared to be that the plaintiff applied on the 18th December at judge's chambers and obtained an order under section 17 of the Common Law Procedure Act, 1852, "that three days after service of a copy of this order at defendant's residence, the plaintiff be at liberty to proceed in this action as if personal service of the writ of summons had been effected upon the defendant."

A copy of this order was left at the residence of the defendant on Friday, the 20th December, and on the Monday following the plaintiff's attorney signed judgment in default of appearance. Later in the day the defendant entered an appearance and applied to a master for and obtained an order to set aside the judgment signed in the cause, writ of *fi. fa.*, and any other writ or writs for irregularity. This order was confirmed by a judge on appeal from the master's decision.

J. O. Griffiths for the plaintiff, now applied for a rule *nisi* to set aside this latter order. He contended that the first order was a permission to the plaintiff to proceed on the third day after service of the copy at the defendant's residence, and that, therefore, the judgment signed on the Monday was regular, and ought not to have been set aside.

F. Brandt appeared to shew cause in the first instance, but was not called on.

The Court were of opinion that the three days after the service of the order were given to the defendant in which to appear, so that the plaintiff could not sign judgment until the expiration of the time mentioned, and they accordingly refused the rule.

Rule refused.

COMMON PLEAS.

Culverhouse v. Wickens.

Garnishee—Payment into court on judge's order—Lien—17 & 18 Vic. cap. 125, s. 63, 65—12 & 13 Vic. cap. 106, s. 184.

A judgment creditor obtained a garnishee order to attach a debt owing to the judgment debtor for work done by him as a solicitor. The garnishee disputed the amount of the debt as being excessive, and a judge allowed him further time to tax it, on his paying £25 into court. The debt was taxed at £27 10s. The day after the £25 was paid into court, the judgment debtor registered a composition deed under the Bankrupt Act, 1861, of which the garnishee subsequently had notice.

Held, that the effect of the payment into court under the judge's order was the same as that of payment under the 63rd section of the Common Law Procedure Act, 1854, and was a discharge to the garnishee as against the judgment debtor.

Held also, that the judgment creditor had a lien on the money paid into court under the 184th section of the Bankruptcy Act, 1849.

[C. P. Jan. 17,—16 W. R. 402.]

Lumley Smith moved, on the part of the garnishee, for a rule calling on the plaintiff, the judgment creditor, to shew cause why the garnishee order should not be rescinded, and all proceedings taken thereon stayed, and why the garnishee should not take out the sum of £25 which he had paid into court, on the ground that since the order the judgment debtor had executed a composition deed. The affidavits shewed the following facts:—The plaintiff, Culverhouse, had formerly been clerk to the defendant Wickens, an attorney; and Clark, the garnishee, was indebted to Wickens in a bill of costs arising out of certain Chancery proceedings conducted for him by Wickens as his solicitor; but this debt was disputed by Clark, on the ground of the unreasonableness of the amount. Judgment having been obtained by Culverhouse against Wickens for £72 12s. 4d., and remaining unsatisfied, Smith, J., on the 7th December last, made a garnishee order, attaching the debt from Clark to Wickens, or so much thereof as should be sufficient to satisfy Culverhouse after the bill had been taxed. On the 23rd December, Byles, J., made an order on the payment into court by Clark of £25, extending the time for taxation by fourteen days. The bill of costs when taxed amounted to £27 10s., more than one-sixth having been struck off. On the 26th December Wickens executed a deed of composition with his creditors under the 192nd section of the Bankruptcy Act, 1861. By this deed all his creditors granted him to the 31st December, 1868, to pay their respective claims in full. There was no *cessio bonorum*, but the deed was made pleadable in bar as a release, and contained a reservation of securities; and he obtained a certificate of discharge and registration thereunder. The £25 was paid into court on the 30th December, and the deed was registered on the 31st. On the 2nd January an order was made allowing Clark to set off the costs of the taxation, and on the same day Wickens served Clark with notice of the composition deed, and that he was to pay him and not the judgment creditor. The following cases were cited:—*Murray* v. *Arnold*, 3 B. & Sm. 287; *Wood* v. *Dunn*, 14 W. R. 84, 1 L. R. Q. B. 77; and in Error, 2 L. R. Q. B. 73, 15 W. R. 184.

