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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS—*Answers to queries.*

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

MR. EDITOR,—Several of our Division Court Clerks are a good deal perplexed as to the charges they *ought* to make for some of the services they are called upon to perform. One or two now occur to me, on which the "*tariff*" is as silent as the dead.

The one—The Revival of a Judgment.

The other—The common case of making one Judgment pay another Judgment!

There are of course extra services here, and assuming that the Clerks are entitled to be paid for these services—the tariff does not make any provision for it—and there is hardly safety in that worthy class applying to their case the advice (given in Scott's Marmion) of, Charge! Chester! Charge!!

I fling these queries into your sanctum "per request" of a suffering Clerk, and I am quite sure that that class generally will "*present arms,*" to mark their approval of your "*coming to the charge!*"

I am yours, &c., R. N.

The good old days are gone, the age of chivalry has passed. We cannot wake the silence of the woods with "England and St. George," or ring out, "Charge for the golden Lilies."

So much for our poetic correspondent. Now for a drop of comfort for R. N.'s friend, the disconsolate Clerk. Seriously, we think there is authority in the tariff for remuneration in respect to the services mentioned.

Revivor of suits under the 73rd section of the D.C. Act, are in the nature of actions—the plaintiff "recovers" in the suit—a summons is issued—a judgment is rendered—and the fees are claimable as for entering an account, and issuing a summons, &c.

When leave to issue execution is necessary, and is obtained under the 67th Rule, there must be an order by the Judge, which must appear in the procedure Book, and we think it comes within the 8th item of the amended tariff, for a fee on order will also be payable to the fee fund.

With regard to the proceedings on cross judgments (51st section D. C. Act) there may be some question, but the better opinion seems to be that an application to the Judge is necessary to give effect to the entry of satisfaction of judgment; in such case the charges last mentioned would be payable. If the Judge makes order at the hearing of a second case that one judgment should be set off against the other, it involves an order in two causes, and would appear to warrant an extra charge for the *entering* a second order.

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

GENTLEMEN,—Feeling the importance of uniformity of practice among D. C. Clerks, I beg to ask the following questions on mileage:—

Double mileage—The two defendants in a suit live at the same place, say 10 miles from Clerk's office, and Bailiff serves each with a copy of summons on same day: Query, Is Bailiff entitled to *single* mileage of 10 miles or to *double* mileage of 20 miles?

Circuitous mileage—A defendant lives 10 miles *west* from Clerk's office, but Bailiff, in performance of his various duties, requires first to go 10 miles *south*, then 10 miles *west*, making various services on the route; from thence he travels 10 miles *north* to serve defendant in question: Query, Is Bailiff entitled to the *direct* mileage of 10 miles, or to the *circuitous* mileage of 30 miles?

I have always found difficulty whenever the above cases occur—Bailiffs contending that the larger sum is the legal one, defendants, the lesser.

Yours, &c., A SUBSCRIBER.

DEVON, December, 1856.

Double mileage.—The Bailiff is only entitled to single mileage: to serve the defendants in the particular suit he has only travelled ten miles; there is but one affidavit, and in it he cannot swear that "he has necessarily travelled *twenty* miles to make such service." In taxation the Clerk should disallow all over ten miles, having knowledge of facts as above set forth.

Circuitous mileage.—In computing mileage, each case is to be considered as if it stood alone; and the amount to be regulated according to the distance by the most direct travellable route from the Clerk's office to the place where the defendant is served. If in the performance of other duties the Bailiff reaches the defendant's residence by a circuitous route, and then affects service in the way above suggested, it can give him no claim to extra mileage: a charge based on such a calculation would be illegal and oppressive. A Bailiff convicted of charging in that way would be liable to the severest penalties of the Act.

As a general rule, if a Clerk knows how far the defendant's residence is from his office, and finds larger mileage charged; in taxing the costs he should enquire into the circumstances, for it is obviously the Clerk's duty to protect the public from illegal and oppressive charges.

SUITORS.

Goods bargained and sold, (continued.)

Earnest or part payment.—A part payment, however small, takes the case out of the invalidating operation of the Statute, but the money must be actually paid over: and it has been held that drawing the edge of a shilling across the hand of the vendor, but not left with him, but returned to the buyer's own pocket, (a customary form of concluding a bargain in England,) is not equivalent to earnest or part payment within the meaning of the Statute.

Where A. was indebted to B. in £4, and it was verbally agreed between them that A. should sell

to B., by sample, certain goods above the value of £10, and that the £4 should go in part payment; and the goods were delivered but refused acceptance, it was held that the contract was void under the statute; but it seems that if there had been an express agreement that A. should pay to B. the £4 and take it back as earnest or part payment, the statute would have been satisfied without proof that the money actually passed.

Note or memorandum in writing of the bargain.—By the word "bargain" is meant the terms upon which the parties contract—and the note or memorandum must express all the terms of the contract. Where a specific price is agreed on and there is nothing said in the written contract as to price, it is imperfect and cannot be given in evidence; but where the price is omitted, and it does not appear that any specific price was agreed upon, a reasonable price may be presumed; but the terms of the written contract cannot be varied by word of mouth evidence—but where the price is ambiguous, as for instance when hops were sold at "100s." this may be explained to mean £5 per cwt. The written demand must be made before the demand is entered for suit.

The making and signing by the parties—A signature by initials is not enough. A printed name is sufficient if recognized by or brought home to the party as having been printed by his authority, and it is immaterial in what part of the agreement his name is signed. But whether the writing of his name by the defendant *in the body* of the instrument for a particular purpose be a sufficient signing, appears to be doubtful. The Statute requires the agreement to be signed by *the party to be charged therewith*, or some other person thereunto by him lawfully authorised. It is good as against him, though only signed by the party to be charged and not by the other party. A correspondence of several letters, if connected together, will form a sufficient memorandum.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(Continued from page 222, Vol. II.)

Evidence.—With regard to evidence generally, but little can be said, without exceeding the limits assigned to these sketches. As a general guide, it may be observed that the following principles should be adhered to:—

1. *No evidence ought to be admitted but what is relevant to the question at issue.*

2. *The best evidence, which the nature of the case admits of, ought to be adduced if it can be had, and if not, then the next best or secondary evidence, proof being first given of the impossibility of procuring the former.*

(The impossibility of procuring the *best* evidence may be by its destruction or loss, or its being in the possession of the opposite party, who, on notice to produce it, has failed to do so.)

3. *The burden of proving the charge lies upon the prosecutor.*

4. *The party charged with an offence is presumed to be innocent until the contrary is proved.*

In addition it may be stated, that upon the question of evidence generally, the Justices ought to require the same regularity and strictness of proof, or nearly so, as upon a trial on Indictment in the Superior Courts.

In the absence of counsel for the parties, the examination of witnesses should be conducted by the presiding Magistrates, the parties of course being allowed to put all proper questions to a witness. With respect to the mode of examination, the following remarks from Stone's work on the Petty Sessions, are very appropriate:—

It is very common for gentlemen who have not attended to the principles and rules of evidence, to fall into the error of supposing that the strictness observed in the Superior Courts, with regard to leading questions, &c., savours more of legal technicality than of equity or justice, and has a tendency to smother the truth, rather than promote its fair development; but practical experience readily detects the aptitude and ease with which an ignorant or dishonest witness may establish a series of facts, by merely answering *yes* or *no* to leading questions, when in reality he has no actual knowledge whatever of such facts, but has perhaps *heard* or *supposed* them. In short, the unanimous voice of the most learned urists and philosophers (not to mention the deliberate opinion of the learned Judges of modern, as well as of former ages) has decided that truth and impartial justice alike forbid leading questions to be put to a witness, so as to suggest favorable answers, on his examination-in-chief, *i.e.*, his original examination, on behalf of the party who seeks the benefit of his testimony.

But if Magistrates are careful to prevent *leading questions*, and to repudiate *hearsay* answers, they may be fairly allowed to relax somewhat from the strictness exercised in the Superior Courts, with regard to other rules of evidence which are not of such general force, and which have of late years been qualified to some extent by the learned Judges themselves. At all events, in the administration of justice in their minor Courts, Magistrates ought not to deprive suitors of the benefit of the fullest investigation, by too nice an observance of technicailties.

Magistrates, in this country particularly, should examine the particular Statute under which they are acting, for the rule as to the admission of interested witnesses is not uniform. The witness who has a pecuniary interest in the result of a proceeding is not competent unless rendered so by special enactment.

In every case there should be sufficient of undoubted evidence to prove the offence clearly, so as to satisfy the true intent and meaning of the Statute; and where compensation is awarded, the extent of the damage should be proved.

A free and voluntary confession made by a defendant in the course of conversation with private individuals, or while in the presence of the Bench of Magistrates, is good evidence against him; but proof of any confession *obtained by threats or promises* would not be sufficient. The evidence of an accomplice is admissible, but if uncorroborated, not very reliable testimony.

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

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 3.

What Goods and Property may be Seized.

A writ of *Fi. Fa.* delivered to a Sheriff binds the goods and chattels against which it is sued forth, from the time that such writ has been delivered to the Sheriff to be executed. This rule has always been considered to apply to executions from the Division Courts, which are in the nature of *Fi. Fa*, and that the defendant's goods and chattels are bound by such a writ from the time it has been delivered to the Bailiff to be executed, and so the Rule applicable to a Sheriff would equally apply to a Bailiff.

The meaning then of goods being bound by the delivery, &c., is that after the writ is so delivered, if the defendant make an assignment of the goods even for a valuable consideration, unless in market overt, the Sheriff may take them in execution. If the party at whose suit the writ issued after the delivery of it to the Sheriff, gave him notice not to execute it, until further order, this is tantamount to a withdrawal of the writ, which cannot be considered in the hands of the Sheriff *to be executed* until an order to proceed.

A Division Court Bailiff would seem to be justified in seizing any goods sold by the defendant in the ordinary way *after* the execution has been *delivered* to the Bailiff, as, notwithstanding the sale, no property would pass to the purchaser, the property being bound by such delivery as against the defendant himself, and all claims by assignment or representation through or under him, and also after an unqualified order from the plaintiff to the Bailiff, not to execute if another execution should come into the Bailiff's hands to be executed, he should seize under the latter execution, although there might not be sufficient goods to satisfy both.[1]

In the above case, and indeed in every case where the Bailiff is called upon to act under circumstances where his powers admit of question, it will be safer for him to take the first step, casting on an adverse claimant and the judgment creditor the responsibility of having the question decided. This the officer can do by suing out the Interpleader Summons, of which hereafter.

With respect to the sort of goods that may be seized, it may be laid down as a general rule that the Bailiff can seize and sell all the personal property belonging to the defendant which he can find and which can be sold, with the exception of wearing apparel and bedding, &c., to the value of five pounds, and perhaps also of goods in the corporal possession of the defendant. "Goods and chattels" are the words used in writs from the Superior Courts, and each of these words, in its largest sense, signifies all a man's property that is not real estate; but they would not include choses in action, as promissory notes, &c.; for these, however, there is a distinct provision, as we shall see.

Under the term, goods and chattels, it has always been considered that the Bailiff can, as in the case of a *Fi. Fa.* in the Sheriff's hands, sell a lease or term for years belonging to the defendant, and execute an assignment of it under his seal to the purchaser, and the same of a term for years acquired by marriage, the execution having the same effect as a disposal by the husband. *Fixtures*, however, cannot be sold: by Fixtures are meant those things which are fixed to the Freehold, and which go to the heir, and not to the executor—such as furnaces, ovens, doors, windows, &c., but utensils fixed for the purpose of trade, such

[1] See Arch. Prac.—Execution.

as coppers, kettles, and the like, may be sold.[2] Also, that growing crops, grain, and other articles raised by the industry of man, may be taken in execution, but that things which are produced without the labour of man cannot—neither can clover or artificial grass, growing under grain, &c. Where the tenant continues in possession after forfeiture of his lease, or is otherwise a trespasser, the crops cannot be seized under a *Fi. Fa.* against him.[3]

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

IN THE MATTER OF ARBITRATION BETWEEN THE MUNICIPAL COUNCIL OF THE COUNTY OF MIDDLESEX AND THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF LONDON.

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

(Trinity Term, 20 Vic.)

Arbitration on erection of town into city—12 *Vic. cap.* 78. *sec.* 15; 12 *Vic., cap.* 81, *sec.* 290; 14 & 15 *Vic., cap.* 103, *sec.* 23—*Retrospective effect given to award*—*Limiting its continuance*—*Construction of* 11 *Vic., cap.* 81. *sec.* 209.

