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VOL. VII. TORONTO, OCTOBER, 1861. No. 10.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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CONTENTS.

REMITTANCES.

A. M. Berlin, $4; Town of Guelph, $4

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of any Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. Wm. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL—This well conducted publication we are glad to learn, has proved eminently successful Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States—*American Railway Review*, September 20th, 1860

THE UPPER CANADA LAW JOURNAL—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, &c, and in fact every person who wishes to keep himself posted in law matters It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England The present number is replete with useful information—*Willand Reporter*, September 20th, 1860

UPPER CANADA LAW JOURNAL—We have received the April number of this excellent publication, which is a credit to the publishers and the Province Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs Maclear & Co, King Street, Toronto—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform, responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazzette. May 10th*, 1859.

UPPER CANADA LAW JOURNAL—The March number of this very useful and interesting Journal has been received We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 10th* 1859.

The Upper Canada Law Journal. Maclear & Co, Toronto. This well conducted publication, we are glad to learn, has proved eminently successful Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co, of Toronto, and edited by the talented Robert A. Harrison, Esq, B C L. author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4 00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount—*Victoria Herald, January* 19, 1859

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co, Toronto, $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co, King Street East, Toronto.

This is the first number of the Fifth Volume: and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged.—viz. $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public—*Thorold Gazette, January* 27, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co, Toronto—It is conducted by W D. Ardagh, and R. A. Harrison, B. C L, Barrister at Law—Price $4 per annum.—*Oshawa Vindicator*, October 13th., 1858.

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession We are not aware of the extent of its circulation in Brantford, it *should be taken*, however by every member of the Bar, in town, as well every Majistrate and Municipal Officer Nor would politicians find it unprofitable, to pursue its highly instructive pages This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number—*Brant Herald*, Nov. 16th, 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains—*Port Hope Atlas.*

UPPER CANADA LAW JOURNAL, Maclear & Co, Toronto, January—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859

THE UPPER CANADA LAW JOURNAL for March By W. D Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co, Toronto. $4 a year cash—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make-mention—*Whig, May, 18th* 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette.*

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law, Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy.—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful perusal A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," is continued from the July number, it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects All questions are answered by the Editors, and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq, decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &C.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol 4) commencing with January last. Its pages have been looked over by us with much interest, It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importance to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual, it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister's office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs—*Hope Oracle, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men The price of subscription is four dollars a year in advance—*Spectator, July 7*, 1858

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful perusal This work should be found in the office of every merchant and trader in the Province, being, in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.—June* 8, 1858,

U C Law Journal, August, 1858. Toronto Maclear & Co.

This valuable law serial still maintains its high position We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August 11th*, 1858.

UPPER CANADA LAW JOURNAL—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student, and carefully read, and referred to, by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice—*Stratford Examiner, August 12th*, 1858

DIARY FOR OCTOBER.

1. Tuesday..... Chancery Examin. Term. London and Belleville, commenced. Last day for notice Hamilton and Brockville. Clerk of Municipality to deliver Assessment Rolls to Collectors.
5. Saturday ..... Last day for notice of Trial for Toronto.
6. SUNDAY ..... 19th *Sunday after Trinity.*
7. Monday ..... County Court and Surrogate Court Terms begin
8. Thursday ..... Chancery Examin. Term, Brantford and Kingston commences. Last day for notice for Barrie and Ottawa.
12. Saturday ..... County Court and Surrogate Court Terms end.
13. SUNDAY ..... 20th *Sunday after Trinity.*
14. Monday ..... Toronto Fall Assizes.
15. Tuesday ..... Chancery Examin. Term, Hamilton and Brockville commence.
20. SUNDAY ..... 21st *Sunday after Trinity.*
22. Tuesday ..... Chancery Examin. Term, Barrie and Ottawa, commences. Last day for notice for Goderich and Cornwall.
27. SUNDAY ..... 22nd *Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

OCTOBER, 1861.

THE ENGLISH COURT OF QUEEN'S BENCH ON ITS TRIAL.

Our readers no doubt, one and all, remember the fact that the English Court of Queen's Bench in January last ordered a writ of *habeas corpus* to issue to Canada in the well known case of Anderson, the slave.

The announcement that the writ had issued was at first discredited, but when corroborated by the published reports of the case the feeling of doubt gave way to combined feelings of astonishment and indignation.

The jurisdiction of the English Court was questioned both here and in England, and all agreed that whether or not the jurisdiction existed, the exercise of it was impolitic

In our March issue we devoted some attention to the discussion of the important questions raised, and afterwards had the satisfaction of finding the positions we took endorsed by the leading legal periodicals of the mother country. We contended that the jurisdiction did not really exist, and pointed out that the exercise of it was the more extraordinary even if the right to exercise it had been undoubted, because the English Court was not under any obligation to issue the writ upon the materials before it. We submitted, that under any circumstances the course which the Court should have adopted would have been to have issued only a rule to show cause why the writ should *not issue, instead of in the first instance and upon the ex parte* application of a zealot ordering the writ to issue.

It is now no small satisfaction for us to find that the very judges who did the act of which we then complained are now converts to the views which we have always entertained and then expressed.

An application was in June last made to the English Court of Queen's Bench for a Rule to shew cause why a writ of *certiorari* should not issue to bring up the record of conviction of John Craven Mansergh, in custody in India, under sentence of a court martial. The Court doubted its jurisdiction to do so, and was pressed with the decision in Anderson's case. The application was refused—each of the four judges pronouncing an opinion against it. CROMPTON, J., said, "This is a discretionary writ, and the time which elapsed since the proceedings of the court martial took place is, I think, one reason for not granting it. But dismissing that, consider what is the nature of this application. It is for a writ of *certiorari* to bring up the proceedings of a court martial held *in India*. True, it is said, that the record is here in England, but to my mind that makes no difference, because we must see for what purpose it is asked that the record should be brought before us. It is in fact an order that the proceedings may be quashed; so that we are asked in effect to control the proceedings of a court in India, and this application must be treated in the same way as one directly for a *certiorari* to bring before us the proceedings of a court in India. The question therefore is, whether we have any such power vested in us. No precedent whatever is suggested for it. It is said that the application is analagous to that in Anderson's case; but it appears to me to bear no analogy to it, nothing whatever was decided in that case. It was *only* a rule to show cause that was granted, and it was in no way decided that the writ of *habeas corpus* eventually *ought to issue*. There is therefore *no case* which shows that we have the power, nor do I think we ought to examine on a writ of *certiorari* the record of a court in India." So BLACKBURN, J., "The ulterior object of this application is to quash the proceedings of the court martial, and of course we should not grant the writ of *certiorari* to bring up the record unless there was something to be done with it when we got it before us. I am not by any means sure that the court martial had not complete jurisdiction in the case. But even if it had not, has this court any power to quash the proceedings of a court in India? *I think no more than to quash the proceedings of a Court in France.* No doubt our authority to inquire into the proceedings of courts of inferior jurisdiction extends to England and some of the adjacent islands, *but I doubt if it extends any further.* The case which approaches the nearest to this is *the one alluded to (exparte Anderson), in which we granted* a rule *nisi* for a writ of *habeas corpus* to bring up the body

of a prisoner in Canada. But that is no authority for granting this application. That was a case of urgency, and the rule was granted in order to initiate the proceedings *and if necessary to have the matter discussed.* I also agree with my brother Crompton that the length of time which has elapsed is also a point to be considered, and I think that the rule ought not to issue." (*Ex parte* Mansergh, 7 Jur. N. S, 825.)

These opinions of learned judges of the Queen's Bench are satisfactory, so far as they show that Anderson's case decided nothing, and is not to be followed as a precedent, but a grave question of fact is raised when it is stated that the court did not authorize the issue of the writ in that case,

The fact that the writ did issue is beyond all dispute. I was received in Toronto by the Sheriff of York and Peel, was exhibited by him to us, was looked upon as a piece of harmless parchment, nobody ever thought of paying any attention whatever to its hollow command, was looked upon as a good joke, and the subject of much amusement, is now in the Sheriff's possession, and if preservedby him, will probably descend to posterity as a monument of judicial folly.

But perhaps we are to understand the English judges as pleading in confession and avoidance—that although the writ did issue the issue of it was in no way authorized by them. Let us take issue on the plea. Now for the proof. On turning to *ex parte* Anderson, (7 Jur. N. S., 122,) we find chronicled the fact, that Mr. Edwin James moved for the writ, the fact that he made a long and illogical argument in support of his application, the fact that after hearing the "argument" the judges retired (according to some reports for full twenty minutes), the fact that these same judges returned to court, the fact that Cockburn, C. J., opened his mouth and spake as follows: "We have *carefully* considered this matter, and the result of our *anxious deliberation* is, that we think the writ *ought to issue,*" &c., the fact that Crompton, J., Hill J., and Blackburn, J., concurred, (which, by the by, is implied in the expression "*We* have carefully, &c, and the result of *our* anxious deliberations," &c,) and the fact that the writ when issued was directed to the Sheriff of the County of York, &c. To the same effect is the report of the case in the *Law Times* and other contemporaneous records. Out of the mouths of many witnesses we have proof of these facts, and by the proof of them we are certainly and clearly entitled to a verdict against the English Court of Queen's Bench.

It is painful to find judges for whom we have hithesto entertained so much respect making such an exhibition of themselves. It was bad enough for them in the first place to have done a thing so absurd as to have authorised the issue of the writ in Anderson's case, but it is ten times worse for them in the face of such testimony to deny the fact or prevaricate about it. Why did Cockburn, C. J., who pronounced the judgment of the Court in the Anderson case, sit silently by and allow his learned brothers, Crompton and Blackburn, JJ., to use such language as they are reported to have done without at least telling them to keep silence? He had himself cunning enough to make no allusion to the Anderson case, and it is a pity, so far as the sanctity of the bench is concerned, that his learned brothers were not equally cunning. It would have been quite enough for Crompton, J., and Blackburn, J., to have said, "We are ashamed of what we did in the Anderson case and promise to do so no more." It is human nature to err, and it is manly to acknowledge an error; for an error gracefully acknowledged is a victory won. Is it possible that these learned judges had not sufficient moral courage to acknowledge their error? We cannot believe it, and yet in the absence of some such supposition we find great difficulty in accounting for their most extraordinary conduct.

If Crompton, J., and Blackburn, J., were of the same opinion at the time the Anderson case was decided as they were when deciding *ex parte* Mansergh, how came it that they concurred in the former decision? Why did they not speak out and say, "we refuse the writ, you may if you choose take a rule *nisi*, but we cannot promise to make it absolute?" If Cockburn, C. J., continued to be of the opinion in *ex parte* Mansergh that he was when deciding *ex parte* Anderson, how is it that he sat silently by and allowed his learned brothers to demolish his former expressed opinion atom by atom? Why did he not say, "You are wrong—according to the Anderson case, we have the requisite power but on this occasion we do not see fit to exercise it?" The more we endeavor to probe the motives and actions of these judges the more mystified we become. We cannot we confess account for their apparent tergiversation on any known and honorable principle of human conduct. We are loath to entertain the idea that they have done wrong but cannot get rid of it. We must however say, that conduct so extraordinary without explanation is not calculated to increase the respect in which English judges have hitherto been held in this Colony.

CHANCERY VESTING ORDERS.

By the 63rd section of the *Act respecting the Court of Chancery, Consolidated Statute* U. C., *cap.* 12, *power* is given to the Court of Chancery to make vesting orders or decrees in certain cases. The section is as follows:—

"In every case in which the Court has authority to order the execution of a deed, conveyance, transfer, or assignment of any property, real or personal, the court may make an order or a

decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at law and in equity as if the legal or other estate or interest in the property had been actually conveyed by deed or otherwise for the same estate or interest to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person."

The power of the Court of Chancery to compel the execution of deeds is only ancilliary to its general jurisdiction in cases of specific performance, fraud, accident, mistake, trusts, &c., and therefore, wherever that power is called into exercise, a vesting order under this section will complete that which the judgment of the court directs to be done, and thereby save the expense of a Chancery conveyance, and the trouble, inconvenience, and annoyance of Chancery Writs of Attachment. But the practical use hitherto made of this section has been to vest in purchasers property bought by them at sales under decrees of the court; and as this vesting power of Chancery is in some measure new it may be well to consider the form and effect of such orders.

We must here state, that we interpret the Act as giving no greater validity or more effective conveying power to a vesting order than that possessed by an ordinary deed; and we therefore think that all artificial or necessary words of a legal conveyance are as requisite in a vesting order as in a deed, so far as the peculiar form of the order will allow. The statute says that the property shall by the vesting order be vested in such person or persons, *in such manner*, and for *such estate*, as would be done by any deed if executed, and that such order *shall have the same effect* as if the property had been actually conveyed by deed or otherwise. And as the vesting order is the only evidence of the intention of the Court as to the manner of conveying and the estate to be conveyed, it is clear that everything should appear in it which is necessary to render the conveyance complete

The person in whom the real or personal property may be directed to be vested may be either a party to a suit who has been declared to be entitled to a conveyance of such property, or a purchaser at a sale by the court. Over the former the authority of the court is undoubted, and it has been decided that where a person becomes a purchaser at such a sale, he thereby subjects himself to the jurisdiction of the court and may be treated in the same way as if he were a party to the suit. But in no case can either party be compelled to accept title under a vesting order instead of a conveyance, it being their right to insist upon covenants from the grantors. (*Slater* v. *Fisken*, 4 U. C. L. J. 261.)

By the words "*vesting in such manner as would be done by any such deed*," we presume the legislature intended to declare that the vesting order should, as nearly as possible, follow the form of an ordinary conveyance. Thus the consideration should be mentioned, (*Ward* v. *Lambert*, Cro. Eliz., 394,) or the property should be conveyed *to the use* of the party or *purchaser*, &c., as well as *unto him*; also the words "granted, conveyed, and vested in," or such like, and the habendum "to have and to hold," &c, should be contained in the order as the ordinary and proper technical words of conveyance.

So also the *quantity of estate* intended to be passed—whether a fee, a life estate, or a term of years—must be shown. The marking out of the estate, says Williams, in his work on Real Property, is as necessary now as formerly, and it is called *limiting* the estate. In addition to the livery of seisin it was necessary that the estate which the feoffee was to take should be marked out, whether for his own life or that of another person, or in tail, or in fee simple, or otherwise. Thus the land may be given to the feoffee to hold to himself simply, and the estate so limited is an estate for life, and the feoffee is generally called a lessee for his life. If the land be given to the feoffee and the heirs of his body, he has an estate tail and is called a donee in tail. And in order to confer an estate tail it is necessary (except in a will, where greater indulgence is allowed,) that words of procreation, such as "heirs of his body," should be made use of. If the land be given to the feoffee and his heirs he has an estate in fee simple, the largest estate which the law allows. In every conveyance (except a will) of an estate of inheritance, whether in fee simple or fee tail, the word "heirs" is necessary to be used as a word of limitation to mark out the estate. Thus if a grant be made to a man and his seed, or his offspring, or the issue of his body, all these would be insufficient to convey an estate tail, only an estate for life. So if a man purchase lands to have and to hold to him for ever, or to him and his assigns for ever, he will have but an estate for life and not in fee simple. Before alienation was permitted the heirs of the tenant were the only persons besides himself who could enjoy the estate, and if they were not mentioned the tenant could not hold longer than for his own life. At the present day the free transfer of estates in fee simple is universally allowed, but this liberty is now given by the law and not by the particular words, by which an estate may happen to be created. So that though conveyances of estates in fee simple are usually made to hold to the purchaser, his heirs and assigns for ever, yet the word "heirs" alone gives the fee simple of which the law enables him to dispose, and the remaining words, and his assigns for ever, have at the present day no conveyancing virtue at all, but

are merely declaratory of that power of alienation which the purchaser would possess without them (pp. 119–121)

These remarks will, we trust, enable those who have obtained vesting orders under this statute to ascertain whether the full estate intended to be vested has been actually conveyed by the order,—especially fee simple estates purchased at sales had under decrees of the Court of Chancery.