Bovill, C. J.—As regards the application relating to £25, I think there is no ground for the interference of the Court. Under the 63rd section of the Common Law Procedure Act, 1854, money owing by the garnishee to the judgment debtor must be paid into court, or a judge may order execution to issue to levy the amount, and the effect of that provision and of the language of the 65th section, is, that such a payment or execution is a valid discharge to the garnishee against the judgment debtor. The fact that here payment had been made by order of a judge makes no difference. Then on taxation the debt was reduced to £27 10s.; but the result is that there was a valid payment so far as the garnishee is concerned of the £25, and within the meaning of the Act of Parliament; and if so there is no ground for the application as regards that sum. But, further, there would be a lien of the judg.

ment-creditor on it within the 184th section of the Bankrupt Law Consolidation Act, 12 & 13 Vic. cap. 106; and on that ground also there is no case for our interference; besides, there is an express reservation in the deed of collateral securities. As to the £2 10s. the parties, if well advised, will not give rise to any application to the Court about that, as considerable costs would be incurred both here and in the Bankruptcy Court; but if necessary the application on that may be renewed.

Willes, J.—I am of the same opinion. In *Murray* v. *Arnold*, the money was paid into court as a condition of the defendant's being allowed to issue a commission to examine witnesses abroad, and it was held that the plaintiff's right to the money was not taken away by the 184th section of the Bankruptcy Act, 1849; and that conclusion might have been arrived at on the Act itself without respect to lien. Wightman, J., there referred to *Ferrall* v. *Alexander*, 1 Dowl. P. C. 132, to show that money paid into Court to abide the event of a suit was not payment to a creditor within 6 Geo. 4, cap. 16, sec. 82; but I do not find that he expressed any opinion on the applicability of that to the Common Law Procedure Act, and I think it is not applicable to the 65th section of the Act of 1854. I should have thought "payment" there must apply to all payments, whether made under the 63rd section or under the order of a judge. Payment into court under such an order as the present is not a payment of money to be held for a creditor if he proves his claim a just one, but a payment of money to be held for the creditor till the amount of the debt is settled by taxing it, and that in effect is a payment to him, and by it the right of the creditor is determined as much as if the payment were made into his hands or into the hands of the sheriff under the execution. If it is said the creditor may not establish his claim, that fails here, because, *ex hypothesi*, he has a judgment. Our decision ought to be with reference to the right when the money was paid in, and then it could not be withdrawn from the creditor.

Keating and Montague Smith, JJ., concurred.

Rule refused.

Clarke et al. v. The Tyne Commissioners.

Practice—Costs—Change of venue—Undertaking where no order drawn up.

A summons to change the venue from London to Northumberland was indorsed by the judge "No order—the plaintiff undertaking to tax his costs, if successful, as if the cause had been tried in Northumberland." The cause occupied two days in trying at the Guildhall, after having been four days previously in the paper. The plaintiff having obtained a verdict, the master taxed on the principle that the cause would have taken only two days at Newcastle; he also disallowed the travelling expenses of witnesses from Strood to Newcastle, who lived near Newcastle, but at the time of the trial were actually at Strood; and compensation for detention of seafaring witnesses on shore.

Held, that the undertaking was binding, though no order had been drawn up; and that the principle on which the master taxed the costs and the claims he disallowed were within his discretion: and

Per Montague Smith, the principle of taxation was right.

[C. P. Jan. 22.—16 W. R. 480.]

Rule calling on the defendants to show cause why the master should not be at liberty to review his taxation of the plaintiff's costs.