Arbitrators were appointed by articles of agreement, dated 28th of December, 1855, to settle certain differences recited as pending between the city of London and the county of Middlesex, respecting the compensation to be paid by the City to the County for the use of the County court-house and gaol, and concerning certain financial affairs then depending between the said municipalities. On the same day they awarded that the stock held by the County in certain railways mentioned should be divided in the proportion of one-fifth to be transferred to the City, the remaining four-fifths to belong still to the County. 2nd—That the City should pay the County £2 675 on account of the county roads, and should keep such roads in repair within the city limits. 3rd—That the City should pay the County £1,966 in full for their portion of the County debt. 4th—That in future each of the municipalities should pay the expense of all prisoners committed to the County gaol by each of them respectively, and the portion of such expense incurred by the City should be paid over by them in January of each year. 5th—That in future the City should pay the County one-third of all incidental expenses connected with the County court-house and gaol, including repairs and insurance, together with one-third of all expenses connected with the administration of justice not paid by government, such payment to be made in the month of January in each year. 6th—That the City should pay the County the sums mentioned in the 1st, 2nd and 3rd clauses, with interest, in twelve months from the 1st of January, 1856, except that the City Council should pay their share of the railway stock at the time the county debentures given therefor should become payable. 7th—That the award should take effect on the 1st of January, 1855, and remain in force until the 1st of January, 1860.

Held:—

That the giving to the award a retrospective effect to the 1st of January, 1855, being the time when London was declared a city, was not objectionable, but proper:

That the arbitrators had authority to give time for payment, as in the 6th clause:

That the limiting the continuance of the award to the 1st of January, 1860, was inconsistent with the 12 Vic., cap. 81, sec. 290, and rendered the award bad as to the 4th and 5th clauses, respecting the court-house and gaol:

That the 4th clause of the award was also bad, because the act directs that the arbitrators shall settle a sum to be paid, and does not authorize a ratable division of the expenses:

That the 4th and 5th clauses might be separated from the rest, and the award set aside as to them only.

(11 Q. B. R., 331.)

On the 28th of December 1855, Thomas Moyle, Thomas S. Shenston, and William Barker, Esquires, made an award, in which it was recited that by articles of agreement made on that day between the Municipal Council of the County of Middlesex and the Mayor, Aldermen, and Commonalty of the City of London, (in Upper Canada) it was recited that certain differences had arisen, and were then pending between the said municipalities respecting the amount to be paid by the City of London to the County of Middlesex as compensation for the use of the court-house and gaol belonging to the county of Middlesex, and also concerning certain financial affairs then pending between the said municipalities, and that it had been agreed to refer such differences to the arbitration of Thomas Moyle, appointed on behalf of the county of Middlesex, and William Barker on behalf of the City of London, with power to them to appoint a third arbitrator before proceeding upon the said reference; the award to be made by the said arbitrators, or any two of them, under their hands and seals, ready to be delivered to the parties in difference, or either of them, on or before the first day of January then next; and that before entering upon the arbitration, the two arbitrators named had duly appointed Thomas S. Shenston to be the third arbitrator. And on the same 28th of December, 1855, the three arbitrators made their award as follows, of and concerning the said premises submitted to them:

1st—They awarded that the stock held by the Municipal Council of the County of Middlesex in the Great Western Railway Company, and in the London and Port Stanley Railway Company, should be divided in the proportion of one-fifth to be transferred to the Mayor, Aldermen and Commonalty of the City of London, and the remaining four-fifths to continue the property of the Municipal Council of the County of Middlesex; the one-fifth of such stock to be paid for by the City of London as thereinafter directed.

2nd—That the City of London should pay to the Municipal Council of the County of Middlesex £2,675 on account of the several county roads; and should keep all such roads within the limits of the City, and on the boundary line thereof, at all times in a proper state of repair, but the tolls on such roads should belong to the County.

3rd—That the City of London should pay to the County of Middlesex £1966, in full for their portion of the county debt.

4th—That in future each of the two municipalities should pay the expenses of all prisoners committed to the common gaol of the County of Middlesex by authority of the respective municipalities; and the portion of such expense incurred by the City of London should be paid over by them in the month of January in each year, after the month of January last.

5th—That in future the City of London should pay to the Municipal Council of the County of Middlesex one-third of all the incidental expenses connected with the court-house and gaol of the said County, such expenses to include repairs and insurance, together with one-third part of all expenses connected with the administration of justice not paid by the government, such payment to be made in the month of January in each year after the month of January last.

6th—That the City of London should pay the Municipal Council of the County of Middlesex the sums referred to in the 1st, 2nd and 3rd clauses of this award, with interest at six per cent. in twelve months from the 1st of January, 1856, except that the City Council should pay in their share of the railway stock at the time the County debentures given therefor should become payable.

7th—They directed and awarded that such their award should take effect on the 1st of January, 1855, and continue in force till the 1st of January, 1860.

Wilson, on behalf of the County of Middlesex, obtained a rule *Nisi* calling on the Mayor, Aldermen, &c., of the City of London to show cause why this award should not be set aside:

First—Because, being made on the 28th of December 1855, it directs that it shall take effect on the 1st of January 1855.

Second—Because it limits its continuance from the 1st of January 1855 to the 1st of January 1860.

Third—Because it illegally postpones the payment of the money declared to be due from the City for 12 months from the 1st of January after the making of the award.

Fourth—Because it is contradictory and uncertain, in directing in the first clause that the one-fifth of the railway stock

[2] D. C. Act, secs. 53. 60, 80. Arch. Prac., *Execution by Fi. Fa.*

[3] The reader is referred to Arch. Prac.—Title, *Execution by Fi. Fa.*—where the authorities as to what may be seized, will be found collected.

shall be paid for by the Municipality of the County of Middlesex, when by the 6th clause of the award it is directed in effect that the City of London shall pay for the said railway stock.

Fifth—Because it directs the transfer of one-fifth of the railway stocks held by the County of Middlesex in the Great Western Railway and in the London and Port Stanley Railway, to the city of London, without providing for the payment thereof, or the mode of payment definitely, or what sum is to be paid therefor by the city.

Sixth—Because it directs that one-fifth of the said railway stocks shall be transferred to the City of London, to be paid for when the debentures of the County given therefor shall become payable, when in fact the debentures given for the stock in the Great Western Railway Company by the County are payable at different periods between the first of August, 1871, and first of August, 1873, and the debentures given for the London and Port Stanley Railway stock are payable in 1874; and it is not stated what fifth of the debentures for either stock is to be paid, or what part thereof, by the City; and the award itself limits its duration to the 1st of January, 1860, a period long before any of the debentures will fall due.

Seventh—Because it limits its operation to five years from the 1st of January 1855, when the statute declares that after five years from the making of such award either party may apply to the Governor in Council, to order that the then existing arrangement shall cease after a time to be named in such order, and until such application and order the arrangement made by the award shall continue.

Eighth—Because the arrangement made by the award is to continue for a *less time than five years from the making thereof*, when the statute provides that it shall continue for five years at least.

Ninth—Because the arbitrators have not directed an annual sum of money to be paid by the City to the County, as a compensation for the use of the court-house and gaol mentioned in the award, but the award is uncertain; and the arbitrators have exceeded their authority by awarding that each municipality shall pay the expenses of all prisoners from the respective municipalities, thereby leaving the amount unsettled—and awarding that the City shall pay one-third of all the incidental expenses connected with the court-house and gaol of the said county, including repairs and insurance, together with one-third of all expenses connected with the administration of justice not paid by government.

Tenth—Because it is unjust in directing that the City shall pay only a small part of the debt of the County contracted for roads, while the town of London formed part of the county, instead of a fair proportion.

Eleventh—Because it is also unjust in this, that the proportion of the county debt awarded to be paid by the City is too small, considering the circumstances stated in the affidavits filed.

M. C. Cameron showed cause.

Wilson (*C. Robinson* with him,) supported the rule, citing Ware v. Regent's Canal Company, 9 Ex. 395; Great Western R. W. Co. v. Baby et al, 12 U.C.R. 112; Eastern Union R.W. Co. v. Eastern Counties R.W Co., 2 E. & B. 530; Regina v. London and North Western Railway Co., 23 L. J. (Q. B.) 185; In re Morphett, &c., 2 D. & L. 167.

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

In regard to an award of this nature, made for settling important public interests, and by persons who we may presume were carefully selected, we ought to entertain every reasonable intendment, and suppose that all has been done rightly and upon good reasons, unless the contrary plainly appears, for we cannot tell what inconvenience and embarrassment may be occasioned by its being set aside.

Many objections are taken.

The first is, that the award being made on the 28th of Dec., 1855, is made to take effect from the 1st of January, 1855: that is, it reflects back in its provisions for very nearly a year. It seems that the reason for giving the award this retrospective operation, stated in the argument, was because the City was then separated; and to carry back the arrangement to the time of London being declared a city would seem just and proper, if not necessary, in regard to several of the matters to be provided for.

We do not see that in regard to the first, second, or third heads of the award, this provision can be objectionable, for as to the first, the stock held in the two railway companies, we presume, ought to be taken to have belonged to the County and the City respectively, according to the proportions now settled by this award, from the time of the City of London forming a separate interest. As to the London and Port Stanley Railway Company, we suppose there have been no dividends yet; and as to the Great Western, it would be right that the City should share in any that have been made, in proportion to the amount of stock assigned to it by the award.

As regards the second provision in the award, respecting the £2,675 to be paid for the county roads: The award provides that that sum shall bear interest from the 1st of January 1855, and we see no inconvenience that can happen, either regarding principal or interest, from the award being made to date back. It is a payment to be made once for all.

The same may be said as to the third head of the award.

As to the effect of the award dating back, so far as respects the fourth and fifth articles in it, which concern the county gaol and the expense of the administration of justice, the consequence would be to throw upon the City its proportion of the expense of prisoners from the 1st of Jan., 1855, whereas it appears to us that the statute 12 Vic., cap. 81, section 200, would entitle the County to expect indemnity from the time of the separation; but that consideration does not apply to the objection that the award should not have been retrospective.

The making it retrospective to the 1st of January, 1855, has this inconvenience, however, from the way in which the proportion is settled—that it assumes that the means exist of ascertaining as to the past the proportion of the actual expense of maintaining prisoners that ought to be borne by the City since the 1st of January, 1855, though there may have been no separate account kept with a view to such adjustment. The same objection would not apply in respect to the fifth head of the award, because there a definite proportion of the whole expense is directed to be paid, and all that is required is a calculation to be made upon what we must suppose the accounts will exhibit.

The second objection to the award is, that it limits the continuation of the settlement made by it to the 1st of January, 1860, which we take to be entirely inconsistent with the 200th clause of 12 Vic., cap. 81, for that requires a proportion to be settled, which shall be paid by the City so long as it shall continue to use the county court-house or gaol, with a proviso, however, that the government may call for a new adjustment after five years *from the making* of the award, and until that takes place the proportion as settled by the award is to run on; but here the arbitrators have in fact only done that for four years which they were to have done without other limitations than through the power of the government to call in their discretion for a new arbitration, at any time after five years.

In this respect we think the award fails to preserve the statute in a material point, and is in that respect bad.

The third objection is, that the award postpones payment of the sums awarded till the 1st of January 1856, which it is contended the arbitrators could not legally do. Whether they could or not depends on the effect of the statute 12 Vic., cap. 78, sec. 15, and 14 & 15 Vic., cap. 109, sec. 22, in which nothing express is provided as regards time of payment. But

in reason we do not see why time might not be given for payment, as the debt will of course bear interest. In other cases arbitrators may postpone payment, and it might be most oppressive in some such cases to exact immediate payment, for it might not always be possible to raise a loan. Moreover, the proportion to be paid by the City may in some cases be on account of its share of a debt for which the County itself has a long period of credit.

The fourth objection is founded upon a clerical error, which is too manifest to occasion any difficulty.

The fifth objection seems to be explained away by reference to the sixth head of the award. We are at liberty to suppose, as the contrary is not shown, that there are county debentures outstanding for the whole amount of stock taken in the railway; and the provision in the sixth article, taken in connection with the first, is that the City will have to pay one-fifth of such debentures as they fall due.

The sixth objection relates to the same matter, the railway stock, and upon that point it is plain that the debentures are all to be paid by the County and City in the proportions awarded, and of course when they fall due.

The holders will look to the County for all, and the County will look to the City for contribution, either before or after the County has made the payment. If not paid before, then, when the County pay all, the proportion of the City will become a debt which the County can enforce.

The award expiring on the 1st of January 1860 would not affect this article of the settlement, because the proportion is settled at once and finally, and requires no revision.

The seventh objection, we think, is a valid objection, and in our opinion makes the award void in regard to such articles as are prospective—viz., the fourth and fifth.

So also the eighth objection is valid. It is of the same nature, but it affects only the fourth and fifth articles of the award.

