Technical and Bibliographic Notes / Notes techniques et bibliographiques

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

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

- [ ] Coloured covers/ Couverture de couleur
- [ ] Covers damaged/ Couverture endommagée
- [ ] Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- [ ] Cover title missing/ Le titre de couverture manque
- [ ] Coloured maps/ Cartes géographiques en couleur
- [ ] Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- [ ] Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- [x] Bound with other material/ Relié avec d'autres documents
- [x] Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distorsion le long de la marge intérieure
- [ ] Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- [ ] Coloured pages/ Pages de couleur
- [ ] Pages damaged/ Pages endommagées
- [ ] Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- [x] Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- [ ] Pages detached/ Pages détachées
- [x] Showthrough/ Transparence
- [x] Quality of print varies/ Qualité inégale de l'impression
- [x] Continuous pagination/ Pagination continue
- [ ] Includes index(es)/ Comprend un (des) index

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

- [ ] Title page of issue/ Page de titre de la livraison
- [ ] Caption of issue/ Titre de départ de la livraison
- [ ] Masthead/ Générique (périodiques) de la livraison
- [ ] Additional comments:/ Commentaires supplémentaires:

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

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

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—The following letter shows how necessary it is that there should be some medium of communication in order to a uniform practice by the Officers of these Courts:—

To the Editor of the U. C. Law Journal.

As there are many questions asked for the purpose of receiving answers through the medium of your valuable periodical, I have one also to propose; it is with regard to Clerks of Division Courts taxing costs. Now, I will suppose a case:—A plaintiff enters a suit with a claim of £20, and after the case has undergone an investigation, obtains a judgment for 20s. only; of course the summons issues with costs endorsed according to the amount of claim. Now, the question is, whether the fees under "defended" and "order" should follow according to the claim, or according to the amount of judgment. My own practice is to tax the latter fees in proportion to the amount of judgment. Am I right?

Your obedient servant, JOHN WILLIAMS,
St. Vincent, Feb. 6, 1857. Clerk, 3rd D.C., Co. Grey.

In every County, with which we are acquainted, the practise is otherwise, and in the County of Simcoe we happen to know the Judge has given express direction upon the point. There is an obvious distinction as to fees, and while it would lead to confusion and create a difficulty in auditing, to have a shifting grade in respect to fees belonging to the Fee Fund, it may be a matter of justice, that the defendant should not be called upon to pay the costs of the higher grade, if the plaintiff has improperly entered a claim for an amount exceeding that which he is entitled to recover: but this last is entirely a question for the Judge, and not for the Clerk. At the hearing the Judge may apportion the costs as he thinks fit, (D. C. Act, sec. 83) but this will in no wise affect the collections for the Fee Fund. To explain: A plaintiff enters a claim for £25; upon the trial it appears plainly that he never had a claim beyond £2, that in fact the demand as to £25, was an attempt to defraud. In such case the Judge would give the plaintiff judgment for £2 with costs, (if given at all) to be taxed according to the lowest grade, namely, as for a claim not exceeding £2. The effect would be this: The plaintiff having entered and represented his claim as good for £25 would pay fees accordingly, about 12s. 6d., (for Fee Fund) but would be entitled to only 1s. 7d. from the defendant, and would lose the difference.

By the 14th section of the D. C. Act and the 3rd section of D. C. Ex. Act, fees are required to be paid by the plaintiff or party on whose behalf such proceeding is to be had in the first instance on or before such proceeding. And so all fees are paid, or must be supposed to be paid before final judgment is pronounced by the Judge; now up to the moment the Judge has given his decision, the Clerk's only guide, in grading the suit, is the plaintiff's claim, and we are clearly of opinion that the amount of claim at entry must, at all events to and including the final judgment, govern the Clerk in making collections for the Fee Fund.

BAILIFFS.—Our intelligent correspondent from *Burford* draws our attention to Bailiffs' Fees. He speaks of Clerks having little expenditure as compared to Bailiffs, who have constantly to put their hands in their pockets to meet some disbursement or another. We give a portion of the letter in the words of the writer:—

I know that if the Act does not compensate them sufficiently they will and do look for some means not strictly legal to meet the deficiency; the same remark applies to the Division Court Clerks, who, in their imagination, think they are far from being as well paid as the Bailiff, get up a tariff of fees purely of their own invention, and charge items which I cannot find in the tariff, and even go so far as to tax parties (defendants) the whole amount of fees, where the case has been settled before the Court sat, even a day or two after the service of the summons, as if *though the case had been adjudicated before the Judge.* Now, I imagine that such things ought not so to be, and some plan ought to be devised to compensate both parties sufficiently, in a legal manner, without resorting to such disreputable practices. I would propose that the Bailiffs in each County meet at their County Town, and discuss the matter among themselves, and appoint a Committee or delegates to draw up an improved Tariff, with a petition to Parliament to grant the same.

I think that all sums over £5 should be a personal service, with a fee of 1s. for such service, and 6d. per mile travelling fees, and all actual disbursements of tolls; and that where the Bailiff cannot make the money on an Execution, he be allowed the mileage, as in very many cases parties, when brought up with judgment summons, have been found to have put their property out of their hands, to gain time or save the property from the process in the hands of such officer. It is a great hardship for the officers of Division Courts to travel so many miles and not receive any compensation.

It is needless for us to say, that illegal charges render the party guilty liable to severe penalties, and we hope the writer has been misinformed in the particulars to which he refers. As respects the remuneration to Bailiffs, we are prepared to admit it is insufficient, and we believe that a proper representation would secure redress. Union is all important in matters of this kind, and we venture to predict that any partial movement on the part of Bailiffs will be of no avail. With so numerous a body scattered all over the country, there are of course serious obstacles to combined action, but they are by no means insurmountable. It only requires that the matter should be taken in hand by a few intelligent and energetic officers in order to put the proceeding in train

The proposal of a meeting in each County is a good one, and we would suggest that the proceedings of each County should be forwarded to a central Committee, with instructions to prepare upon it proper memorials, to be afterwards circulated in

each County for signature, and when completed to be forwarded to the Committee with a view to submission to the legislature. This will of course be attended with some expenses, but a very trifling sum from each D. C. Bailiff in the County (and all are interested) would be sufficient. Our columns will be open to any Communications of reasonable length and to the point, and when we see what case Bailiffs make out for themselves, will have pleasure in advocating their just claims.

We are asked by a Bailiff, "Should not the Bailiff be allowed one mile on every summons if *but a short distance* from the office?" We think not according to the present tariff: another question the same party puts was answered in a former number.

SUITORS.

Goods bargained and sold (*continued from page 22.*)

Signature by Agent.—A sale by auction is within the Statute, and the auctioneer is the agent both for the seller and the buyer.

An auctioneer ought to have a Book in which the particulars of every sale may be entered: it may be prepared beforehand, with a proper heading showing whose property is to be sold, the conditions of sale, &c., and with a column describing each article or lot to be sold, and two blank columns, one for the name of the purchasers and another for the price at which each lot is bid off: and when the auctioneer writes down the buyer's name in this book, together with the price bid, it is a sufficient memorandum within the Statute. But when the conditions of sale are not in the Book or referred to, it will not be a sufficient compliance with the Statute.

With regard to signature by agent, it is settled that the agent or person authorised by the party to sign need not be authorised in writing.

A subsequent recognition of the authority of the agent by the principal is sufficient; therefore if A, without authority, makes a contract in writing for the purchase of goods by B, and subsequently ratifies the contract, such ratification renders the act of A. valid as an agent within the Statute of Frauds.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

Evidence, (*continued.*)—In all examinations the opposite party has the right to cross-examine the witness with a view to elicit, if he can, evidence in his own favour; and the party who first calls the witness has a right to re-examine him.

If the witnesses on behalf of the complainant do not make out a clear case, the Magistrates should deliberate, and if they are of opinion that no case has been established, should dismiss the complaint without calling on the defendant for any proof. If they are of opinion that a *primâ facie* case has been established, they will proceed to hear the defendant's defence: the defendant, in the first place, may address the Magistrates personally or by his counsel, and then call his witnesses. After the evidence of the witnesses for the defence has been gone through with, the complainant may call witnesses to contradict the witnesses examined by the defendant. When the case on both sides is closed, the Justices may proceed to adjudicate upon it: if after considering the evidence on both sides they are in doubt, but have reason to believe that more conclusive evidence can be adduced, and think that the ends of justice require it, they may adjourn the case and summon additional witnesses.

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

(*For the Law Journal.*—BY V.)

CONTINUED FROM PAGE 24.

In addition to the ordinary personal property the growing crops and fixtures belonging to defendant may be seized and sold.

By the 89th section of the Division Court Act, an execution from the Division Court has a wider range than that of one from the Superior Courts, for a Bailiff executing the process of execution may by virtue thereof seize and take any *money or bank notes*, any *cheques*, *bills of exchange*, *promissory notes*, *bonds*, *specialities* or *securities for money*, belonging to the person against whom such execution shall have issued: and the following section (90) enacts that the Bailiff shall hold any cheques, bills of exchange, &c., &c., so seized and taken as security or securities for the amount directed to be levied for the benefit of the plaintiff, and the plaintiff may sue in the defendant's name, or in the name of any person in whose name the defendant might have sued for the recovery of the sum or sums secured or made payable thereby, when the time of payment thereof shall have arrived.

The question arises, what would the Bailiff be entitled to seize and take under this enactment? There are decisions on a similar enactment in England which throws some light on the subject.(1)

---

(1) See *Arch. Prac.—title, Execution by Fi. Fa.*

No deeds, writings, &c., unless they be securities for the payment of money, are within the meaning of the clause. For instance, a title Deed, or a letter or a guarantee for some collateral act, or any other deed or writing which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an unconditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit are within the words "securities for money," and may be taken.

The word "money" used in the above enactment means specific gold and silver coin or bank notes, and *not* debts due to the defendant, nor money in the hands of a third person and held by such third party for the defendant, and this would probably extend to money in the hands of a Clerk of the Court. A question may arise whether money, &c. in the actual possession of the defendants, in his pockets, or the like, can be taken: apparently it cannot—at least, if the taking involve an act of trespass.(2)

It would seem that "Stock Notes" and "Labor Note," if the amount in money be mentioned therein, are within the enactment, and may be seized. As a general rule, it will be found more convenient not to seize notes, &c., where there is other property sufficient to satisfy the amount of the execution; and whenever securities for money are seized, it will be advisable for the Bailiff to hand them over to the Clerk with as little delay as possible, for in case of losing the documents he would be liable to the plaintiff for any loss incurred thereby.

Should any nice question arise as to Bailiff's right to seize a particular chose in action, he may reasonably ask an indemnity from the plaintiff before proceeding.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

FETTERLY v. THE MUNICIPALITY OF RUSSELL AND CAMBRIDGE.

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

(Trinity Term, 20 Vic.)

Work done for municipality—Necessity for contract under seal—Separation of townships—By-laws and resolutions.

The plaintiff sued for work done upon a road in the Township of Russell. Clarence, Cumberland, Cambridge and Russell had been united: Cumberland was separated from the union in 1850, and Clarence in 1853.

In January 1851, the Municipality (then consisting of Clarence, Russell and Cambridge) passed a by-law, enacting that their treasurer should receive from the county treasurer all monies received by him as tilled lands assessment money due those townships: that the councillor or councillors for each township should decide on the localities in which such monies should be expended therein respectively, and should expend the same, making proper returns to the treasurer; and that on completion of such jobs so given out, the road surveyor should be associated with the councillor for examining the same, and if approved of, the parties performing the work should be entitled to payment.

In June 1851, a resolution of the same municipality was passed, that the road surveyor should be associated with J. S., one of the councillors for Russell, to receive tenders and approve of contracts for opening the road from the boundary line of Cambridge and Russell to Louck's mill in Russell.

In January 1854, another by-law was passed by the municipality (which then included only Cambridge and Russell) authorizing the treasurer to accept all orders drawn by the late municipality upon the late treasurer (that is, the treasurer of Clarence, Russell and Cambridge.) The plaintiff's tender was accepted in pursuance of the resolution of June 1851, and the work was performed examined and approved of by the surveyor, and Stewart, the councillor named in that resolution; and under the by-law of January 1851, Stewart gave an order for the sum agreed upon in favour of the plaintiff on the treasurer of Clarence, Russell and Cambridge.

Held;—1st. That under the by-law of 1854, the defendants (the municipality of Russell and Cambridge) had adopted the order on the treasurer of the former union, and therefore no difficulty was caused by the fact that the municipality sued was not that contracted with.

2nd. That a contract under seal was unnecessary.

3rd. That it was no objection that H., the other councillor for Russell, had not acted with Stewart; and if it were, his dissent was not sufficiently shown.

(14 Q. B. R., 433.)

DEBT on simple contract, on common counts, for work and labour and materials, and on an account stated.

Pleas—Never indebted, payment, and set-off.

The plaintiff sued for work done by him for the defendants, in making a road from the boundary line of the township of Cambridge to Louck's, in the township of Russell, between the 1st of August and the 4th of November, 1851.