The action was brought to recover damages from the defendants for injury caused by a collision in the river Tyne, at Newcastle, and the plaintiffs laid the venue in London. After notice of trial, the defendants took out a summons to change the venue to Northumberland, principally on the ground that most of the witnesses resided at North and South Shields, in the neighbourhood of Newcastle. The summons was heard before Keating, J., by adjournment, on the 8th of February, 1867, when his Lordship made upon it the following indorsement:—"No order—the plaintiffs undertaking to tax their costs, if successful, as if the cause had been tried in Northumberland." The cause was in the paper at the Guildhall sittings, on the 1st, 2nd, 3rd, 4th, 5th and 6th of July; the trial lasted during the 5th and 6th, and ended in a verdict for the plaintiffs for £354 12s. 11d., the amount of their claim. Subsequently the taxation was begun, and pending it the plaintiffs twice took out a summons to show cause why the master should not tax in a different way; these summonses were, however, dismissed by Keating, J., and the case was referred to the court by the present rule.

The items in the plaintiff's costs disallowed by the master were as follows:—the expenses and loss of time of the plaintiff's attorneys, and witnesses for the days during which the cause was in the paper, over and above the two days actually employed in trying it. The expenses of witnesses who, though resident at South Shields, were at the actual time of the trial elsewhere; and compensation to seamen for engagements given up in consequence of their being subpœnaed to attend at the Guildhall, and for detention on shore. Two of the witnesses, though resident at South Shields, were at the time of the trial at Strood, in Kent, and the master disallowed a claim for their travelling expenses from Strood to Newcastle.

T. Jones, Q. C., and *Gainsford Bruce* showed cause, and contended that the undertaking indorsed by the judge on the back of the summons was binding on both parties, and that it was not necessary to draw it up and serve it, because, as there was "no order," there was nothing to draw up. The master was right in taxing on the supposition that the cause had been actually tried at Newcastle at the Spring Assizes, at which there were only two working days to dispose of the cause list; consequently it would have been wrong to take into consideration the days during which the cause was in the list at Guildhal before the trial.

Giffard, Q. C., and *Rew*, in support of the rule. There was no such undertaking given; but to avail themselves of it the defendants should have drawn up the order and served it: *Joddrell* v. ——, 4 Taunt. 253; *Wilson* v. *Hunt*, 1 Chitty's Rep. 647. But assuming the undertaking to be binding, the master taxed on a wrong principle. He only allowed two days' expenses, because the Newcastle assizes only lasted that time. But he ought not to have entered on any such speculation, for the undertaking was meant to apply only to the geographical difference between the two places, and not to the ordinary incidents of the cause. In the case of the witnesses who came from Strood, but

were properly resident at Shields, he disallowed their travelling expenses altogether, whether from Stood to Newcastle, or from Strood to London; and he disallowed all claims for detention because it was not proved to his satisfaction that there would have been any detention at all if the trial had been at Newcastle.

Bovill, C. J.—As to whether the undertaking in question was given, the affidavits are rather contradictory; but it was made by the judge in the presence of the parties, and it was their duty to see what was written. The only safe guide for us is the judge's indorsement, and therefore we hold there was such an undertaking given. Was it, then, necessary that the undertaking should be embodied in an order? It is necessary if it is to be used as an order; but that was not the case here, and therefore it was not necessary to give validity to the undertaking, and it was binding on both parties. Then three objections were made with reference to the taxation; and, first, it was said that the master only allowed the expenses of the witnesses for two days in London, though the cause was in the paper six days. I think it was a question for the master whether the witnesses had been detained longer in London than they would have been in Newcastle. It was a matter for his discretion on the facts before him on both sides; and the objection must be made out very clearly that he exercised that discretion wrongly before we interfere; and that was not done. Then the second objection to the taxation was that the master refused to allow the travelling expenses of witnesses from Strood to Newcastle. In fact, they only incurred the expense of travelling from Strood to London. The answer to the objection is, that the witnesses did not go to Newcastle, and the expenses were not incurred. The third objection relating to the taxation was the disallowance of of the detention money. It was a question for the master whether, if the trial had taken place at Newcastle, there would have been any such detention. Some one must determine the question, and it is essentially one for the master; and on that point also it is not shown that he was clearly wrong. The rule must therefore be discharged.