CHANCERY NOTICE.

During the circuits for the examination of witness, the Court will not sit on Tuesday, except in case of the postponement of any of the circuits. Notices, however, will be given for Tuesday, as usual, and court will be held on the Saturday of each week, for which days the notices for Tuesday will continue good, or for the first day on which court will be held. In Chambers, business will be taken on any day that the Judge may be in town, and notices of motion are to be given in the usual manner, and will continue good for any day that Chambers may be held, in the event of their being no sitting on the day named in the notice.

Dated, 16th September, 1861.

COMMON LAW JUDGMENTS.

QUEEN'S BENCH.

CASES ARGUED DURING EASTER TERM LAST.

Present:—McLEAN, J.; BURNS, J.

Judgments delivered, Thursday, Sept. 12, 1861.

Gilkison v. *Alexander.*—Rule absolute to set aside proceedings with costs. One week further time to plead.

Bank of Upper Canada v. *Killaly.*—Rule discharged.

McGinnes v. *The Corporation of Yorkville.*—Rule *nisi* for new trial refused, and judgment for defendants on demurrer to 2nd, 3rd and 4th pleas, and for plaintiff on demurrer to 5th plea.

Regina v. *Askin.*—Rules discharged.

Carrall v. *The Bank of Montreal.*—Rule discharged.

Corbett v. *Kirkpatrick.*—Judgment for plaintiff on demurrer with leave to amend in two weeks.

Stanley v. *The London Gas Company.*—Appeal allowed without costs.

McDonald v. *G. W. R. Co.*—Rule discharged and judgment for defendants on all the demurrers except demurrer to 8th plea, and for plaintiff as to that demurrer.

Todd v. *Perry.*—Judgment for plaintiff.

VanEvery v. *The Buffalo and Lake Huron Railway Co.*—Rule discharged.

Ferrie v. *Wright.*—Rule discharged.

Bartles v. *Benson*—Rule absolute for new trial, costs to abide the event.

Craig v. *Odell.*—Rule absolute on payment of costs.

Anglin v. *Henderson.*—Judgment for plaintiff on demurrer.

September 23, 1861.

The Queen v. *Preston et al.*—Rule absolute to quash indictment.

Bank Upper Canada v. *Corbett.*—Rule discharged with costs.

Town of Sarnia v. *Great Western Railway Company.*—Rule discharged.

Town of Goderich v. *Buffalo and Lake Huron Railway Company*—Special case. Judgment for plaintiffs *Held*, that land covered with water is not liable to taxation under the Assessment Act.

Corporation of Essex v. *Strong.*—Rule discharged with costs.

Watts v. *Howell*—No judgment, stands for re-argument.

Martin v. *White.*—Rule absolute for new trial on payment of costs.

TRINITY TERM.

Present:—ROBINSON, C. J.; BURNS, J.

Monday, September 23, 1861.

McCabe v. *Shore*—Rule discharged.

Addison v. *Burrill.*—Rule absolute for new trial, costs to abide the event.

Pherrill v. *Turner.*—Rule discharged.

Lake v. *Wright*—Rule discharged.

McDonell v. *McDonell*—Rule absolute for new trial upon payment of costs by plaintiff; plaintiff to be at liberty to amend his pleading.

In the matter of Charles Widder v. *The Buffalo and Lake Huron Company.*—Rule absolute for mandamus *nisi*.

Robinson v. *Stock.*—Rule discharged.

In re Simons v. *The Corporation of the Town of Chatham*—Rule absolute to quash by law with costs.

Todd v. *Walsh.*—Rule absolute for a new trial upon payment of costs.

Shack v. *Smith.*—Rule discharged.

Baldwin v. *Foster.*—Rule absolute for new trial without costs

Talcutt v. *Sycklestean*—Rule discharged without costs.

Reeves v. *The Corporation of the City of Toronto.*—Rule discharged.

Hurd v. *Palmer.*—Rule discharged.

McMurtrie v. *Swanston.*—Rule discharged.

In the matter of the heirs of Francis Ann Boulton.—*Held*, that title and interest of parties proved as stated in partition Act. Order accordingly.

Dixon v. *Hamilton.*—Rule discharged.

Chamberlin v. *Smith.*—Rule discharged.

Vidal v. *Donald*—Rule discharged.

Nourse v. *Foster.*—Rule discharged.

In re Wright and Cornish.—Rule for transfer articles from one attorney to another.

Nicholson v. *Burkholder.*—Rule absolute for new trial, costs to abide the event, upon condition that it be admitted on the trial that the late James McGill died seized. If not drawn up in three weeks rule to be discharged.

In re Durand.—Rule discharged with costs.

Humberson v. *Henderson.*—Rule refused. *Held*, 1. That if there be a plea on the record putting title in question, a County Court is ousted of jurisdiction. 2. That a plaintiff in a Superior Court with a plea of that kind on the record is entitled to full costs.

In re McDougall and Township of Lobo.—Rule refused. *Held*, that Township Councils are enabled but not required to pass by-laws for the relief of the poor. The relief is discretionary not imperative.

Present:—Sir J. B. ROBINSON, Bart., C. J.; McLEAN, J.; BURNS, J.

Saturday, September 28, 1861.

Clark v. *Donaldson.*—Rule absolute for new trial without costs.

Vance v. *King et al.*—Verdict for plaintiff on 1st issue to stand; for defendants on 2nd and 3rd issues and judgment for defendants upon the demurrer.

Smith et al. v. *Bill et al.*—Rule absolute for new trial without costs.

Addison v. *Jennings.*—Appeal from county court allowed. New trial ordered. Costs to abide the event.

Sparling et al. v *Robertson.*—Appeal allowed. New trial ordered without costs.

Murdoff v. *Wier.*—Judgment for defendant on demurrer.

McDonald v. *Bell.*—Judgment.

Denison v. *Nation* —Judgment for plaintiff on demurrer, with leave to apply to amend within a fortnight.

Moore et al. v. *Gurney et al.*—Judgment for plaintiff on demurrer, with leave to apply to amend in ten days.

Moore et al. v. *McKinnon.*—Judgment for plaintiff on demurrer.

Ryan et ux. v. *Miller.*—Rule absolute for new trial granted without costs.

Crawford v. *Corporation of Cobourg.*—Judgment for plaintiff on all the demurrers.

Com. Bank v *Bank of Upper Canada* —Judgment for defendants.

Teehan v. *Learny* —Postea to plaintiff.

Fortune v. *Garnett.*—Postea to plaintiff.

Harris v. *Malloch* —Postea to plaintiff.

Bank of Upper Canada v. *Glass.*—Judgment for defendant.

Sykes v. *Cobourg and Port Hope Railway Company.*—Judgment for defendant

Glass v. *Wigmore.*—Judgment for plaintiff.

Reg. v. *Dessauer.*—Rule discharged.

Reg. v. *Davidson.*—Judgment for the crown.

McCoy v. *Smith* —Judgment for defendant.

Small v. *City of Toronto* —Rule absolute for new trial. Costs to abide the event. Leave to amend.

Rey v. *Walker.*—Conviction affirmed.

COMMON PLEAS.

CASES ARGUED DURING EASTER TERM LAST.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Saturday, August 31, 1861.

Snarr v *Baldwin et al.*—Judgment for defendants on demurrer.

Ryland v. *King et al.*—Rule absolute to enter a verdict for defendants, Smith and Richards, with leave to plaintiff to take out a rule *nisi* for judgment *non obstante veredicto.*

Doan v. *Warren et al.*—New trial on payment of costs.

Mein et al v. *Short et al.*—Judgment—Defendants to have costs of the issues, and the costs of the cause as relating to the issues found for them. Plaintiffs to have general costs of the cause, (except as to the issues found against them,) and the costs of the issue on the plea of set off against the defendants *de bonis propriis.*

TRINITY TERM.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Monday, September 23, 1861.

Macauley v. *Moodie.*—Judgment of Court of Queen's Bench affirmed. Postea to defendant.

Hart v. *Benson.*—Rule absolute to dismiss appeal with costs.

Ogilvie et al. v. *McLeod.*—Rule *nisi* discharged.

Moore v. *Gray et al.*—Rule absolute for new trial on payment of costs.

Macdonald v. *Macdonald.*—Rule discharged.

Bishop of Toronto v. *Cantwell.*—Rule absolute for new trial without costs. *Held,* that a term's notice is as much necessary in an action of ejectment as in other actions.

Turner v. *Mills.*—Rule absolute to enter verdict for defendants.

Smith v. *Modeland.*—Appeal allowed without costs.

Fitzgerald v. *Kendall* —Rule discharged.

Parker v. *McDonald.*—Rule discharged with costs.

Howard v. *Haight.*—Appeal allowed without costs, new trial ordered.

Jury v. *Fry.*—Postea to plaintiff.

Holder v. *Langley.*—Rule discharged.

Patterson v. *Langley.*—Rule absolute for new trial, costs to abide the event.

Higgins v. *The City of Toronto.*—Rule absolute for new trial without costs.

Kirchhoffer v. *Ross et al* —Rule absolute to arrest judgment unless plaintiff within one month amend by suggesting omitted facts.

Metropolitan Gas Company v. *Rossin.*—New trial, costs to abide the event.

Martin v. *Cowan.*—Appeal dismissed with costs.

Dempsey v *Carson.*—Appeal allowed without costs.

Haight v. *McInnis.*—Appeal allowed without costs.

Baldwin v. *Elliot.*—Rule absolute for new trial without costs.

Perritt v. *Arnold* —Rule discharged.

McNab v. *Howland & Fitch.*—Rule absolute for new trial, costs to abide the event.

Present:—DRAPER, C. J.; RICHARDS, J.; HAGARTY, J.

Saturday, September 28, 1861.

Smith v. *Mutchmore.*—Rule absolute for new trial without costs.

Cleland v. *Robinson et al.*—Rule absolute to set nonsuit aside, and for a new trial except as to defendant Robinson.

Dunne v. *O'Reilly.*—Rule absolute, without costs.

Moore et al. v. *Chambers.*—Judgment for plaintiff on demurrer to equitable plea for defendant on plea of *nunquam indebitat,* with leave to plaintiff to amend on payment of costs.

Moore et al. v. *Hudson.*—Judgment for plaintiff on demurrer to plea.

Moore et al. v. *Murphy.*—Judgment for plaintiff on demurrer; equitable plea held bad.

Moore v. *McDonald.*—Plaintiff entitled to judgment on demurrer. Held, plea bad.

Clendenan v. *Great Western Railway Company.*—Judgment for plaintiff on demurrer.

Gouanlock v. *Smith.*—Appeal dismissed without costs.

Moore v. *Muma.*—Appeal dismissed with costs.

The Queen v. *The Provisional Council of Dorcc.*—Rule discharged with costs.

In the matter of George Michie and the City of Toronto.—Rule absolute to quash clause 4 of by-law, without costs, and discharged as to residue.

Proudfoot v. *Harley.*—Rule discharged.

In re McMaster and the Corporation of the Village of Newmarket. Rule absolute with costs.

Harvey v. *Mutual Fire Insurance Company of Prescott.*—Rule absolute. Postea to defendants.

Brown v. *Osborne.*—Judgment for plaintiff on the demurrer, with leave to the defendant to amend within ten days on payment of costs.

LAW SOCIETY OF UPPER CANADA.

MICHAELMAS TERM, 1860.

ARTICLED CLERKS' EXAMINATION.

SMITH'S MERCANTILE LAW.

1. What is a restrictive endorsement, and an endorsement *sans recours* respectively of a bill or note?

2. Can a lien be retained for a debt, the remedy by action for which is barred by the Statute of Limitations? Give your reasons.

3. When does a right to stop in transitu arise, and when is it determined; and will the *bonâ fide* endorsement of bill of lading, in any way, and if so, how affect it?

4. Will such a *delivery* of goods as would be sufficient to support an action for goods sold and delivered, be sufficient to ratify a contract of sale within the Statute of Frauds? State the difference.

BLACKSTONE'S COMMENTARIES, VOL. 1.

1. How may a corporation be created, and how dissolved?

2. Below what age are children presumed not to be *criminally* answerable for their Acts?

3. What is municipal law, and into what four branches is it divided?

STORY'S EQUITY JURISPRUDENCE.

1. Distinguish between a bailment and a trust.

2. When are voluntary settlements of real estate void, and when not.

3. When is surprise or mistake a ground of equitable jurisdiction.

4. When is relief in equity with respect to sureties more complete than at law?

5 How, and when are receivers appointed, and what are their rights and duties?

WILLIAMS ON REAL PROPERTY.

1. Can a husband convey to his wife? and give reasons for your answer.

2. What effect, if any, has the deed of an infant?

3. What is the effect of the registration of a judgment, and what are the rights and remedies under it?

4. Can a mortgagor make a conveyence by lease and release, and give reasons for your answer?

5. Give the most important statutory provisions of the Statute of Limitations with respect to real estate.

STATUTES AND PLEADING OF COURTS.

1. In what cases will replevin lie in Upper Canada?

2. What is the effect upon a cause of the withdrawal of a juror at the trial?

3. Can an award under a compulsory reference be enforced, and if so, how, before the time for moving to set it aside has elapsed?

4. Within what time must a bond be perfected and executed so as to stay execution, in the case of an appeal from the decision of a County Court judge?

5. When a person, not an infant, nor of unsound mind, has been served with an office copy of the bill, within the jurisdiction, but not personally, in what manner must an *order pro confesso* be applied for against him?

6. Can a decree be obtained before the time for answering has expired? State the practice in such cases.

7. Does the dismissal of a bill for want of prosecution operate as a bar to another suit of the same sort?

8. What is the practice when one of the parties wants a rehearing?

9. What is the practice in proceeding under a reference to the master as to title?

EXAMINATION FOR CALL.

SMITH'S MERCANTILE LAW.

1. Will the delivery of goods to an agent of the vendee appointed to convey them, deprive the vendor of his lien for the price; or of the right to stop in transitu, or either?

2. What are the respective rights of debtor and creditor as to the appropriation of sums paid by the former?

3. What are the *implied* warranties in a marine policy?

BYLES ON BILLS.