At the trial, at Cornwall, before *Draper, C. J.*, the facts appeared as follow:

The townships of Clarence, Cumberland, Cambridge and Russell, had been at one time united, and Cumberland was separated from them by a by-law of the United Counties of Prescott and Russell in December 1850. In 1853 Clarence was taken from the union by a by-law, leaving Russell and Cambridge to form one municipality—the junior.

On the 10th of June 1851, while Clarence, Russell and Cambridge were still united, a resolution of the municipal council was passed, reciting that several of the said townships, and among them the township of Cambridge, had expended large sums of money in opening and making passable the road through the several townships, so as to confer upon the inhabitants the benefit of a leading post communication through the interior of the county to the city of Montreal, and that there yet remained, as an impediment to the completion of such communication, a small portion of the road to be opened from the boundary line of Cambridge and Russell to Louck's mill in the township of Russell; and it was thereby resolved (on the motion of John Stewart, seconded by David Harrison) that the road surveyor be associated with Mr. John Stewart for the receiving of tenders and approving of contracts on said road, and that so soon as possible they should proceed to lay out said road in sections of half a mile each, and advertise for tenders for the same, so as to complete the line of post communication from Russell to the city of Montreal.

On the 21st of January preceding (1851) a by-law had been passed by the Municipal Council of the united townships of Clarence, Russell and Cambridge, reciting that it was necessary that a system should be adopted for the due expenditure of the wild-land assessment money, and enacting that the treasurer of the municipality should demand and receive from the county treasurer all sums paid into his hands as *tilled* land assessment money due the townships composing this municipality, and should keep a separate account thereof; that the councillor or councillors for each township of the municipality should decide on the localities in which the said monies should be expended from time to time in the several townships, and should cause notices to be put up in the respective townships, in three of the most public places, stating

(2) See note ante.

the work to be performed, and appointing a day and place where tenders would be received for the performance of the work required: that the several councillors be authorized to draw from time to time from the township treasurer all road monies belonging to the townships which they severally represented, and to expend the same, and render to the Council returns of such outlays, with sufficient vouchers, &c.: that the wild land assessment money belonging to each township composing the municipality should be expended within that township; and that on completion of the several jobs that might be *given* out, the township road surveyor in each of the townships composing the municipality might be associated with the councillor or councillors thereof for examining the same, and (if approved of) such jobs should entitle the parties performing the work to payment.

On the 16th of January 1851, a by-law was passed by the Municipal Council of the united townships of Russell and Cambridge, by which it was enacted that the collector of taxes for these townships for 1853 should pay over all taxes collected by him to the treasurer of the municipality, and "they thereby *authorized their treasurer to accept all orders drawn by the late municipality upon the late treasurer, Alexander McCaul, Esq.*, (who had been treasurer of the former union of Clarence, Russell and Cambridge.)

On the 27th of August, 1851, the plaintiff's tender for the road from the boundary line of Cambridge to Louck's, in Russell, in pursuance of the resolution of the 10th of June, 1851, having been accepted, he entered into a bond reciting that resolution, and binding himself to open the whole line of road according to a specification contained in the bond at 1s. 6d. a rod, the work to be done by the 1st of December 1851.

Mr. Loucks, who was surveyor of highways for Clarence, Russell and Cambridge in 1851, was examined on the trial, and swore that by desire of Mr. Stewart, the councillor named in the resolution of the 10th of June, he surveyed the road, laid it out in sections, and advertised for tenders, and with Stewart's concurrence accepted the plaintiff's tender and took his bond to perform the work: that the plaintiff finished the work according to the contract, and that he and Mr. Stewart examined and approved of it; and under the by-law of the 21st of January, 1851, an order was given by Mr. Stewart on the 4th of Nov. 1851, in favour of the plaintiff, for £147 4s, 6d. for the work, describing it as the line of road between Louck's mill and the boundary line of Cambridge. This order was produced on the trial. It was signed by Stewart, as councillor, and was directed to Alexander McCaul, Esq., treasurer for the Municipality of the united townships of Clarence, Russell and Cambridge.

The treasurer received his order and acknowledged its receipts, giving no reason for not at once paying it, except want of funds.

Harrison and Stewart were councillors for Russell, within which township the work was done.

The Reeve of the three united townships (for 1851) when the resolution was passed, stated on the trial that he knew the plaintiff had performed the work.

It was objected, on the part of the defendant that the plaintiff could not recover for want of a contract by defendants under their corporate seal.

Secondly, That the two councillors ought to have joined in giving out the contract, whereas Stewart alone had acted—not Harrison. Both objections were overruled.

Harrison was examined as a witness, and swore that he had not been consulted about giving out the work or accepting it, or giving the order produced: he also declared that he thought the work was not worth more than £100.

The learned Chief Justice considered that defendants were liable, for that under the by-law of January 1851, they had virtually adopted the order on the treasurer as a debt due by them. The jury found for the plaintiff £170 12s. 4d.

Galt obtained a rule *Nisi* for a new trial on the law and evidence, and for misdirection. *Richards* showed cause.

Fellowes supported the rule.

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

We are of opinion that this verdict should be allowed to stand. As regards the justice of the case, there can be no question that under the circumstances proved the inhabitants of the township of Russell ought not to enjoy the benefit of the plaintiff's labor on a leading highway through their township, and not pay its value. Any technical objections peculiar to the case must of course be considered; but as regards the main question of liability, this case much resembles that of Bartlett v. The Municipality of Amherstburg, (14 U.C.Q.B.R. 152) which was lately before us.

As to the general question, whether a corporation can be held liable in debt on simple contract to pay for goods or labor furnished at their request and accepted by them, we must consider that settled by the late judgment given in the Court of Appeal in this Province, when there is nothing to create an exception according to the principles laid down in that case.

Now here it cannot be denied that to make and improve the highways within the respective townships is a matter clearly within the scope of the duties and authority of the township municipalities. It is indeed in many townships their chief and most important business. Now we have the facts proved, that the municipality, which included the townships of Russell and Cambridge, certainly required this road to be made, for they advertised for tenders, and received and approved of an offer made by the plaintiff to do the work at what would seem to be a moderate price. The by-law of the 10th of June 1851, committed to Mr. Stewart, one of the Council, the duty, in conjunction with the road surveyor, of calling for tenders and contracts for the work, and it was in that manner that the plaintiff was employed. The work was done, and for all that appears according to the contract, and to the satisfaction of Mr. Stewart and the surveyor. A difficulty has been raised because Mr. Harrison, the other councillor for Russell, seems not to have acted in the matter; but in the first place it was under a previous by-law of January 1851, that the *councillors* of the township were required to concur with the surveyor in examining and approving of the work. The later by-law of June 1851, respecting this particular road, committed the duty of contracting for it to Mr. Stewart and the surveyor; and in the next place, even if it had been strictly necessary that Harrison as well as Stewart should have acted in the matter, all that we see here is that Harrison tells us he did not concur with Stewart. Being wholly illiterate, as it is stated, it is not to be expected that he would take the leading part in the business. He did intimate a desire that the plaintiff should not go on with the work, but only, as it appears, for the reason that there were not funds to pay for it. The plaintiff nevertheless did go on and finish the road, certainly with the sanction of Stewart and the road surveyor. His doing so must have been a matter well known to all, and as the municipality has been content to see him make the road without taking any steps to prevent it or to check him, the natural presumption is that Harrison either waived his objection, or if he insisted upon it as a member of the Council, that he was overruled by his colleagues; and at all events the road has been completed, and in justice should be paid for.

Mr. Harrison on the trial expressed an opinion that £100 would be a fair compensation for the work. If the road was made according to the plaintiff's tender, there would be no justice in refusing to pay the price which had been named by him. At all events his evidence went to the jury, and if they had considered the work worthless, and had given less, we should not have thought that their verdict could be interfered with on that ground, for where the plaintiff sues a corporation as on an agreement to pay a particular price, he must be prepared to show their contract under seal to pay that price, because the law could not imply any special agreement of

that kind. When the plaintiff has not such a sealed contract to produce, he must be content to take what a jury may judge to be the worth of his work, and we take it for granted the jury in this case thought the work done was worth the sum asked for it, or they would not have given it. It is only on a *quantum meruit* that the plaintiff sues.

As to any supposed difficulty arising from the circumstance that the work was contracted for and done while Clarence was united to Russell and Cambridge, and therefore that the municipality sued is not the same municipality that was liable, we agree with the learned Chief Justice that the by-law of the 16th of January, 1854, and the order given on the treasurer, and accepted under it, fairly disposes of that objection.

Rule discharged.

ALEXANDER JUDD, TREASURER OF THE TOWN OF BELLEVILLE, v. ALEXANDER O. PETRIE.

(Hilary Term, 19 Vic.)

Demurrer—Special averment.

In debt on bond to plaintiff, as treasurer, by defendant as collector of taxes, conditioned that if defendant should faithfully collect and pay over to the proper officer the taxes imposed for the then current year, should well and faithfully comply with all the other duties of his office as specially defined in the by-laws, &c.—*Held*, That the declaration should have alleged that the Town Council had imposed taxes, amount that should have been collected by defendant; the by-laws defining defendant's duty, &c.

(6 C. P. R. 48.)

Writ issued 18th Sept. 1855; Declaration 19th Oct. 1855.

DEBT on bond, dated 19th Nov., 1853, whereby defendant acknowledged himself to be held and firmly bound to plaintiff and his successors in office in the penal sum of £2,700, to be paid, subject to a certain condition thereunder written, whereby, after reciting to the effect following—that is to say, that if defendant should faithfully collect and pay over to the proper officer the taxes imposed by the Town Council of the town of Belleville for the then current year, and should also well and faithfully observe and comply with all others the duties of his said office of collector, as specially defined in the by-laws in that behalf, then &c., otherwise &c.

Breach—that defendant did not nor would well and faithfully collect and pay over to the proper officer the taxes imposed by the Town Council of the town of Belleville for the then current year, and did not well and faithfully observe and comply with all other the duties of his said office of collector as are specially defined in the by-laws in that behalf; contrary &c., whereby, &c.

Demurrer to declaration, on the grounds that the treasurer had no right to take a bond from the collector; that the Corporation should have done so. Second—That it is not stated that the Town Council had imposed or did impose taxes.—Third—That the duty of defendant is stated by way of recital, and that no time is stated, and no amount stated that defendant should have collected. Fourth—That no by-laws are set out; that the breach of duty charged is double.

The demurrer was argued during this term.

Wallbridge, for the demurrer, contended that the word treasurer is mere description, and looking at the declaration in that light, an individual would have no right to take a bond to himself from the collector of taxes—12 Vic. cap. 81; 13 & 14 Vic. cap. 67, sec. 60: That the declaration should have alleged that the taxes were imposed—Collins v. Gibbs, 2 Bur., 899; Peeters v. Opie, 2 Saund. 353, note *b*: That the declaration should have set out the by-laws which it says the defendant has not observed—The Feltmakers Co. v. Davis, 1 B. & P. 98; Andrews v. Hardy, 12 East. 116: That the breach is double, two distinct breaches being mixed up together—Warn v. Bickford, 7 Price, 550.

O'Hare contra—That the question is, whether the bond is void, in having been given to the treasurer instead of the Corporation: That if the bond is to plaintiff individually, then it is a bond taken in a private capacity, and can be collected—Baby v. Drew, 5 U.C. Q.B. R. 557; Brown v. Styles, 2 U.C. C. P. R. 316: That defendant is stopped by signing this bond from saying it is void—Webster v. Macklem, 4 U.C. C. P. R. 266: That the breach is not double—Denison v. Donelly, 2 U. C. Q. B. R. 395; Small v. Stanton, 3 Ib. 148.

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

We are of opinion that the defendant is entitled to judgment on the special objections assigned in the demurrer to the breaches laid in the declaration. The bond is not before us, and it would be unsafe to express an opinion on the plaintiff's right to recover substantial damages, without seeing the bond and condition. Under any circumstances, it would be necessary for the plaintiff to amend his declaration and to supply by averment those facts without which he could not recover more than nominal damages. The bond is clearly within the statute of William. The judgment for the penalty would only stand as security for such damages as the plaintiff could obtain upon breaches to be assigned under that statute; and if the plaintiff failed to aver and prove such facts as would entitle him to recover from the defendant, what is due for the taxes to be collected in the town of Belleville, it would be to very little purpose that he should further prosecute this action.

We think the plaintiff should have leave to amend his declaration on payment of costs; otherwise the defendant must have judgment on this demurrer.

Per Cur.—Judgment accordingly.

STARK v. MONTAGUE ET AL.

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

(Trinity Term, 20 Vic.)

School rate—Right of trustees to reimbursement of costs, &c.—Unauthorized rate.

School trustees cannot impose a rate to reimburse themselves for costs incurred in defending unsuccessfully a suit brought against them for levying an unauthorized rate, or for travelling expenses incurred in order to consult with the Superintendent.

No rate can legally be imposed for the salary of an unqualified teacher.

(14 Q. B. R., 473.)

APPEAL from the Fifth Division Court of Lincoln and Welland.