Willes, J.—I am of the same opinion. I think there was an undertaking, and I have heard Lord Truro say that the attorneys should not be bound by such an undertaking made in the course of the cause, unless it is in writing. Here it was in writing, and was put into writing by the judge, who represents the Court. For the rest, the appeal is against the discretion of the master, and we should be very careful how we interfere, unless we can say that such and such an item is wrong, and we cannot go into every item.

Montague Smith, J.—I am of the same opinion. It is said that the master took into consideration the time that would have been occupied in trying the cause at Newcastle, and that only, and that he should not have done so. But I think he was right, for he followed the very words of the order, and he must go into probabilities. I cannot see that he did anything wrong.

Keating, J., concurred.

Rule discharged.

CHANCERY.

Hunt v. White.

Vendor and purchaser—Covenant—Quiet enjoyment.

A covenant for quiet enjoyment given by vendor to purchaser does not extend to protect the purchaser from a defect of title which the recitals of the deed, in which the covenant is contained, were sufficient to disclose.

[V. C. M. Feb. 23.—16 W. R. 478.]

This was a petition by S. Rogers, who had purchased property from W. M. Bush, the testator in the cause, praying that he, S. Rogers, might be admitted as a creditor against the testator's estate for damage in respect of a breach of the covenant for quiet enjoyment contained in the purchase deed.

It was believed, when W. M. Bush conveyed the property to the petitioner, that W. M. Bush was entitled to the estate in fee absolutely, whereas he merely held the fee simple subject to be divested on his death without issue, which event happened. The deeds recited in the conveyance from Bush to the petitioner were sufficient to disclose this defect of title.

The persons who took the estate on W. M. Bush's death without issue, brought an action against the petitioner to recover it, and there was no defence to such action. The petitioner therefore brought in a claim bofore the chief clerk in the suit filed to administer the testator's estate, to be admitted a creditor in respect of the damage he had suffered by being thus ejected. It was admitted that the covenant for title was restricted to the covenantor's own acts, but the plaintiff relied on the covenant for quiet enjoyment, which it was contended was an unlimited covenant, not restricted to the covenantor's own acts. The chief clerk refused to admit the claim of the purchaser, who thereupon presented this petition.

Browne, for the petitioner, cited Sugden's Vendors and Purchasers, 14th ed. 606, as to the generality of the covenant for quiet enjoyment, and contended that damage occasioned by the vendor's want of title, came within the provisions of that covenant.

Downing Bruce for trustees.

Cole, Q. C., and *Stiffe Everitt*, for other respondents, were not called on.

Malins, V.C., said that the covenant for quiet enjoyment could only extend to incumbrances and defects in the title of the covenantor, of which the purchasers had no notice; if the vendor had secretly created a mortgage, the covenant for quiet enjoyment would have protected the purchasers against that, but here the damage to the purchaser arose from misconception of the vendor's title as disclosed by the deed of conveyance itself. It could not be reasonably contended that the covenant extended to cover such a defect as this, especially as the covenant for title was restricted to the covenantor's own acts. The petition wholly failed, and must be dismissed with costs.

GENERAL CORRESPONDENCE.

Insolvent Acts—Assignees.

Belleville, 31st March 1868.

To the Editors of the Law Journal.

Gentlemen,—"A communication under the caption, *Assignees in Bankruptcy matters—The operation of the Act*, appears in the *Local Courts and Municipal Gazette* of March, 1868; wherein the "Scarboro" correspondent asserts that, "The working of the Act since 1864 clearly proves it to be a bungled, defective affair," and he proposes, "to point out a few of its defects and in addition to refer to the conduct of *official assignees*."