1. What are the essential requisites of a bill of exchange?

2. Is the drawer of a bill of exchange, accepted for his accommodation, entitled to notice of dishonour under any, and if so what circumstances?

3. When, and by whom, must a bill of exchange be paid so as to extinguish the instrument?

TAYLOR ON EVIDENCE.

1. What are the respective functions of the judge and jury with regard to a written instrument offered in evidence.

2. What is a latent and what is a patent ambiguity, and which can be explained by parol evidence?

3. Under what circumstances must a confession have been made to render it admissable in evidence against a prisoner? Is there any statute applying to this subject?

4. Upon what principle are declarations accompanying acts admissible as evidence? Is this in reality an exception to the rule rejecting hearsay evidence? Give your reasons.

STORY'S EQUITY JURISPRUDENCE.

1. Explain what is meant by tacking; how far the doctrine is affected by our registry laws, and in what cases it may still be applied?

2. Under what circumstances will a surety be held to be discharged in equity?

3. Explain the doctrine of specific performance, and whether it will be put in force with respect to land in foreign countries?

4. When is a trust deemed a purchase, and when not?

5. What defences are peculiar to equity?

WILLIAMS ON REAL PROPERTY.

1. What is the effect of the destruction of the reversion upon the rent incident to it?

2. What are the requisites of a conveyance for barring an estate tail?

3. What is equitable jointure?

4. What are powers, and explain how estates thereunder take effect?

5. What is a shifting use, and distinguish between it and a remainder.

PRACTICE AND PLEADING

1. What is the difference between a demurrer at law and in equity in point of pleading?

2. Can the silence of the answer as to any statement in the bill be construed into an implied admission of its truth?

3. What is the effect of admissions made in an answer by one defendant as regards his co-defendant?

4. What effect has an unproved allegation of fraud in the bill, on the costs of the suit, when the plaintiff succeeds generally?

5. How is a bill taken *pro confesso* against a married woman?

6. What is a departure in pleading?

7. At what period of a suit may either party with or without leave of the court or a judge serve interrogatories on the opposite party?

8. In what cases can a submission to arbitration be now made a rule of court?

9. In what cases of finding on an immaterial issue will a repleader or judgment *non obstante veredicto*, respectively be granted?

10. What is the effect of a reversal of a judgment, by virtue of which a judgment creditor has garnished a debt, upon the garnishee, who has paid over to such creditor the amount due from him to the judgment debtor, under a regular order?

ADDISON ON CONTRACTS.

1. In what cases will a contract in partial restraint of trade be upheld?

2. Mention some cases in which a representation made by the vendor at the time of sale will, and some in which it will not, amount to a warranty.

3. What will amount to a sufficient acknowledgment in writing by a debtor, to take a case out of the Statute of Limitations?

POSTPONED ARTICLES RELATING TO THE DIVISION COURTS.

Several articles on our list for preparation, have been unavoidably postponed in consequence of the continued absence of one of the Editors in Europe. His return, daily expected, will enable us to fulfil all promises at an early day.

CHANGES IN THE LAW.

CHARGE OF HIS HONOR, K. McKENZIE, ESQ., JUDGE OF THE COUNTY COURT OF FRONTENAC, LENNOX AND ADDINGTON, TO THE GRAND JURY AT THE LAST COURT OF QUARTER SESSIONS FOR THE UNITED COUNTIES.

Mr. Foreman and Gentlemen of the Grand Jury:—I find by the Sheriff's calendar that twelve prisoners are confined in the common gaol of the counties, or out on bail, charged with crime. Their cases will be submitted to your investigation. The offences alleged are of the ordinary character, and call for no special direction from the court. Other parties, not in the calendar, charged with crime, may be out on bail. I believe such parties are out on bail. The respective charges will be brought under your consideration in due form of law by the Crown Attorney, who will, no doubt, afford you every assistance in his power to enable you to get at the truth of such matters as will come before you as a Grand Inquest.

At the time of the last sittings of this court, in the month of June, I did not receive the authorized printed copy of the statutes passed in the last session of the Provincial Parliament, consequently I was unable then to direct the attention of the Grand Inquest to the alterations and changes made thereby in the law. An Act was passed to prevent vexatious indictments for certain misdemeanors. For the future no bill of indictment for perjury, subornation of perjury, conspiracy, obtaining money or other property under false pretences, keeping a gambling house, keeping a disorderly house, and any indecent assault, shall be presented to, or found by, any Grand Jury unless the prosecutor or other person presenting such indictment had been bound by recognisance to prosecute or give evidence against the party accused of such offence, or unless the person accused has been committed to, or detained in, custody, or has been by recognisance to appear to answer to an indictment to be preferred against him for such offence, if charged to have been committed in Upper Canada, be preferred by the direction or with the consent, in writing, of a judge of one of the supreme courts of law, or of Her Majesty's Attorney or Solicitor-General for Upper Canada, or of a Judge of one of the County Courts or Recorder of a city in Upper Canada.

And when a party is charged before a Justice of the Peace with any of the said enumerated offences, and the justice shall see fit to refuse to commit or to bail the person charged, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, the justice is bound to take the recognisance of such prosecutor to prosecute the charge or complaint, and to transmit such recognisance, information or deposition, if any, to the County Crown Attorney.

By another Act the law relating to the unlawful administering of poison has been amended. Heretofore the law was found insufficient to protect persons from the unlawful administering of poison, except in cases where the intent was to commit murder. Now, by the act in question, it is declared that whosoever shall unlawfully and maliciously administer poison or other destructive or noxious thing, so as to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and, being convicted thereof, shall be punished accordingly; and whosoever shall unlawfully and maliciously administer to, or cause to be administered to or taken by any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof, shall be punished accordingly.

By another Act of the last session it is enacted that when any person, being feloniously stricken, poisoned or otherwise hurt at any place within the limits of this Province, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of the limits of this Province, every offence committed in respect of any such case, whether the same will amount to the offence of murder or manslaughter, may be dealt with, inquired, tried and punished in this Province in the same manner in all respects as if such offence had been wholly committed within the limits of the Province.

The Act respecting the Extradition of fugitive felons from the United States has been amended. The power of apprehending such fugitive felons, and of enquiring into the truth of the charge made against them with a view of a requisition, being made by the United States Government to deliver them up under the Ashburton Treaty, is now taken out of the hands of the ordinary magistrates, and very properly placed in the hands of the judges of the Superior and County Courts, Recorders of cities, Police Magistrates, Stipendiary Magistrates, and Inspector and Superintendent of Police empowered to act as a justice in Lower Canada. This amendment of the law was rendered necessary by the legal complications which attended the case of Anderson, a colored person who escaped from slavery in the State of Missouri, and fled into free Canada, and who, unfortunately, killed a white man in making his escape. This celebrated case, as you all know, called forth much learning, and the learned judges differed in opinion in expounding the treaty and the law. The feeling of the Province from the one end to the other—the feeling of Great Britain and Ireland,—the feeling of our countrymen all over the world, was aroused and enlisted on the side of this poor man. At one time it would appear that the whole re-

sources of the British Empire would be called forth to save him from slavery and death. During all the excitement called forth by the case, the sober majesty of the law was respected. The people at home and abroad, had implicit faith in the power of truth, and that in the end it should prevail—it has prevailed. The fugitive is free, his chains have fallen off him, and slavery with all its crimes and horrors, stands rebuked and punished in his person. It was truthfully and eloquently remarked by Mr. Justice McLean, in giving his elaborate judgment in the case: 'The man,' he said, 'was committing no crime in endeavoring to escape from slavery, and to better his own condition. A love of liberty is inherent in the human breast, whatever may be the complexion of the skin; its taste is grateful and ever will be so, till nature herself shall change: and in administering the laws of a British Province, I can never feel bound to recognize as law, any enactment which can convert into chattels a very large number of the human race'—language worthy of the bench in its best of days, and worthy of the upright and manly character of him who gave it utterance.

Another Act of considerable importance was passed in the last Session of Parliament, to provide for the more general adoption of the practice of Vaccination. The small pox for ages had been a direful scourge to the human race. Death and desolation followed its devastating course. All authors who give an account of it tell us the great mortality occasioned by this loathsome disease wherever it has appeared, and the consequent terror which everywhere seized the minds of the people on its appearance among them. It is said that physicians had been acquainted with the small pox for upwards of a thousand years before any idea had been promulgated that its ravages could be arrested, and its virulence mitigated by artificial means. Several eminent physicians studied the disease with care and attention, but it was reserved for our own gifted countryman Jenner, to discover and establish the efficacy of vaccine innoculation. When vaccination was first introduced by Jenner, like other new discoveries, it encountered opposition and ridicule. But Jenner lived to see the triumph of his discovery complete. He lived to see vaccination introduced into the public hospitals, and the army and navy of Great Britain, and himself acknowledged as a public benefactor by the Imperial Parliament, which conferred upon him two grants of £20,000 and £10,000. Vaccination is now universal, and has become a subject for Parliaments to consider and governments to regulate. By our own Act of last session, the law has taken the practice of vaccination under its own vigilant eye, to a certain extent. For the future, no money will be granted or paid to any hospital unless it has a distinct and separate ward set apart for the exclusive use of patients afflicted with the small pox; and the Council of each of the cities of Quebec, Three Rivers, St. Hyacinthe, Montreal, Ottawa, Kingston, Toronto, Hamilton, London, and the town of Sherbrooke, are required to contract with some legally qualified and competent medical practitioner for one year, and so from year to year, for the vaccination, at the expense of the city, of all poor persons, and at their own expense, of all other persons resident in such city. Within three months after the passing of the Act, the Council of each such city shall appoint a convenient place in each ward of such city for the performance, at least once in each month, of such vaccination, and shall take effectual means for giving from time to time, due notice of the days and hours at which the medical practitioner contracted with for such purpose, shall attend to vaccinate persons who may then appear, and also of the time when such medical practitioner will attend to inspect the progress of such vaccination in the persons so vaccinated.

After the first day of January, 1862, parents and persons who have the care of children in the said cities, are bound to take children, within four months after birth, to the medical practitioner in attendance at the appointed place, in the ward in which they may reside, for the purpose of being vaccinated; and to exhibit them to the medical practitioner upon the eighth day following the day of vaccination, in order that he may ascertain by inspection, the result of such operation. A certificate of successful vaccination shall be delivered to the parents of the child by the practitioner who performed the operation. Any parent or person having care or custody of any child, who shall not cause it to be vaccinated within the period prescribed by the Act, shall be liable to a penalty of five dollars, recoverable upon a summary conviction.

It is to be trusted that the authorities of this city will employ a competent practitioner for Kingston, to carry out the requirements of the law, and appoint a proper place in each ward of it, for the purposes of the Act. Although the provisions of the Act are for the present restricted to the nine cities of Canada and the town of Sherbrooke, it is not improbable but they will be extended in due time to all towns, villages, and townships in the Province. In the meantime people living in towns, townships and municipalities, not included in the Act of Parliament, should take their children to a qualified medical practitioner within the time mentioned in the statute, and have them properly vaccinated. They owe this duty to the children, to themselves, and to society at large. If we cannot extirpate this loathsome disease, let us do all in our power to circumscribe its progress, and avail ourselves of every security which science and intelligence have placed within our reach against the virulence of such a dreadful malady.

The Act which was passed last year for the purpose of exempting certain articles from seizure in satisfaction of debts, has been amended by confining its operation to debts contracted after the 19th day of May, 1860.

The Act respecting the investigation into accidents by fire has also been amended. The party requiring the investigation, hereafter must pay the expenses of such investigation, unless the investigation be ordered by a warrant under the hand and seal of the Head Officer of the Municipality, and of at least two other members of the Council thereof.

Acts were also passed for the better assignment of Dower: and to repeal the laws relating to the registration of judgments in Upper Canada.

All new Acts, and all amendments of old laws should be promulgated as speedily as possible after they have been passed and sanctioned; and their provisions should be made known as publicly and extensively as practicable. With this view I have directed your attention to some of the most prominent Acts of last Session having force in Upper Canada.

It is an old maxim in English jurisprudence that ignorance of the law doth not excuse any man. For every man is bound at his peril to know the law of the country. Half the litigation in the country, and a great portion of the disputes which our courts and juries have to settle, arise out of an improper acquaintance with the requirements of the law. The unwillingness on the part of a large portion of the community to resort to legal advice and guidance before entering into agreements and undertakings is a fruitful source of litigation and trouble. Paper writings intending to secure rights and execute terms, are often drawn so loosely and imperfectly that the parties differ and quarrel as to the meaning and construction thereof. Resort then is had to the court for an interpretation. Often a few dollars paid in the beginning to professional man, for drawing out papers and giving a proper advice, would save many pounds and much trouble and vexation. It is not private individuals only who err in this respect, but justices of the peace, and municipalities get into difficulties themselves and cause difficulties to others by not apprehending the law, and not adhering to its forms and requirements. At almost every sitting of this court we find the first day, and often the second taken up in hearing appeals

from the summary convictions of justices. Convictions quashed for want of form and requirements We find also every term of the supreme courts at Toronto largely occupied in contesting the legality of by-laws, and such by-laws are frequently quashed for not being framed according to law. Convictions founded upon municipal by-laws are repeatedly quashed for want of a proper by-law to support them, which occasions justice to be defeated. Enormous expenses, trouble and inconvenience are the consequences. When it is taken into consideration that municipal by-laws and proceedings bind to a certain extent the property and rights of the public, and may affect future rights, great care should be taken in the naming and passing of them. The idea has often suggested itself to me that if the various municipalities in each county would come to an agreement among themselves to employ some legal gentleman at the County Town, the County Attorney, or any other legal man, to advise them in all matters touching by-laws and other legal instruments, great saving would be effected, and much trouble avoided. The matter deserves the consideration of those concerned.

It forms a part of your duty to visit the gaol, to examine the condition of the prisoners, and the state of the building. You should see that the rules and regulations which the Inspectors of Prisons have promulgated at the commencement of the year, are complied with by the officers in charge of the gaol, who will furnish you with a copy of such Rules and Regulations.

SELECTIONS.

THE NEW LAW OFFICERS OF THE CROWN IN ENGLAND.

The new Lord Chancellor, who was recently gazetted to a peerage as Lord WESTBURY, of Westbury, in the County of Wilts, but who for some time to come will be better known to the public and the profession as Sir Richard Bethell, is a native of the town of Bradford-on-Avon, Wilts, where he was born June 30, 1800. His father was Dr. Bethell, a physician, resident first at Bristol and afterwards in London, the descendant of an ancient Welsh family, originally named "Ap Ithel," of which the late Dr. Christopher Bethell, Lord Bishop of Bangor, was a distant relative. Dr. Bethell, of Bristol, enjoyed the reputation of being a man of great skill in his profession; he was a man of education and considerable mental powers, and, what is more, one who in early life had little or nothing to depend upon but his medical practice. Dr. Bethell devoted himself earnestly to the education of his son Richard, the future Chancellor, who has been known to attribute whatever success he has had in life to his father's attention to his education, and to the care and skill with which that gentleman formed and disciplined his mind from his earliest years.