This was an action of tort, in which the plaintiff claimed damages for the seizure and sale of certain goods under a distress for school rate imposed by the trustees of school section 7 in the township of Crowland. It appeared that the trustees had, in 1854 and 1855, employed an unlicensed teacher, for whose salary they had imposed a rate, which one of the ratepayers had resisted, and recovered judgment against them in the Division Court for the seizure of his goods to satisfy it. The chief superintendent, when applied to, refused to appeal, and the costs were recovered from the trustees. To reimburse themselves for these costs, together with the expenses of certain trips to Toronto, undertaken in order to consult with the chief superintendent, and to procure the sum of £2 10s. paid for salary to a female teacher afterwards employed and regularly licensed, the trustees imposed a rate upon the school section. The respondent resisted payment of all except his proportion of the sum due for the teacher's salary, which the collector refused to accept, and upon the seizure and sale for the whole amount this action was brought.

The learned judge below decided in favour of the plaintiff, from which the defendants appealed.

Duggan for the appeal. *W. Eccles*, contra.

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

We see no good ground for appeal.

It seems to be clear on the Common School Act, 13 & 14 Vic., cap. 48, that no rate can legally be imposed for paying the salary of an unqualified teacher. Such a teacher cannot legally be allowed to receive any portion of the school fund, and the 15th section of the statute provides that no teacher

shall be deemed a qualified teacher who shall not at the time of his engagement, and of his applying for payment, hold a certificate of qualification.

It seems that in this instance the trustees chose to persist in retaining a teacher who held no certificate; that a ratepayer in consequence disputed the legality of the assessment imposed for paying such teacher, and was successful in his opposition, for the Division Court sustained an action brought by him for seizing his property in order to pay the rate assessed upon him. This judgment in favour of the ratepayer was acquiesced in; yet nevertheless the trustees took upon themselves to raise a rate in order to reimburse the expense they had been put to in their ineffectual attempt to sustain the legality of their assessment, also to pay their expenses incurred in a journey which they chose to make to Toronto for the purpose of conferring with the superintendent upon the subject.

It need hardly be said that if the amount of costs and expenses so incurred could be thus levied upon the ratepayers, there would be no object in withstanding the illegal proceeding, and it would be better to submit to what has been illegally done than to oppose it, even with the certainty of success.

We take it to be an acknowledged principle in regard to public officers, that when their conduct being complained of has been sustained as legal, they are admitted to have a just claim to be reimbursed in any charges they have been put to in upholding their authority by proving the legality of their proceeding; but where they violate the law, they are generally left to bear the consequences, and are not admitted to have a claim to be indemnified.

The executive government of a country may have it in its power to indemnify its officers even in such a case, and may in some instances have found it just to do so, when the officer has acted under a sense of duty, in a case that admitted of doubt; but it would require the express provisions of an act of parliament, to authorize money to be levied upon the subject for the purpose of indemnifying a public officer or agent who has got into difficulty by violating the provisions of a statute.

It appears that in this case part of the rate was to cover an expense legally incurred for the salary of a female teacher. But the plaintiff, Stark, did not object to that, and offered to pay it. The officer however would have the whole rate or none, and on that account only the seizure was made. If there might be room for contending in a superior court that the proper remedy for the wrong was not trespass, where there was a legal cause for seizure, but an action on the case for the excess, yet that could be no objection to the judgment of the Division Court, which is not fettered by such technicalities, but can adjudge upon the substantial question, whether legal wrong has been done and an injury sustained to be compensated in damages.

Appeal dismissed.

Cleghorn v. Carroll (Sheriff.)

(*Reported by C. Robinson, Esq., Barrister-at-Law.*)

(Trinity Term, 20 Vic.)

Practice—Change of venue—Delay in serving order.

On the 28th of September an order was made to change the venue from Brant to Oxford. No rule was taken out until the 9th of October, and it was not served untill the 13th. The assizes for Brant were then sitting, and the case was entered for trial there. The plaintiff continued it on the docket, notwithstanding the order, but it was not tried, owing only to want of time. It was then entered again at Brant at the next assizes, and a verdict taken, the defendant not appearing.

Held, that the plaintiff should not have gone to trial at Brant after service of the order; and the verdict was set aside, but without costs, as the plaintiff had been guilty of laches in not making the service sooner.

(14 Q. B. R., 480)

Case for false return to a *Fi. Fa.* in a case of *Cleghorn v. Hopes.*

Eccles moved for a new trial on the law and evidence, or to set aside the verdict for irregularity with costs, the cause being tried in Brant after the venue had been changed to the county of Oxford. *M. C. Cameron* showed cause, citing Hornby v. Hornby, 3 U.C.R., 274; McNair v Sheldon, Tay. Rep. 598; Wilson v. Hunt, 1 Ch. Rep. 617; Charge v. Farhall, 4 B. & C., 865; Kenney v. Hutchinson, 6 M. & W., 131; Normanby v. Jones, 3 D. & L., 113; Gordon v. Cleghorn, 7 U.C.R. 171.

Carroll supported the rule.

The facts of the case are stated in the judgment.

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

There seems to be no grounds for moving on the merits as the facts were made to appear on the trial; but the case was undefended on account of the irregularity on which defendant has moved.

On the 28th of Sept. 1855, an order was made in Chambers, by *Robinson, C.J.*, to change the *venue;* defendant to take any notice of trial for the Oxford assizes, or the notice of trial given for Brantford (if one had been given) to stand good in Oxford; the record to be entered at any time during the assizes, and the defendant to admit the second and third issues to be in favour of the plaintiff without proof.

For some reason unexplained a rule of court to change the venue was not taken out on this order till the 9th of October. It was served on the 13th. The assizes had then been sitting four days, and so the plaintiff seemed to feel himself at liberty on that account, or for some other reason not stated, to disregard the rule, and he continued his cause, which had been entered at Brantford, upon the docket till the assizes terminated. The case was not tried only because there was not time to finish the business of the court.

Then the plaintiff proceeded at the next assizes in April, 1855, by giving notice of trial for Brantford again, as if no order for changing the *venue* had been served upon him, and the cause was then tried, the defendant not appearing, and making no defence.

The plaintiff now contends that he was entitled to treat the order to change the *venue* as waived, because no rule of court was taken out upon it till the 9th of October, and he seems to rely also on the fact that the defendant made no motion against his proceeding, and served him with no notice of his intention to move for the irregularity, but allowed him to go on.

When a party serves another with a notice of trial or other proceeding that is irregular, and the party served takes no notice of the irregularity, but allows the other party to proceed on the supposition that all is right, then in some cases the party by thus lying by in silence loses the benefit of the irregularity.

The difference in this case is, that it is no slip in the plaintiff's proceedings, of which he might have been unconscious, that the defendant is now excepting to; but his objection is, that although the plaintiff has been served with a rule of the court directing that the trial should be had in Oxford, he proceeds in disregard of the rule served upon him as if nothing of the kind had taken place.

Cases have been cited as having been decided at an early period in this court, which, when looked into, are found not to be in point. The oldest of these cases, McNair v. Sheldon, (Tay. Rep. 598.) is not quite accurately stated in the report of the case of Hornby v. Hornby (3 U.C.R. 274.) The objection was that no rule of court had been taken out and served upon the judge's order. In consequence of that the plaintiff had not the venue changed upon the record, and he was not in fault in not having done so, for the practice had not been conformed to by the other side. In Hornby v. Hornby the same objection existed; there was no service of a rule to change the venue upon the plaintiff's attorney, but only a judge's order for the change served upon his agent, the plaintiff's attorney having himself no knowledge that the venue had been ordered to be changed.

The plaintiff's counsel referred to several cases affirming the principle that when a judge's order has been obtained for

any purpose, it will not have the effect of staying the plaintiff's proceedings unless a rule is without delay taken out upon it and served. No doubt that is so; but in those cases the plaintiff will be found to have proceeded before the rule was served upon him. That was not the case here. The plaintiff had entered his cause in the original county before he knew of the change of venue, and of course there was nothing wrong in that, but he knew of the change of *venue* afterwards, and in time to prevent the trial in the wrong county. The application was made on the eve of the assizes, and the order was in consequence made upon terms calculated to prevent a failure of trial from that circumstance. Though the plaintiff's attorney, if he had heard of the order, might have been excused for trying the cause before the rule was served upon him, on the ground that he had supposed the order was waived, yet we can hardly admit that he was entitled to treat the change of venue as waived after the rule had been served upon him.

Still, undoubtedly the defendant seems to have been lax in not serving his rule sooner, and we think it will be proper on that account not to give costs, but simply to set aside the verdict.

Rule absolute.

Hutchison v. Sideways.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

(Trinity Term. 20 Vic.)

Application for reference to master, under C. L. P. Act, sec. 143.

Where in an action on the common counts for goods sold, interlocutory judgment having been signed, the plaintiff desires a reference to the master under sec. 143 of the Common Law Procedure Act, it must be shown that no dispute is likely to arise either as to quality or price.

(14 Q. B. R., 472.)

The plaintiff declared in assumpsit, on the common counts, for goods sold and delivered, goods bargained and sold, money paid and advanced, money lent, and on an account stated, claiming £100. Interlocutory judgment had been signed. It was not shown that any certain quantities of goods were claimed for, which were admitted by the defendant to have been delivered to him at prices agreed upon; but the question of amount, for all that appeared, was as much open as in any other case of judgment by default on the common counts.

Burns, for the plaintiff, had applied in the Practice Court for an order, under sec. 143 of Common Law Procedure Act, to have the damages assessed by the clerk of the court, and was referred by the learned judge to the court in banc.

The court desired that it should at least be made to appear to them by affidavit that the plaintiff was claiming for something so specific as to quantity and price that the only question would be one of mere computation. It was not mentioned again, and no such affidavit was furnished.

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

It is upon the 143rd clause that the plaintiff founds his application. There are but six items in the account which the plaintiff shows as the account on which he is suing; and there being no set-off pleaded, there can be no account on the other side, so that this need not be treated as a case in which damages cannot be assessed in the ordinary way. We do not therefore direct that it shall be referred to the master under the 143rd clause to ascertain the amount. If we were clear that the 143rd clause applies *primâ facie* to such a case, we should call on the defendant to say whether he had any cause to show against the summary disposal of the question of damages by reference to the master; for if it should appear to us that the same questions are likely to arise in this case as in others in which the plaintiff has judgment by default in an action on the common counts, then we think we should pause before we apply the statute in such a manner as would put the master in the place of a jury, to determine all questions that may arise upon conflicting evidence as to the quantity of goods delivered, the quality, and the value in reference to quality. In the words of the clause, "the amount of damages is substantially a matter of calculation," when the things sold, and the quality and value in reference to quality, are agreed upon, or have been ascertained, but until that is done the data for the calculation are wanting, and we think it ought to be shown that no contest is liable to arise upon those points before we send the case to the master, for otherwise we not only deprive the defendant of the option to have the case tried by a jury, but also of the privilege of referring it to arbitrators in whose selection he can have a voice.

Rule refused.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by T. Moore Benson, Esquire.)

Gallena v. Cotton.

Attendance of witnesses before arbitrator.

An order compelling attendance of witnesses before arbitrator, under 30th sec. of 7 Wm. IV, cap. 3, will be granted on an *ex parte* application: upon affidavit that the cause has been duly referred—that arbitrator has appointed a certain day for proceeding—and that certain parties (giving their respective places of residence) are necessary and material witnesses for party applying.

(Nov. 17, 1856.)

McLean, J., granted an order, upon the *ex parte* application of plaintiff, commanding the attendance of witnesses before the arbitrator to whom the cause was referred, under the 30th section of 7 Wm. IV, cap. 3: upon the affidavit of plaintiff, stating that this cause was referred to arbitration by order of *Nisi Prius*, at the last Assizes for Leeds and Grenville; that *W. B. McLean*, Judge of the County Court, is therein named as arbitrator, and has fixed certain days by appointment for proceeding with the reference; that certain parties (naming them and setting out their respective places of residence) are necessary and material witnesses for deponent; that said order of *Nisi Prius* directs that the same may be made a Rule of Court.

Cataraqui Cemetery Company v. Burrowes.

Removal of suit from Division Court by Certiorari, 13 & 14 Vic., cap. 53, sec. 85.

A suit brought by an Incorporated Company will be removed from a Division Court to one of the Superior Courts, if it be shown that difficult questions of law will arise on the trial as to the powers conferred by the Act of Incorporation.

(Nov. 20, 1856.)

Draper applied to McLean, J., for an order for a writ of *Certiorari* to remove this suit from the Division Court in which it was brought, to the Court of Common Pleas, under the 85th section of 13 & 14 Vic., cap. 53—and cited *Robertson v. Wormack*, 15 Jur. 579; *Reg. v. Hodges*, 9 Jur. 665.

The action was brought for £25, being one share of stock subscribed in the above Company; and the grounds of this application were, that the question would arise on the trial whether the Act of Incorporation of the Company contains any express or implied authority or power to the Company to bring any action at law for recovering the amount of calls or shares of stock, and whether any such calls were regularly or sufficiently made, and, if not, whether any action will lie to recover the amount of a share of such stock with such calls.

Order granted.

REISCHMULLER v. UBERHORST.

Suggestion of plaintiff's death.—Sec. 210 of C. L. P. Act, 1856.

Leave to enter a suggestion of death of plaintiff, and proceed under 210th sec. of C. L. P. Act, 1856, will be granted upon an *ex parte* application; upon affidavit showing the nature and state of the action, and that the party applying is plaintiff's legal representative.