The ninth objection is very material to be considered. Our opinion upon that is, that the Legislature intended, by clause 200 of 12 Vic., cap. 81, that the arbitrators should settle a sum to be paid, and not attempt to divide the expenses ratably, which might lead to disputes, and be very inconvenient in practice, especially as regards any attempt to divide the actual disbursements already made. The statute enacts that the arbitrators shall award *an annual sum of money* to be paid by the City as a fair compensation for the use of the gaol and court-house. We think that can only be understood to mean a definite and ascertained sum, not fluctuating and depending upon accounts and vouchers. The provision that the *amount* of contribution may be ordered to be revised further, shows this to have been meant, rather than that the arbitrators should leave the expenses of the gaol to be divided according to a detailed account of the expenses actually incurred for city prisoners; because a division made on the latter principle, if it were convenient, would be as just at one time as at another, and would not require revision. There is much force too, we think, in the objection that such an award would be difficult, if not impossible, to be carried out consistently with the assessment laws, since there is a necessity for knowing at certain periods what sums are to be raised.

The last two objections go to the justice of the award, of which we are not made judges, unless under the possible contingency of something being directed so outrageously unjust as to afford ground for a strong suspicion of partiality, if not corruption,

Then, looking at the whole award, we think the 1st, 2nd and 3rd heads are so far independent of the 4th and 5th that they are separable without inconvenience or injustice, and that the award may be allowed to stand good as to all but the 4th and 5th articles, which two articles of the award we are of opinion must be set aside.

Rule accordingly.

JACK v. THE ONTARIO, SIMCOE, AND HURON RAILROAD UNION COMPANY.

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

(Trinity Term, 20 Vic.)

Pleading—Statement of cause of action—Obligation to erect gates—By-law, construction of.

First count: That defendants' railway crossed on a level a certain highway; that it was their duty to erect and maintain gates at such crossing on each side of the railway, or to erect cattle-guards instead, provided that the board of railway commissioners should approve thereof, and also to use due care to prevent injury by the railway to persons and cattle lawfully being and passing upon said highway; that the commissioners did not approve of cattle-guards instead of gates at such crossings; that nevertheless defendants, not regarding their duty, did not nor would erect gates; and for want of such gates an ox of the plaintiff being and passing lawfully upon said highway while the train was approaching the crossing, by the negligence and improper conduct of the defendants and their servants, was run against and killed. The 2nd count was founded entirely upon alleged negligence of the defendants in the management of their train—Plea: not guilty. At the trial, it appeared that plaintiff's land did not join the railway, and that the highway was unenclosed on either side, so that the want of gates could not have occasioned the accident. The jury found that defendants had not been guilty of negligence, and gave a verdict in their favour on the second count; but they found against them on the first count.

Held, that the first count disclosed a sufficient cause of action after verdict, whether defendants were bound to erect gates or not; but

Held, also, that as defendants were acquitted of negligence, the verdict could not be warranted.

Semble, that a by-law enacting that certain animals shall not run at large, does not impliedly allow others not named to do so, contrary to the common law.

(14 Q. B. R., 223.)

CASE, for killing an ox of the plaintiff's by the negligence of defendants' servants, &c. *Plea*—Not guilty.

The first count (on which the plaintiff recovered a verdict for £4) stated that after the passing of the statute 12 Vic., cap. 96, and 16 Vic., cap. 51—viz., on the 15th of December, 1851—defendants were the owners of a certain railway, upon certain land taken for the use of the same under the authority of the statute in that behalf made, which was used for the purposes of carriages drawn by locomotive engines; that the said railway crossed on a level a certain highway in the township of Innisfil—viz., the 7th concession line; that it was the duty of the defendants to erect at such crossing, and at all times to maintain a good and sufficient gate at each side of the railway, where the said highway communicates therewith, to be kept constantly shut, except when they should be required to be opened for the use of any person using the highway and desiring to cross the railway; or, instead of such gates, to erect cattle-guards at such crossing, as should appear more conducive to the public safety and convenience, *provided* that the board of railway commissioners approve of such cattle-guards; and also to use due and proper care to prevent accident and injury by the railway to persons, horses and cattle, lawfully being or passing along and upon the said highway; and the plaintiff averred that the board of railway commissioners did not approve of cattle-guards instead of gates at such crossings; and that nevertheless the defendants, not regarding their duty, did not nor would at any time erect at the place where the said railway of the defendants crosses the said highway, a good and sufficient gate, or any gate, at each side of the said railway at such crossing, but neglected to do so; and that for the want of such gate an ox of the plaintiff, then lawfully being and passing in and upon the said highway, while the trains and carriages of the defendants were approaching and passing the point where the railway crosses the said highway, a train of cars of the defendants then being on and along the said railway of the defendants, by the negligence and improper conduct of the defendants and their servants struck against and killed the plaintiff's said ox, which was then lawfully being and pasing on and along the said public highway, &c.

At the trial, at Barrie, before *Robinson, C. J.*, it appeared that the plaintiff's ox was standing on the railway track when he was killed; the train was approaching at the ordinary rate of speed; the whistle was sounded as it approached, and when the ox was observed the brake was applied, but the track at that part being a heavy downward grade, it was not stopped in time, and the ox was run against and killed.

The plaintiff's land did not come to the line of railway, but was 30 rods distant from it. There were cattle-guards at the crossing, but no gates. The road or concession line along which the ox was passing over the railway track lay in that point through unimproved land, not enclosed.

A by-law of the municipality of the township of Innisfil was put in, which enacted what should be the height of a lawful fence, and provided that any cattle coming from any other township for the purpose of pasturing at large in Innisfil should not be considered as free commoners, but should be liable to be impounded; that all horses, bulls, and breachy cattle, and hogs under forty pounds weight, should not be allowed to run at large; and that the owner of any animal not permitted to run at large by the regulations of the township should be liable for any damage done by it, notwithstanding the fences inclosing the premises might not be of the lawful height.

This by-law was passed in 1851, and was said to be still in force. The defendants' counsel contended that the ox was unlawfully on the highway, and no wilful misconduct shown in the defendants; that the want of gates could signify nothing, as the highway was not fenced, but lay open, and the ox consequently could have passed round the gates at either end if any had been placed there.

The jury were told, that as the by-law did not affirmatively authorize cattle to run at large, but only negatively provided that certain animals and under certain circumstances *should not run at large*, in the opinion of the learned Chief Justice the common law principle, that all persons were bound to keep their cattle from trespassing upon others, was in force, and not abrogated, and that the ox was therefore unlawfully on the track; and that on that account the defendants would not be liable for what happened to him, unless there was such a want of ordinary care on their part as amounted to recklessness, and in a manner to misfeasance, but unless there was misconduct on their part they were not responsible.

The jury found that the defendants were not guilty of negligence, and on that ground they acquitted them on the second count, which was founded entirely on alleged negligence in the defendants' management of the train; but they found a verdict for the plaintiff on the first count, giving him £4 damages, though the ox was sworn to be worth £15.

McMichael obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was contrary to the judge's charge; or to arrest judgment on the first count, on the ground that no liability of defendants is disclosed on the facts therein alleged, there being no duty incumbent on defendants to put up gates. He cited Dolrey v. Ontario, Simcoe & Huron Railroad Company, 11 U.C.R., 600; Dovaston v. Payne, 2 H. Bl., 527.

M. C. Cameron showed cause.

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

I infer that the jury either considered that the defendants should have put up gates, or that the ox was lawfully at large; or, what is more likely, that it was an accident for which neither party was to blame, and so they would divide the loss between them, and estimate it moderately.

As to the motion to arrest the judgment on the verdict which has been given on the first count, it is averred that the ox at the time of the accident was lawfully on the highway, as he might have been, for he might have been then using the highway as a road, being driven along it at the time by his owner. The plaintiff also avers that the defendants, *by their negligence*, ran their train against the ox and killed it. This would give a good cause of action independently of what is stated in the same count, of its being the duty of the Company to keep up gates; for if the defendants by their negligence killed an ox of the plaintiffs which was then lawfully on the highway, they would be certainly liable in damages. The allegation that the ox was lawfully on the highway is traversible if untrue; and not being traversed, we must, in considering any question upon the sufficiency of the pleading, take it to be true. It may have been true, because the ox may lawfully have been on the highway, even in that part of it which is crossed by the defendants' railway, for we see that the law allows that, but of course due care must be taken by the driver of the animal to see that it crossed the railway, using due care to avoid collision. The driver of the ox in such a case must look out for the railway; and as the declaration asserts that the collision arose from the negligence of the defendants, we are not at liberty to assume that it was otherwise in merely pronouncing upon the pleadings.

It is true that the count charges also a breach of duty in not keeping up gates, but it states also, we think, a good cause of action on the ground of negligence in driving the cars against the ox; and it would be no objection to the count, especially after verdict, that it stated two causes of action, or rather stated a double title to compensation for the same injury.

The question now is, whether any ground of action is stated in the count, and in our opinion there is a cause of action substantially stated, whether the Company were or were not bound to put up gates.

We are disposed also to think that the breach of duty in not putting up gates is sufficiently assigned. If the defendants had pleaded what they assert in argument, but what we cannot judicially notice, that there were no railway commissioners, and that they had put up sufficient cattle-guards, and that gates would have been useless, as there was no fence along the side of the road in which to place the gates, and that it was not incumbent on them to have a fence there—we say if the Company had pleaded to that effect, that might possibly have been held sufficient to release them from the charge of breach of duty in not putting up gates; but that is quite another question. As the count stands we take it to be sufficient.

Then, as to a new trial: The plaintiff's premises did not join the Company's line, but were distant from it 130 yards. They were therefore certainly not bound to fence as against him. His ox then coming to the road and standing upon it, as was proved, came to a place where he had no right to be, unless he was driven along the road; that is, using it for travelling. He had no right to be wandering upon it. On the other hand, the Company's train had a right to pass across the road at that point; and as the jury acquitted them of negligent or improper conduct in the management of the train, could they possibly hold them liable in damages? We think not, for the plaintiff (as we see when the evidence is before us, as it is in the application for a new trial) cannot attribute his loss to the fact of there being no gate, since the ox could just as well have got on the track if there had been a gate, the concession line being uninclosed. We think therefore that defendants are entitled to a new trial.

Rule absolute for new trial.

CHAMBER REPORTS.

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

Cataraqui Road Co. v. Dunn.

Attachment of debts—194th section C. L. P. Act, 1856.

The affidavit required by 194th section C L. P. Act 1856, for an order to attach debts, will not be dispensed with, and that affidavit must be positive and explicit. Under certain circumstances, however, an affidavit founded on belief will be sufficient.

Defendant had been examined orally pursuant to an order under 193rd section of the C. L. P. Act, 1856, and it appeared from the return of his examination that certain debts were then owing to him. Upon this return and an affidavit that their judgment is still unsatisfied, and that the parties owing defendant reside within the jurisdiction, plaintiffs applied *ex parte* for an order to attach such debts under 194th section.

HAGARTY, J.—I cannot dispense with the affidavit required by the 194th section. That affidavit, I see by some of the English cases, is required to comply strictly with the requirements of the statute, and to be very explicit—stating positively that the garnishee is indebted to defendant, and the particulars of such indebtedness.

Under the circumstances of this case, however, had the plaintiff made an affidavit that he verily believed that certain persons are indebted to defendant—stating that his belief was grounded on the return of the examination—I would have granted the order.

WHITTIER v. WHITTIER.

Interpleader summons—Affidavit for—7th Vic., cap. 30, amended by 9th Vic., cap. 56, sec. 4.

The affidavit on which to apply for an Interpleader summons on behalf of Sheriff should state that the application is made solely for the benefit of Sheriff, and that he does not collude with either claimant or plaintiff.

(Nov. 11, 1856.)—Sheriff applied under 7 Vic., cap. 30, as amended by 9 Vic., cap. 56, sec. 4, for an Interpleader summons, upon his own affidavit.

HAGARTY, J.—The affidavit is insufficient: it should state that this application is made solely for the protection of the Sheriff, and that he does not in any manner collude with the claimant or with the plaintiff.

BUFFALO AND LAKE HURON RAILWAY COMPANY v. GORDON.

Replevin—When local and when transitory—14 & 15 Vic., cap. 64.

Where the goods to be replevied have not been distrained, the writ of replevin may be sued out in any county, and a writ of replevin may be issued from one outer county to replevy goods in another outer county.

This was an action of replevin. The goods replevied were situate in the county of Welland: the writ was sued out in the county of Brant. Defendant took out a summons to set the writ aside, on the ground that it should have been sued out in the county of Welland, where the goods were, and not elsewhere, and also that Deputy Clerks of the Crown cannot issue writs of replevin from one county to another.

(Nov. 12, 1856.)—*Burns* showed cause. It is only where the goods have been *distrained* that the action is local. He cited 14 & 15 Vic. The 6th section of the C. L. P. Act, 1856, allows the writ for the commencement of any transitory action to be sued out of the office of any of the Deputy Clerks of the Crown.