Sir Richard Bethell was brought up in Bristol, where his early education was conducted at a private school. Just before he attained the age of thirteen he returned home, in consequence of the school being given up, and remained at home for a short time, pursuing his studies under the care of his father. At the age of fourteen his father determined to send him to Oxford, and he lost no time in entering his name on the books for admission in Wadham College. This was in October, 1814. After some demur on the part of the authorities, in consequence of his extreme youth, he was permitted to matriculate, and went into residence as a commoner early in the following year. A scholarship at Wadham College was the subject of a competive examination in the following June; and although there were many candidates, and consequently a severe contest, young Bethell, in spite of his extreme youth, was fortunate enough to obtain it, and to be elected scholar on the day that he completed his fifteenth year—an example of precocity which, if it has ever been equalled by any living personage, has been equalled only by the present Bishop of Exeter. Whilst in residence he enjoyed the proceeds of a college exhibition for proficiency in Greek, and these resources enabled him to complete his education with but little aid from his father. He closed an under-graduate career of great promise by taking his B A. degree in April 1818—before he was eighteen—gaining a first class in classical, and a second in mathematical honours. In due course of time he succeeded to a fellowship, having maintained himself in the meantime by acting as a resident private tutor. Soon after finishing his year of probation, he came to London, and having previously entered as a student at the Middle Temple, he began to study law in earnest. Having been called to the bar at the Middle Temple in Nov. 1823, he began practise as a Chancery barrister, and soon obtained considerable distinction, and what is better a considerable share of business. Dr. Gilbert, now Bishop of Chichester, then Principal of Brasenose College, and who had been one of his examiners in 1818, appointed Mr. Bethell counsel for his college in a suit instituted against them by a wealthy and influential nobleman in the east of England, in which an adverse decision would have been a serious blow to the society over which he presided. It is said that a very eminent counsel advised a compromise, and that the college was only encouraged to resist the action by the earnest representations of Mr. Bethell, who was then comparatively a young and untried man. The college persevered and gained the day. This success, of course, greatly augmented Mr. Bethell's practise, which continued to increase until early in 1840, when he was then nominated a Queen's Counsel by the then Lord Chancellor, the late Earl of Cottenham.

The elevation of Mr. Wigram and Mr. Knight Bruce to the judicial bench, and the death of Mr. Jacob, made way for Mr. Bethell as the acknowledged leader of the court at that time presided over by the late Sir Lancelot Shadwell, over whose mind, and indeed over whose legal decisions, Mr. Bethell was very justly supposed to have established and to exercise a very powerful influence. He continued to practise with great success in the equity courts under Lords Cottenham, Truro and Cranworth, down to the formation of the Aberdeen or Coalition Cabinet, in the month of Dec. 1852, when he was appointed Solicitor-General (Sir Alexander Cockburn being Attorney-General), and received the honour of knighthood. Meantime, on a casual vacancy which occurred in the early part of 1851, Mr. Bethell was returned to Parliament in the Liberal interest as one of the members for Aylesbury; and at the general election of the following year he regained his seat, in conjunction with Mr. Austin H. Layard, the Eastern traveller and author. He was again elected at the dissolution of 1857; but, owing to a difference which arose as to a compromise with the opposite party, in 1859 he withdrew from Aylesbury, and was a successful candidate for the support of the electors at Wolverhampton, by whom he was chosen without opposition, in the place of their veteran M.P., Mr. Thomas Thorneley, who then retired on account of increasing age and infirmity.

While engaged in the discharge of the duties of the important post of the Solicitor-General, Sir Richard Bethell greatly assisted in carrying through the Lower House the Succession Duty Bill; as also the Oxford University Reform Bill, the Bill for the Abolition of the Ecclesiastical Courts, and several other measures of importance. On the promotion of Sir Alexander Cockburn, in Nov. 1856, as Chief Justice in succession to Sir John Jervis, Sir Richard was appointed Attorney-General, in which capacity he carried, after a formidable struggle, measures for the Abolition of the Ecclesiastical Testamentary Courts, the establishment of the Divorce and Probate Courts, &c. He also brought before Parliament the Fraudulent Trustees Act, and the Charitable Trusts Act, in addition to several other important measures relating to improvements in the Equity and Common Law Courts.

When the new Court of Probate and Divorce was about to be formed, it is understood that Lord Palmerston offered the

judgeship to Sir Richard Bethell, as an acknowledgment of his distinguished services in conducting to a successful issue the important measures of law reform upon which the court was established. Patronage to the extent of some £40,000 is attached to the office; but Sir Richard declined the post, considering that the circumstance of his having had in his charge the carriage of the Bills in the Lower House might lay him open to the imputation that his exertions in connection with them had not been of that disinterested character which Parliament and the public had a right to expect at his hands.

The learned gentleman resigned the Attorney-Generalship in February 1858, the change of Administration consequent on the failure of Lord Palmerston's famous Conspiracy Bill: and returned to his former office in June 1859, although generally named at the time for the Chancellorship. The latter, however, was conferred on Lord Campbell, to whose seat on the woolsack Sir Richard Bethell has now succeeded after just two years' delay.

Amongst the important law cases conducted by Sir Richard Bethell may be mentioned the Bridgewater will case (in which Lord Brownlow and the Cust family were so deeply concerned) and the Montrose and the Shrewsbury peerage cases. In the former property was involved to the enormous extent of two millions sterling, and the case was ultimately adjudged by the House of Lords. In the last named case Sir R. Bethell appeared, in virtue of his office as Attorney-General, as assessor on behalf of the Crown; and afterwards, when out of office, during Lord Derby's second brief administration, as counsel for the infant son of the Duke of Norfolk, who was made a party to the suit.

In the House of Commons Sir Richard Bethell was an eloquent speaker and a ready debater. To use the words of a contemporary: "Unlike many honorable members, and unlike many of his brethren at the bar, he introduces the largest amount of matter in the fewest possible words; while he rarely, if ever, repeats an idea. As an illustration of his powers of oratory, it may be mentioned that shorthand-writers, in reporting many speakers, are able to lay down their pens from time to time during the delivery of speeches, without losing anything of importance. Repetitions and unnecessary phrases are so frequent and so readily detected by professional stenographers, that they can desist from their labours minutes and minutes together, and yet afterwards present an unquestionably full and accurate report. With the (late) Attorney-General, however, the case is widely different. His ideas are so aptly expressed, and his arguments so concise that a momentary inattention would indubitably result in the omission of some sentence necessary to the whole, and consequently fatal to the report." The measures recently adopted by the Inns of Court for the education of the students are largely due to the exertions of Sir Richard Bethell, or, as we ought to call him now, Lord Westbury. He has also been, from the commencement, Chairman of the Council of Legal Education.

On the 19th Nov. 1826, Sir Richard Bethell married Ellinor Mary, daughter of Robert Abraham, Esq., by whom he has a family of three sons and four daughters. Two of his sons have been called to the Bar by the Honorable Society of the Middle Temple.

Sir WILLIAM ATHERTON, the new Attorney-General, according to a sketch in the forthcoming edition of "Men of the Time," is the son of a Wesleyan clergyman, the Rev. William Atherton, and was born in 1806, in Glasgow, where his mother's family lived. He was called to the Bar at the Inner Temple in 1839, having practised as a "special pleader below the bar" for several years. He chose the Northern as his circuit, and soon rose into a successful practice. In 1852 he was elected M.P. for Durham in the Liberal interest, and was re-chosen in 1857 and 1859. In 1855 he was appointed Judge-Advocate of the Fleet, and standing counsel to the Admiralty, which post he held until his elevation to the Solicitor-Generalship in 1859, on which occasion he received his usual honour of knighthood. Sir William (who is himself we believe a staunch and active member of the Wesleyan body) is married to a daughter of Thomas J. Hall, Esq., chief magistrate at Bow-street. As a lawyer Sir Wm. Atherton is sound and safe, but not of brilliant abilities and in the opinion of the Profession he will make a very excellent judge when he reaches the bench. He is a sensible painstaking man; moderate and liberal in his views; amiable and quiet in his disposition. He is represented in Parliament to be opposed to the repeal of the Maynooth Grant, and in favour of a large extension of the suffrage, vote by ballot, extensive legal reforms, and the removal of all civil disabilities. His name, however, as yet, is not connected with any very important legal cases or Parliamentary measures.

Mr. ROUNDELL PALMER, Q.C., the new Solicitor-General, is the second son of the late Rev. William Jocelyn Palmer, many years rector of Mixbury, Oxon, by the youngest daughter of the late Rev. William Roundell, of Gledstone, Yorkshire, and brother of the late Mr J. Horsley Palmer, and of Mr George Palmer of Nazing-park, many years M.P. for South Essex, and uncle of the present Colonel Palmer, of Nazing. He is also distantly connected with the family of the late Archbishop of Canterbury, Dr. Howley. He was born at Mixbury Rectory in 1812, and educated at Rugby and Winchester schools. In 1830 he was elected to an open scholarship at Trinity College, Oxford, where he graduated as a first-class in classics in Easter Term 1834, having previously gained the Chancellor's Prize for Latin Verse, in 1831 (subject "Numantia"), and for the Latin Essay in 1835 (subject, "De Jure Clientelæ apud Romanos"), the Newdegate Prize for English verse in 1832 (subject, "Staffa"), and the Ireland Scholarship in the same year. He was subsequently elected to a fellowship at Magdalen College, which he held as a laymen down to the date of his marriage. He also obtained the Eldon Law Scholarship in 1834. (*) In the year 1837 he was called to the bar at Lincoln's Inn, and practised with great success as a Chancery barrister. In April 1849 he was made a Queen's Counsel by the then Lord Chancellor, the late Earl of Cottenham. He sat as M.P. for Plymouth, as a Liberal Conservative, from July 1847 till the general election of 1852, when he was an unsuccessful candidate for re-election, having offended his constituents by voting against the Ecclesiastical Titles Bill. His opponent, however, Mr. J. C. Mare, was unseated on petition, and Mr. Palmer was chosen into the vacant seat in the following June. He did not, however, seek re-election at the dissolutions in 1857 or 1859. He has lately been returned, as our readers are aware, for the quiet borough of Richmond, Yorkshire, which is in the patronage of the Earl of Fitzwilliam and the Earl of Zetland, and where election contests are things almost wholly unknown. Mr. Roundell Palmer, having been appointed Solicitor-General, will of course receive the customary honour of knighthood at the next levee. He has taken an active interest in most of the charities and religious institutions of the Church of England, and is an amiable and excellent man and an accomplished scholar. His English verses on Winchester College have gained a place in the literature of the age, and he was a large contributor of Latin verses to the Anthologia Oxoniensis, edited by the Rev. William Linwood in 1847. In 1849 Mr. Roundell Palmer married the Lady Laura Waldegrave, second daughter of the eighth Earl Waldegrave, by

(*) As our readers may not be aware of the nature of this scholarship, we subjoin the following extract from the *Oxford University Calendar*: "This scholarship was founded from moneys subscribed for the purpose of providing some testimonial to commemorate the political services of the Earl of Eldon, and was more especially established in order to record Lord Eldon's connection with the profession of the law, and with the University of which he was so distinguished an ornament, and at the same time to confer a real benefit upon meritorious individuals, who may have to struggle with difficulties in the early part of their professional career. The annual value of the scholarship is 200*l.* for three years. Candidates must be Protestants of the Church of England, and members of the University of Oxford, who having passed their examination for the degree of Bachelor of Arts, shall have been rated in the first class in one branch at least of examination, or shall have gained one of the Chancellor's Prizes, and who shall intend to study the profession of the law.

whom he has issue. Of Mr Palmer's brothers one, the Rev. Wm. Palmer, late fellow of Magdalen College, Oxford, is well known for the active interest which he has taken in the question of a union between the Anglic[illegible]nd Greek churches, and for his publications on the subject. Another brother has succeeded to his fathers living at Mixbury; and the youngest brother is the Rev. Edwin Palmer, fellow of Balliol College, Oxford, who gained the Ireland Scolarship in 1843, and the Chancellor's Prize for Latin verse in 1844.—*Law Times.*

THE NEW BANKRUPTCY AND INSOLVENCY ACT.

On and after the 11th of October next, the Bankruptcy Act (1861) will take effect. All the complaints of Mr. Commissioner Fane, and all his letters to Lord Palmerston to the contrary notwithstanding. This measure of reform in the Court of Bankruptcy has been a long delayed one, and the struggle to obtain it has been a somewhat arduous one. Indeed, had it not been for some conciliatory feeling, and some compromises on the part of both Lords and Commons, the late session would have passed over without having accomplished reforms which all felt to be most urgently required. The proposal to appoint a Chief Judge of the New Court of Bankruptcy was well nigh fatal to the Bill. The bankruptcy judge was not merely as useless as the fifth wheel of a coach, but there was every prospect of his being a disagreeable obstacle to the progress of the Bill through Parliament. Fortunately, however, moderation prevailed; the good sense and arguments of the Lords, which were unanswered, were acknowledged, and we have now the Bankruptcy Bill, without the expensive luxury of the judge with little or nothing to do. If it be true, as was stated by the law lords, and it was not contradicted, that the present legal establishment is fully able to discharge all the duties which are likely to be brought before it in connexion with bankruptcy and insolvency, then it is a cause for congratulation that the country has been spared an unnecessary expense of £5000 a-year for a superintending functionary. Should it be found that the services of an additional judge are required, they may be easily provided another year; while if the appointment had been made, and it had happened that there was not sufficient work for the new judge, the country would still have had to bear the expense so long as the fortunate judge with nothing to do should continue to lead a life of dignified ease.

The principle which has been recognised in the new Bankruptcy Act, is that of placing the creditor in a situation as near to that in which he would be entitled to stand according to the terms of the original contract, as the altered circumstances of his debtor will allow; and to relieve the insolvent from all inconvenience and suffering which are not actually necessary for the purpose of enforcing payment to the extent of his real ability; and as far as possible to discourage the imprudence and repress the fraud in which insolvency and bankruptcy so often originate. These objects have, more or less, been kept in view in all preceding Acts with respect to bankruptcy or insolvency. They have, however, most egregiously failed, and the little reforms which have been attempted, have been made rather for the purpose of removing some particular subject of complaint, which was thought at the time improperly to weaken the security of the creditor, or to press with an uncalled-for severity upon the debtor. At one time it was the creditor who was favoured by legislation; at another time the debtor was the object of the anxious solicitation of the law-makers. A desire to protect the rights of the creditor, and an anxiety to lessen the sufferings of the debtor, have alternately predominated in such a manner as to bring the law into a state of uncertainty and confusion. It was high time that some steps were taken for placing this part of our legal system upon a sound and efficient footing. The numerous cases in which immunity has been extended to crime, and in which severity has been exercised against misfortune under the operation, if not with the sanction, of existing laws, have tended to lower and destroy the tone of commercial integrity and mercantile honour which we would wish to have seen preserved in this country.