(Nov. 18, 1856.)

McLEAN, J., granted leave, upon an *ex parte* application, to the widow of plaintiff, to enter a suggestion of plaintiff's death, and that she is his legal representative, and proceed under the 210th section of the C. L. P. Act, 1856: upon the affidavit of the widow stating the nature and time of commencement of the action; that a trial has been had, and a verdict given for plaintiff; that subsequently plaintiff died intestate as to his goods, &c., in Canada; that judgment has never been entered; that deponent has taken out Letters of Administration to plaintiff's estate from the proper Court, and that she is now his legal representative; that the verdict has never been satisfied, to deponent's knowledge.

ROSS ET AL v. COOK.

Absconding debtor—Proceedings where action commenced under old practice.

Where a warrant of Attachment had been issued against an absconding debtor under the former practice, and the notice thereby required has been duly given previous to the C. L. P. Act, 1856, a writ of Attachment will be granted under the new Act without new affidavits. And service of the writ on some relative of defendant at his last place of residence, will be allowed good service.

(Nov. 21, 1856.)

A warrant of Attachment had been issued under 2 Wm. IV, cap. 5, and the three months' notice required by 12 Vic., cap. 67, had been given before the C. L. P. Act, 1856, came in force; and *Macdonald* now applied for a writ under the new Act and leave to proceed by serving the writ on a son of defendant who had been at one time his Clerk and afterwards his partner in business, and who now resides at defendant's last place of residence in this country, without any new affidavits.

McLEAN, J.—You may take the writ of Attachment and proceed as you suggest.

BOUCHIER ET AL v. PATTON ET AL.

Interlocutory judgment—Affidavit of merits.

An Interlocutory Judgment will in some cases be set aside upon an affidavit disclosing a good defence upon the merits, though not distinctly swearing "that defendant has a good defence to the action upon the merits."

(Nov. 21, 1856.)

McMichael, for defendants, obtained a summons to set aside the Interlocutory Judgment signed in this cause, and to allow defendants six days after its return to plead therein.

The affidavit on which the summons was obtained stated that the defendants deny altogether the account on which this action is brought, as also their liability to pay the same to plaintiffs, not having had any dealings whatsoever with them in the matters included in said account, nor have they any reason to believe that plaintiffs have any cause of action whatsoever against them or any of them on the said matters; that an application was made to have the venue changed, and that before the return of the summons for that purpose, plaintiffs signed judgment for want of a plea; that defendants verily believe that should such judgment be allowed to stand, great injustice will be done; that defendants verily believe that the work and materials sued for were done and provided by a certain firm of Fensome & Co., and not by plaintiffs, and was furnished for the use of a steamer, the property of the Lake Huron Transit Copartnership, in which defendants only hold a part of the stock; that the firm of Fensome & Co. has been dissolved, and that Lyall, one of the plaintiffs, is the only person authorized to collect its debts.

Burns showed cause, and contended that the judgment could only be set aside upon an affidavit of merits, and that the affidavit of defendants was insufficient. He also put in an affidavit in answer, showing plaintiffs are the only persons composing the firm of Fensome & Co.

McMichael in reply.

McLEAN, J.—The affidavit sufficiently discloses a defence upon the merits, and I will set the judgment aside upon payment of costs.

Summons absolute accordingly.

BUCHANAN v. FERRIS.

Absconding debtor—Action commenced under old practice.

Upon its being shown that a warrant of Attachment was issued and notice duly given under the old practice, a writ of Attachment according to the C. L. P. Act, 1856 will be granted, and service thereof on a relative of defendant at or near his last place of residence, will be allowed good service.

(Nov. 22, 1856.)

A warrant of Attachment had been issued against defendant as an absconding debtor, and due notice given, under 2 Wm. IV, cap. 5, as amended by 12 Vic., cap. 67, previous to the C. L. P. Act, 1856, coming into force.

McMichael now applied for instructions how to proceed.

McLEAN, J.—This case is precisely similar to one in which an application was made yesterday, (*Ross et al v. Cook*) and you may take a *fiat* for a writ of Attachment, and proceed as directed in that case—namely, by serving a copy of the writ at the last known place of residence of the defendant in this country, and also on some relative of his residing near his last place of residence.

MAITLAND v. BROWN.

Judgment as in case of non-suit—Enlargement of peremptory undertaking.

An application to discharge a peremptory undertaking to go to trial, and for leave to enter judgment for defendant as in case of a nonsuit, may be met by showing that the absence of necessary and material witnesses whose testimony plaintiff could not procure, prevented his going to trial.

(Dec. 3, 1856.)

In Mich. Term last *Nanton* obtained a Rule that unless the plaintiff should within four days after notice thereof show cause to the contrary, the Rule obtained by the plaintiff in Hilary Term last discharging the Rule *Nisi* for judgment as in case of a nonsuit obtained by defendant in said Hilary Term on the usual peremptory undertaking of the plaintiff, should be discharged, and the said Rule *Nisi* for judgment, as in case of a nonsuit, be made absolute, the plaintiff not having proceeded to trial in pursuance of his said peremptory undertaking, and that judgment, as in case of a nonsuit, should be entered for the defendant. This Rule was enlarged into Chambers by consent.

Carrall now showed cause, and filed an affidavit of plaintiff stating that he had given notice of trial in pursuance of his undertaking, but that in consequence of the absence of two material and necessary witnesses in the United States, he was unable to proceed to trial; that both said witnesses are now

residing in Toronto, and that he will be able to proceed at the ensuing January Assizes; that he made efforts to obtain the presence of said witnesses, but could not succeed; and that if he is compelled to commence a new action, many of the claims for which this action is brought, will be barred by the Statute of Limitations.

Nanton in reply.

Burns, J.—I will enlarge the peremptory undertaking until the next Assizes, upon payment by the plaintiff of the costs of this application.

Macpherson v. Norris.

Practice—Interpleader—Costs of feigned issue.

Where a feigned issue is directed upon an interpleader application and is found against the claimant the execution creditor will, on the production of the Record obtain an order of course for the payment by claimant of all costs incurred in consequence of his claim.

(Nov. 21. 1856.)

An Interpleader summons had been obtained by the Sheriff, and an issue was directed in which the claimant (Macpherson) was made plaintiff, and the execution creditor (Norris) defendant. The issue resulted in favour of the execution creditor and against claimant. The record returned to Court showed that the issue was so found. No further papers or affidavits were put in.

J. Paterson, for execution creditor, now applied for an order for the payment by the claimant of the costs of the original Interpleader application, of the issue, and of the present application.

McLean, J.—You are entitled to the order of course.

Irvine v. Mercer et al.

Practice—Oral examination of judgment debtor—C. L. P. Act. 1856, section 193.

An affidavit on which to apply for the oral examination of a judgment debtor should show that an execution has been issued and acted upon.

(Dec. 8. 1856.)

E. Martin applied *ex parte* for an order for the oral examination of the defendant, upon affidavit "that plaintiffs had recovered a judgment against defendants, and that such judgment was still wholly unsatisfied."

Richards J.—Your affidavit should show that some attempt has been made to make the money by execution. I will not grant an order in the first instance; but if you think your grounds sufficient you may take a summons.

Carter v. Carry et al.

Practice—Oral examination of judgment debtor—C.L.P. Act 1856, sec. 193.

The proceeding for the oral examination of a judgment debtor, should be by by summons and order: an order will not be granted in the first instance upon an *ex parte* application.

(Dec. 9, 1856.)

Plaintiff applied *ex parte* for an order to examine defendants under the 193rd section of the C. L. P. Act, 1856, upon affidavit "that a judgment had been recovered against them, and was still wholly unsatisfied; that execution had been issued and returned 'no goods'; and that defendants reside within the jurisdiction of the Court."

Richards, J.—I will only grant a summons. The parties should have an opportunity to show cause why they should not be examined.

Wilson v. Downing.

Practice—Bail—Effect of final order of Insolvent Court.

A Final Order in Bankruptcy discharging a debtor from his liabilities, is a sufficient release of his bail to the limits upon a judgment recovered previous to the presentment of his petition, and it is not necessary to enter an *exoneratur* on the bail-piece.

(Dec. 9, 1856.)

Defendant was a prisoner on the limits under a *Ca. Sa.*, having given bail to the limits. He applied for relief under the "Insolvent Debtor's Acts," and a final order was made protecting his person from arrest, and discharging him from all debts contracted previous to the date of the presentment of his petition.

H. B. Morphy now applied for leave to enter an *exoneratur* on the bail-piece in this action.

Richards, J.—If the final order of the Judge of the Insolvent Court is a release of the bail, they may plead it on bar of any action brought against them as such. If it is not a release, I ought not to grant the application.

Application refused.

Macpherson et al v. Kerr.

Practice—Attachment of debts—C. L. P. Act, 1856. sec. 191.

An order will be granted *ex parte* to attach debts due by garnishee to judgment debtor, upon affidavit that on an oral examination of the debtor, he swore that garnishee was indebted to him.

(Dec. 10. 1856.)

Plaintiff applied *ex parte* for an order to attach debts, under the 191th section of the C. L. P. Act, 1856. The affidavit of his attorney, on which the application was made, stated that "on the 9th December inst., defendant was orally examined before the Judge of the County Court of Simcoe, in pursuance of an order bearing date 19th November last, and then swore that one Francis Kerr was indebted to him in the sum of £78 6s. 6d. of lawful money of Canada, and that said Francis Kerr resides within the jurisdiction of this Court."

Richards, J., granted the order.

Sinclair v. Barrow.

Practice—Proceeding where plaintiff refuses to enter his judgment.

If plaintiff refuse to enter his judgment in a case where defendant is entitled to set-off his costs against plaintiff's verdict and costs, a Judge in Chambers will limit a time within which plaintiff must enter his judgment, and, in default, allow defendant to enter it for him.

(Dec. 10, 1856.)

This action was brought to recover against defendant damages for the overflowing of plaintiff's land. The cause was tried at the last Spring Assizes for the County of Perth, and a verdict given for plaintiff of one shilling damages. Plaintiff applied to the Judge who tried the cause for a certificate for costs, which the learned Judge refused to grant.

On the 2nd December, defendant obtained a summons calling on plaintiff "to show cause why he should not enter his judgment on the verdict obtained by him in this cause; or why he should not bring into Court the postea, and allow the defendant to enter judgment for his costs, after deducting his (plaintiff's) costs, according to the Statute."

Plaintiff showed cause, and said that the *Nisi Prius* record was in Court, and not in his possession.

Richards, J., granted an order "that the plaintiff do within two weeks from the service hereof, either enter up final judgment upon the verdict in this cause at the office of the Clerk

of the Court at Toronto, or bring the Record of *Nisi Prius* into the office of the said Clerk, if the same is in his possession.

"And if the said plaintiff shall not enter judgment in the said cause before the expiration of the said two weeks, then the defendant shall be at liberty to enter the said judgment for him.

"If the Record at the time for entering judgment by defendant for plaintiff shall be in the custody of the Clerk in Chambers, he shall deliver the same to the defendant on being paid his fees."

Wilson v. Storey.

Practice—Arrest—Amendment of copy of writ—C. L. P. Act, 1856, secs. 37 & 291.

An omission or variance in a copy of a writ of *Ca. Re.* is amendable under the 37th and 291st sections of the C. L. P. Act, 1856.

(Dec. 22, 1856.)

The particulars appear in the judgment.

Hagarty, J.—The defendant has been arrested on a writ of *Ca. Re.* He moves to have the arrest set aside for irregularity on the ground that a true copy of the writ was not served upon him. He files an affidavit to which is attached the alleged copy served. It varies from the original writ (which the plaintiff produces) in one particular: in the *teste* the year "*fifty-six*" is omitted in the copy, so that it appears tested the 6th day of December in the year one thousand eight hundred and——(blank.) The plaintiff contends that, if material, it is now amendable under the 37th section of the C.L.P. Act: "If the plaintiff or his attorney shall omit to insert in or endorse "on any writ *or copy thereof* any of the matters required by "this act to be inserted in or endorsed thereon such writ or "copy thereof, shall not on that account be held void, but it "may be set aside as irregular, or amended upon application "to be made to the Court out of which the same shall issue, "or a Judge, and such amendment may be made upon any "application to set aside the writ, upon such terms as to the "Court or Judge shall seem fit."

Plaintiff also relies on the general powers of amendment contained in section 291.

Before the C. L. P. Act, there are many cases showing that although the original writ may be amended, the copy may not. In *Moore v. Magan*, 16 M. & W., 95, *Baron Platt* ordered the copy of the writ to be amended, and the Court reluctantly set aside his order on the force of the previous decisions. In the last edition of Archbold's Practice, Vol. 1, page 729, are the words, "The Court would not before the C. L. P. Act, 1852, allow an amendment *of the copy*, or allow a fresh copy to be served"; but such amendment would now probably be allowed under the 222nd section of the Act (corresponding to our 291st section already mentioned.)