HAGARTY, J.—There are two classes of replevin—local and transitory. The former class comprises all cases of goods distrained: the latter includes all other cases. As it is not shown on this application that the goods were distrained, we must infer that this case belongs to the transitory class; and if so, the 5th section of 14 & 15 Vic., cap. 64, justifies the issuing of the writ in Brant. It appears to me that in transitory cases the Deputy Clerks may issue writs of replevin from any one county to replevy goods in another county.

I shall discharge this summons with costs, on the ground that the affidavits filed by defendant do not support the objection to the irregularity complained of.

Summons discharged accordingly.

COMMERCIAL BANK v. PRINGLE.

Certificate for costs of special jury.

Where a cause has been referred to arbitration by *Nisi Prius* order of reference after a special jury has been struck and called, an application for certificate for costs of jury must be made to the judge by whom the reference was made

(Nov. 14, 1856.)

This cause had been entered for trial before *Burns, J.*, but was left to arbitration by a *Nisi Prius* order of reference, after a special jury had been struck and called. Plaintiffs applied to *Draper, C.J.C.P.*, in Chambers, for a summons for a certificate under 13 & 14 Vic., cap. 55, sec. 49, and submitted that as the cause had never been actually *tried*, the certificate might be made by any judge.

DRAPER, C.J.C.P.—The cause was, *technically* speaking, *tried;* and you must apply to the judge by whom the order of reference was made.

HAZLEWOOD v. DEBERGUE ET AL.

Practice—Attachment of debts—Affidavit.

The affidavit for the attachment of debts under 194th section of C.L.P. Act 1856, must be positive; a statement founded on belief is insufficient.

(Nov. 26, 1856.)

Plaintiff applied for an order, under the 194th section of the C. L. P. Act, 1856, for the attachment of debts due by garnishee to defendant, upon affidavit "that he *has good reason to believe and verily doth believe* that garnishee is indebted to defendant."

MCLEAN, J.—The affidavit is insufficient; it should state positively garnishee's indebtedness. The Legislature could not have intended to authorize the issuing of attachments on the mere chance of a debt being due; but, on the other hand, it is difficult for a creditor to establish the actual existence of a debt, and I should be inclined to consider presumptive proof sufficient; but in *The Cataraqui Road Co. v. Dunn.*(a) the circumstances of the application were stronger than they are here, and the order was refused. I cannot, therefore, grant this order.

MCDOUGALL v. GILCHRIST.

Absconding debtor—Service of writ—45th section of C. L. P. Act, 1856.

Service of a writ of attachment against an absconding debtor in the wife of the debtor will be allowed good service, upon affidavit that after diligent enquiry plaintiff is unable to ascertain debtor's whereabouts.

(Dec. 1, 1856.)

Carrall applied for an order under the 45th section of the C. L. P. Act, 1856, that service of the writ of attachment on the wife of the defendant, an absconding debtor, should be deemed good service upon defendant.

The affidavit upon which he applied, stated: 1st. That deponent had made enquiries of the wife and relatives of defendant, residing in the township of, &c., for the purpose of ascertaining the whereabouts of defendant, in order to effect personal service of the writ of attachment, but they deny all knowledge of where defendant is. 2nd. That deponent believes that defendant has gone to, and is now residing in the State of New York, one, &c.; but that further or more particular information he is unable to obtain.

BURNS, J.—Take the order.

(a) In Chambers, Nov. 11, 1856, per Hagarty, J., vide page 27.

The Great Western Railway Co. v. Chadwick.

Joinder of different causes of action—75th sect on of C. L. P. Act, 1856.

Causes of action in Replevin and Trespass may not be joined under 75th section of C. L. P. Act. 1856.

[Dec. 1, 1856.]

On the 4th Nov., 1856, plaintiffs issued a writ of replevin, and declared on the 23rd.

Declaration—1st count: "For that the defendant, at &c., took the goods and chattels, to wit, &c., of the plaintiffs and unjustly detained the same against sureties and pledges."

2nd count: "For that the defendant wrongfully deprived the plaintiffs of the use and possession of the plaintiffs' goods, that is to say, &c.

Carroll, for defendant, obtained a summons "to show cause why the 2nd count of the declaration should not be struck out, on the ground that such count is not allowable with the 1st count thereof."

Plaintiffs showed cause.

Burns, J.—The 1st count is in Replevin, and the 2nd in Trespass, and as the 75th section of the C. L. P. Act, 1856, expressly excepts Replevin from the causes of action which may be joined, I must make this summons absolute with costs.

Summons absolute accordingly.

Henderson v. Comer.

Practice—Counsel fee.

The rule of Practice that a person cannot tax a counsel fee in his own case against the opposite party, does not extend to his partner. A counsel fee will be taxed between party and party, even though the counsel did not attend the trial.

[Dec. 2, 1856.]

The plaintiff *Henderson* is an attorney, and sued in person. He is the partner of *H. Smith*, Solicitor General. A brief was placed in the hands of *Smith*, who not being able to attend the trial, the brief was given to *O'Reilly*. Family affliction prevented the latter attending, and the brief came again into the hands of *Smith*, who conducted the case on the trial.

The Deputy Clerk of the Crown, at Kingston, in taxing the costs in the cause, allowed the counsel fees to both *Smith* and *O'Reilly*.

Helliwell now applied for a revision of taxation; and contended that as the plaintiff, being the attorney on the Record, would not be entitled to tax a counsel fee against the defendant for conducting his own case, he should not be allowed a fee to *Smith*, who is his partner and shares the fees, and that the fee to *O'Reilly* could not be allowed, as he did not attend the trial.

Smith, Solicitor General, supported the decision of the Deputy Clerk of the Crown.

Burns, J.—I must allow both these fees.

Kenney v. Shaughnessy.

Ejectment—Particulars of claimant's title—C. L. P. Act, 1856, sec. 222.

In an action of Ejectment for breach of covenant in a lease, the notice of claimant's title should set out the particular covenant which has been broken, and the particulars of the breach in general terms.

[Dec. 2, 1856.]

This was an action of Ejectment, and the writ was endorsed pursuant to the 222nd section of the C. L. P. Act, 1856, with a notice of the nature of the title intended to be set up by the claimant, as follows:—

"To Joseph Shaughnessy, the within defendant:

"Take notice that the plaintiff claims the premises for which this action is brought, by virtue of a breach of covenants of a certain Lease, bearing date the 1st October, 1854, and made between the plaintiff of the first part and the defendant of the second part."

Defendant obtained a summons calling on plaintiff to show cause why he should not give defendant better particulars of the title intended to be set up by the claimant on the trial of this cause, by specifying the particulars of the breach of covenant of said lease, and the particular covenant which has been broken, by which plaintiff claims the premises.

McMichael moved summons absolute, and *Jackson* showed cause.

Burns, J.—Your particulars of title should show what particular covenant has been broken, and you should set out generally the manner in which such covenant has been violated.

Summons absolute.

Sewell v. The Buffalo, Brantford & Goderich Railway Company.

Interpleader—Costs—Determination of Issue.

An application for costs of an Interpleader issue must not necessarily be made to the Judge who directed the issue. Where proceedings have begun under an order obtained in Chambers, all subsequent applications must be made in like manner. Where claimant neglects to bring the feigned issue to trial, the proper course to determine the proceedings is to move to rescind the Interpleader order.

[Dec. 2, 1856.]

A similar application to the present had been made in this cause by *R. Miller*, in Practice Court, in Trinity Term last, the particulars of which will appear from the judgment then given—as follows:

"Hagarty, J.—Mr. Miller moves for a rule on Stockton to pay to the Sheriff of the county of Lincoln, the costs by him incurred in his application for relief, and to pay plaintiff the costs by him incurred in said application, and the costs of the day incurred by him in defending a feigned issue, and to discharge the Interpleader order so far as it restrains the Sheriff from proceeding to sell the property seized by him.

"On 6th Sept., 1855, an order was made by the late Chief Justice of the Common Pleas, by which, on hearing the plaintiff, the Sheriff and the claimant, Stockton, it was ordered that the parties should proceed to try a feigned issue (not saying when) the claimant to be plaintiff, and the present plaintiff defendant, to try whether certain property seized by the Sheriff was the goods of the claimant—and that the costs of the feigned issue should abide further order thereon: nothing further is said as to reserving costs.

"It appears by affidavit that Stockton did make up the issue so directed, and entered it for trial, and gave notice for the Niagara Assizes, 2nd October, 1855—that present plaintiff attended with his witnesses and was ready—that claimant withdrew his record and has not since entered it or given notice of trial, though another Assize has since elapsed.

"The claimant, in answer to the rule, files an affidavit of his attorney, stating that some three or four weeks before issuing the Rule, the Sheriff sold the property in question, but does not say for what purpose or under what authority.

He contends that there is no power in this case in this Court, and that no one but the Judge who made the order can interfere.

"I regret to find the law in a very unsatisfactory state on this point.

"The order was made under 9 Vic., cap. 56, sec. 4, empowering a single Judge to give relief in the same manner as the Court could under 7 Vic., cap. 30, concluding with the words, 'and the costs of such proceeding shall be in the discretion of such Judge.' These words and the clauses generally are almost identical with the Imperial Act, 1 & 2 Vic., cap. 45. *Brough v. Scolefield*, 9 M. & W. 478, was an application like the present: the claimant, however, having abandoned his claim,

"LORD ABINGER decided that on the whole by the last quoted Act, 'the discretion is vested in the Judge who made the order.' 'There appears to be no inconvenience, however, in construing the Act liberally, except indeed in the event of the Judge's dying or being removed to another Court.'

"PARKE, B., says, 'the Act means the Court shall have power over the costs when the order is made by the Court, and a Judge where the proceedings were before a Judge. I should hardly be disposed to restrict the authority to the individual Judge who made the order. The words may be construed in this way, and I should be disposed to put the more enlarged construction upon them—any other leading to much inconvenience. But I think that the case must be worked out by a Judge, where the proceedings originated before a Judge.' The Rule was discharged. *Marke v. Ridgeway*, 1 Ex. 8, is recognised as leading, but nothing is said as to the individuality of the Judge.'

"In 1 U. C. Practice Reports, 276, *Commercial Bank v. Clark*, Mr. Justice Draper (in Practice Court, Mich. Term, 8 Vic.) quotes these two cases and decides accordingly, saying, 'Where the proceedings have begun under an order obtained at Chambers, all subsequent applications should be made in like manner.'

"I feel reluctantly compelled to discharge this Rule on the authorities. The plaintiff must apply to a Judge in Chambers, and I think under the remarks quoted in *Brough v. Scolefield*, he need not fear much difficulty in the objection that the Judge who made the order can no longer be applied to.

"Rule discharged without costs."

On the 26th Nov., 1856, *R. Miller* obtained a summons in Chambers in the terms of the Rule *Nisi* in Practice Court.

W. H. Burns, for claimant, now showed cause, and made use of the same arguments as those adduced by him upon the former motion.

BURNS, J.—The case of *Hood v. Bradbury*, 7 Scott's N. R. 892, is directly against this application, and I must discharge this summons—but it will be without costs, as it is difficult to know how to bring an Interpleader issue to an end, and no authority is cited. The proper course is, as it appears to me, if the claimant does not go down to the Assizes next ensuing the making of the Interpleader order, either for the Sheriff or the party who desires to proceed to move to rescind the order, and to embody in the rescinding order a direction barring the claimant: and I apprehend that it will not be found there is any difficulty in the presiding Judge in Chambers making an order to that effect, notwithstanding the original interpleader order was made by a Judge not now on the Bench.

Summons discharged without costs.

RATRICK v. MONARCH INSURANCE COMPANY.

Increased counsel fee—Application for.

An application for an increased counsel fee must be made to the Judge who disposed of the case at *Nisi Prius*.

[Dec. 3, 1856.]

Holden, for plaintiff, applied for an increased counsel fee. The case was not really *tried*, a verdict having been taken for the plaintiff by consent subject to the decision of the Court upon a special case reserved.

BURNS, J.—You must apply to the Judge who disposed of the case at *Nisi Prius*, or to one of the Judges before whom the argument took place in Banc, who may be acquainted with the facts of the case.

SINCLAIR v. BABY, AND GLENDENNING v. BABY.

Sheriff's sureties—Relief of.

The sureties of an Ex-Sheriff desiring to be released from their covenant, should pay to the new Sheriff the amount of their covenant, and also of all costs of suits against such Ex-Sheriff up to the time of such payment; having done so they may plead such payment in bar of actions subsequently brought.

[Dec. 3, 1856.]

These were actions against Ex-Sheriff Baby.

Phillpotts applied on behalf of one of the sureties of Baby for relief and release from his covenant.