"Scarboro" points out what he thinks are defects in the Act, and refers to the conduct of official assignees, but omits (except by his own assertion, that the working of the Act clearly proves it to be a bungled affair) to give instances where there has ever been any failure in the working of the Act. Many insolvents have been refused, and many more have obtained discharges; and it must be assumed, that these insolvents, who have been refused discharges ought not to have obtained them; and, if they deemed the judges decision erroneous, the Superior Court, on appeal, might have rectified the error or confirmed the decision; and any one creditor has the right of appeal against the decision granting the discharge. Therefore, it follows, that, if any insolvent has been wrongfully refused or has improperly obtained a discharge—it is not the fault of the Act, but of the insolvent or his creditors as the case may be. It is denied that because the assignee is corrupt, and deceives the creditors—that the Act is a bungle, or defective. The official assignee is bound to give security "*for the due performance of his duties*," and the creditors assignee is bound to "give such security and in such manner as shall be ordered, by a resolution of the creditors; and shall conform himself to such directions, in respect thereof and in respect of any change or modification thereof or addition thereto, as are subsequently conveyed to him by similar resolutions"—which bond is to be taken in favor of the creditors and deposited in the proper Court. The assignee is likewise under the summary jurisdiction of the Court and the performance of his duties may "be enforced by the judge on petition in vacation or by the Court on a rule in term under penalty of imprisonment, as for contempt of Court whether the duties are imposed on him by deed of assignment, by instructions of creditors communicated to him or by the terms of the Act."

His duties are well defined and performance can be enforced which proves there is no bungle or defect in the Act in that respect. If "Scarboro" knows that "the working of the Act since 1864 *clearly* proves it to be a bungled, defective affair," because the insolvent "selected the official assignee *to get him through for a certain fee generally* $50," he impliedly admits that his creditors allowed a public officer to deceive and injure them whilst the Act affords a most severe and certain remedy. If creditors neglect to secure professional assistance and permit assignees to deceive them, "Scarboro" ought to blame the bungling, careless creditors, not the Act.

No doubt many men have obtained discharges who have not made a full disclosure of their estate, some owing to perjury—others through the neglect of the creditors. But this does not prove the Act a bungled or defective affair. "Scarboro" reminds me of Lord Palmerston's reply to the Scotch Clerical petition to the Government to set apart a day of prayer to our Lord, to remove pestilence, which was that the pestilence was caused by filth and to remove the cause instead of praying, and the pestilence would abate, so I say, if creditors will employ good counsel and remove the corrupt assignees, "Scarboro" will fail to see the bungled, defective Act.

For instance, if an assignee gives a certificate that the insolvent "has complied with all the provisoes of the Act, has attended all meetings, has filed a statement of his affairs on oath, fairly showing how he has disposed of his property," &c., and it can be proved that the certificate is untrue, there can be no difficulty in applying a remedy. If it cannot be shown or is neglected, it is presumed true, and creditors have no cause of complaint; at all events it is not the fault of the Act. It is admitted that legislation is not always perfect but it is denied that it is always imperfect. In ninety-nine cases out of one hundred, Statutes are declared defective by persons too lazy to study them or too ignorant to understand or properly construe them, or too negligent to take advantage of their provisions.