I find a case of *Knight v. Pocock*, 17 C. B., 177, (since *Archbold*) in which the Court of C. P. expressly decided that under the 20th section of the English C. L. P. Act, (same as our 37th sec. above) "the Court may order an amendment as "well of the copy as of the writ upon an application to set "the same aside—the writ and copy should be amended and "the service stand good." (As to a material variance being amendable, see the language of *Crowder, J.*)

This was a non-bailable case. I cannot see why it should be contended that the words of the Act do not apply to *all* writs and copies; in my opinion they do so apply, and are wisely designed to prevent those frequent failures of justice and those numerous discharges from arrest which the rigid language of previous decisions forced on reluctant Courts and Judges. This salutary liberality of amendment, discreetly exercised, cannot prejudice any defendant; no reasonable protection or advantage is taken from him; and carelessness will be always checked by the penalty of costs of amendment. In *Clutterbuck v. Wiseman*, 2 C. & J. 211, a mistake of the year in the notice to appear was considered by the Court of Exchequer as not calculated to mislead a defendant.

I find it noticed in some of the cases as a reason against amending *the copy*, that it is not in the power of the Court, but is in the possession of the defendant.(a)

Where, as in this case, the copy is filed by the defendant to show the error, I do not see the force of the reason assigned.

I discharge the summons and direct the copy of the writ to be amended by inserting the words "fifty-six" in the *teste*—the costs of the application and amendment to be paid by the plaintiff to the defendant.

Amendment allowed accordingly.

Darling v. Wright.

Practice—Satisfaction Piece—Rule 64 T. T. 1856.

Plaintiff's signature to Satisfaction Piece, as required by Rule 64 T. T. 1856, will be dispensed with where plaintiff resides abroad, and has given a written authority to an attorney to acknowledge satisfaction for him.

(Jan. 30, 1857.)

M. C. Cameron applied *ex parte* for an order dispensing with the signature of plaintiff to the Satisfaction Piece, as required by Rule 64 T. T. 1856.

The amount of the judgment was only £30. Plaintiff resides in Montreal, and had sent *Cameron* a written authority to acknowledge satisfaction in his name.

Robinson, C.J., granted the order.

Corby et al v. Cotton et al.

Practice—8 Vic., cap. 5, sec. 13—Amendment—C. L. P. Act, 1856, sec. 291.

The Court will not allow an amendment, the effect of which will be contrary to the justice of the case. *Semble*, that a bond given by third parties for the assignment of a vessel, but which is not intended to operate as an assignment, need not contain a recital of the certificate of ownership.

(Jan. 31, 1857.)

A. Macdonald, for defendants, moved for leave to amend by adding a plea.

S. Richards, for plaintiff, showed cause.

The particulars appear in the judgment.

Robinson, C. J.—This action is on a bond of defendants, given in order to secure plaintiffs in receiving a valid title to a steamer owned by Donald Bethune & Co., and which plaintiffs were willing to purchase, and to pay £6000 for it. Mr. Bethune being in England, it was alleged in the recitals of the bond given by defendants and sued on in this action that a regular title could not at the moment be made on that account; and defendants bound themselves that if plaintiffs would pay £2,000 down, and give their notes (negotiable) for the remaining £4,000, payable at certain times, they, defendants, under-

(a) See Harrison's C. L. P. Act, note *g* to section 34.

took that a good legal title should be made to plaintiffs in three months after date of the bond, and that plaintiffs should in the meantime be allowed without interruption to possess and use the steamboat.

Plaintiffs paid the £2,000 down, and gave their notes, which defendants endorsed away to third parties—thereby receiving the whole consideration; and plaintiffs have paid to the holders the greater part of the amount due on the notes. But plaintiffs have received no title to the boat, which they ought to have had more than two years ago. Plaintiffs have brought this action on the bond, in the Common Pleas, setting out the condition in the declaration, and assigning breaches.

Defendants have pleaded: 1st. *Non est factum;* 2nd. Two special pleas, by which they set up the defence that it is by the plaintiffs' own default in not complying punctually with what they had undertaken, that they have lost the benefit of what they had stipulated for, and been deprived of the possession of the boat: and that plaintiffs' not having received a title to the boat has arisen from circumstances and arrangements to which they were consenting parties, &c.

The plaintiffs have taken issue on these special pleas, and have also, by leave of the Court, demurred to them.

Plaintiffs had taken down the record at the January Assizes (1857) in Toronto, to try the issue and assess damages on the demurrer; but on the application of defendants the trial was put off to the next Assizes, on account of the absence of a witness.

The defendants' counsel, after the trial had been postponed, obtained leave to amend one of his special pleas, or rather to substitute a plea for it, stating the intended defence more exactly in accordance with the facts, which he alleged he had not an accurate knowlege of when he filed his plea.

Now he moves before me in Chambers to be allowed to plead an additional plea, setting up an entirely new matter of defence which he had not attempted to resort to before—namely, that the defendants' bond is void for want of a recital in it of the certificate of ownership—wishing to contend under the new plea that the Ship Registry Act (8th Vic., cap. 5, sec. 13) applies even in the case of an instrument of this kind, not being, or intended to be an assignment of the vessel, but a security from third parties given for a collateral purpose. The defendants' counsel says that he thinks the same objection would probably be open to him on argument of the demurrer, on an objection which he may take to the declaration on that ground; but he is not certain of it, and therefore desires leave to add the plea.

I do not allow the plea to be added—

1st. I do not at present consider that there was any necessity of reciting the certificate to this bond, though there may be room for an argument on that point.—Abbott on Shipping, 66, (9th edition); *Mortimer et al v. Fleeming*, 4 B. & C. 120; *Hughes v. Morris*, 21 L. J. 761; S. C. in appeal, 16 Jurist, 603; *Duncan v. Tindall*, 17 Jurist, 347; *McCalmont v. Rankin*, 8 Hare, 1; 20 L. Times, 1.

2nd. To set up such a defence, after defendants have by their bond procured for Bethune & Co. in effect the whole £6000, and after plaintiffs have paid £4000 of it and upwards, and made themselves liable to third parties for what remains, would be as contrary to good faith as anything that could be conceived; and therefore defendants should receive no aid from the Court in setting up such a defence in this late stage, after they had passed it by and have received other indulgence in the cause.

3rd. The desired amendment, so to call it, is not that kind of amendment contemplated by the 291st section of the C. L. P. Act, 1856; for it is not "an amendment necessary for the purpose of determining in the existing suit *the real question in controversy* between the parties." The first amendment obtained was of that character—this is not.

I think I am called upon to exercise a discretion in allowing such an amendment, just as before the C.L.P. Act—the object of that Statute being to enlarge the power of the Court and Judges in granting amendments—not to compel the granting amendments against the justice of the case.

(See *Ritchey et al v. VanGelder*, 9 *Ex.*, 762; *McDowall v. Lyster*, 2 M. & W., 52.)

I shall leave it open to defendants to apply to the Court in Term.

Summons discharged.

YEATMAN V. DISTIN.

Practice—Pleading several defences—C. L. P. Act, 1856, sec. 130.

An acceptor of a Bill of Exchange will be allowed to deny his acceptance, the endorsement to plaintiff by payee, and to plead the Statute of Limitations, upon affidavit that such pleas are necessary to his defence. This affidavit may be made by the agent of defendant's attorney.

(Jan. 31, 1857.)

Declaration on Bill of Exchange drawn by one Distin, dated 1st June, 1839, directed to the defendant, requiring defendant to pay to the order of Yeatman, Wilson and Shields, £119 11s. 60 days after date, accepted by defendant, and endorsed to plaintiff.

J. B. Read moved for leave to plead:—

1st. That defendant did not accept the Bill.

2nd. That Yeatman, Wilson and Shields did not indorse to plaintiff.

3rd. The Statute of Limitations.

The application was supported by the affidavit of *Mr. Read*, as agent for the defendant's attorney, stating "that he (Read) has been advised by defendant's attorney as to the facts by him alleged to exist, and believes that to enable defendant to defend this action properly, according to said alleged facts, he should plead the pleas above stated."

Eccles, Q.C., showed cause, and objected to the affidavit, as not complying with the 130th sec. of the C. L. P. Act.

ROBINSON, C.J., allowed the pleas to be pleaded.

Order absolute.

COUNTY COURTS.

[In the County Court of the United Counties of Huron and Bruce—ROBERT COOPER, Esquire, Judge.]

REGINA EX REL. ROBERT WALKER V. JAMES REYNAS.

Cameron for relator; *Davison* for defendant.

This is an application under the Statute 18th Vic., cap. 132, on the part of the relator, to have the defendant, who has been elected a School Trustee for the town of Goderich, unseated, and an order issued for a new election.

The grounds taken are, that the election was continued on the second day, whereas it is contended that the School Act requiring the election to take place on a particular day, precludes the adjournment and continuance of it; and, further, that several of the parties voting for the successful candidate, were not duly qualified, and that therefore the actual majority of good votes was on the side of the relator.

Numerous affidavits, as to the votes, were filed on both sides. It was conceded that the election was continued on the second day, but it does not appear that this course was protested against.

At the close of the first day the poll seems to have stood, as sworn by the returning officer, 21 to 19. At the close of the second day the majority was apparently on the same side. Three main questions, each involving more than one point of investigation, come up on the law and the affidavits.

1st. Can the Judge *compel* a new election to take place in any case under this Statute; and if he can, by what practice and in what way can he proceed to do so?

2nd. Can the election occupy more than one day, and if not, does the error render invalid the whole proceeding?

3rd. If the election is to be decided by the first day's polling, which of the votes are bad on the facts appearing on the evidence?

I shall begin by deciding the last of these questions, and so on to the first.

The vote of one man on the side of the defendant is plainly shown to be bad. He neither paid taxes nor was he rated on the assessment roll, nor, I think, a resident. This reduces the majority to one only. Other votes are contended, on both sides, to be bad, because the voters did not actually pay their taxes, but agreed with their employer (they being hands in a manufactory) that he should pay their taxes and charge them, and the collector was cognizant of this and assented to it. He was in fact paid by the employer, though not till some little while after the required time. There is no evidence that the men were warned that their employer was not keeping faith in the matter, or that the collector let them know that they must pay and he would look no longer to the other. The arrangement seems to have been well understood and fairly carried out. I cannot hold that these voters were disfranchised. They paid their taxes in such way that the collector cannot be now looked upon by the law as entitled to say they did *not* pay. The compact having been ultimately fulfilled must relate back to its inception, or the parties would be disfranchised from no fault of their own, and, without any opportunity being given them to prevent the default by repudiating the arrangement, to which it is clearly proven the collector was a party. These votes then remain unimpeached. The votes stood then, according to the returning officer's book or list, after taking off the bad vote, 19 to 20. But the relator contends that one Bell, who is returned as having voted on the *second* day for the minority candidate, in fact voted on the *first* day, so that the votes were in fact equal at the close of the first day's poll, and therefore a new election must be ordered. On this point the evidence is most disreputably conflicting. So conflicting indeed, that it is hard to escape from the painful conclusion that some one or other of the witnesses may have permitted electioneering excitement to lead them to forget that care and caution with which statements on oath ought to be made. It is clear that all cannot have sworn without exaggerating and perverting the circumstances. But, after balancing the statements of third parties, which are pretty nearly even, I take the statement of the returning officer, who swears that his entry now produced was made at the time, showing the vote for the second day, and that the appearance of Bell on the first day was not until after the poll-book had been closed. Had the majority on the second day turned against the defendant, the vote of Bell might have to be considered in another point of view. As it is, I take it not to have come into the first day's polling; and I conclude that the defendant had, on the first day's polling, a majority of one. This answers the third proposition or question which I have laid down for consideration.