BURNS, J.—The surety must pay to the present Sheriff the amount of his covenant, (£500) and also all costs of actions which may have been brought against Baby, as Sheriff, up to the time of such payment. The costs must be paid over and above the amount of the covenant. After having done this the surety may plead such payment in accord and satisfaction, shewing the facts, in bar of any action against him, and I think such a plea would be perfectly good.

HARRINGTON v. HARRINGTON.

Ejectment—Defence by person not named in writ—C. L. P. Act, 1856, sec. 225.

A person in possession and not named in the writ of ejectment will be allowed to appear and defend, even though the defendant have already given a confession of judgment, and a writ of *Hab. fac. poss.* has been issued thereon.

[Dec. 4, 1856.]

This was an action of Ejectment. The defendant had confessed judgment, and a writ of *Habere facias possessionem* had been issued. The present application was made by one Mary Harrington, daughter of the defendant, for the purpose of being allowed to appear and defend this action, under the 225th section of the C. L. P. Act, 1856, on the ground "that she is entitled to the possession of the said premises, and the defendant was not in possession thereof when served with the writ of summons in this cause, and that the said defendant has confessed judgment in this cause collusively with the plaintiff for the purpose of turning said Mary Harrington out of possession of the said land."

The affidavits filed fully sustained the facts stated as above in the summons.

Carrall now showed cause, and filed affidavits contradicting the statements made by Mary Harrington. He also contended that as the defendant had already confessed judgment, a third party could not be allowed to appear and defend. If Mary Harrington is entitled, and defendant not, a judgment against defendant will not prevail against her; and if turned out of possession she may have her remedy by action of trespass.

M. C. Cameron, in reply.

BURNS, J.—The object of the 225th section was precisely to prevent the necessity of proceeding by action of trespass for redress, by allowing persons in possession to appear and defend their possession. I will not interfere with the confession of judgment given by the defendant, but will restrain the plaintiff from turning Mary Harrington out of possession until the title is settled. This summons must be absolute.

JONES v. DEBERGUE ET AL.

Attachment of debts—C. L. P. Act, 1856, sec. 194.

An order for the attachment of debts under 194th section of C. L. P. Act. 1856. will be granted upon affidavit of *belief* of garnishee's indebtedness, provided sufficient grounds be shown, in affidavit, for such belief.

[Dec. 5, 1856.]

Plaintiff applied *ex parte* under the 194th section of the C. L. P. Act, 1856, for an order to attach a debt due by garnishee to defendants.

The application was made upon an affidavit of the plaintiff that he had recovered a judgment in this cause; that said judgment is still wholly unsatisfied; that he *had been informed, and had good reason to believe, and did verily believe*, that the Brockville and Ottawa Railway Company are indebted to defendants in a very large amount; that said Company resides within the jurisdiction of this honourable Court; and that this action was not commenced against defendants as absconding debtors. Another affidavit was filed for the purpose of showing the grounds on which plaintiff founded his belief of the indebtedness of the garnishees, which stated that it has been generally understood, and deponent has been informed by the Secretary of the said Company, and he verily believes that defendants, with one Sykes, deceased, were contractors for the construction of said Railway, and have done a large amount of work on said Railway under said contract; that in a conversation with one of the defendants about six months ago, said defendant told deponent that he had been offered £20,000 in satisfaction of the claim of defendants against said Company for work done on said Railway, and that he would not take that sum; that the defendant's claim was £90,000; that in a conversation with R. M. Watson, Esq. formerly Managing Director of said Company, in October last, said Watson told deponent that there appeared upon the books Company a balance of over £20,000 in favor of Sykes, of the DeBergue & Co. (of which firm defendants are the surviving partners) and that such balance had been subsequently reduced to about £19,000.

BURNS, J., granted the order.(a)

(a) There is a conflict of opinion in Upper Canada as to whether the affidavit in a case like the present should not be positive instead of expressing mere belief, as in this case. In favour of the former branch of the proposition is the decision of McLEAN, J., in *Hazlewood* v. *DeBergue et al*, Chambers, Nov. 26, 1856, and of HAGARTY, J., in *Cataraqui Road Company* v. *Dunn*, Chambers Nov. 11, 1856—with both of which the case here reported seems to conflict.

BROWN v. MERRILLS.

Attachment of debts—C. L. P. Act, 1856, section 194.

Where the garnishee resides out of the jurisdiction of the Court, money in the hands of his agent within the jurisdiction may be attached under 194th section of C. L. P. Act, 1856.

(Dec. 5, 1856.)

Plaintiff applied *ex parte* for an order under the 194th sec. of the C. L. P. Act, 1856, to attach a debt due by one Young to defendant.

The affidavit on which the application was made was that of plaintiff, and stated that a judgment had been recovered by him against defendant, and that the same was still wholly unsatisfied; that a *Fi. Fa.* had been issued against goods and chattels, and returned "no goods"; that one Young, formerly of the city of London, C.W., now of London in England, is indebted to defendant in £107 10s.; that said Young, on being drawn upon by defendant in favour of plaintiff for the amount, referred plaintiff to one Beddome, whom he stated was his agent in Canada; that said Beddome admits that he has moneys of said Young, but refuses to pay plaintiff; and lastly, that said Beddome resides within the jurisdiction of the Court.

BURNS, J., granted the order.

HARDING v. BARRATT.

Attachment of debts—C. L. P. Act, 1856, section 194.

Where there has been a previous understanding between the judgment debtor and the garnishee that the latter should have a certain period of credit, a Judge will not order garnishee to pay the debt until such period of credit expires.

(Dec. 12, 1856.)

An order had been obtained under the 194th section of the C. L. P. Act, 1856, attaching a debt due by one Stovel to defendant, and also a summons calling on the garnishee to show cause why he should not pay the amount thereof to the plaintiff.

Stovel, the garnishee, now appeared and stated that he was willing to pay the amount of the debt, but the amount was not due for three months, which period of credit had not elapsed.

RICHARDS, J., granted the order that Stovel should pay the debt to the plaintiff as soon as the period of credit expired.

HARRIS v. ANDREWS.

Practice—Appearance—C. L. P. Act, 1856, sec. 82.

An appearance is in time even though filed while plaintiff is entering judgment, so that the judgment be not fully signed.

[Dec. 19, 1856.]

Defendant had obtained a summons on plaintiff to show cause why the judgment signed in this cause should not be set aside, on the ground that it was signed after an appearance had been entered for defendant, and notice thereof given to plaintiff's attorney, as required by the 82nd section of the C. L. P. Act, 1856.

It appeared that on Saturday, 29th Nov., the appearance to the writ of summons was due. On Monday morning following, immediately upon the opening of the Deputy Clerk's office, plaintiff's attorney proceeded to enter judgment for non-appearance; and while the Clerk was taxing his bill, defendant's attorney handed the Clerk an appearance for defendant to be filed, and at the same time served notice thereof on plaintiff's attorney, who disregarded the appearance and went on entering his judgment.

E. Fitzgerald, now showed cause.

HAGARTY, J.—The appearance was in time; the Statute allows the defendant to appear at any time before judgment, and certainly there was no judgment until it was fully signed.

Summons absolute, *without costs.*

WEBSTER ET AL v. HORSBURGH.

Ejectment—Appearance: by person not named in writ.

Leave to appear and defend an action of Ejectment will be granted to a person not named in the writ, pursuant to the 225th section of C. L. P. Act, 1856, upon affidavit of the applicant that he is in possession, and disclosing his title.

[Dec. 13, 1856.]

One Isabella Horsburgh obtained a summons for leave to appear and defend this action, pursuant to the 225th section of the C. L. P. Act, 1856.

Her affidavit stated that she is in possession of the land for which this action is brought; and that she claims title under Deed from the defendant, dated on, &c., and duly registered on, &c.

M. C. Cameron showed cause.

RICHARDS, J., granted the order.

BEATY v. CHARRITY.

Practice—Writ of trial—Commission.

It is a good objection to an application for a writ of trial that it will be necessary to issue a commission for the examination of defendant's witnesses.

[Dec. 22, 1856.]

Plaintiff moved absolute a summons for a writ of Trial.

Defendant showed cause, and produced the affidavit of his attorney, stating that, owing to the residence of some of his witnesses without the jurisdiction of the Courts, it will be necessary for defendant to issue a commission for their examination.

ROBINSON, C.J.—The objection is good, and the summons must be discharged.

Summons discharged without costs.

THE BANK OF MONTREAL v. CRONK ET AL.

Practice—Satisfaction Piece—Dispensing with plaintiff's signature—Rule 64, Trinity Term, 1856.

Where the amount of the judgment is small and plaintiff resides without the jurisdiction of the Court, his signature to the Satisfaction Piece will be dispensed with, and his attorney authorized to acknowledge satisfaction.

(Dec. 22, 1856.)

Hutton, for plaintiffs, applied for an order dispensing with the signature of the plaintiffs to the Satisfaction Piece, as required by Rule 64, Trinity Term, 20th Vic., 1856; and authorizing their attorney to acknowlege satisfaction of the judgment.

The President of the Bank resides in Montreal, without the jurisdiction of the Court, and could not there conveniently appoint any practising attorney of the Court to witness his signature.

ROBINSON, C.J.—As the amount of the judgment is small, I will grant the order.

Order granted.

COUNTY COURTS, U.C.

(In the Court of Quarter Sessions and County Court, County of Simcoe—J. R. GOWAN, Judge—January, 1857.)

REGINA v. ERRIDGE.

Attorneys no right to be heard as advocates—Barristers only allowed to practice as advocates in the Inferior Courts of Record.

Mr. Wright, an attorney-at-law, stated yesterday that he had been engaged by the prisoner in this case of *Regina v. Erridge* as counsel to defend, and desired audience. As an attorney-at-law duly admitted in Upper Canada, he claimed moreover the right to be heard as an advocate in these Courts in every case, criminal and civil, in which he might be retained. The early adjournment of yesterday has enabled me to consider this application, the first of the kind which has come before me.

The question as to whether attorneys should be admitted to the privilege of Counsel seems to resolve itself into the following considerations:—

1st. Are attornies prohibited by the Law Society's Act from practising as advocates? or, in other words, have barristers the *exclusive* right to act in that capacity in all Courts of Record in Upper Canada?

2nd. Supposing no express prohibition to exist, is an attorney entitled *de jure* to plead as an advocate both in the County Courts and Courts of Quarter Sessions?

3rd. If a discretionary power be appealed to, ought it to be exercised in favour of attornies-at-law?

First—Does the Law Society Act of Upper Canada (37 Geo. III, cap. 13) give barristers a right to audience as advocates to the exclusion of attornies, in the County Courts and Courts of Quarter Sessions?

The Act provides for the incorporation of the persons then "admitted to practice in the law and practising *at the* Bar of any of Her Majesty's Courts in this Province," into a Law Society, and empowers the Society to "form a body of rules and regulations for its own government." The 5th section enacts "that no person other than the present practitioners, and those hereinafter mentioned, shall be permitted to practice a the bar *of any of His Majesty's Courts* in the Province, unless such person shall be previously entered of and admitted into the said Society as a Student of the Laws, and shall have been standing in the Books of said Society for the space of five years, and shall have conformed himself to the Rules and Regulations of the said Society, and shall have been duly called and admitted to the practice of the law as a Barrister, according to the constitution and establishment thereof."

The question turns on the true construction of the words "any of His Majesty's Courts"; if they refer to and include the Inferior Courts of Record, the right of Barristers to exclusive audience is beyond doubt; if intended to designate the Superior Courts only, then an attorney's claim to be heard as an advocate in the Inferior Courts is not affected by the Statute, but must be disposed of on other grounds. The words "any of His Majesty's Courts," implies the existence of more than one; and there was, I believe, at the passing of the Act, only one Superior Court in U. C.; so that they must have referred also to the Inferior Courts. Every Court of Record is the King's Court, (Co. Litt., 1170, Bac. Ab., 2 vol., 101.) "The Courts of Westminster are the Superior Courts of the Kingdom," (Bac. Ab., 102.) County Courts and Courts of Quarter Sessions are Courts of Record, and are therefore within the term "Her Majesty's Courts," if used by the Legislature in its broad and comprehensive sense.

The *popular* use in England of the words "His Majesty's Courts," has reference to the Courts at Westminster but in many of the Imperial Acts to which I have referred, the special designation "Her Majesty's Courts of Record at Westminster" is used; for example in the following statutes passed before and about the time when the Law Society's Act was passed, viz., 34 Geo. III, cap. 46, sec. 4; 36 Geo. III, cap. 8, sec. 17; 38 Geo. III, cap. 78, sec. 29. In the 33rd Geo. III, cap. 68, sec. 1, similar language occurs, but in the 3rd clause, the words "any of His Majesty's Courts of Record in Wales," (Courts of limited jurisdiction) are used.