The most important principle recognised in the Act is that of the abolition of the distinction between traders and non-traders. This distinction, which has existed for so long a period, and which has divided debtors, unable or unwilling to meet their engagements, into bankrupts or insolvents, just as the one happened to be engaged in trade, and the other was a non-trader or professional man, has at last ceased to exist. It is a distinction which appears to have had its origin in feudal times, and when a marked line was drawn between persons engaged in commerce, and the military and territorial portion of the community. In the present state of society it was a distinction which it was very difficult to maintain in an age of railways, mining companies, and steam ships, and other trading companies. It has become exceedingly difficult to define what constitutes a trader or non-trader. A shareholder in a railway company is practically a carrier; a holder of shares in a steam-shipping company is a shipowner; and it is not easy to understand why a hundred persons joined together in a trading enterprise should be treated as insolvents because they please to enrol themselves in a joint-stock company, while any number of persons less than six trading in copartnership would be liable to be treated as bankrupts in the event of non-payment of their debts. The Act, therefore, very properly provides that all debtors, whether traders or not, shall be subject to its provisions; but it provides that the Act shall only be applied to persons who are not traders in respect of some one of several specified acts of bankruptcy. These acts of bankruptcy are—persons going or remaining abroad, or making fraudulent conveyances, with intent to defeat or delay their creditors; lying in prison or escaping out of prison; the trader filing a declaration that he is unable to meet his engagements; suffering execution to be levied, or his goods to be sold under such execution. The commission of any one or more of these acts will bring the non trader within the provisions of the Act, and his creditor may thereupon issue out a judgment-debtor summons against him. This summons is to be served upon the debtor personally, unless when he is not resident in England; and in such cases the court may order service in such manner and form as it shall deem fit. If the court has reason to believe that the debtor is keeping out of the way to avoid service, then a notice in the *Gazette* and one or more newspapers that the debtor "is wanted," for the purpose of being served, shall be deemed sufficient to justify further proceedings. After such notice or service has been made, the debtor, whether trader or non-trader, must appear before the court on a day to be named, and produce all books, papers, and documents relating to property applicable to or alleged to be applicable to the satisfaction of the debt. Upon failing to pay after the service of the judgment summons, or refusing to obey the order of the court, the debtor may be committed as under the existing law. A debtor may petition for adjudication of bankruptcy against himself. In the case of creditors petitioning for adjudication against their debtor, the debt must amount, if to one creditor, to £50; to two creditors, to £70; and to three or more, to £100 and upwards. In the case of a non-trader, the debt due to the petitioning creditor must, however, have been contracted after the passing of the present Act, its provisions not applying to the non-trader in the case of debts made before the Act became law. It is not in this matter retrospective in its action.

After the adjudication of bankruptcy, and at the first meeting under a bankruptcy, the creditors may remove the proceedings to any County Court, or if they think fit, determine to wind up the estate under a private arrangement, and also decide whether the bankrupt shall have any and what allow-

ance of support. The official assignee is to collect the debts not exceeding £10, and the court is to order into whose custody the books and papers belonging to the estate shall be deposited. The creditors are to determine whether the estate shall be realized by an official assignee, or assignees chosen by themselves, and in the latter case may allow them the assistance of a paid manager. All moneys received by the assignees are forthwith to be paid into the Bank of England, to the account of the Accountant in Bankruptcy, and in country districts where there shall be no branch of the Bank of England, then into such other bank as the court shall direct. The creditor's assignee must, every three months, submit a statement of his accounts, with vouchers, to the official assignee for examination; and after such accounts have been passed the official assignee is to send a printed copy thereof, or a statement showing the nature and result of the transactions and accounts of the assignee, to every creditor who has proved under the bankruptcy. The proof of debts may be made by sending to the assignee, through the post, a statement of such debt, and of the account, if any, between the creditor and the bankrupt, together with a declaration signed by the creditor that such statement is a full, true and complete statement and account between them. Persons making false statements are to be liable to indictment for misdemeanor, and all the statements of account are to be compared with the books and papers, and be kept by the assignee for the purpose of verification. The classification of the certificate is abolished by the Act. The bankrupt after the passing of his last examination is to be entitled to an order of discharge. Stringent penal clause are provided, and for a variety of offences the court may summarily order imprisonment for any period not exceeding one year, or may refuse or suspend the order of discharge, or attach conditions thereto as to future property. For offences made misdemeanors under the Act, bankrupts may be tried in the Court, with or without a jury, at the option of the bankrupt, and on conviction may be imprisoned for any term not exceeding three years, and be liable to any greater punishment attached to the offence by any existing statute. The court may direct the creditors assignee, official assignee, or any creditor to act as prosecutor, and the costs of such prosecution will be borne in the same manner as the expenses of prosecutions for felonies are now borne; and other costs incurred by such prosecutor not so defrayed are to be paid out of the Account-General's fund. Important facilities are afforded to enable a debtor and his creditors to effect private arrangements under trust or composition deeds. A majority of creditors in number, including three-fourths in value, may, on execution of a deed of arrangement, and registering it in the court, bind a minority, and are to have the use of the court in all cases in which they shall require its assistance to decide questions as to disputed claims, or any differences that may arise between the parties interested in the debtor's estate. The court is not, however, to interfere in any manner except its aid is invoked by some person having a direct interest in the matter. Every deed of composition must be registered. The official assignee is called upon to make a report to the court, on the state of the bankrupt's accounts. One year's parochial rates may be paid in full out of the estate of the bankrupt. When the order of discharge has been granted by the court it will be a sufficient plea in all actions for debts contracted prior to bankruptcy; the order differing in this respect from the discharge at present given by the Insolvent Debtors' Court, where the future property of the insolvent is still held liable for the payment of debts. An appeal to the Court of Appeal in Chancery on the part of creditors, bankrupts, or assignees, may be made within thirty days against the decision of any commission in bankruptcy. At the expiration of four months, or sooner, from the date of the adjudication of bankruptcy, the creditor's assignee is to submit to a meeting of the creditors a statement of the whole estate of the bankrupt, the property recovered and the amount outstanding, and the creditors are to determine whether any and what dividend shall then be paid, and what allowance shall be made for the bankrupt; and meetings of a similar kind, and for a similar purpose, are to be held every four months until the whole estate of the bankrupt shall be realised and paid as dividends. The Courts in Scotland and Ireland are made auxiliary to the court in England for the purpose of examining witnesses; and orders made in England may be enforced in Scotland and Ireland. Acts of misdemeanor include the non-surrender of the bankrupt at the time specified, concealment of books or property, removal of property with intent to defraud his creditors, if within sixty days of the adjudication; the proving a false debt; omission from the schedule of any effects or property; the mutilation or alteration of books with a view to defraud; concealment of any debt: statement of petitioner's losses or expenses; obtaining goods on credit within three months of bankruptcy, with intent to defraud, and disposing otherwise than by *bonâ fide* transactions of goods obtained on credit within three months of the bankruptcy, and remaining unpaid for. Each of these acts will subject the bankrupt to a charge of misdemeanor, for which the court may order prosecution. The salaries to be given under the Act are: for the chief registrar, £1400; the registrars in London, £1200; in the country, £1000; the registrar in attendance on the chief judge, £1200; the taxing master, £1400; the accountant in bankruptcy, £1500; the registrar of meetings, £250. The messengers of the Court of Bankruptcy are to be continued in their office, but any vacancies which occur are not to be filled up until the number has been reduced to two in London, and in the district court to one; the remuneration, however, instead of amounting to the extravagant sums which these officers have hitherto received, exceeding in almost every instance the salary of the commissioners themselves, will not in future exceed £500 in London, and £400 in the country. The official assignees in London will each receive £1200, and £1000 in the country; but in the case of future appointments the salaries are not to exceed £1000 and £800 respectively for London and the country. Provision is made for retiring pensions for commissioners, registrars, and other officers, at the rate of two-thirds the salary after service of twenty-five years. The Court of Bankruptcy, as constituted by the Act, will have all the powers and authorities of the superior courts of law and equity, and all the jurisdiction, powers and authorities now possessed by the Court for the Relief of Insolvent Debtors in England. The Act received the Royal assent on the 6th Aug., and is to be cited for all purposes as "The Bankruptcy Act 1861." The Act contains 232 clauses, and, with the schedules, adds seventy one pages to the collection of statutes.—*Law Times.*

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 230.)

Reg. v. *Evans* (7 Cox, C. C. 293,) is a leading case in reference to the fourth offence—according to our division of sec. 3 of the forgery Act—namely, acting or professing to act under false color or pretence of process; and establishes the important principle that it is not necessary to shew that the document used bore any resemblance to the genuine process of the court.

This case was decided in the Court of Criminal Appeal on a case reserved from the Montgomeryshire Sessions. The prisoner, in order to obtain a debt due to him, sent to

his debtor a letter, partly written partly printed, having at the top of the page the letters V. R. and the Royal arms, and addressed to the debtor. It was as follows:—

"Sir,—I hereby give you notice that unless the amount of your account, 10*s.*, which is due to me, is paid on or before the ——, at ——, proceedings will be taken to obtain the same, in pursuance of the provisions of the Statute 9 & 10 Vic., c. 95, of the new County Courts' Act for the more easy recovery of small debts, &c.

"Yours, &c.,

"Instructed by "Fred. Mugleston,

"John Evans." "*Clerk to the Court.*"

Some days after the letter had been received the wife of the debtor went to the prisoner, who represented to her that he had ordered the court to send the letter, when she paid him the debt, 10*s.* He then demanded 1*s.* 3*d.* more for the County Court expense, which she did not pay. It was contended that the letter contained only a threat if the money was not paid, and that there was nothing on the face of it to give it any appearance of a County Court process, and it was in fact different from the general process of the court.

The conviction, however, was affirmed. "It is contended," said Erle, J., in giving judgment, "that no case falls within the section unless the false instrument purported on the face of it to be, and bore resemblance to, the genuine process of the court. It is certain, if that were so, that the section would be very nearly inoperative: for the class of persons by whom the very ignorant are generally defrauded, consists of those who, though more artful, are not much less ignorant than themselves, and who would, for the most part, use such imperfect devices as would not deceive any one at all acquainted with genuine process. Taking this view of the statute, it seems to me that there was in this case indisputable evidence of a professing to act under the false color or pretence of process."

And Williams, J., puts the case of a man falsely pretending that he was bailiff of a court and that he had a writ in his pocket, and asks, "Can it be doubted that the framers of the section meant to reach such a case? The words are quite large enough to include it, and in my judgment the statute applies whenever any one falsely pretends to have process under which he professes to act. In this case, looking at all the facts stated, the prisoner seems to me to have done so, and he was therefore, in my opinion, properly convicted."

Per Crowder, J., "The Legislature intended to include within the operation of the section not only the cases where there has been genuine process, or some imitation of genuine process, under color of which the party charged has professed to act, but also those where, although no genuine process or imitation of it has been used, a person has been induced to part with his money by reference being made to something either verbal or written, for the purpose of inducing a belief that the money is demanded by virtue of some process of the County Court. It is impossible to doubt that the wife in this case did so believe; and there is as little doubt of the intention of the prisoner, who, according to his own statement, had obtained money from another person by the same means." And Lord Campbell, C. J., observed, "Perhaps if the prisoner had merely sent the letter that would not have been enough; but when he afterwards tells the woman that he had ordered the court to send it, it purporting to be signed by the clerk, and then demands a sum of money for County Court expenses, the whole taken together affords abundant evidence that he intended the woman to believe that he had process of the court authorising his demand, and that he did falsely pretend to her that he had such process, and that under that process he was acting in receiving from her the 10*s.*, and also in claiming the County Court expenses. I cannot, therefore, entertain any doubt that this case falls within the words of the section, and also within the intention of the legislature in passing it."

Reg. v *Richmond* (8 Cox, C. C. 200,) is a more recent case on the same point. The prisoner had obtained a blank form used in the County Court office to fill in particulars for names, nature and amount of claim, &c., as instructions for the issue of County Court summons. This form the prisoner filled up, and signed it, "G. G., Registrar of T. Court," writing on the back, "unless the whole amount claimed by Mr. A. Richmond (the prisoner) be paid on Saturday an execution warrant will be issued against you. Witness my signature, W. G."

This document the prisoner sent by post to a party indebted to him whose wife went with the document to D. G., the registrar of the court, *to pay the money.* The prisoner was convicted, but the case was reserved for the consideration of the Court of Criminal Appeal, and that court held that the offence proved was clearly a professing to act under a colorable process of the County Court, and the conviction was affirmed.

On the other hand it has been held by Mr. Justice Crompton (in *Reg.* v. *Myott*, 6 Cox, C. C. 407,) that the enactment does not apply to a mere verbal assertion of authority. In this case it appeared in evidence that J. K. brought an action in the County Court of W. against J. W. for 27*s.*—that a summons issued, to which J. W. did not appear—that the prisoner Myott called at his house and said he was authorised by the court to receive the debt and costs, and if the amount was not paid on that day or before 10 o'clock the following morning he would bring an execution and take the goods. J. W. thereupon went with the prisoner to a public house and there paid the money.

CROMPTON J., stopped the case for the prosecution, saying that in his opinion the charge was not made out, as he thought the Act of Parliament applied to false instruments and not to mere false representations as to the authority or employment of the prisoner. There was no acting or professing to act under the *process* of the County Court.

The prisoner was accordingly acquitted.*

No prosecutions have taken place in this country under the provision in question, which, as shown, is similar to that in England relating to the County Courts, the offence being a felony in both countries. The intimidation of persons in a humble position of life by means of false process or pretended authority of the regular tribunals, is not merely a gross fraud upon the public, but tends to bring the courts into discredit.

It is expressly enacted that the Division Courts shall not be held to constitute Courts of Record (sec. 5), though they have in some sort one of the qualities of a court of record; the judicial entries of the proceedings are made proof of themselves; for by section 42 "the entries in the clerk's books, or a certified copy thereof, are admissible in all courts and places as evidence of such entries and the proceedings referred to thereby, without further proof."

The Division Courts are not inferior courts according to the common acceptation of the term (Bac. Abr. Courts, 392,) for the jurisdiction is not confined to causes of action arising within the judicial district or restricted to parties resident therein, and the original summons may be sent to other counties for service therein, while the judgments of the courts are enforceable on transcript in any part of Upper Canada, and may in certain cases be made operative against lands. However, strictly speaking, "all courts are inferior courts but those held *coram rege*," and as such the Division Courts are referred to in several enactments.

As to the nature and authority of the Division Courts generally, it is to be observed that in some particulars the law and proceedings of the courts are opposed to the principles of the common law, and they have no power by implication of law, except such as is absolutely necessary to effect the purpose of their creation; and this power, by implication, only arises in the absence of express provision where such exists, it must be followed in the manner and and to the extent prescribed (1 Roll. Abr. 564,—2 ditto, 277, 260, 256; Dr. Bonham's case, 8 Rep. 237, Com. Dig. tit Justices I., 1.) In this connection the provisions of the 69th section of the Act must be mentioned, viz.: "In any case not expressly provided for by this Act or by existing rules, or by rules made under this Act, the county judges may, in their discretion, adopt and apply the general principles of practice in the superior courts of common law, to actions and proceedings in the Division Courts."