The second question is as to the continuance of the election on the second day, and whether all the proceedings must therefore be set aside. On this point several authorities were cited. To most of them I have referred, and they support the proposition of *Mr. Cameron* on the part of the relator, namely, that as a general rule, when an election is directed to be held on a particular day, it will be bad if held on another day. But none of them go clearly to the point as to the *continuing* the proceedings on a second day where they have been properly commenced and there is no protest. That question is a new one, and the recent decision of the learned Judge of the county of York is the only one I know of coming near it. He held the election totally bad because it was continued on the second day, but in that case, it is quite clear, there was a protest; and even then the matter seemed so open to reasonable doubt, that no blame was attached to the returning officer, although the Act under which we are now proceeding expressly gives power to the Judge to enquire into the officer's conduct, and to impose a fine if he shall have "disregarded the requirements of the law." Were the enactment simply, that the election should be holden on a certain day, there could be no difficulty in acquiescing in the decision of his honour *Judge Harrison*, that the election must be finished on that day. But the Act of 13 & 14 Vic., cap. 48, governing the election of School Trustees does not merely give that simple direction; it directs the election to be held and conducted in the *"same manner as ordinary municipal elections."* When this Act was passed, every "ordinary municipal election" was held under the 12 Vic., cap. 81, the old Municipal Act, and which gives *a day* for the holding of the elections, just as distinctly as does the School Act, but the 159th section is superadded, which distinctly lays down the mode of proceeding on a second day if the election is not finished on the first. This, it would seem, was the practice contemplated by the legislature, when they used the words "in the same manner." In holding otherwise one would be met by this difficulty. But for the 159th sec. of 12 Vic., no *"manner"* of electing is prescribed, and we can only get clearly at the proper mode of proceeding by taking this 159th sec. to be imported into the subsequent Act of 13 & 14 Vic. by the clause already cited. Acts of parliament must be construed, if it can be done consistently with their express words, in such way as to give effect to and not to cripple, what may be reasonably taken to be the intention of the framers of the law. I cannot suppose that it should be considered compulsory to finish the election on the one day, when the legislature, so far from saying that the return shall be made at the end of the first day, *"directs"* the proceeding to be in the "same manner" as at municipal elections which continue for two days, unless brought to an end by the omission to vote for one hour. That the law leans against construing such enactments strictly in reference to words, and favours an interpretation more consonant with the apparent intention, is strongly laid down in several cases; for instance, *Rex v. Norwich*, 1 B. and Ad. 308; and *Rex v. Greet*, 8 B. and Cr. 361. But for the decision at Toronto, before referred to, I should have felt warranted in deciding that it was proper to hold the election for two days, in any case, but in deference to that decision I do not lay down that rule now, as it is not absolutely necessary for the determination of the present question; but, in the absence of any protest such as was made in the Toronto case, I am of opinion that the defendant was *de facto* elected to the office. The declaration was made on the second day, and whether the state of the poll on the first or second day be taken as the criterion, the result might have been the same. This is disputed, and I have not scrutinised the votes of the second day, both because the complaint is on an opposite ground, and the character of these votes is immaterial to the grounds on which I refuse to interfere. It was strongly argued on the part of the relator, that the continuation

of the election on the second day rendered the whole proceeding void, however true it may be that the election was regular up to the close of the first day. In support of this the case of *Regina v. Rowley* is cited. But that case is not clearly in point. There the election was of several parties to fill vacancies. One required to be distinguished from the others in the election papers, that is, I take it, in the lists which contained the votes. This was omitted, and it therefore could not be ascertained how the parties were elected—which were to fill certain vacancies, and which one to fill another vacancy. As to this latter one the election was bad; and it necessarily followed that it was bad as to the whole, because the uncertainty as to the one involved an equal degree of uncertainty as to the others. This does not establish the general proposition that the one irregularity must necessarily involve the invalidity of the whole election. If the poll ought to have been closed on the first night, as the relator contends, was not the election then in fact decided? for the returning officer, as I find it is proved, declared the state of the poll, and that the defendant was elected, unless he, the officer, should find, on reference to the law, that he could open the poll on the next day. Against these proceedings no protest was made, although there was ample opportunity for doing so. It is contended that the absence of protest is of no importance, and I am referred to *Regina ex rel. Mitchell v. Adams*, and *Charles v. Lewis*, in the Chamber Reports. These cases are authorities for holding, that the acquiescence of the candidate is not a good objection to a proceeding by an elector who was no party to the acquiescence. This relator (a brother of the unsuccessful candidate) says he was not present *at the close of the poll* on the first day nor *at all*, during the second day, and therefore must not be held to have acquiesced. But the unsuccessful candidate himself has come forward, and is evidently interested in the matter: *he* acquiesced—and the mere substitution of the brother as the relator scarcely goes to show that their positions are so distinct as to hold that such an acquiescence is of no consequence. The present relator, let it be admitted, is not disqualified from taking the position of relator, as the candidate himself certainly would be under these same authorities, but in this case where the *motive* for not protesting is pretty obvious, the acquiescence must be seen to be anything but immaterial. Besides, in the case of *Mitchell* there was a protest when the election was declared; and the course pursued by the candidate is never quite put out of the question.

I think the principle of law laid down by *Macaulay, C. J.*, in *The Queen v. Parker*, 2 U.C.C.P.R. 15, appears to apply, although the cases are in one important particular distinguishable. There the relator had it is true, actually assisted the candidate he afterwards applied against. But a main ground of the decision and of those cited in support of it, is that a relator cannot prevail against an election on the ground of certain proceedings in which he has himself concurred and acquiesced, or, to put the same proposition in another shape, he cannot appeal against an act to which he was himself a party. It is not too much to say that Walker the candidate and his supporters were here willing enough parties to the opening of the poll on the second day, although this relator happened not to be present. It would be inconsistent with *Parker's* case and with the cases on which it rests, to permit a candidate to have a *locus penetentiæ* in such cases—to follow a certain course apparently to his advantage, and being ultimately unsuccessful, to set aside the election, by himself or one of his supporters, because that very course of proceeding had been allowed.

Another objection was urged against this relator. The statute under which we are proceeding, to the curious insufficiency of which I shall presently refer, does not say who may make the objection or application, whereas as candidate or *voter*, under the municipal statutes is expressly allowed to institute the proceeding. I have have not seen any authority for a voter making an application under the 18th Vic. It seems plain enough that the candidate, if he thought at all of the matter, at the close of the poll on the first day, was willing enough to let it be opened again to see if his position would be improved by the subsequent votes; and, being disappointed, his brother now asks for a new election.

I am not all clear that the election could not be held for two days—indeed I incline to the opinion that it could: and if it could not, I think upon the evidence that the defendant must be taken to have been elected on the first day, as stated by the returning officer, although he stated that he might find it necessary to open the poll again: and unless the law compels the directing of a new election, I think it a case in which it would be most impolitic to interfere. It is certainly not a case in which any discretionary power should be readily used in favour of the relator, or, in other words, of the successful candidate.

The statute says that the judge shall "investigate" the matter, and may confirm the election or order a new one; but we are not told on what grounds he is to consider whether it is good or bad, or who may be parties to the investigation. To say the least of it, very much—far too much, I think—is left, independent of authority, to the discretion of the judge; and I do not think it would be just to permit an unsuccessful candidate, through a third party, to take advantage by these means of an alleged error of the returning officer, which error (if it were one) the candidate evidently winked at, for it could not injure his position but might improve it. I think it would be sound policy, even under the Municipal Act, where the practice is clear and the means of applying the authorities easy, to insist upon the candidate being always a party to these applications, and thus prevent mere experimental contests. In such cases as the present a candidate might say, if we apply the cited cases, "I will not object to this irregularity. "I will not protest; and then true enough, I cannot afterwards "in my own name seek a new election if this fails, but I can "get a voter to do so for me—some voter who did not acquiesce." Without saying that this was done here, it is obvious that the state of the law with regard to the municipal elections opens the door for dealings of that kind. I have considered the case to some extent on the municipal authorities; but the Statute does not say that the investigation shall be in accordance with the law governing contested municipal elections; unless indeed the Statute which says the election shall be conducted "*in the same manner*" as those elections, is held to import all the law as to bad votes, protests, acquiescence, &c. If that is the case, the clause as to the two days is also imported, and the return of the defendant would be good on that ground. If on the contrary, that clause does not bind, the judge, one would suppose, is not bound by the decisions which relate to municipal contests. Nothing in either point of view can be more unsatisfactory than the state of the law, as created by the few comprehensive words of this too concise enactment, which directs most important proceedings to be taken, without affording the slightest hint as to the law or practice to be observed.

The remaining point is that first stated as to the practice.

Numerous very obvious objections were made to the practice pursued here, and no practice could be pursued to which apparently sound objections could not be raised, and for the plain reason that the Statute prescribes no practice, and there is none.

A summons was issued calling the parties before me, and for convenience I directed the forms of proceeding to be similar to those under the municipal rules; but the statute has not directed this, and, unless some alteration is made in the law, on reflection, I shall not feel warranted in signing a fiat or ordering a writ to issue on any future applications. The Act tells us to "investigate," but gives not the slightest power to compel any one to submit to the investigation. It gives power to order a new election, but no means of enforcing the order. The result is, that the proceeding must, as the law now stands, be purely voluntary, and unless parties choose to abide by

some proceeding and decision, they cannot be compelled to, and there is substantially no redress, without an application to the Queen's Bench for a *quo warranto*, just as might have been made had no such law as this been in force.

The course to pursue would have been plain enough had a few words been added to this enactment, making the law, rules and practice as to municipalities, govern school cases. In municipal matters, care has been taken to provide a clear practice even to the very forms of writs. But were I of opinion here that a new election ought to take place, there is no writ I could order to issue which any returning officer or candidate or present holder of the office could be compelled to obey. There has been an oversight in drawing the Act, which it would be well to remedy as soon as possible; for, the ends of justice will never be promoted by decisions which cannot be enforced, or by proceedings as to which there can be no certainty.

It is perhaps as well that the law is as defective as to the power as it is respecting the practice; for, by no practice being provided, the power to "investigate" and "*order*" a new election, is most arbitrary. The enactment has been copied from the Act of 16 Vic., giving the same power to the Local School Superintendent, and how these officers have been guided in their decisions or how they have enforced them, it is not easy to guess. A power so important should be definite, and decisions so material to the public should not be left to be enforced by mere persuasion, or the direction of the Chief Superintendent. It seems quite plain that under these acts no order could be *enforced*, and that therefore it would be worse than idle to make any order. The general power given to the Local Superintendent by the Act of 13 & 14 Vic., sec. 30, to decide "any questions of difference" is open to the same objections.

The objections made by *Mr. Davison* to the practice pursued in this case, for the reasons just now stated, were, I think, sound. It was further objected on the same side, that under this Act the only investigation contemplated was as to the conduct of the returning officer; and further, that if the votes were to be scrutinised, only those could be impeached, which were at the time objected to, and that in any case the *declaration* of the voter was sufficient as to his qualification, as the act requires the vote to be received upon the declaration being made. I do not agree in these views. The investigation, if to take place at all, must be intended to be complete, and although true it is, that votes must be received on the statements being made, a candidate must, if he permit bad ones to be polled, act on his own risk; and when an enquiry takes place the question will be always whether the votes were good or bad. The penalty for making a false declaration is not the only consequence which may follow the propounding of false votes.

From what has been said, it is plain that in all these cases much difficulty will be found in procuring evidence, for there is no power to issue a subpœna; but in this instance we were fortunate enough to elicit all the facts by means of the attendance of the parties making affidavits, and their cross-examination; though as to the power to administer an oath in such case, I have very serious doubts.

I have made these remarks, though not absolutely necessary, on the merits, but on the view I take of the statute alone, which affords no means of enforcing any order I might make, I feel compelled to decline to interfere in this case, and must leave the parties in such cases to the same remedies in the Queen's Bench as were open to them independent of the Statute.

The application is dismissed. No order is made as to costs.

The only points I give a decision upon are the following, although I have expressed, with some hesitation, opinions upon some others:

1st. That I have no power to initiate any proceeding to *compel* a party to vacate the office; and that I was wrong in signing a fiat, or any formal paper; and should be wrong if I ordered any writ to issue.

2nd. That defendant had a majority on the first day, and the course pursued by the officer, in the absence of protest, cannot now be impeached.

3rd. That the relator, not being a candidate, cannot apply under this Statute.

TO COERESPONDENTS.

O. K., Preston.—Your letter arrived too late to receive attention in the present number: all letters should be sent us before the 25th of the month, when intended for insertion in the *Law Journal*, or when answers are required.—Correspondents generally should attend to this.

G. B., Milton.—Your remittances were acknowledged in the last number in the due course. The Publishers request that it may be understood that no receipts for remittances are sent, unless specially asked for: all remittances appear in their turn in the third page of advertisements; also, the Publishers would particularly desire that any person remitting money, and not seeing it noticed, should at once write to them.

A. W., Preston.—Let us know what numbers are wanting to complete your volume.

A. C., Kingston.—Did you receive the numbers sent you containing the Chamber Reports.

J.—Thanks for the D. C. List, which appears in the present number. The Index for vol. 2 will shortly be out.

TO READERS AND CORRESPONDENTS.

All Communications on Editorial matters to be addressed to

"The Editors of the Law Journal,"
Barrie, U. C.

Remittances and Letters on business matters to be addressed (*prepaid*) to

"The Publishers of the Law Journal,"
Barrie, U. C.

Whatever is intended for publication must be authenticated by the name an address of the writer, not necessarily for publication, but as a guarantee of his good faith.

Matters for publication should be in the Editors' hands three weeks prior to the publication of the number for which they are intended.

NOTICE.

The *Upper Canada Law Journal* is not liable to postage. The Terms are 20s. *per annum*, if paid before the 1st of March in each year—if paid after that period 25s. The Scale of Charges for

ADVERTISEMENTS:

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

Advertisements should reach the office not later than the 25th of each month.

THE UPPER CANADA LAW JOURNAL is published at the *Barrie Herald* Office, Dunlop-Street, Barrie.

THE LAW JOURNAL.

MARCH, 1857.

A FIXED TENURE OF OFFICE.

The principle of a fixed tenure of office, dependent on the good conduct of the officer, numbered amongst its early advocates the most virtuous, wise and patriotic of English statesmen. When the blessings of civil liberty began to be more appreciated and diffused, the British nation affirmed and gave permanence to the principle by legal enactment.

Improvements affecting materially the best interests of a community cannot long exist and be

operative without men asking why they are not made of universal application. And we find that the fixed tenure, established more than one hundred years ago, has been gradually extended to nearly every office in the administration of the law in England—not only to judicial offices, but also to those of a ministerial character has it been applied. A proposition so plainly recommended by common sense, and so ably supported by eminent authorities, could not fail to take a fast hold on the minds of the English people.