It is a remarkable suggestion, "that if a man has once gone through the insolvent

court," he should not again go through without paying 10s. on the pound." That is, if a man, whether trader or non-trader, is twice unfortunate, and on the first failure obtains a discharge—he must on the second pay 10s. in the pound although he discloses and assigns all he has for the benefit of his creditors. The tendency of legislation of late both in England and Canada seems to point more towards mercy to insolvents than otherwise. With that view the Statutes have been construed in both countries with more consideration for the honest insolvent than the grasping creditor. As to notice of discharge although not required to be personal, it is given after the creditors have received personal notice of the examination before the assignee, and if the creditors attend the meeting they can judge for themselves whether there is any fraudulent retention or concealment of the insolvent's estate, or whether there is any evasion, prevarication, &c., or whether he has not subsequent to the act kept an account book showing his receipts and disbursements, and they can then, or soon afterwards, decide whether they will oppose his discharge or not; and if they do so decide, it cannot be believed that publicity of application for discharge in the Gazette and local paper could escape them unless by neglect. As to an assignee acting as agent, it is apprehended there is ample remedy already for such misconduct; and if such conduct is difficult of proof now, it would not be less so if it should be distinctly stated that such assignee should act as the agent of the insolvent under a penalty.

If the assignee refuses to perform, or improperly performs his duties, or if his appointment is not contemplated by the act, he may be removed: *Small ex parte, in re Day*, 7 L. T. N. S. 376, or if he refuses to perform his duties or misconducts himself in that behalf, he may be punished, or creditors may resort to his bond: sec. 6 & 16, Act 1854; *Singlehurst ex parte, in re Tristam*, 3 DeG. & J. 451: *Maddegan, in re Stiff*, 10 L. T. N. S. 914. Under the same sections and ample authorities, there is now power not only to impose on or withhold costs from assignees, creditors or insolvents, or to impose terms for contempts or delays. If "Scarboro" will consult the tariff of fees promulgated by the Superior Courts of Common Law, it will enlighten him at least in that respect.

The insolvent must wait, if he makes a voluntary assignment, twelve months, before he can apply for a discharge, and after two examinations and such ample time, if a creditor possesses ordinary firmness, he ought to decide in that time whether he will appeal or not.

"Notice of application for an allowance of appeal, must be served in eight days from the day judgment appealed from is pronounced, *but the application itself may be made after the eight days*:" *Re Owens*, 3 U. C. L. J. N.S. 22. And even if the notice is irregular it may be amended. *Ib.*

It seems absurd to expect an insolvent to pay a certain rate in the pound, except under the sections for composition and discharge, if he assigns his estate. The tending of modern legislation is that the insolvent and his estate shall not be more embarrassed and diminished by costs, and that his creditors shall take his whole estate. If they obtain this they ought to be satisfied to allow the unfortunate to try his luck again and benefit by experience which may ultimately be an advantage to himself, to his creditors and to the public generally. The rules under which the Judge exercises his direction of granting the discharge absolutely, conditionally, or suspensively, or refuses it absolutely, are laid down by Westbury (Lord Chancellor) in *Re Mew* v. *Thorne*, 31 L. J. N. S. (Bankruptcy) 87, to which "Scarboro" is referred, which if he reads carefully, the writer ventures an opinion, he will arrive at the conclusion that the Act of 1864 is neither a bungle nor so defective as he imagines.

Again "Scarboro" thinks it should be enacted distinctly, that the insolvent "shall be discharged only from the debts or liabilities mentioned in his Schedule of debts." Upon this point "Scarboro" puts the question to you in the 3 U. C. L. J. N.S. 193, and you drily ask him "to look it up." He is now referred to *Philips* v. *Pickford*, 14 Jurist, 272, where it was decided that a final order granted under the English Acts, similar to our then bankrupt and Insolvent Acts, could be set up as a defence to any debt not included in the Schedule. See also *Stephen* v. *Green*, 11 U. C. Q. B. 457; *Greenwood* v. *Farrie*, 17 U. C. Q. B. 490; *Romillio* v. *Holahan*, 8 Jurist, N. S. 11; *Franklin* v. *Busby*, Ell. & Ell. 425; *Booth* v. *Caldman*, 1 Ell. & Ell. 414. None of the Acts under which these decisions were had, con-

tained any such special provision as stated; yet the courts have always held that no creditor is bound whose name and debt is not mentioned in the Schedule.