The statute is comprehensive in its provisions, and the procedure is very fully traced out by the rules, and so with the general provisions of sec. 69. Any difficulty in administration is at least not probable, but if a question should arise as to how far the power by implication of law may be extended, it must be borne in mind, as before observed, that the Division Courts are partly, not in accordance with the common law, creatures of the statute law called into existence under express provisions conferring the necessary powers for their formation, these courts, as to their right, means and power of doing justice, are confined within certain limits, and all the enactments respecting them must be strictly observed.

* There was another indictment against him for a misdemeanor, in obtaining the money by falsely pretending that he was an officer of the County Court, and a person authorised by the court to apply to J. W. for the payment of the debt, and to settle the action. It appeared, however, doubtful whether the prisoner had not been authorised by J. K.'s son to obtain the money, and the sum having been in fact paid on the faith that the prisoner was authorised by the plaintiff in the action, rather than by reason of any supposed authority from the County Court, the case broke down and the prisoner was discharged

THE LAW OF EXEMPTION.

The second section of the act of last session, cap. 27, amending the Exemption Act, being materially modified, the law on this subject, sec. 2, is as follows:

"Notwithstanding anything contained in the said eighty-fifth chapter of the Consolidated Statutes for Lower Canada, or in the twenty-fifth chapter of the Acts passed in the twenty-third year of Her Majesty's Reign, intituled, *An Act to exempt certain articles from seizure in satisfaction of debts*, the various goods and chattels which were, prior to the passing of the last mentioned Act, liable to seizure in execution for debt in either Upper or Lower Canada, shall, as respects debts contracted before the nineteenth day of May, one thousand eight hundred and sixty, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized, shall have endorsed upon it a certificate, signed by the Judge of the Court out of which the writ issues, certifying that it is for the recovery of a debt contracted before the date above named."

This provision came into force on the first day of last July. We took occasion, at the time of the passing of the Exemption Act, to point out the great injustice of the measure, and its injurious effects on the business transactions of the country. The glaring injustice of making the act applicable to cases of debt previously contracted, and contracted on the strength of the possession of property subsequently exempted, has been remedied in the amending act before us, and so far justice has been done to creditors. We draw attention to the enactment with a view of making its provisions generally known, and offering a few practical remarks.

Executions as respects debts contracted previous to the 19th May, 1860, have the same range as formerly, and the exemptions will be as set forth in the 151st section of the Division Court Act, if the Judge grants the necessary certificates.

It will be observed that the enactment only relates to executions founded on judgments in actions of contract: the words "debts contracted," &c., clearly exclude judgments in actions of tort; and section 2, before us, will have no bearing on executions in such cases.

The Judge may certify in proper cases, but is he bound to do so? Will he as a matter of course sign the certificate on being satisfied that it is true in fact? There is nothing in the act making it the express duty of the Judge to sign such certificates, but the implication certainly is that under ordinary circumstances he is called upon to do so. The time when the debt was contracted is made the hinging point to entitle to the privileges of section 3, and not the time when judgment was recovered; and it would seem that a judgment for the defendant upon set-off would be within the provision. Upon what evidence is the Judge to be satisfied as to the period when the debt was contracted? In judgments before the 19th May, 1860, the mere production of the execution showing when the judgment was recovered, and that it was in an action upon contract, would probably be sufficient. But where the judgment is recovered after that date, upon what evidence is the judge to act? In disputed cases he may certainly refer to his notes, and so satisfy himself; but in those cases where judgment goes by default, he has no means of satisfying himself when the debt was contracted by a reference to his notes or to the "judges lists." An affidavit from the execution creditor might be necessary, or the production of the original account to the judge might induce him to grant the certificate. The latter course has been adopted in some counties.

It will be observed that the certificate is to be endorsed upon the execution, and we apprehend that after a seizure under execution the judge would not certify upon that execution. A difficulty will occur in respect to executions upon transcript; for it is the judge of the court out of which the writ issues that must certify, and the judge of the outer county can have no knowledge of the particular cases. This difficulty has been met in one county in this way; the judge of the county from which the transcript issued, certified thereon to the judge of the county into which it was sent, that the judgment was "for a debt," &c., and the latter judge then, we believe, certified on the execution, acting on the strength of the first judge's certificate.

A form of certificate we have seen was very simple, and we think all the statute requires, viz:

"I certify, in accordance with the provisions of the second section of the Act 24 Vic., cap. 27, that this writ of execution is for the recovery of a debt contracted before the 19th May, 1860."

A.—— B.——, *Judge Co.*

Will some of our correspondents inform us what is the practice in their counties under this new law?

U. C. REPORTS.

COURT OF ERROR AND APPEAL.

(Reported by THOMAS HODGINS, Esq., M. A., Barrister-at Law)

SMITH v. NORTON.

Dower—Seizin of husband—Measure of damages and yearly allowance.

A. conveyed land to B in 1833, and on the same day took back a mortgage for the whole purchase money. B. paid nothing for either principal or interest, and in 1840 re-conveyed absolutely to A.—the land being then vacant B.'s wife did not join in either mortgage or re-conveyance, and 18 years after B.'s death, brought an action against C. who had purchased from A. soon after the re-conveyance, and had erected valuable buildings

Held, 1st. That the seizin of the husband B. was complete, and that the widow was entitled to dower, (*Potts* v. *Meyers*, 14 U C Q. B 499 affirmed.)

2nd. That the damages to which she was entitled only from the time of demand made, should be calculated upon the average value of the land during that period, irrespective of improvements made by the tenant; and that the allowance to be paid to her should be estimated upon a computation of one-third of the occupation value of the ground only, without the buildings.

Held (Per Esten, V. C and Hagarty, J.) That the Court of Appeal sits as a Court of Law or Equity, according as the case comes from the Common Law Courts, or from the Court of Chancery

(9th September, 1861.)

SPECIAL CASE.

This is an action of Dower, brought by the demandant, as widow of Asa Norton, deceased, to recover her dower in Town Lots, numbers Fifteen and Sixteen on Dundas Street, in the Town of Whitby, in the County of Ontario, containing one half of an acre.

1. It is admitted that a demand of dower was duly served by the above named Demandant who is the widow of the said Asa Norton, on the tenant, George Smith, who is the owner in fee of the said land, on the 21st day of May, 1860.

2. That the said Eliza Norton was the wife of the said Asa Norton on and before the 18th of January, 1833.

3. That Asa Werden was owner in fee of the land, and by Deed dated 18th January, 1833, for £30, conveyed said land in fee to said Asa Norton—that said deed was duly registered in the proper Registry office on the 7th February, 1833.

4. That Asa Norton on the same day reconveyed to Asa Werden by way of mortgage for the whole purchase money.

5. That Asa Norton never paid any part of the purchase money or interest, and by deed dated the 28th day of August, 1840, reconveyed the said land absolutely to Werden in fee.

6. That Demandant did not bar dower in either mortgage or reconveyance.

7. That subsequent to the deed to said Norton, and prior to the reconveyance to Werden, said Norton had fenced the Lots and cultivated potatoes in them

8. That Norton died on the 6th day of June 1842, at which time the premises were vacant Lots, worth about £125.

9. That after the death of Asa Norton, Werden, by deed, dated the 1st May, 1843, conveyed to tenant George Smith, in fee, who built a house and other buildings on the Lots which he occupied as a Hotel, and which are still so occupied by his Tenant at a yearly rental of £187 10s. or thereabouts.

10. That about one third the said Lots are still uncovered by buildings.

The Demandant contends that she is entitled to have assigned to her one third in value of the premises in their present improved state.

The Tenant contends that the Demandant's husband had no sufficient seizin of the premises to entitle her to Dower.

And that if entitled to dower, she is only entitled to have assigned to her one-third of the premises as they were at the death of her husband, or one-third in value calculated as of the date of her husband's death—or one-third of the present value of the land, irrespective of the buildings.

The Questions for the opinion of the Court are:—

First—Whether the demandant is entitled to Dower in the said land.

Second—If the Court should be of opinion that the Demandant is entitled to Dower, then whether she is to have one-third in present value assigned to her as the Demandant contends, or whether she is to have one-third in value calculated as of the date of her husband's death, or one-third of the present value irrespective of the buildings, as the tenant contends.

The case was argued in the Court of Queen's Bench in Michaelmas Term, 1860, when the rule was made absolute. The judgment of the Court is reported in 20 U. C. Q. B , 213.

The Tenant appeals from the said judgment and states the following grounds of appeal:

1st. That under the facts stated in the special case, the Demandant is not entitled to Dower in the lands in question; inasmuch as her husband had no sufficient seisin thereof to entitle his wife to Dower.

2nd. That if entitled to Dower, the Demandant is only entitled to one-third as of the present value, such value must be computed as of the land alone, irrespective of the value of the buildings thereon, or of the increased value of the land by reason of those buildings

The Demandant contends and alleges that there was and is no error in the judgment of the Court of Queen's Bench.

1st. Because under the facts stated in the special case, the Respondent was and is entitled to Dower in the lands in question: such facts showing an estate in her Husband of which she was dowable.

2nd. Because the Respondent is entitled by law to one-third of the present value of the land including the improvements thereon.

C. S. Patterson, for the appellant.

M. C. Cameron, for the respondent.

ROBINSON, C. J., I consider it would be a great reproach to the law if this demand for dower should be allowed. I continue to be of the opinion I expressed in the case of *Potts* v. *Meyers*, 14 U. C. Q. B. 499, although I submitted to the judgment of the other members of the Court below in this case; and now as the case comes before me as a member of the Court of Appeal, I feel myself at liberty to give an independent judgment. The right to dower depends upon the seisin of the husband, but in this case I do not think the husband was ever seised of the land, the deed and mortgage being one transaction, and there being only an instantaneous seisin. The case of *Thompson* v. *Webster*, L. T. N. S. 750, was where a mortgage and settlement were both executed the same day in fulfilment of one contract, and it was held that they formed but one transaction. In equity the widow would never be held entitled to dower, and in the United States the question has been treated in several cases as perfectly clear, following the common law of England. Chancellor Kent, long at the head of a Common Law Court, has thus laid down the law in his commentaries: A transitory seisin for an instant, does not give the wife dower in her husband's lands; nor if the husband takes a conveyance in fee and immediately thereafter mortgages back to the vendor On the question of damages I continue to be of the opinion expressed in the court below. I follow the decision of the Queen's Bench in the case of *Robinett* v. *Lewis*, (Dra. Rep. 272); but the question of the measure of damages cannot hereafter occur as the Legislature has settled the question by the Act 24 Vic., chap. 40. In my opinion the appeal should be sustained.

DRAPER, C. J., C. P.—I agree with the latter part of the judgment of the learned Chief Justice as to the measure of damages in cases of dower as given in the report of this case in 20 U. C. Q. B. 213; but I differ from him as to the first part, in regard to the right of the widow to dower, and consider that there was such a seisin in the husband as entitled the demandant to dower. I therefore follow the judgment of the majority of the Court of Queen's Bench in *Potts* v. *Meyers*, and think the appeal should be dismissed.

ESTEN, V. C.—I agree with the learned Chief Justice Draper. The cases which have occurred in England are cases where property has been conveyed to one for the use of another—the effect of which under the statute of uses is to convey the estate to the party for whose use it is conveyed to the person first named, who only acts as a conduit to convey it to the party intended, and in which first party there is only an instantaneous seisin not entitling a widow to dower. But the case is different where the mortgage and deed are one transaction. In that case the person is by the deed fully and perfectly seised of the estate until by his own act (not the act of another) he parts with it by executing the mortgage. Now, in this case we sit as a court of law or equity according as the appeal comes from the Common Law Courts or Chancery. A court of law could not compel specific performance of a contract to make a mortgage, it could only give damages, but in equity the purchaser would be compelled to make a mortgage to secure the purchase money. In the first case the party is fully seised of the land, and the damages would be the amount of the mortgage, and in the latter the purchaser would be a trustee for the vendor to the amount of the purchase money. Now, such being the view I take of the case, I must hold that having obtained a conveyance of the estate, the husband was so seised of the property as that the dower of the wife could attach and has attached, and that consequently this demandant is entitled to have her dower in the lands. The appeal therefore should be dismissed.

BURNS, J.—I see no reason to change the view I took of the right of dower in the case of *Potts* v. *Meyers*. In coming to that decision I considered well all the cases I could find bearing upon the question in the United States. The United States courts only disposed of a portion of the question. As to the measure of damages in the case, I agree with the other members of the Court.

SPRAGGE, V. C.—I agree with the majority of the court that the appeal should be dismissed. In equity, the purchaser is only a trustee for the vendor to convey back the estate by way of mortgage to secure the purchase money, and then dower would not attach. But in this case the seisin was complete in law, and consequently the widow is entitled to dower.

RICHARDS, J., Concurred with the court below.

HAGARTY, J.—I concur with the majority of the court. If there is relief in equity it is a pity that the case did not go to equity, for it may yet go to a Court of Equity and come up before us again, and we may then have to give a judgment the opposite to that we are now giving. I think it a pity we cannot dispose of it at once in both law and equity. But we have only to dispose of the case as a court of law, and in that view I am clearly of opinion the widow is entitled to her dower, and that the appeal should be dismissed.

Per Cur.—Appeal dismissed with costs.

QUEEN'S BENCH.

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister-at-Law.*)

BELLHOUSE v. GUNN.

Interpleader—Costs.

Two interpleader actions having been twice tried, resulted in favour of the plaintiff, the claimant of the goods in question, and on application to the judge who granted the orders to dispose of the costs, the matter was referred to full court. *Held*, that the plaintiff was entitled as of right to the costs of the actions: that the costs incurred before the issues, in procuring the order, &c., should also be paid by defendant; but the question raised as to the discretion of the court in such cases being a new one, each party was ordered to pay his own costs of the application.

(E. T. 23 Vic.)

On the application of the sheriffs of Lincoln and Wentworth, two interpleader issues were directed to try whether two certain locomotives belonged to Gunn, the execution debtor, or to Messrs. Burton & Sadlier, claimants of them. These orders had been made by the Chief Justice of this court. The issues were tried at Hamilton, at the fall assizes, in 1859, in one of which the jury not agreeing were discharged, and in the other the jury found a verdict in favour of Messrs. Burton & Sadlier. The court upon application set the verdict aside, and ordered a new trial. Both issues came on again for trial at the spring assizes, 1860, and in both verdicts were rendered in favour of Messrs. Burton & Sadlier. Applications were again made for a new trial, which rules were ultimately discharged. (See *Burton* v. *Bellhouse*, 20 U. C. R. 60.)

The Chief Justice, who made the interpleader orders, was applied to for the purpose of disposing of the costs of the issues and different proceedings under the orders, but entertaining some doubts as to the proper order to make, and whether it was discretionary with the judge to make such order as to him seemed to be right according to the facts of the case as proved at the two trials, he referred the parties to the court.

Accordingly in Hilary Term last *Jackson* obtained a rule *nisi* calling upon the plaintiff, Bellhouse, and each of the sheriffs to

shew cause why Messrs. Burton & Sadlier should not have their costs of the issue, and otherwise attendant thereon, and of the various proceedings.