The people of the neighboring country in one of the "fever fits of excitement which belong to their political system," departed from this principle contrary to the advice of their best and wisest citizens; and deeply have they regretted the retrograde movement. Speaking of the judicial system in the state of New York, and its results, an American writer says: "If there be anything clear in regard to the magistracy, it is that the members of it should be what is called independent—that is to say, not only independent of the suitors who come before them, but of the very power which created them." * * * "The only mode in which the judiciary can be made independent is to make them feel secure of retaining their offices, provided their duties are faithfully discharged, and by making those offices so valuable and important that they will not be regarded by the incumbents as stepping stones to future preferment, mere rounds in the ladder of ambition, but as sufficient and reasonable rewards for years of honourable labour. All this is of course subject to the qualification that they are to be made strictly and speedily responsible for neglect of duty or abuse of trust." * *

"A hundred and fifty years ago the English Parliament, sick of the miseries resulting from a corrupt judiciary, changed the tenure of the office, abolished their dependance on the Sovereign, and made the tenure of their existence, dependant on their good behaviour alone. From that time to this the English judiciary has risen in character and influence."

"We in our supreme wisdom have ingeniously rejected the whole of the English experience. We have reversed the process, and whereas heretofore our judges sat *quam diu se bene gesserint*, we have now made the tenure really *de bene placito*." * * "We have reduced the judiciary to a condition of dependence, to a degree of uncertainty in the tenure of their office which would be considered intolerable by a clerk in a dry goods store, or the conductor of a rail car." * *

"Our judges are changed indeed in their position;—now dependant on a bar they ought to control—at the mercy of the ebb and flow of the political tide—subjected to the jealous suspicions of an army of angry litigants—how is it possible for them to preserve their dignity, their character, or even their self-respect?" * *

"Any one who can hug himself into the delusion that a magistracy, situated as ours now is, will long discharge the duties expected from an upright and learned judiciary, may be expected to believe that the laws of nature will cease to hold their course." * * "The principles that govern human conduct are not less fixed than the laws of gravity and attraction."

If the wisdom or value of a scheme is to be measured by its effects and consequences, we find in the judicial tenure, as established in England,—whether we regard the primary or inferior objects of the system,—a safe guide, for it has attained the objects for which it was designed; while the opposite system in the United States has "rendered the officer contemptible in the eyes of the community, and made the office undesirable in the eyes of the incumbent himself—and tends to leave the judge who passes through the ordeals of the system, little respect either for himself or for any principle of that great science of truth and justice which he has sworn to administer."

On a former occasion we noticed the anomalous position of the County Judges in Upper Canada—they being neither free from executive dependency nor placed beyond the control of popular clamour. The tenure was at one time during good behaviour; the Act of 1846, a hasty and unwise measure, made the tenure during pleasure; it prostrated the judges at the feet of any dominant power of the day—left them open to attack from any disappointed litigant, and exposed them to machinations which, however groundless, would invariably affect their after usefulness.

What is the nature of a tenure during *good behaviour*? to act with justice, integrity and honour, and to administer justice speedily and impartially,

is good behaviour. It is the tenure by which the judges of the Superior Courts now hold office; and the tenure of all judges should be the same. All the arguments in favor of a fixed tenure apply with perhaps greater force to County Judges than to Judges of the Superior Courts—the former being sole judges—being brought into more direct personal contact with litigants, and being in every way more exposed to the shafts of personal and party rancour.

Both classes—Superior and Co. Court Judges—have similar duties, civil and criminal, to perform. The only distinction consisting in the limit as to jurisdiction—but whether jurisdiction covers cases for one hundred or one hundred thousand pounds, can make no difference. The idea of judicial independence has no relation to that of amount of jurisdiction. If the interests of society require this independence in the one case, they must equally require it in another. But it is said that the difficulties in case of impeachment are so great that it would be inexpedient to apply the mode of trial appointed for Superior Court Judges to Judges of County Courts, and therefore the reason of a tenure to the latter during *pleasure*. It is asserted that practically they hold during good behaviour, as they are not removed unless misbehaviour is established. How established, and before whom? Not on public, open trial; before a Court governed by fixed principles—but by a paper trial before the executive of the day, and without those safeguards which are necessary to secure a trial to the satisfaction of the executive, the public or the individual affected. The present system is better calculated to screen misbehaviour than to insure its punishment; it is, except in glaring cases, a weak and an irregular instrument for securing the object it aims at. We have noticed the suggested difficulty, but in reality it is beside the question—it only serves to divert attention from the main proposition. Should Judges be liable to be turned out of office for any cause except misbehaviour or inability?

The *mode* in which misbehaviour or inability is to be ascertained is a minor, a subordinate consideration. Let the power to investigate and adjudge be placed in the hands of one Judge, or of several in existing Courts, or in a special tribunal, (it matters not,) only let a grave enquiry of the kind be conducted publicly and openly before a suitable tribunal, acting on defined principles, and incapable of being affected by irregular influences.

The Parliament is now in session, and the remedy must proceed from the Legislature. Will it be applied? or will this important matter be crowded out by the thousand and one measures of party, political or local prompting, or laid aside till a more convenient day. Surely it cannot be neglected, for we believe there are not ten intelligent men in the country opposed to a fixed tenure for Judges. Indeed it is difficult to lay hold of anything in the shape of opposing argument, however feeble, with sufficient steadiness for the purpose of discussion.

T. & J. W. JOHNSON & CO'S. PUBLICATIONS—INDEX TO ENGLISH LAW REPORTS FROM 1813 TO 1856.

In referring to to Mr. Mowat's lecture in a former number, we took occasion to notice the value to the profession in Canada of American reprints of English works;—and expressed an opinion that unmutilated reprints by *reliable* publishers, with notes from men of recognized ability, were infinitely more valuable to the Canadian lawyer than the English books. We have had occasion lately to examine recent republications by Johnson & Co., Philadelphia, and find in their books additional and very ample evidence of the correctness of our remarks. *Smith's Landlord and Tenant*, by *Maule*, annotated by *Morris*; and *Smith's Law of Real Property*, with notes by *Rawle*: these we mention for example, as the first occurring to us in the numerous list of recent issue by the publishers we have named.

Few can understand the expense, the labor and the enterprise necessary to a prompt and accurate reprint of a law book, the addition of notes and reference to American cases, while adding to the value of such works, must necessarily draw largely on the mental and business resources of annotators and publishers; but Johnson & Co. have proved themselves equal to the arduous undertaking. We have only to point to their advertisement to satisfy our readers of the remarkable promptness with which standard text books and *late English cases* have been reprinted by these eminent publishers.

Their Index to the whole body of Common Law Cases decided in England from 1813 to 1856, occupies another ground; and it is with peculiar satisfaction we direct attention to a work which possesses the merits of a digest without its defects. As a convenient book of reference its value cannot be over rated. We have examined it with much care, and commend it strongly to the notice of the profession here and at home. One point giving it peculiar value to us is this, that *the references are to the page and volume* of the English reports, as well as to the American Philadelphia reprints.—The arrangement of the work is admirable; the divisions of the subjects bear the impress of having been settled on scientific principles: the numerous heads, and the multiplication of sub-heads, tend greatly to facilitate research. Throughout the work there is a studied conciseness of expression, yet at the same time sufficient is set down to show the points involved, and to exhibit a brief but clear outline of the copious matter referred to.

The work is so planned as to be a guide, and the best guide we know of, in "exploring the vast body of the law" it embraces, and of which it is in fact an outline chart.

We shall be pleased if by any testimony of our approbation we can aid in the circulation of the work.

LAW REFORM.

There are many very important measures of law reform now before Parliament. The Bills most important are those: To amend the law respecting appeals;—To amend the act authorizing limited partnerships;—To amend the Common Law Procedure Act, and facilitate remedies on bills of Exchange and Promissory Notes;—To amend the law in relation to Adultery and Seduction;—For the appointment of County Attornies;—To amend the laws with respect to Wills;—and, To further modify the Usury laws.

The County Attornies bill is an excellent measure, sound in principle, and very few objections to its details. The two most prominent features are to provide for the proper conduct of criminal cases at the Courts of Quarter Sessions, and for advice and assistance to Magistrates in discharge of their duties.

The want of regular counsel for the Crown at the Sessions has long been complained of, and was a prolific source of injustice and oppression on the one hand and too often of impunity to crime on the other. Parties were compelled to prosecute if they lodged an information; compelled to pay Counsel out of their own pockets. There was consequently a disinclination to proceed against criminals, and justice was defeated. Again, parties prosecuting did not know what evidence would be required, and offenders escaped for lack of proof that might have been obtained. But the grand defect lay in requiring or allowing public prosecutions to be conducted by private individuals—permitting them to shape a charge of a public nature as their private feelings urged. Another povision—advising Magistrates is most important. The laws for the summary conviction of offences, are most numerous and intricate, and are increased every Session.

It is quite unreasonable to suppose that the Magistracy could be able to deal with all these cases, without occasionally needing advice; and to compel unpaid Magistrates to pay money out of their own pockets for the public benefit is unreasonable in the extreme. This bill gives them the right to obtain advice from the County Attorney, who is to be a Barrister of some years standing. There is a fee of 25s. allowed to the County Attorney for conducting every criminal case at the Quarter Sessions. We think this is too little—50s. would not be too large a fee.

We sincerely trust the measure, in some shape, will become law.

The bill to further modify the Usury Laws is a move in the right direction, and will in effect reduce the rate now actually paid. A greater rate than 6 per cent. is now every day virtually taken by purchasing notes, mortgages, and other securities, at a discount, and no legislation will or can prevent parties obtaining for the use of money what it is worth in the market.

The bill enables any rate of interest agreed on, not exceeding——per cent, to be recovered; and where no rate of interest is specified, money is to draw seven per cent. The blank, we think, might be filled with *ten* per cent: money is now worth that at least.

POINTS OF PRACTICE IN THE COUNTY COURTS.

We have much pleasure in giving a prominent place to the subjoined letter from *Judge Chewett*. It is by communications of the kind that the practical value of the *Law Journal* to Local Courts' practitioners is made apparent, and the growth of an uniform procedure encouraged—and we are sure our readers will appreciate the learned Judge's manifest desire to promote efficiency in the system he has so many fellow-laborers in working under.

GENTLEMEN:—

In compliance with request in *Law Journal* to see how far Practice agrees in different Counties:

In Essex, as to Costs—The same view was taken as in *Coulter v. Willoughby*, in Simcoe, by *Judge Gowan*, and afterwards by *Mr. Justice Burns*, in *Chard v. Lout*, U. C. L. J., 227.

Issue Books are delivered and Records *entered merely*, (without being sealed or examined and passed by Clerk) as in Superior Courts, as being the correct practice under 19th sec. C. L. P. Acts—there being nothing in the unrepealed 30 sec. 8 Vic., cap. 13, *preventing* it, *but rather* requiring it. The words are, "plaintiff shall prepare and enter N. P. Record with Clerk."

As to time to plead reply, &c., the 9th section of 8 Vic., cap. 13, is considered as *virtually* repealed by 102 and 112 secs. C. L. P. Act, adopted in County Court Act—thereby allowing eight days instead of four. The 46th sec., 8 Vic., requiring prisoner to plead in four days, *is* repealed—no doubt with the intention of allowing eight days in *all* cases in *County Courts*, which was often *really* necessary under the old practice. The 22nd and 24th secs. C. L. P. Act made applicable to County Court, when defendant in custody, or on special bail, makes proceedings to judgment, same as in Superior Court.

Yours, &c., A. CHEWETT.

SANDWICH, Feb. 7, 1857.

THE COMMON SCHOOL LAW.

We direct attention to an important decision by *Judge Cooper*, (*Regina ex rel. Walker v. Reynas*,) published in this number: the copy has been corrected by the learned Judge.

The subject is very fully examined by *Judge Cooper* and difficulties disclosed, which are likely to prevent the provision for the trial of contested elections being satisfactorily acted upon by the local Judges. It is most important that there should be no vague legislation respecting our school system, and when reasonable doubts occur they should be removed by the Legislature.

MONTHLY REPERTORY.

COMMON LAW.

EX. ANDREWS v. SANDERSON AND NICHOLS. *Jan.* 30.

Execution—Sheriff—Ca. Sa. after seizure under Fi. Fa. abandoned—Returned.

Where goods have been seized under a *Fi. Fa.*, and the Sheriff has abandoned the seizure at the request of the execution creditor, a *Ca. Sa.* cannot be executed until the Sheriff has made a Return to the *Fi. Fa.*

EX. THOMAS v. PACKER. *Jan.* 28.

Landlord and Tenant—Condition of Re-entry—Forfeiture by nonpayment of rent—Conditions implied where tenant holds over.

A tenant held over under a Lease containing a condition for re-entry on nonpayment of rent and paid rent. *Held*, that tenancy from year to year thus created was subject to the condition.

EX. TURNER AND STEERS v. JONES. *Feb.* 9, 11.

Attachment of debts—Effect of attachment order—Payment under attachment order—Notes given by garnishee to judgment creditor—Bankruptcy of judgment debtor—Statute 17 & 18 Vic., cap. 125, secs. 61, 62, 65.