Quinte.

Preferential Assignments.

To the Editors of the Canada Law Journal.

Toronto, April 16, 1868.

At page 301, Con. Stat. U. C. 22 Vic. cap. 26, sec. 18, we find these words: "In case any person, being at the time (1st) in *insolvent circumstances* (2nd), or unable to pay *his debts in full* (3rd), or, knowing himself to be on the *eve of insolvency*, makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, &c. (1st), with intent to defeat or delay the creditors of such person (2nd), or with the intent of *giving one or more* of the creditors of such person a preference over his other creditors (3rd), or over any *one or more of such creditors*, every such gift, conveyance, &c., shall be null and void," &c.

I have above (putting in figures, to denote the material points of law contained in the section) given the substance of section 18, relating to preferential assignments, passed in 1859.

An interpleader case, that was decided recently in the Division Court at Richmond Hill, in which case the law contained in the section was construed by John Duggan, Esq., Q. C., deputy judge, in a certain way new to me, has induced me to trouble you with a few remarks on this branch of the law. The decision itself was, considering the facts of the case, not only a surprise to me so far as the law is concerned, but one which could not but have a damaging effect upon the rights of all creditors, and in effect nullifies the act itself.

We all know—at least those who were in full law practice prior to 1858—how very common it was for dishonest debtors, prior to that year, to give chattel mortgages of all their goods to one creditor, generally a relative, and that the country was flooded with one-sided assignments and covert and secret transfers of goods, whereby one creditor or a few creditors were preferred to the creditors in general. This act of 1859 was passed to stop the mischief, and was so framed and worded that one would have thought that rogues in the shape of debtors had a network thrown around their acts which would catch almost any case of attempted fraud. The act was passed to put down all dishonest dealings and improper preferences; in fact (and so lawyers have heretofore understood it), that a man who was in embarrassed, failing, or even *quasi* insolvent circumstances, had no right, in his troubles, to make over all his chattels to one creditor, leaving the rest nothing to lay hold on. Now this decision at Richmond Hill, of the learned Q. C., acting for Judge Boyd, is in the very teeth of this view of the law. In fact, so fully did the public and lawyers take my view of the law, that it is well known that since 1858 not one chattel mortgage or assignment has been filed and made, where five used to be made prior to that period, under similar causes for them.

The facts of this case at Richmond Hill are briefly these: A., a debtor, owed many debts, and B., C., D. and E., at Richmond Hill, had obtained judgments in the Division Court against him there, on which executions had been issued and returned *nulla bona* repeatedly; and he had in consequence of this been ordered to pay small sums, such as one dollar and half-a-dollar a month, on the judgments, as an insolvent. A. owed also other things elsewhere, and judgments too. He owed $1,100 for rent unpaid; and he owed a sister of his, for borrowed money, borrowed for many years back, nearly $1,500. He had given formerly (in 1863, I think) a chattel mortgage to his landlord to pay his rent, part of the $1,100 above referred to. This chattel mortgage had been neglected, and allowed to run out. One of his creditors (B.), seeing this, took out an execution, and was about to levy on his goods, when he made another chattel mortgage, in January, 1868, to his sister, conveying all his goods to her, and setting at defiance his said creditors. B., notwithstanding this transfer, levied on his goods, and hence the interpleader case, which arose on a claim made by his sister to his goods, under the last chattel mortgage.

Now, there is not a shadow of a doubt but that A. intended, by this transfer, to prefer his sister to all other creditors; to cut off all others, to give her all his goods, preferring one creditor to another. There is no doubt but that his sister knew this, nor that he was in embarrassed circumstances, unable to pay his debts in full—in fact, that he was an insolvent. The goods he conveyed were not worth over

$1,000, at a high estimate, which would not pay the chattel mortgage he gave his sister. He owed these creditors, B., C., D. & E., besides, and his landlord over $1,000. He had some valueless interests in lands heavily mortgaged. And if it were possible to find a debtor or a case coming within the meaning of section 18 of the act of 1859, this debtor A. and this case came within such meaning. Yet it was held at the court by the learned deputy judge, that the chattel mortgage of 1868 must prevail, and the creditors be sent to the wall, the sister of A. taking all the goods!