During this term *MacLennan* shewed cause, citing *Rex* v. *The Lord of the Manor of Oundle*, 1 A. & E. 299; *Rex* v. *Round*, 4 A. & E. 139; *Rex* v. *Commissioners of the Thames and Isis Navigation*, 5 A. & E. 817; *Regina* v. *The Justices of Surrey*, 9 Q. B. 37; Tapping on Mandamus, 416; *Regina* v. *Mayor of Lichfield*, 6 Jur. 624; Consol. Stats. U. C., ch. 30.

Eccles, Q. C., supported the rule, citing *Lewis* v. *Holding*, 2 M. & G. 875; *Melville* v. *Smark*, 3 M. & G. 57; *Bowen* v. *Bramidge*, 2 Dowl. 213; *Janes* v. *Whitbread*, 11 C. B. 419; *Regina* v. *Kelsey*, 20 L. J. Q. B. 283; *Dempsey* v. *Caspar*, 1 U. C. P. R. 134.

McLEAN, J.—By the 9th section of chapter 30, Consolidated Statutes of Upper Canada, it is declared, (as in 7 Vic., ch. 30, sec. 6,) that the costs of all such proceedings, that is the costs of all proceedings authorised by the preceding sections, shall be in the discretion of the court or judge. Then the question is in what manner that discretion must be exercised in the present case? The whole property claimed has been decided to belong to the plaintiff in the interpleader cases, and therefore there is no occasion for exercise of the same discretion as in the case of *Lewis* v. *Holding*, (2 M. & G. 875,) where the court gave neither party the general costs of the issue, nor the costs of the rule, but gave to each such portion of the costs as applied to the part on which he had succeeded, and allowed the claimant his costs of the application under the Interpleader Act.

In the case of *Melville* v. *Smark*, (3 M. & G. 57,) the court decided that the claimants of goods taken in execution having failed upon an issue directed to try the validity of the claim under the Interpleader Act, the proper course was to require them to pay the costs of the application and of the subsequent proceeding, and Tindal, C. J., in delivering judgment, said, "In cases of interpleader, the Court of Chancery always requires the unsuccessful party to pay the costs. The same course has been adopted in practice in the courts of common law, acting under the late statutes. I see no reason for pursuing a different course when claimants happen to be assignees of a bankrupt." In the case of *Janes* v. *Whitbread*, (11 C. B. 419,) the verdict in an interpleader case being unsatisfactory, a new trial was granted on payment of costs. Maule, J., said "The verdict was unquestionably against the evidence. I see nothing to take the case out of the general rule as to costs, which applies as well to trials of interpleader issues as to any other cases."

The execution creditor, the plaintiff in the suit against Gunn, having caused property to be seized which has been decided by several juries to be the property of Burton & Sadlier, the claimants, and they having been compelled to proceed by the interpleader suits to establish their right to such property, and being successful in that object, are entitled to all costs to which they have been put in obtaining the interpleader orders, and all subsequent costs in the suits instituted under the orders. But Bellhouse having been brought into court on this occasion by a summons issued at the instance of Messrs. Burton & Sadlier, relating to the costs, and the question being a new one as to the discretion of the court or a judge with reference to costs, and how such discretion is properly to be exercised, I think the rule must be made absolute, but without costs on either side, on this application, each party paying their own costs.

BURNS, J.—The costs of these cases must now be very considerable, and a matter of some importance, and may, as Tindal, C. J., said in *Lewis* v. *Holding*, (2 M. & G. 875,) be divided into three descriptions—costs incurred before the issues were ordered, and attendant upon the exercise of the sheriff's duty upon the *fi. fa.*, costs of the trial of the issues and consequent thereon, and costs of the subsequent applications.

The question is whether the power of the court or a judge, under the provisions of the Interpleader Act, ch. 30, of the Consolidated Acts of Upper Canada, is or not discretionary over all these costs? With respect to the costs of the interpleader rule there can be no question, but a question has been made as respects the costs of the issues and attendant thereon. Messrs. Burton & Sadlier, as plaintiffs in the issues, claim to be allowed those costs on the general principle of law that the successful party is entitled to be paid his taxable costs as in any ordinary case, and that these being interpleader issues makes no difference; while, on the other hand, Bellhouse contends the court or a judge is invested with power to grant or withhold those costs according as the facts or circumstances of each case may call for.

In the case I have already mentioned, of *Lewis* v. *Holding*, Chief Justice Tindal said he could not consider an interpleader issue as in the nature of an action of trover, in which by the strict rule of law, founded upon the Statute of Gloucester, the plaintiff is entitled as of right to the costs of the cause if he succeeds as to any part of it, and he thought the court had a more extended jurisdiction under the Interpleader Act than under the Statute of Gloucester. He further makes this observation, "It seems to me that we are entrusted with a discretion as to costs, in the exercise of which we ought to be mainly guided by the decision of the jury." It must be observed that the court was there dealing with a case in which the jury had found that part of the property belonged to the plaintiff and part of it to the defendant. The direction the court gave was that the master should tax the bills of both sides and then set off the one against the other. In the case before us there can be no division as to the costs of the issues, the plaintiffs in the interpleader issues having succeeded must get the costs or not at all.

In *Janes* v. *Whitbread*, (11 C. B. 406,) in disposing of the costs upon granting the new trial in that case the court said, "We feel some difficulty as to the costs," and Jervis, C. J., speaking of the discretionary authority of the court, said that he apprehended that power applied to the costs of the interpleader rule only. Mr. Justice Maule, who had tried the case, stated that the verdict was unquestionably against the evidence, but he saw nothing to take the case out of the general rule as to costs, which applies as well to interpleader issues as to any other cases; and the court ordered the new trial only on payment of costs.

In *Bowen* v. *Bramidge*, (2 Dowl. 213,) the court of exchequer laid down the rule in an interpleader issue that the party who succeeds is entitled to the costs of the action, and the party who fails must pay them.

In the present case Messrs. Burton & Sadlier succeeded, and there is nothing to deprive them of the rule thus stated in *Bowen* v. *Bramidge*, unless the court has the power of discretion over the costs of the action as well as the other costs. I have not been able to find any authority supporting such a proposition. I do not think the case of *Lewis* v. *Holding* upholds any such view. The verdict was a divided one. Each party was right to a certain extent, and the court only did what would have been done had there been two issues instead of one; for in the former each successful party would have recovered costs against the other, and the one judgment for costs might in such case have been set off against the other, but the whole matter being disposed of by the one issue, the court applied the principle which would have been allowed in the other case. Therefore, instead of that case being an authority for saying that a discretion is given over the costs of the issues irrespective of the finding of the jury, I think it supports the general proposition that costs of the issue are awarded to the successful party.

The Interpleader Act was made in relief of sheriffs, and the consequence is when a claimant is brought before the court he is deprived of his action against the sheriff, and he is made to join issue with the execution creditor with respect to his claim upon the property. Now, although he may, notwithstanding the interpleader, perhaps bring his action against the execution creditor in some cases, where the creditor is active in setting the sheriff in motion, yet he is deprived of any remedy against the sheriff. I can hardly imagine the legislature intended that the claimant should be subject to be deprived of his costs of the action which he is compelled to engage in for the relief of the sheriff. It is enough to deprive him of any remedy against the sheriff, without also giving the court a discretion to deprive him of costs of an action he must go on with, and if he does not must pay costs. To hold otherwise would, I think, be holding that the Interpleader Act by implication has repealed the Statute of Gloucester in such cases as the present.

I am therefore of opinion that the costs of the issues and trial, with the costs consequent thereupon, of right should be paid by Bellhouse to Messrs. Burton & Sadlier: that the cost incurred before the issues ordered—that is of the interpleader summons and consequent upon the sheriff discharging his duty with respect to the property—should be paid by Bellhouse; and the costs incurred by the parties since in procuring the summons and order in chambers as to the costs, and the costs of this application, should be divided between the parties—that is, each side paying his and their own costs.

THE QUEEN v. THE MUNICIPAL CORPORATION OF THE COUNTY OF HALDIMAND

Mandamus to repair bridge—Indictment—Practice.

A mandamus *nisi* having issued commanding a municipal corporation to repair and rebuild a bridge, it appeared on the return that the liability was disputed on several grounds, it being contended that the bridge did not belong to defendants: that it was not constructed on the site provided by the charter of the original company which built it, and was in an unfit and dangerous place; and that it should be repaired by another municipality.

Held, that under these circumstances a mandamus would not lie, and that the applicants must proceed by indictment; and *semble*, that the latter is the proper remedy in all cases, except where a charter has been obtained to construct the road, and the work has never been done. (Q. B. E. T. 24 Vic.)

Eccles, Q. C., during last term obtained a *mandamus nisi*, of which the following is a copy.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To the Municipal Corporation of the County of Haldimand, greeting.

Whereas we have been given to understand in our court before us, that by a certain act of parliament passed on the twentieth day of April, in the year of our Lord one thousand eight hundred and thirty-six, certain persons were incorporated under the style and title of "The Cayuga Bridge Company," and authorised and empowered to build and construct a bridge over and across the Grand River at Cayuga, in the said county of Haldimand, for the use and benefit of the public generally:

That pursuant to the terms and provisions of the said act of parliament the said bridge was built and constructed at the place and for the purpose aforesaid, and was used and enjoyed by the public generally:

That on or about the fifth day of August, in the year of our Lord one thousand eight hundred and forty-two, William Kingsmill, Esquire, sheriff of the then district of Niagara, (within which the said bridge was situate,) under and by virtue of certain writs of execution to him directed, sold the said bridge to one William Fitch, and by a certain deed poll conveyed the same to him, and thereby the title to the said bridge became vested in him, the said William Fitch:

That by a certain indenture made between the said William Fitch, of the one part, and the said municipal corporation of the county of Haldimand, of the other part, and dated on the seventeenth day of October, in the year of our Lord one thousand eight hundred and fifty-one, the said William Fitch duly conveyed unto the said municipal corporation all his right, property, title, interest and demand of, in and to the said bridge, and thereby the same became vested in the said corporation:

That the said municipal corporation have from the time of the said conveyance to them as aforesaid until the happening of the accident hereinafter mentioned, repaired and maintained the said bridge, and used and suffered the public generally to use and enjoy the same as a common and public highway:

That some time in or about the month of March now last past, the said bridge became and was greatly damaged and injured, and parts thereof were carried away by the freshets of said river, and thereby became useless and impassable, and by reason thereof the public generally have been deprived of the use and benefit thereof, and of the means of crossing said river at the place aforesaid, as they had been accustomed to do:

That application has been made to the said municipal corporation to cause the said bridge to be repaired and in part rebuilt, but they have neglected and refused to do so, and have declared their intention of abandoning the same, and of allowing it to remain in its present dilapidated state, to the great inconvenience, damage and injury of the public in general, and of the inhabitants of the village of Cayuga in particular, as we have been informed from the complaint of Joseph Harsell, Esquire, reeve of the said village of Cayuga, and a ratepayer within the said county of Haldimand.

Whereupon he hath humbly besought us that a fit and speedy remedy may be applied in this respect, and we being willing that a due and speedy justice should be done in this behalf as it is reasonable, *We therefore command you* the said municipal corporation of the county of Haldimand, firmly enjoining you, that immediately after the receipt of this our writ you do properly repair and in part rebuild the said bridge, and keep the same repaired and maintained, so that the public generally may use and enjoy the same as a common and public highway for crossing the said river at the said place, or that you do shew us cause to the contrary thereof, lest on your default the same complaint should be repeated to us, and how you shall have executed this writ make appear to us at Toronto, on Friday, the thirty-first day of May instant, at twelve o'clock, noon, then returning to us this our said writ.

Witness the Honorable Sir John Beverley Robinson, Baronet, Chief Justice of our said court, at Toronto, this twentieth day of May, in the year of our Lord one thousand eight hundred and sixty-one, and in the twenty-fourth year of our reign.

By the court,

(Signed) CHAS. C. SMALL.

Issued from the office of the Clerk of the Crown, Toronto,

(Signed) CHAS. C. SMALL.

Affidavits were filed verifying the statements contained in the writ.

The return, supported by affidavits, set out that the bridge was built originally not on the line of the Canboro' and Simcoe road mentioned in the statute 6 Wm. IV. ch. 10, but deviated therefrom about 300 feet northerly: that the sale under execution in 1842, was upon a *fi. fa.* against goods and chattels, and not against lands: that the bridge was wholly within the limits of the village of Cayuga: and lastly, that the site selected originally, and upon which the bridge was built, was not suitable, but the original one mentioned in the charter, that is, the continuation of the Canboro' and Simcoe road, would be preferable.

Adam Wilson, Q. C., shewed cause. 1. The sheriff could not sell the interest of the company in this bridge. They could not do it themselves, it would have been a dissolution of the company, and the sheriff therefore could not do it for them. All that he could possibly sell would be the tolls, for which the assistance of the Court of Chancery would probably be required, but he could not dispose of the bridge. The public have an interest in it as part of the highway, and it cannot be sold. (Burns, J., referred to *Scott* v. *The Trustees of Union School Section No.* 1, *in Burgess, and No.* 2, *in Bathurst* (19 U. C. Q. B. 28), where it was held that land conveyed to the trustees for the purposes of a school house could not be sold under an execution.) Grant on Corporations, 306. In *Arnold* v. *Ridge* (13 C. B. 760), it is said, quoting from Dyer, 7 *b*, "A man can never have a thing extended on an execution, unless he may grant and assign it." In *Legg* v. *Evans* (6 M. & W. 36) and *The Governors of St. Thomas's Hospital* v. *The Charing Cross R. W. Co.* (7 Jur. N.S. 256), this seems to be taken for granted. *Furness* v. *The Caterham R. W. Co.* (4 Jur. N.S. 1213, S. C. 27 Beav. 353), *Fenwick* v. *Laycock* (2 Q. B. 108), *Regina* v. *South Wales R. W. Co.* (14 Q. B. 902). These cases shew that the original bridge company could not have sold their bridge, and if so at common law the sheriff could not.

If the act, Consol. Stats. U.C., ch. 49, secs. 68, 69, 70, authorises a sale by the sheriff, then he must make a valid sale, and here it should have been under a writ against lands, not goods, for the bridge is not chattels, but realty, being part of the highway.

There is another objection fatal to this application. The 6 W. IV. ch. 10, requires that this bridge shall be built on the main Canboro' and Simcoe road, and the affidavits shew that it never was built there, but on an entirely different road. They had no authority to construct the bridge where they did, and the court therefore cannot compel us to put a bridge where there is no right to place it. In *The Mayor of Norwich* v. *The Norfolk R. W. Co.*

(4 E. & B. 397), it is held expressly that erecting a bridge out of the authorised line was an act *ultra vires*, and all contracts relating to it were void. If it is 300 feet out of the way, as here, it is the same in effect as 300 miles

Again, it is within the Municipality of the Village of Cayuga, and the county has no jurisdiction there. Consol Stats. U. C., ch. 54, secs. 336, 339. Sec. 342, sub-sec. 7, shews that they may obtain aid from the county to build the bridge, but that is a very different thing from making the county build it themselves

Another reason urged to the discretion of the court is, that if the bridge really were on the line of road, the place is shewn to be unsafe and improper for the purpose.