Seeing that the words "His Majesty's Courts" were used by the U. C. Legislature in Acts before, at the time of, and after the passing of the Law Society's Act, we may from a reference to them find a reasonable clue to the meaning of the same words in the Law Society's Act.

The 32nd Geo. III, cap. 2, enacts that every issue of fact found in any action, real, personal, or mixed, and brought in

any of "His Majesty's Courts of Justice" within U. C., shall be tried by a Judge, &c. The 32nd Geo. III, cap. 7 and 33, Geo. III, cap. 5, severally give penalties, &c., to informers, "who shall sue for the same in any of His Majesty's Courts of Record within this Province." The 3rd section of the last mentioned Act provides a method for preserving the testimony of certain marriages by attestation, registered, &c., which "registry shall be held as sufficient evidence of such marriage in all His Majesty's Courts of Law and Equity." The old Registry Act, 36 Geo. III, cap. 5, sec. 6, directed the Registrar's recognizance "to be transmitted unto the Court of His Majesty's Bench of the said Province." Here it is observable that the Court of Queen's Bench is designated in special and appropriate terms; while in the 10th clause treble damages are given to a party injured, &c., to be recovered by action of debt "in any of His Majesty's Courts of Record." And the last clause provides that the Act shall be taken "in all Courts within the Province" as a public Act. The variation in terms in reference to Courts is very noticeable:—1st. The Court of His Majesty's Bench; 2nd. His Majesty's Courts of Record; 3rd. All Courts within this Province. Again, in 36 Geo. III, cap. 1, sec. 3, the Court of King's Bench has the special designation, "His Majesty's Court of his Bench," and in sec. 5, "The Court of His Majesty's Bench." In the 37 Geo. III, cap. 7, the terms "Court of King's Bench" appear. Referring to the revised Statutes of U. C., (1831) in no Statute previous to the Law Society's Act did I notice the Court of King's Bench described as "His Majesty's Court": it is designated as above or included under the general terms "His Majesty's Courts of Justice," "His Majesty's Courts of Record," or "His Majesty's Courts of Law," or else specially described as "The Court of His Majesty's Bench," or the like.

The language of some of the Statutes passed subsequently to the Law Society's Act may also help to furnish an exposition of the sense in which the words "His Majesty's Courts" (as used in the Act,) are to be understood. The 59th Geo. III., cap. 15, makes certain instruments, evidence of particular facts, "in all His Majesty's Courts," &c. The 59th Geo. III, cap. 24, is by the 24th clause declared to be a public Act," and the same is to be construed as such in Her Majesty's Courts in this Province." The 4th Geo. IV, cap. 3, required "*every attorney of His Majesty's Court of King's Bench* in this Province" to take out an annual certificate of his having been admitted to practise "as an attorney in the said Court," and a subsequent clause imposes a penalty on an uncertificated attorney practising "*in any of His Majesty's Courts in this Province*," (surely County Courts, if not, Courts of Quarter Sessions, were here comprehended) to be recovered by information "in His Majesty's Court of Queen's Bench. The 3rd Vic., cap. 2, repealed this Act, but the 6 and 7 sections contain a similar enactment. In the 11 Geo. IV, cap. 5, County (District) Courts are, *in direct terms*, designated as "His Majesty's Courts." The first clause enacts that "if any action to be hereafter commenced in His Majesty's Court of King's Bench, or in any of *His Majesty's District Courts*," the defendant proves a demand beyond the amount plaintiff proves, he may have a verdict for the difference: and in the *next* clause there is a provision relative to *Inferior Courts*, the Court of Request. This is the only Statute in which I find the term, "His Majesty's District Courts"

It is said the County Courts and Courts of Quarter Sessions, being Courts of Local Jurisdiction, are Inferior Courts, and are not in any sense *Superior Courts*, which it is urged "His Majesty's Courts" mean. However this may be, the question at issue will not be much affected if in the Law Society Act they were included under the term, His Majesty's Courts; and it is a circumstance of considerable weight that in the Acts of Parliament I have noticed County Courts and Courts of Quarter Sessions are referred to as "His Majesty's Courts," and in one Act receive that special designation; independently of this I see little in the argument itself as to limit in jurisdiction. The Courts of the Counties Palatine, though limited as to place, were held to be Superior Courts. The Court of Queen's Bench was "*The* Superior Court of Common Law in U. C., and in these terms it is noticed in the preamble to 48 Geo. III, cap. 4, "An Act to regulate the costs in actions brought in the Court of King's Bench, where same might have been brought in District Courts." In the 3rd Wm. IV, cap. 1, s. 27, relative to Courts of Requests, District Courts are referred to as "Superior Courts"; and again in the Statutes of Canada 4 & 5 Vic., cap. 3, sec. 50, the words "Superior Courts of Record" are applied to District Courts—but I do not build anything on the expression in this Act of *Canada*.

The bearing of the references I have made seem to point but to the conclusion that "His Majesty's Courts of Record," as used in the Law Society's Act, include the County Courts and Courts of Quarter Sessions, and therefore that attornies are prohibited from practising therein as advocates: I so speak with great diffidence, but I may be permitted to say that had the above considerations been urged upon the Court in the case of *Lapenotiere* the decision might have assumed a different shape.

But an opinion having been expressed, that no satisfactory grounds appeared for or against the claim of attornies to be heard as counsel, I do not feel at liberty to hold otherwise as respects the Quarter Sessions. With regard to the County Courts, the case is different; in my opinion the Judge acting therein not only may but *must* decline hearing attornies as advocates, for by "the County Courts Procedure Act of 1856, (sec. 19) it is enacted that in cases not expressly provided for by law, the practice and proceedings of the County Court shall be regulated by and shall conform to the practice of the Superior Courts. The case of *Lapenotiere* is authority for holding the absence of any express legal provision; the practice then of the Supreme Courts applies, and to the exclusion of attornies.

I now proceed to the next question:

Second—Supposing no express prohibition to exist, is an attorney entitled *de jure* to plead as an advocate in the Local Courts of Record?

"An attorney-at-law (says Blackstone) answers to the *procurator* or proctor of civilians and canonists; and he is one who is put in the place stead or *turn* of another to manage his matters at law."

In *Impey's Practice* the definition is, *atturnatus* or *attornatus* in law, is an officer appointed by the court to prosecute or defend actions brought against or prosecuted by their clients.

In *Comyn's Digest*, "a person appointed *ad prosequendum* or *defendendum*"; in *Bacon's Abridgement*, "one appointed to prosecute or defend for his client: and *Merifield*, in his treatise of the law of attornies, gives this description: "An officer of a Court of Record legally qualified to prosecute and defend actions in Courts of Law on the retainer of clients."

I see nothing in any of the Books I have been able to refer to, to show that the office of an attorney embraces that of an advocate also: in its origin it certainly did not, nor is there anything in the properties of the office of attorney, as explained, signific: nt of the advocate's duty. Barrister is only the modern term for advocate. The profession of the barrister and the attorney have their several duties, and are as distinct in their nature as those of the physician and apothecary.

"To the barrister it properly appertaineth legally and in order to set before judges and juries that which the diligence o. the attorney has gathered from the complaints of the client; so that the whole together, barrister, attorney and client, make, as it were, one man."

The benefits arising from a division of labour and distinct duties in the profession of the law, are certainly very partially felt in this country on account of both branches being commonly followed by the same person; *but there has been no blending of the callings:* the office of the attorney is merely

accidental to that of the barrister, and the distinction is recognized by the Legislature and the Courts.

The usage in England and Ireland is referred to as evidence of a recognition of the attorney's right to act as an advocate at the Quarter Sessions. I know not if this practice at home be founded on ancient usage or permitted in the exercise of a discretion: I should suppose the latter from what is said on the subject in *Dickenson's Quarter Sessions Practice*. But the usage or practise of the Courts at home cannot bind us here, unless embodied in our legal system; and the attorney in England occupies higher ground than the attorney in this country, he receives *after* examination a certificate of his fitness, which the latter does not.

In this point of view the 9th sec. of 4 & 5 Vic., cap. 24, is relied on as a Legislative recognition of the existence of a practice—hearing attorneys as advocates: the words are—"all persons tried for felonies shall be admitted, &c., to make defence, &c., "by counsel learned in the law or by attorney in the courts where attorneys practise as counsel."

If the practice existed in U. C., I must presume it prevailed in the exercise of a discretion on the part of the court in favor of attorneys, as a mere matter of practise in particular courts for public convenience, it can be altered by any court when occasion demands it. For in respect to practise not *prescribed* by law, every independent tribunal can and does act, unfettered by the rules laid down by another of the same grade for its internal regulation.

It seems to me however, that any argument to be drawn from the clause will at least be greatly weakened by the following considerations:—This is a Statute of Canada. The Law Society's Act, and other Acts to which I have referred, were passed by the Legislature of Upper Canada. The 4 & 5 Vic., cap. 24, had reference to Lower Canada as well as to Upper Canada: it re-enacted matter before then law in Upper Canada: the measure was not even introduced by an Upper Canada member. Now, when there is change of constitution, it seems to me that unless acts be in *pari materia* very little weight is to be given to legislative expressions by the Legislature under one constitution, in expounding the meaning of laws by the Legislature under another; the position of England and Ireland after the Union would probably furnish illustrations on this point, but I have neither time nor material to make the examination. Respecting this particular act, we may conclude that the whole Province was in the minds of the framers of the law, and that the expressions used were directed thereto. It may be that in certain Courts in Lower Canada attorneys were heard as advocates; if so, the fact implied would have foundation, although that privilege was not granted in any Court in Upper Canada.

The U. C. Act, 6 Wm. IV, cap. 41, to allow persons indicted for felony to make full defence, presents no recognition of the attorney's right to act as counsel, but the reverse. The words are, it shall be lawful for any person tried for felony "to be heard in full defence before the court and jury, either personally *or by counsel* at his or her election."

The preamble shows the reason of the law and the evils it was designed to remove.

"Whereas, (it reads) nothing is more just and reasonable than that persons prosecuted for felony, whereby their liberties, lives and characters may be lost and destroyed, should be justly and equally tried, and that persons accused as offenders therein should not be debarred of *just and equal means for defence* of their innocencies in such case, *in order thereunto*, and for better regulation of trials of persons prosecuted," &c.

Now, if the practice of hearing attornies as advocates existed in U. C., it is reasonable to suppose it must have been known to the U. C. Legislature; and it is equally reasonable to presume that its existence would have induced the Legislature to insert apt words in the law to meet it, in order more effectually to enlarge the means for carrying out the beneficial end in view. If then this statute of *Upper Canada* is not a *proof* of the *non*-existence of the practice in U. C., as *evidence*, it is at least a good set-off against the statute of *Canada* before referred to.

On the whole I am of opinion, that an attorney is not entitled *de jure* to plead as an advocate in these Courts.

I come to the last question:

Third—Ought a discretionary power to be exercised and the privilege of advocacy to be granted to attorneys in the Courts of Quarter Sessions; (as respects the County Court as before mentioned, I think there is no discretion—attorneys must be excluded.)

An application to the discretion of the Court, should be founded on public convenience and on public policy—these are the only grounds on which an appeal to the discretion of any court of justice can properly be made. I do not think that either can be brought to sustain the present application. There is a bar in attendance sufficient to afford a choice of advocates to the suitors; and therefore attornies cannot claim to be let in as advocates *ex necessitate*, and to allow attorneys to invade the peculiar functions of the advocate, would not in my judgment be defensible on any ground whatever.

The privilege of advocacy held by the bar has been recognized for ages, and the exclusive principle encouraged for the public benefit.

A brief review of the enactments in reference to attorneys and barristers will better indicate their relative *status* at this time.

The ordinance of the Province of Quebec (25 Geo. III, cap 4.) was, I believe, the first legislative provision in this country, after it became a British province, respecting the profession. The preamble is in these words: "Whereas the welfare and tranquility of families require as an object of the greatest importance that such persons only should be appointed to act and practice as barristers and attorneys," * * * * "who are properly qualified to perform the duties of those respective employments."

This ordinance appointed the manner in which barrister and attorney should obtain qualification to practise: in both branches of the profession it was the same—a service under articles; but each candidate was commissioned after examination, and on being approved of by the judges. The clause is to this effect, that no person should be commissioned or permitted to practise as a barrister, advocate, solicitor, attorney or proctor-at-law, who had not *bonâ fide* served under articles with a practising advocate, &c., for six years; and it goes on, neither shall any person, &c., "be commissioned or admitted to practise in any of the several capacities as aforesaid until after he shall have been examined by some of the first and most able barristers, advocates and attorneys of the Courts of Judicature in this Province, before the Chief Justice or two or more of the Judges of some of His Majesty's Courts of Common Pleas, and approved and certified by such Chief Justice or Judges to be of fit capacity and character to practice the law in the several courts of the Province."