G., a judgment debtor, had a claim against J. for £300, payable under a contract of sale, by which J. agreed to pay G. £400—£100 in cash, and the residue by three bills for £100 each, payable at the end of June, July and December respectively. A judgment creditor of G. served upon J., at a period anterior to the time the first bill would have become due, and when no bills had been given, an order to attach all debts due or accruing to G. to satisfy a judgment of £501 against G., and requiring him to show cause why he should not pay the money to the judgment creditor of G. J. (the garnishee) gave the judgment creditor his three promissory notes for £100 each, payable at the times when the bills were to fall due under the contract with G. (the judgment debtor.) G. became a bankrupt.

Held, that his assignees were entitled to recover the money from J. (the garnishee) as the service of the order of attachment, and the giving of the promissory notes did not discharge the debt as against the assignees of the judgment debtor, or prevent its passing to them.

Semble, first, that in order to discharge the debt as against the judgment debtor, payment to the judgment creditor by the garnishee must be under the compulsion of an order requiring him to pay, or under the process of the Court, and the mere order of attachment is not sufficient to justify him in paying the judgment creditor. Second, that to discharge the debt as against the judgment debtor, the garnishee must do what his obligation to him requires.

C.P. VORLEY v. BARRETT. *Nov.* 7.

Pleading—Equitable replication—Principal and surety—Discharge of principal by mistake.

Declaration by a co-surety for money paid. Plea, that the plaintiff had discharged the principal without the defendant's consent. Replication on equitable grounds: that the principal was discharged by a mistake in the drawing up of the agreement contrary to the true intention of the parties; and that the real and true agreement was in all respects performed by the parties thereto. *Held*, that the replication was a good answer to the plea.

Per WILLES, J.—Where both plea and replication are on equitable grounds, the replication only can be considered on equitable grounds. Where the plea is on legal grounds and the replication on equitable grounds, the latter may be good either on equitable or on legal grounds.

EX. CLARKE v. LAURIE P.O. *Nov.* 19.

Pleading—Equitable plea—Trust—Pledge of dividends by married woman being cestui que trust—Power of attorney.

The trustee for the payment of dividends on stock to a married woman, gave a power of attorney to bankers in London, empowering them to receive the dividends and pay them to her. She went with her husband to Brussels, and the dividends were paid to her, according to her directions, through a bank there. She and her husband received the amount of a dividend before it was due, from the Brussels bankers upon an agreement that the Brussels bankers should receive and retain the dividend when it became payable. Subsequently to receiving the money, and before the dividend was due, she revoked the authority to the London bankers to receive the money; they, notwithstanding, received the dividend and paid it over to the Brussels bank, by whom it was retained.

Held, that these facts offered no answer to an action by the trustee against the London bank for the recovery of the dividend.

Held, also, that although the defendants might not be answerable in equity, the Court would not give leave to plead the facts on equitable grounds, inasmuch as a Court of law could not afford complete relief.

EX. DINGLY v. ROBINSON. *Nov.* 25.

Garnishee—Attachment of debt—Property of wife of judgment creditor—Savings Bank annuities—Common Law Procedure Act, 1854, *sec.* 61.

Money due in respect of Savings Bank annuities to the wife of a judgment creditor, cannot be attached under the garnishee clauses of the 17 & 18 Vic., cap. 125.

C.P. MATHER v. LORD MAIDSTONE. *Nov.* 22, 24.

Bill of exchange—Renewal of forged acceptance—Onus of proving consideration.

M. having accepted bills of exchange for the accommodation of V., upon a bill presented by the plaintiff, as indorsee to him (M.) for payment, believing it to be one of the bills accepted by him for the accommodation of V., paid the interest, and gave a fresh acceptance in lieu of the one presented. The latter turned out to be a forgery. An action being brought by the plaintiff against M. on the fresh genuine acceptance in which action M. proved the forgery:

Held, that it was incumbent on the plaintiff to show affirmatively that he was a *bonâ fide* holder for value of the forged bill.

C.P. SWYNFEN v. SWYNFEN. *Nov.* 24, 25, *Dec.* 1, 2, [*Jan.* 12.

Practice—Counsel and client—Attachment to enforce arrangement at Nisi Prius—Filing affidavits in answer.

Where one judge differs from the rest of the court, a writ of attachment will not be granted.

Where an arrangement was entered into by the counsel on both sides at *Nisi Prius,* the attorneys also being present:

Held, (per CROWDER, J.) that without deciding whether the agreement ought or ought not to be held binding on the client, by reason of the attorney's tacit acquiescence, an attachment ought not to be granted for contempt against a party who, having given no special authority for the purpose, refuses to perform it.

The proper time to file affidavits in answer to the affidavits used by the other side in showing cause against a rule is after the court has heard the latter affidavits read, and is of opinion that they ought to be answered.

EX. SMITH v O'BRIEN, JULLAND v. RICHES. *Nov.* 18.

Practice—Change of venue—Affidavit—Use and occupation.

The venue will be changed in actions for use and occupation on an affidavit that the cause of action arose in the county to which it is desired to be changed, and not where it is laid, and that the witnesses of the party making the application reside there, unless it be shown in answer that the cause may be more conveniently tried in the county where the venue is laid.

EX. HART v. DENNEY. *Jan.* 20.

Practice—Payment of money into Court—Amendment—Wrongful dismissal.

The plaintiff complained of a wrongful dismissal, alleging the hiring to be for a whole year. The Court refused the defendant liberty to plead, with a denial of the dismissal, a plea that the contract was subject to the condition that the hiring should be determined by giving three months' notice, and payment into Court of £29; but the Court intimated that the plaintiff should not be allowed to amend at the trial, except on the terms that the defendant should be in the same situation as if the money had been paid in with the pleas.

B.C. IN RE —— (AN ATTORNEY.) *Jan.* 20.

Practice—Attorney—Amendment.

Where a rule *Nisi* for an attachment against an attorney is obtained on the last day but one of term, plaintiff cannot be required to show cause at Chambers without his consent.

B.C. LEE v. SANDELL. *Jan.* 31.

Affidavit in support of suggestion to deprive plaintiff of Costs—Hearing—Inference from facts.

In support of a rule to enter a suggestion in order to deprive plaintiff of costs in an action on a bill for £20, the affidavit of A. stated that the cause of action arose in a material point within the jurisdiction of the City Small Debts Extension Act; that at the trial B. was called as a witness, and stated that he endorsed the bill to the plaintiff within that jurisdiction, and that C. being also called stated facts confirming B.'s statement. The affidavit of B. and C., in opposition to the rule, positively stated that the bill was endorsed to the plaintiff out of the jurisdiction of the city court.

Held, that the affidavit of A., in support of the rule, stated hearsay evidence in opposition to the positive oath of B. and C. and was insufficient, and that the rule must be discharged.

EX. BROWN v. FOSTER. *Jan.* 28.

Privileged communication—Knowledge of document acquired by counsel at trial—New trial—Strong observations of Judge.

A barrister attended as counsel for B. on the occasion of two examinations before a Magistrate on a charge of embezzlement against B., upon both of which, a book into which it was B.'s duty to enter sums received by him for his master the prosecutor, was produced and put in evidence on behalf of the prosecution. On the second examination B.'s counsel pointed out to the magistrate an entry under the proper date of the sum to which the charge referred, and he was thereupon discharged. B. brought an action for malicious prosecution against the prosecutor, at the trial of which it was suggested that the

entry had been made by B. after the first examination, and it was proved that the book was accessible to him.

Held, that the counsel who had appeared for B. at the examinations before the magistrate, might be examined as to whether the book contained the entry on the first examination. It is no ground for a new trial that the judge who tried the cause has pressed any particular part of the evidence strongly on the jury.

Q.B. O'Toole v. Potts. *Nov. 25, Jan.* 14.

Practice—Arbitration on cause and all matters in difference—Time for siging judgment—Common Law Procedure Act, 1852, sec. 122, Reg. Gen. Hil. T. 1853, sec. 170.

Where, by order of *Nisi Prius*, a verdict has been taken subject to a reference of the cause and all matters in difference, the successful party may sign judgment, notwithstanding the time for moving to set aside the award has not elapsed.

B.C. Russell v. Doel and another. *Jan.* 30.

Practice—Attachment for not answering interrogatories—Personal service.

An attachment for not answering interrogatories under the Common Law Procedure Act, 1851, will not under any circumstances be granted, unless it appear that personal service of the rule *Nisi* has been effected.

C.C.R. Regina v. Garbutt. *Jan.* 31.

Larceny as servant—Embezzlement—Evidence—14 & 15 Vic., cap. 100, sec. 13.

Where upon an indictment against a defendant as servant for stealing there was no count for embezzlement, but there was evidence of embezzlement, but not of stealing, and the jury found a general verdict of guilty, this count quashed the conviction.

NOTICES OF NEW LAW BOOKS.

The Principles of the Law of Real Property, *intended as a first book for the use of Students in Conveyancing, by* Joshua Williams, Esq., *of Lincoln's Inn, Barrister-at-Law: Second American, from the fourth English, edition, with notes and references to American decisions by* William Henry Rawle, *Author of a Treatise on Covenants for Title.*

Of the merits of this excellent work we need say nothing—it is so well known as to need no commendation at our hands. The edition before us has an advantage over English editions in being carefully annotated by *Mr. Rawle*, and the American cases on the subject collected and arranged in the notes. The American Editor, keeping in view the original plan of the work, has not attempted to compile local Statutes, but has endeavored, and successfully, to illustrate the general principles of real property in the United States.

We have no hesitation in recommending this edition to Students and members of the profession. *Mr. Rawle* has added largely to the value of the work by his learned notes, and they give it peculiar value to us in Canada, the circumstances of both countries (Canada and the United States) in respect to real property and its conveyance, being so much alike.

CORRESPONDENCE.

To the Editor of the U. C. Law Journal.

Sir,—I notice in the last two numbers of the *Law Journal* that several cases are published as having been reported by me, which were in reality reported by the late Mr. Talbot; and I deem it but due to his memory to correct the mistake.

Many of these cases were collected and sent by me to Mr. Harrison, subsequently to Mr. Talbot's decease; and hence, perhaps, the supposition that they were reported by me.

I cite you a list of the cases referred to, in order that, should any collection of these labours of Mr. Talbot be made hereafter, his memory may receive the credit to which his ability was so well entitled.

The following cases, published in the December number of the *Journal*, were reported by Mr. Talbot, viz.:

Chard v. Lout, Oct. 8, 1856; *Rosse v. Cumming*, Oct. 4, 1856; *Metropolitan Building Society v. McPherson*, Oct. 3 and 4, 1856; *Reilly v. Clark*, Oct. 6 and 7, 1856; *Carruthers v. Dickey*, Sept. 16, 1856; *Moberly v. Baines*, Sept. 18, 1856; *Swan v. Cleland*, Sept. 20, 1856; and in the January number, the following: *Street v. Cuthbert*, Oct. 4, 1856.

Absence from home is my reason for not having made this correction before now.

I am your obedient servant,

T. Moore Benson.

Osgoode Hall,
February 9th, 1857.

[Mr. Benson naturally feels sensitive, as every honourable mind would, on the subject to which he refers. We very willingly insert his letter, and regret the mistake into which we inadvertently fell.—Eds. L. J.]

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF BRANT.

Judge of County and Division Courts, Stephen James Jones, Brantford.

First Division Court.—Clerk, Henry Racey—Brantford P.O.; *Bailiffs*, William Young and Daniel Costells, Brantford P.O.; *Limits*—The town of Brantford, and that part of the township of Brantford not included in the other Divisions thereinafter mentioned.

Second Division Court.—Clerk, John A. Penton—Paris P. O.; *Bailiff*, Roger Brookshanks—Paris P.O.; *Limits*—The town of Paris, that part of South Dumfries, west of Lots 18 in the several concessions, and that part of the first concession of Brantford, and of the Gore between South Dumfries and Brantford lying south of the above described portion of South Dumfries.

Third Division Court.—Clerk, Samuel Stanton—St. George P.O.; *Bailiff*, Albert Huson—St. George P. O.; *Limits*—The remainder of South Dumfries and of the first concession and Gore of Brantford.

Fourth Division Court.—Clerk, Leander D. Marks—Burford P. O.; *Bailiff*, William H. Serple—Burford P. O.; *Limits*—The ten northern concessions of Burford, and the first ten lots in 2nd, 3rd, 4th and 5th concessions Brantford, and that part of the Kerr tract immediately south thereof.

Fifth Division Court.—Clerk, James Malcolm—Scotland P. O.; *Bailiff*, Andrew Malcolm—Scotland P.O.; *Limits*—The township of Oakland, the remainder of the township of Burford, and the first five lots in the ranges east and west of the Mount Pleasant Road in the township of Brantford.

Sixth Division Court.—Clerk, Robert Wade—Tuscarora P. O.; *Bailiff*, James Spencer—Tuscarora P. O.; *Limits*—The townships of Onondaga and Tuscarora, and that part of the township of Brantford south of the Hamilton Road, and east of Fairchilds Creek.

† *Vide* observations *ante* page 196, Vol. I., on the utility and necessity of this Directory.