The decision was alleged to be made on the ground that A. swore he did not *mean* to defraud—that he had some interests in mortgaged lands. If we look at the strict, searching clauses of the section, as marked with figures by me, we will see that it matters not what the debtor may swear as to his intents, when those intents are contrary to the patent facts of the case. We are to judge of a man's intents by his acts. If A. conveys all his chattel property to his sister F., leaving all his other creditors with nothing—prefers her by a chattel mortgage, what is the true inference? He has preferred one creditor to another, and put it out of his power to pay any other. He has shown himself unable to pay his debts in full by paying only one, and leaving unpaid many others. Who cares what he may swear about his intents? The law points out the fact of what he has done, and what exists; and that is, that he has divested himself of all his property to pay one, to prefer one over all. If the act did not intend to prevent such a thing, what is its meaning?—what is it worth? A man may have uncertain interests in mortgages of lands, or may even, if the lands are sold well, be able to pay all he owes; but that fact would not make such a sale as I refer to good under the act of 1859.

We yet have to see what it means when it says a debtor shall not prefer one creditor to another, by transferring all his goods. Creditors having judgments and executions are not to be defrauded by chattel mortgages set up by one, and told to go and look to some uncertain interest in mortgaged land. One creditor has no right to step in and take all the available goods of a debtor by a chattel mortgage, and stop other equally deserving creditors from getting anything.

The act of 1859 was not intended to interfere with chattel mortgages, or sales made by persons who had goods amply sufficient to pay all their creditors if sold. A chattel mortgage made by any perfectly solvent person, one who at any time could show chattel property enough to enable a sheriff to make the amount of all executions placed in his hands, is no doubt good in law; but if such a person simply had lands, and were to transfer all his goods to one person, having at the same time judgments against himself on which executions could or were about to issue, then it might be very fairly asked whether that debtor had not preferred—had not given one creditor an illegal preference over his other creditors.

It is quite evident that the act of 1859 was passed for the benefit of creditors, upon a generous view of the law, and no crimping construction should be given to it.

If, as in this case, a debter owes a relative $1,500, which sum more than covers all his chattel property, and on the eve of the levying of several executions gives a sweeping chattel mortgage of all to this one relative or creditor, could any lawyer say that he did not bring himself within the meaning of some part of sec. 18?

It may be said, he swears his intention was not to do so; but that is simply nonsense, as the act is self-evident. Would he have done so if he had not owed many others—had not been about to be sold out, being on the eve of insolvency? Does he not patently give a preference to one creditor, and set at defiance all others? These are the pertinent questions. It is greatly to be lamented that courts and judges will not construe acts of Parliament in the spirit in which the Legislature passed them. Further, no case can be found, or was quoted or produced, under the evidence in this interpleader case, to warrant the decision.

C. M. D.

APPOINTMENTS TO OFFICE.

DEPUTY JUDGES.

CHARLES ANDERSON SADLEIR of Osgoode Hall, and of the City of Hamilton, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court, in the County of Wentworth, in the said Province. (Gazetted, March, 14, 1868.)

CHRISTOPHER CHARLES ABBOTT, of the City of London, in the County of Middlesex, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Middlesex, in the said Province. (Gazetted, March, 21, 1868.)

GEORGE LEVACK MOWAT, of Osgoode Hall, and of the City of Kingston, in the County of Frontenac, in the Province of Ontario, Esquire, Barrister-at-Law, to be Deputy Judge of the County Court of and for the County of Frontenac. (Gazetted, March, 28, 1868.)