The Upper Legislature altered the system established by this ordinance, but the distinction of classes was preserved and defined. Persons were entitled to be commissioned and admitted to practise as attorneys *without any examination* as to their fitness, a service under articles to an attorney being the only qualification required.

The degree of *barrister*, however, could only be obtained from the Law Society upon these preliminaries—admission to and remaining on the books of the Society as a Student for five years—conforming to the rules and regulations of the Society, and being duly called "according to the constitution and establishment thereof." By the rules of the Law Society of Upper Canada, no person can be admitted as a Student, unless found, on full and strict examination, to be by habits, character and education, duly qualified for admission: and a

thorough familiarity with certain prescribed subjects and books is required.

The Student member of the Law Society must attend a given course of Lectures, and after remaining on the books of the Society for five years, he must again submit to an examination of his legal and general attainments, and if found properly qualified for call, he is admitted to the degree of barrister at law. (The course prescribed was always respectable, and late rules have wisely enlarged the requirements.) Thus in U. C. we see the qualifications of the attorney lowered, or at least the test of fitness dispensed with, and that branch of the profession placed on a less safe footing for suitors than in England or in Lower Canada, while the distinguished calling of the barrister is elevated and accredited by extended qualifications and searching requirements.

It is to be remembered also, that as at present constituted the Local Courts are presided over by a single Judge, whose duties are not wholly confined to one Court or to one class of cases, and who has the bulk of the business, civil and criminal, arising in his county, to dispose of; that the jurisdiction delegated to County Judges has been greatly enlarged, and that new and difficult questions are constantly arising before them; and therefore it certainly seems most desirable that the Local Courts should have the assistance of an educated and able local bar. The law requires a standing in the Judge, why not in the advocate?

An advocate is something more than a mere agent for his client; he is in reality an officer assisting in the administration of justice—"acting in aid of the judge before whom he practices."

Of the capabilities of the four gentlemen practising in this county as attorneys, I entertain a high estimate, and I would by no means say anything disparagingly of attorneys as a class; but I think that on broad grounds the assistance of the accredited advocate is to be preferred. If attorneys were admitted to act as advocates, articled clerks would bye and bye ask for the same privilege, and in the end simple loquacity might advance a claim. It is far more important to the public than to the profession, that advocacy should be confined to the gentlemen admitted to the bar.

The Law Society of Upper Canada was instituted for the purpose of securing to the Province a learned and honourable body to assist their fellow subjects, and support and maintain the constitution; and we have it from the highest authority in the Province, that it was extremely well calculated to ensure the respectability of the profession in Upper Canada, and has most satisfactorily fulfilled its object.

Unless plainly obliged to hear attornies as advocates, I would not in my sphere of action (whatever may be the practice in other independent tribunals) exercise a discretion at variance with privileges conferred upon barristers for the public good, and held by them as a sacred trust; and in refusing to attornies the privilege of advocates, I follow a course which I believe will best serve the due and satisfactory administration of justice. The gentleman who now applies, I am pleased to know, will only be temporarily affected by my decision, for *Mr. Wright* now stands on the books of the Law Society as a Student, and may be called to the bar in due course.

TO CORRESPONDENTS.

T. W.—Your queries will be answered in our next; all [illegible]s should be sent in before the 25th of each month, to be in time to receive an immediate answer.

A. S.—In future please prepay your letters: we publish your letter, with reply annexed.

J. C.—Have written you by mail in reply.

R. N.—We sent you the No. required.

E. S.—Have you received the number for May, forwarded?

B. L.—The 2nd Volume and No. 1 of 3rd Volume was forwarded by the Publishers and registered. Your letter has been handed us by Mr. Patton: that gentleman has now no connection whatever with the *Law Journal*; all letters should be addressed either to the Editors or Publishers of the *Law Journal*.

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NOTICE.

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THE LAW JOURNAL.

FEBRUARY, 1857.

*PRACTICAL POINTS.

COURT OR JUDGE—RELATIVE POWERS.

To tell where the jurisdiction of a Judge in Chambers ends, and that of the Court begins, is simply impossible. His authority to make orders in the various cases which are brought before him is, when considered upon principle, the authority of the Court itself. No order made by a Judge in Chambers can be enforced by attachment until it has been made a rule of Court. On any other principle it is difficult to account for the validity of many acts done by a single Judge, such as setting aside irregular judgments; which judgments must in principle be considered the acts of the whole Court, discharging prisoners out of execution, and the like; (*Doe dem. Prescott v. Roe*, 1 Dowl. P.C., 274.) The Judge, for the purpose of all applications that may be made to him, represents the Court, and sits apart both for the convenience of the Court and of suitors. It is intended that matters which from their nature are too trivial to be entertained by the full court, or of too urgent a nature to be delayed till term, should be disposed

* By Robert A Harrison, Esq., Barrister-at-Law.

of by a single Judge. He exercises a subordinate and generally a delegated power. But of late his jurisdiction is much increased under powers expressly or impliedly given by Statute. No words are of more frequent occurrence in our C.L.P. Act, 1856, than the words "Court or Judge." The jurisdiction acquired by a Judge under an Act of Parliament must be governed by the provisions of the particular Act. In some cases the powers conferred are concurrent with those of the Court and exercisable subject to the control of the Court. Whilst in others the jurisdiction of the Judge is complete and supreme in itself—admitting of no appeal. The nature and extent of the jurisdiction must be gathered from the language of the Statute. The Court, it seems, may delegate its power to a single Judge without any express enactment for that purpose. And where a Statute confers authority, unless a distinction is made in the Statute between the powers of the Judge and those of the Court, the Judge has the same power as the Court; (*Smeeton v. Callier*, 1 Ex.,'457.) Where a motion is to be made in open Court in *term time* it may be urged that the Legislature contemplated that such authorities should be confined to the Court, (*Jones v. Fitzaddam*, 1 Cr. & M. 855); or where the power as in Prov. Stat. 7 Vic., cap. 30, sec. 6, for relief of Sheriffs on adverse claims, is directed to be exercised by *rule of Court*; (*Shaw v. Roberts*, 2 Dowl. P. C., 25.)

No better example can be adduced of the distinction to be observed between the powers of the Court and a Judge than that of the Interpleader Act, 7 Vic., cap. 30, already mentioned. The first section enacts that it shall be lawful for "the Court or any Judge thereof" to make rules and orders; but the sixth section before amendment enacted that "the Court" should have the power to call the parties before them by "rule of Court." The inference that the legislature contemplated a distinction between the powers to be exercised by the Court and the Judge was irresistible. To remove the effect of such a construction, and to confer upon a single Judge power to deal with applications under sec. 6, an express enactment was passed, (9th Vic., chap. 56, section 4.) Wherever the legislature give powers in general terms, and without any express limitation, it is the same as if those powers were given by common law. The legislature is aware of the powers the Courts are accustomed to exercise. When fresh powers are given by the legislature they are to be exercised in the usual and ordinary way. When special limitations are intended to be imposed the legislature express themselves to that effect, (per Alderson B., in *Smelton v. Callier*, *ubi sup.*) Therefore it has been held under Stat. 7 Geo. II, cap. 20, empowering the "Court," upon payment of principal money, interest and costs, due on any mortgage, &c., sued upon, to discharge the defendant from the action that a Judge in Chambers has power to entertain the application, (*Smeeton v. Callier*, *ubi sup.*) Where a Judge exercises duties which belong to the Court, it is to be taken that he is to exercise them in the same manner as the Court itself, unless there is something in the context of the Statute which leads to a different conclusion, (*Ib.* Parke B.) A Judge in Chambers has the same jurisdiction in respect of the costs of a summons as the Court whom he represents has over the costs of a rule; (*Doe dem. Prescott v. Roe*, 9 Bing, 104; *In re Bridge and Wright*, 24 A. & E, 48; *Sheriff v. Gresley*, 1 A. &. W., 588; *Davy v. Brown*, 1 Bing., N. C., 460; *Wilson v. Wortharp*, 4 Dowl. P. C. 441.) And if a party make application to the Court in a vexatious and oppresive manner, for an object that might be obtained at far less costs from a single Judge, the Court may refuse the application with costs; (*The Duke of Brunswick v. Sloman*, 5 C. B. 218.) Though a Statute direct something to be done before a Judge of a particular Court, such as Court in which action is instituted, it does not follow that a Judge in Chambers, though of a different Court, has no power to act. On the contrary, it is enacted, "that the Chief Justice and Judges of the Queen's Bench and Common Pleas shall sit in rotation, or otherwise as they shall agree among themselves, and that every Judge of either Court, to whatever Court he may belong, shall be authorized to transact such business at Chambers or elsewhere depending in either of such Courts, as may be, according to the course and practice of the said Courts, transacted by a single Judge"; (12 Vic., cap. 63, sec. 9.) This Statute, if it mean anything at all, must mean that a Judge in Chambers is in effect a Judge of each of the Courts, no matter to which Court he may in

fact belong. It is substantially the same as English Statute, 1 & 2 Vic., cap. 45, sec. 1, under which all the Judges agreed that a Judge of the Exchequer sitting in Chambers had jurisdiction to make an order in a Queen's Bench case, though the Statute authorizing it required it to be made by a Judge of the Court "in which judgment was entered"; (*Palmer v. The Justice Assurance Company*, 28 L.T. Rep., 120.) The Judge to whom application is made, may either refuse or grant the order sought; if he refuse it, and have in the matter before him absolute and supreme jurisdiction, there can be no appeal. But generally, unless taken away by express enactment, there is the right of appeal; for such is the ordinary practice of the Court: (*Chapman v. King*, 4 D. & L., 311.) Where the Court has original jurisdiction in reference to the subject matter refused in Chambers, it has, as a general rule, appellate jurisdiction: (*Robinson v. Burbidge*, 9 C. B. 289.) If the Judge grant the order applied for, and the matter be not one exclusively within his discretion an appeal may be had for a review of the order: (*Teggin v. Langford*, 10 M. & W., 556;—*Grussell v. Stokes*, 14 C. B., 678.) But the Judge has authority to open again an order granted by himself, or even to rescind it before it has been carried into effect upon his discovering that he has made it inadvertently, or that he has been surprized into making it by any perversion or concealment of facts: (*Shaw et al v. Nickerson*, 7 U. C. R., 543) If a party, knowing that Judges sometimes review their own orders, elect to make a second application to the Judge in Chambers, instead of appealing to the full Court, the decision of the Judge in Chambers cannot be appealed from: (*Thompson v. Becke*, 4 Q.B. 759) One Judge in Chambers cannot entertain an appeal from a brother Judge as a single Judge in such a case has no appellate jurisdiction: (*Ib.*) Neither the Court nor a Judge will allow a party to succeed in a second application, who has previously applied for the very same thing without coming properly prepared, unless perhaps upon satisfactory explanation of his previous conduct: (*The Queen v. The Manchester and Leeds Railway Company*, 8 U. & E. 413) or unless the first application has failed in consequence of some clerical error: (*Tilt v. Dickson*, 4 C. B., 736) The rule which prohibits the making of a second application upon the same ground as a former unsuccessful one has been made, is one of very considerable importance. In the first place it tends to secure regularity and propriety in the mode of making applications. It also protects the party, called upon to show cause, from being harassed by repeated applications; and it prevents the undue and wasteful occupation of the time of the Court: (*Ib.*, Wilde, C.J.) The Court will not encourage appeals from the decision of a Judge in a matter over which he had a full discretionary power, though differing from him on the merits of the particular case: (*Tomlinson v. Ballard*, 4 Q. B., 642) If the circumstances of a case are already insufficient to warrant an order made, it is the duty of the party affected by it to apply to the Court to vary or rescind it on the ground that it is not the result of a fair exercise of discretion: (*Griffin v. Bradley*, 6 C. B. 722) It is said that there is no inflexible rule as to the period at which such an application should be made, but the party must at least apply within a reasonable time: (*Ib.*) The application should in general be made in the course of the term next after the decision: *Meredith v. Gittins*, 15 Jur. 564; *Orchard v. Moxey*, 2 El. & B. 206, affirmed in *Callins et al v. Johnson*, 16 C. B., 588.) Two years is most undoubtedly an unreasonable time: (*Griffin et al v. Bradley, ubi sup.*) On a motion to rescind a Judge's order, the affidavits on which the order was obtained should be before the Court: (*Needham v. Bristowe*, 4 M. & G., 262; *Pocock v. Pickering*, 21 L.J., Q.B., 365) The rule should be drawn up on reading the affidavits filed in Chambers: (*Edwards v. Martin*, 21 L. J., Q. B., 884; *Grissell v. Stokes*, 2 N. C. L. Rep., and notes thereto.)

ATTORNIES AS ADVOCATES.

We refer to the case of *Regina v. Erridge*, in this number. We think Judge Gowan has taken the safe course in respect to admissions of attorneys to the the privilege of advocacy.

There was a time in the history of Upper Canada when it was considered necessary to admit (by Statute) individuals to practice—when the country was in its infancy, and when educational advantages were not easily to be had: that day has passed, and now in every township an elementary education is accessible to all; and in every county

there are two or more Superior or Grammar Schools designed to prepare the youth of Upper Canada for entering with advantage the Universities of the country. No one can deny that it is for the interests of all that there should be privileged orders in the practice of the Courts of Judicature, and that the gentlemen to whom that privilege is granted should be fitted by educational and professional training for discharging the duties incumbent upon them.

In the case of barristers the Law Society has taken every reasonable precaution to prevent any but learned and honourable men obtaining a degree which qualifies them to practice—in the preliminary examination before admission to the Society, and the final examination before call. Our readers out of Upper Canada will see by reference to the notice of the Law Society (on page vi.) that the subjects of examination for admission secure the exclusion of ignorant candidates, and the final examination is equally extensive and searching.

In the case of attorneys there is absolutely no guarantee. They may be deficient in general education, and know no more law than a "bum bailiff." They are admitted on mere proof of service. There is no test by which their fitness is determined. They may be worth their weight in gold, or their weight in pig lead: who is to say they have not the standard stamp of value?

There are doubtless several well qualified gentlemen amongst the class of attorneys, but how are the public to determine at their time of need? and nothing can be more true (to use the words of the Lower Canada Act,) than that "the welfare and tranquility of families require as an object of the greatest importance" that such persons only should be appointed to act in the profession of the law as are "properly qualified to perform the duties of their employment."

Let the attorneys be generally recognized as advocates, and you open a door to further inroads, and from the lower grade in the profession the transition would be easy to non-professional intruders; and ignorant and garrulous babblers would in time drive away in disgust the honorable and educated practitioner.

The tendency of Legislation here and at home is towards decentralization, with new and multudinous objects of jurisdiction heaped upon the local Judges. It is all important that they should have the assistance of an upright and educated bar—and on grounds of public policy every encouragement should be afforded them.

We see in one of the local papers a report of a similar application to *Judge Cooper* of Goderich, on which the learned Judge would appear to have taken a course different from Judge Gowan; but perhaps there is little substantial difference, for *Judge Cooper* appears to have granted the privilege with much reluctance, and strictly on the ground of necessity: he is reported to have said, "In granting "this permission, it must be understood that it is "granted entirely *ex necessitate*," * * * "and "that upon any future application, if the circum-"stances are so changed that the interests of suitors "can be properly guarded without conceding the "privilege, it will be refused."*

Until lately attorneys as a class distinct from barristers, have been almost unknown, but of late years they are becoming more numerous, and it is within the bounds of possibility that legislation may bring upon us a host of attornies from over the water that would spread like "roaring lions" over the land.

As to the purely legal aspect of the case *Regina v. Erridge*, we entirely coincide in the view taken as to the effect of the 19th section of the County Courts Act—the practice of the Superior Courts in all matters not expressly provided for applying and extended to the Co. Courts. If the Law Society's Act did not prevent attorneys from practising in the Inferior Courts, it did in the Superior Courts, and now the section referred to says the practice of both Courts shall conform.

The position of barristers here and in England is different in this particular. The Superior Courts in England, *by ancient usage*, allow only barristers to practice as advocates, but if barristers did not attend, attorneys *might* be permitted to act in that capacity.

With us barristers have *by Act of Parliament* the right of exclusive audience as advocates, and the benefits of that Act are by the section in question extended to the County Courts.

* We quote a case from a newspaper report with some reluctance, as it is a standing rule with us not to republish from such a source.—EDS. L. J.

Of course every County Judge will act on his own views until there is some positive decision by the Superior Courts, but we sincerely trust that their discretion will be exercised in a way most conducive to the interests of suitors and the well-being of the community at large.

STATUTES OF PRACTICAL UTILITY.

We are pleased to see that McClear & Co. have now in press the Statutes of practical utility in the administration of Justice in Upper Canada. Such a work has long been a *desideratum* on circuit, and for convenient reference in the office.

It is edited by Mr. R. A. Harrison, which gives sufficient guarantee that it will be all it professes.

The size will be the same as Harrison's C. L. P. Acts. We refer to the Publisher's advertisement on another page The price 10s. seems very moderate indeed.

CHAMBER CASES.

Our Chamber Reports are again so numerous that we can only, as before, give notes of many of them, which want of space will not allow us to publish in full in this number:—

Gallena v. Cotton.

Attendance of witnesses before arbitrator.

An order compelling attendance of witnesses before arbitrator under 30th section 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 proceedings, and that certain parties (giving their respective places of residence) are necessary and material witnesses for party applying.—*Per McLean, J., Nov.* 17.

Reischmuller v. Uberhorst.

Suggestion of plaintiff's death.

Leave to enter a suggestion of death of plaintiff and proceed under 210th section of the 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.—*Ib., Nov.* 18.

Ross et al v. Cook.

Absconding debtor—Proceedings where action commenced under old practice.

Where a warrant of attachment has 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 the service of the writ on some relative of defendant at his last place of residence, will be allowed good service.—*Ib., Nov.* 21.

Cataraqui Cemetery Company v. Burrowes.

Removal of suit from Division Court by Certiorari. 13 & 14 Vic., cap. 53. sec. 86.

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.—*Ib. Nov.* 20.

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 the defendant has a good defence to the action upon the merits."—*Ib., Nov.* 21.

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.—*Ib., Nov.* 22.

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.—*Ib., Nov.* 24.

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.—*Per Burns J., Dec.* 3.

Irvine v. Mercer et al.

Oral examination of judgment debtor—C. L. P. Act. 1856, section 192.

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.—*Per Richards, J., Dec.* 8.

Carter v. Carry et al.

Practice—Oral examination of judgment debtor—C. L. P. Act 1856, sec. 192.

The proceedings for the oral examination of a judgment debtor shall be by summons and order: an order will not be granted in the first instance upon an *ex parte* application.—*Ib.,* Dec. 9.

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.—*Ib., Dec.* 9.

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.—*Per Richards, J., Dec.* 10.

MACPHERSON ET AL v. KERR.

Practice—Attachment of debts—C. L. P Act, 1856. sec. 194.

An order will be granted *ex parte* to attach debts due by garnishee to judgment creditor, upon affidavit that on an oral examination of the debtor he swore that garnishee was indebted to him.—*Ib.*, Dec. 10.

WILSON v. STRONG.

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.—*Per Hagarty, J., Dec.* 22.

CORRESPONDENCE.

COUNTY CLERK'S OFFICE,
Sarnia, Feb. 3, 1857.

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

SIR,—I have been requested by the Warden of this County to put the following question, and to request an answer through the *Law Journal*—viz.: Have Township Councils the right to divide the Township into Wards by a four-fifth majority of the Council, without any action on the part of the people?

I remain, Sir, your obedient servant,
ALEXANDER SCOTT,
County Clerk, Lambton.

[Clearly they have not such power. We apprehend from the terms of your query that you have had before you the 12th Vic., cap. 81, sec. 8, whereas that section is repealed and the subject re-enacted by 18 Vic., cap. 109, sec. 6, by reference to which you will see what requisites must be complied with, before any action can be taken by a Township Municipality in dividing the Township into Wards.—ED. L. J.]

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

SIR,—I am pleased to see that Mr. Mowatt has drawn attention to the value of American authorities, both in England and in Upper Canada; and the Profession, I think, are much indebted to you for the publicity which you have given to his remarks. It is not my intention to follow the learned gentleman through the various arguments, of which he has made use in support of the position he took, much less to question any one of them: suffice it to say that not only in Upper Canada, but in England, there exists the highest authority in favour of his views. Of these, Mr. Mowatt has made several quotations. In addition to which, I ask leave to lay before you the testimony of our much admired Chief Justice Robinson. In the case of *Montreal Bank v. DeLatre*, 5 U. C. R. 368, the Chief Justice is thus reported:—

"The defendant's counsel in the argument referred to American authorities, and it is always advisable and useful on questions of this nature (mercantile agency) to look for information in that quarter, for in applying legal principles to mercantile contracts, the American Courts have generally gone before those in England, in introducing such relaxations as seemed necessary for the convenience and safety of those engaged in commerce; and they have in some instances gone further, without the aid of legislative enactments, in moulding the principles of common law to suit supposed exigencies, than English Courts of Justice have yet ventured to go. Yet as such questions present themselves, they desire to justify the relaxation by as many authorities as they can find in favor of it in English decisions; and we may therefore generally expect to find such authorities cited, so far as any such exist."

"X. Y."

APPOINTMENTS TO OFFICE, &c.

COUNTY COURT JUDGE.

GEORGE MALLOCH, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County and Surrogate Courts for the United Counties of Leeds and Grenville, in the room of Worship B. McLean, Esq., resigned.—[Gazetted Nov. 29, 1856.]

JUDGE OF DIVISION COURT.

GEORGE DUGGAN, Esq., the younger, Recorder for the City of Toronto, to be Judge of the Division Court of the said City of Toronto, and the liberties thereof.—[Gazetted Dec. 22, 1856.]

CLERK OF THE PEACE.

THOMAS MILLER Esq., to be Clerk of the Peace for the Co. Waterloo, in the room of Æmilius Irving, Esq., resigned.—[Gazetted Nov. 29, 1856.

NOTARIES PUBLIC.

RICHARD ALLARD, of Ingersoll, Gentleman, and WILLIAM DARLING POLLARD, of Collingwood, Gentleman, to be Notaries Public in Upper Canada.—[Gazetted Nov. 22, 1856.]

HAMILTON LOW, of STRATHROY, in the County of Middlesex, Gentleman, to be a Notary Public in Upper Canada.—[Gazetted Nov. 29, 1856.]

HENRY BALDWIN HOPKINS, of Barrie, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—[Gazetted Dec. 3, 1856.]

JONATHON SISSON, of Toronto, Esq., Attorney-at-Law, and CHARLES HUTCHINSON, of London, Esquire, Barrister-at-Law, to be Notaries Public in Upper Canada.—[Gazetted Dec. 13, 1856.]

ROBERT NEWBERY, of Belleville, Gentleman, SAMUEL GAMBLE, of Nanticoke, County of Haldimand, Gentleman, JOHN ROBERT JONES, of Toronto, Esquire, Barrister and Attorney-at-Law, JOHN EASTWOOD, of Southampton, County of Bruce, Gentleman, and WILLIAM STEPHENSON, of the Township of St. Vincent, Gentleman, to be Notaries Public in U. C.—[Gazetted Dec. 20, 1856.]

JONAS AP JONES, of Toronto, Esquire, Attorney-at-Law, and WILLIAM LAWRENCE LAWRASON, to be Notaries Public in Upper Canada.—[Gazetted January 10, 1857.]

EDWARD GILMAN, of the Town of Simcoe, Esquire, Attorney and Solicitor-at-Law, to be a Notary Public in Upper Canada—[Gazetted Jan. 17, 1857.]

HENRY MUMA, of Drumbo in the County of Oxford, Gentleman, to be a Notary Public in Upper Canada.—[Gazetted January 24, 1857.]

ALEXANDER FORSYTH SCOTT, of Brampton, Esquire, Attorney-at-Law, and MOORE A. HIGGINS, of Toronto, Esquire, Attorney-at-Law and Solicitor in Chancery, to be Notaries Public in Upper Canada.—[Gazetted January 31, 1857.

ASSOCIATE CORONERS.

THOMAS BRADY, of Alfred, Esquire, to be an Associate Coroner for the United Counties of Prescott & Russell.—[Gazetted Nov. 29, 1856.]

JOHN HENRY GORDON, of the Township of Arthur, Esquire, Surgeon, to be an Associate Coroner for the County of Wellington.—[Gazetted December 13, 1856.]

JOSEPH CARRIER, of Galt, Esquire, M.D., to be an Associate Coroner for the County of Waterloo, JAMES BEAMAN, Esquire, to be an Associate Coroner for the County of Carleton, EDWIN THEODORE BROWN, Esq., M.D., to be an Associate Coroner for the County of Brant; DAVID BRIDGMAN, of Richmond Hill, Esquire, to be an Associate Coroner for the United Counties of York & Peel; DAVID EARL BURDELL, of Belleville, M.D., GEORGE P. BULL, of Stirling, and PATRICK GILBERT FERGUS, of Trenton, M.D., Esquires, to be Associate Coroners for the County of Hastings.—[Gazetted Dec. 20, 1856.]

WILLIAM BURGESS, of Port Stanley, Esquire, Surgeon, to be an Associate Coroner for the County of Elgin.—[Gazetted January 11, 1857.]

HENRY THEODORE LEGLER, Esq., M.D., and DAVID S. BOWLBY, Esquire, M.D., to Associate Coroners for the County of Waterloo.—[Gazetted January 31, 1857.]