As to whether a mandamus is the proper remedy in such a case, there are authorities on both sides of the question. *Regina* v. *The Bristol Dock Co.* (2 Q. B. 64), *The King* v. *The Severn and Wye R. W. Co.* (2 B. & Al. 646). As to the obligation on a company to complete their work when partly performed, see *York and North Midland R. W Co.* v. *The Queen* (1 E. & B 860).

We contend therefore that the writ should not go—1. Because the county has no jurisdiction. 2 Because the road has never passed properly from the original company, which therefore still exists. 3. Because the original site is not that on which the bridge has been constructed, and we cannot be compelled to put it in the wrong place. 4. Because it is shewn to be an improper and dangerous site for the purpose.

Eccles, Q. C., (*J. R. Martin* with him) contra. As to the sale having been made under a *fi. fa.* against goods, that appears only by recital in the sheriff's deed. It is not proved otherwise or sworn to here, and the recital, which may be wrong, cannot bind us. Moreover, if the sale was so made, there is nothing to shew that this bridge was not in fact goods; it may have been, and if so the presumption is that it was, for otherwise the sheriff should not have sold it under the writ. But under the statute referred to, Consol. Stats. U. C, ch. 49, sec. 70, it is clear that the sale being made under legal process is valid.

As to both these objections, however, it does not lie in the mouth of the county now to say that they have no title. They have assumed the bridge, they have repaired it, they have leased it, and have taken the tolls; and they cannot now say that they never owned it, and were wrong in doing all these acts.

Then it is alleged that the act (6 W. IV., ch. 10) requires the bridge to be on the Canboro and Simcoe road. The statute recites that it would be very convenient to have it on that road; it is not said that it must be there. The deviation of 300 feet is not material, and at all events there the bridge was when the county assumed it, and they assumed it in that locality. If there were no act to authorize the bridge at all, still they assumed it as a county bridge, and having done so they must continue to repair and maintain it, and cannot escape their liability,

As to the argument that the village only has jurisdiction and the county none, there was no incorporated village there when they assumed the road. It became then the property of the county, and having done so it never vested in the county. The corporation of Cayuga have never assumed it by by-law or otherwise. Consol. Stats. U. C. ch. 54, secs. 315, 316, 329. Under sec. 337, the county were authorised to assume the bridge, which they did. The village never got it, and never could, for the county would not give it up so long as they could collect tolls from it. Under secs. 339 and 340 the county might build a new bridge and then give it up by by-law, but now at all events until that is done they must repair.

As to the remedy by mandamus in this case, in the *Justices of Huron* v. *the Huron District Council*, 5 U C. Q. B. 574, the writ was refused to compel the council to build a court-house, but the judgment shews that in a case like this it would have been granted. In the *Municipality of Augusta and the Municipal Council of Leeds and Grenville*, 12 U. C. Q B. 522, the writ was ordered to compel the council to make a road, which is a case clearly in point

But without any statute there is no reason why the common law of England should not prevail here, and if it does there is abundance of authority to show that the counties are, with very few exceptions, bound to repair bridges. *Rex* v. *The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594; S. C. 2 W. Bl. 685; *Regina* v. *West Riding of Yorkshire*, 2 East 343; *Ib.* 356, note; *Rex* v. *The Inhabitants of Kent*, 2 M. & S. 513, shews this. *Rex* v. *The Inhabitants of Northampton*, 2 M & S. 262; *Rex* v. *The Inhabitants of Devon*, R. & M. 144, shews that any bridge over a stream running between banks is a public bridge, *James* v. *Green*, 6 T. R. 231; *Rex* v. *Inhabitants of Kingsmoor*, 2 B & C. 194. It is a common law liability, and applies notwithstanding the trustees of the bridge are authorised to raise tolls. The county are bound to repair, because it is for the public benefit, unless it is clearly shewn that the obligation is cast upon some one else, as, for instance, a company authorized to build a bridge and compelled to repair and maintain it; but as there is nothing in the act of incorporation obliging the Cayuga Bridge Company to repair, even if the title remained in the county, as is contended, they would still be bound to repair.

BURNS, J.—The cases are not altogether satisfactory upon the point of jurisdiction to grant the writ of mandamus to repair a road, but I think the weight of authority and precedents are against it, for the proceedings seems to be rather by way of indictment The distinction seems to be that where certain parties have undertaken the construction of a road, and have obtained a charter for the purpose, which is assumed to be a contract between such parties and the public that the road or work will be constructed, and the work has not been done, then the court will interfere by mandamus as the proper remedy, upon proper cause made and no sufficient excuse shewn. This court acted upon that principle in the case of the *Municipality of the Township of Augusta* v. *The Municipal Council of the United Counties of Leeds and Grenville*, (12 U. C. R 522.) That principle was established in England by the cases of *Regina* v. *The Birmingham and Gloucester R. W. Co.*, (2 Q. B. 47, 1 G. & D. 337,) and other cases. But where the application is for the repair of a road already constructed it may be doubted whether the proper remedy is not by indictment. In the case of *The Queen* v. *The Trustees of the Oxford and Witney Turnpike Roads*, (12 A. & E. 427,) Lord Denman said, "I know no instance of a mandamus to repair a road." The case of *Rex* v. *The Commissioners of Llandilo Roads*, (2 T. R. 232,) which is cited as an authority upon this point, does not contradict his lordship's assertion, for the rule for it was discharged, but the case has been cited by most writers as in support of the application for mandamus. Whether his lordship, in giving the judgment of the court, when he said, "If we entertained applications for writs of mandamus in such cases, we might have to try questions of guilty or not guilty on the state of the roads, and all questions affecting the liability," meant this to be of universal application, I cannot say, or whether he intended it to apply only in the particular case, where it was a dispute between two bodies upon whom the duty lay of repairing part of a street in the city of Oxford. Since that decision I have found no instance of a mandamus being asked for to repair a road, but, on the contrary, the proceeding has been by way of indictment generally, though on one occasion the Court of Queen's Bench granted an information for the non-repair of a road, because two persons, inhabitants of the parish liable to repair the road, happened to be upon the grand jury at the assizes, and through their influence the bill of indictment had been thrown out. See *The Queen* v *The Inhabitants of St. Leonards*, (10 Q. B. 287.) The case of *The Queen* v. *The Inhabitants of Bedfordshire*, (4 E. & B. 535,) was an indictment for not repairing a bridge.

The first question in dispute between the two corporations is upon which of them rests the liability to repair the bridge. The village of Cayuga contends that the title to the bridge is vested in the county now by the purchase of it, but the county contends it has no legal title to the bridge, and the village answers that again by alleging that, though possibly that may be true, yet the county has hitherto since the purchase exercised ownership over it, and has also from time to time repaired it and exacted tolls for the use of it. Then again, the county contends that under the section of the Municipal Act, ch. 54 of the Con Acts U C., the bridge being wholly within the village of Cayuga, the duty is cast upon the village to repair it, for under those provisions the bridge belongs to the village, and that the jurisdiction which the county has hitherto exercised over it is a usurped one Besides all this, the county contends the bridge never was constructed in the place intended when the charter was granted to the Cayuga Bridge

Company, and besides that it is contended the site is not a proper one to have been selected originally, and the county would, if the onus be cast upon them to repair, desire to remove the site to another part of the river. The village opposes that, because if removed it would not be in accordance with the streets of the town approaching the bridge.

These conflicting interests seem to be the very matters contemplated by Lord Denman, and render it proper that the rights of the parties should be settled by indictment, or some other mode than by mandamus.

The village of Cayuga in adopting this remedy did so avowedly upon the ground of being more speedy in its application than that of indictment, and as they have chosen to try an experiment I think the applicants must pay the costs.

The mandamus *nisi* should therefore be quashed with costs.

McLEAN, J, concurred.

Mandamus *nisi* quashed.

BRADLEY AND ROWE v. TERRY.

Ejectment—Several plaintiffs—Proof of title.

In ejectment there are several plaintiffs claiming each an individual interest, it is not necessary that they should prove a joint title, or any privity between them, but they may maintain a joint action upon separate titles.

(Q. B., T. T, 24 Vic)

This was an action of ejectment for lot 20, in the 7th concession of Alnwick. The plaintiffs claimed by several titles, each an undivided one-half. The defendant claimed under a deed from Robert Drope, the patentee, and upon the evidence, which it is immaterial to report, the jury found for the plaintiffs, upon the ground that that conveyance was fraudulent. At the trial it was objected that the plaintiffs could not maintain a joint action, as they claimed under several titles; and that, if entitled to recover, each must bring an action for his undivided half.

Leave was reserved to move for a non-suit upon this ground, and *Eccles, Q. C.*, obtained a rule *nisi* accordingly, or for a new trial upon the evidence, and upon affidavits.

C. S. Patterson, shewed cause, citing *Coltman* v. *Brown*, 16 U. C. R. 133.

McLEAN, J.—Mr. Eccles contended that the plaintiffs could not maintain a joint action on separate titles, though they hold each an undivided interest in the land. No doubt either of the plaintiffs could bring an action for his individual undivided portion, but that could only have the effect of removing the defendant from an undivided half, and letting the one suing come in with the defendant into possession: but the one object being to remove the defendant from the premises, if the plaintiffs shew together an interest which covers the whole land, I cannot see why they should not join in an action which will enable them to recover the whole instead of each being obliged to have recourse to a several action, a recovery in which by each would only have the effect of placing them in the position of tenants in common on the premises.

As to the title under which the defendant claims from Drope, there was certainly very strong evidence to shew that it was fraudulent, and given for the purpose of delaying the creditors of Drope. The dealing of the defendant and Drope with the lands after the execution of the deed, and their statements and declarations to some of the witnesses who were examined on the trial, were such as to satisfy the jury that defendant's title was fraudulent when given, and that the sole object of it was to defeat and defraud creditors.

The affidavits of defendant and Drope do not materially change the aspect of the case, and even if they did the defendant cannot be a witness in his own behalf, should a new trial be granted.

I think the jury came to a correct conclusion on the evidence, and that the verdict should not be set aside, especially as the defendant may, if he thinks proper, bring another action, and bring forward any other testimony which he may be able to produce in support of the validity and honesty of his own title. The rule must be discharged.

BURNS, J.—With respect to the point raised at *nisi prius*, and reserved as ground of non-suit, namely, that plaintiffs in ejectment should, as in cases of assumpsit, debt, &c., prove some joint title, or connected with each other in some way, as joint tenants or tenants in common, &c,—it is the first time I have heard such a point raised. In the old form of ejectment the declaration contained several demises whenever it became necessary to rely upon different chains of title, and it is contended that the effect of the alteration of the form of action of ejectment is to alter the law, and render it necessary that plaintiffs should have a joint interest. However, a little reflection upon the words of the act of parliament must dissipate that idea. The form of writ given in the ejectment act is this, "to the possession whereof A, B, and C., some or one of them, claim to be," &c., and the writ in this action is so framed. The 21st section enacts that "the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part," &c.

Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence. *Doe dem. Rowlandson* v. *Wainwright*, (5 A. & E. 520). See Cole on Ejectment. 285, 286.

I have examined the evidence given at the trial, and upon that the question was whether the deed under which the defendant claimed from the grantee of the Crown was or not fraudulent as against creditors, being made, as contended, without consideration. The jury so found, and I think the evidence justified that finding. The affidavits do nothing more on the part of the defendant than state that he thinks if he had a new trial he would be better able to shew by some old scraps of accounts, which he said was his mode of keeping accounts, for he kept no books, that the person who conveyed him the land was indebted to him at the time of the conveyance. That person was examined as a witness at the trial as to the state of the accounts. If the defendant thinks he can make out a good title and sustain his deed, he may bring another ejectment and thus test it, but I think the rule should be discharged.

Rule discharged.

COMMON PLEAS.

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

COTTER v. MUNICIPALLITY OF DARLINGTON.

School section—By-law—Quashing of—13 & 14 *Vic., ch.* 48—*Laches.*

On a motion to quash a by-law passed on the 1st of October, 1859, by defendants' doing away with school section No. 7, in the Township of Darlington, and attaching a portion thereof to school section No. 6, and other part to No. 8.

Held, 1st, that it is unnecessary that a by-law should state on its face that the alteration shall not go into effect till the 25th December following the passing thereof—13 & 14 Vic., ch 48, sec. 18 sub-sec 4

2nd, that no step having been taken to quash a by-law for a year or more from the passing thereof, the decision in *Hill* v. *Municipality of Tecumseth*, 6 U. C C. P. 297, adhered to, and the motion was refused on account of delay in making the application.

(C. P. E. T., 24 Vic)

On the 4th of February, 1861, in Hilary Term, 24 Vic., *McLeod* obtained a rule *nisi* to quash a by-law passed on the 1st October, 1859, by which school section No. 7, in the township of Darlington, was virtually annihilated, one portion of it being attached to, and made part of section No. 6, and the residue of it attached to and made a portion of No. 8. No objection was urged to anything apparent on the face of the by-law. The objections were, that there was no consent of a majority of the inhabitant householders and freeholders, and want of notice, and that the by-law did not express on the face of it, that it was not to come into operation until after the 25th day of December next after the alteration was made. At the time of granting the rule *nisi*, leave was given to file additional affidavits in support of the rule. Under some misapprehension the rule was drawn up giving the applicants leave to file affidavits in reply to the case made by the municipality.*

McBride in Easter Term, answered the rule, filing affidavits, by which it was shewn that there was a petition to the township council for the alteration asked for, from a majority of the inhabitant householders and freeholders of section No. 7, and that notice

* Whether the court would have done this, after hearing what was advanced in answer to the application, is a question; but it was intimated that the court would not do so beforehand, for it is very easy to suggest the great inconveniences such a course might lead to.

of the intention to pass the by-law was duly mailed, addressed to the trustees of that section. He referred to *Sutherland* v. *Municipality of East Nissouri*, 10 U. C. Q. B. 626; *Hill* v. *Township of Tecumseth* 6 U. C. C P. 297; Con. Stat. 740, secs. 40, 41, 47; *Shaw et al*, v. *Municipality of Manvers*, 19 U. C. Q, B. 288.

McLeod produced further affidavits, denying the validity of some of the signatures to the petition, asserting that some of the parties whose names were to it, were not entitled to vote at school meetings, and denying therefore that a majority desired the change. There was also a denial on the part of the relator, one of the trustees for section No. 7, and of one of his co-trustees, that they received any notice, and other inhabitant freeholders and householders swore they had no notice, and did not, or most of them did not, know of the change until November, 1860. The relator however, stated that he had heard of a petition for the change, and that he attended the meeting of the township council, at which the by-law was discussed (not stating when this was) and opposed it, but he was not aware until about the 5th of November, 1860, that such by-law had been passed. Three of the affidavits last put in stated the inconvenience to which the deponents were subjected by the change. He referred to *Shaw* v. *Municipality of Manvers*, 19 U. C. Q. B. 288; *Hart* v. *Vespra*, 16 U. C. Q B. 32.

On the other side it was stated that nothing was done in pursuance of this by-law until after the 25th December, 1859, but since that time the by-law had been acted upon.

DRAPER, C. J.—The statute in force affecting this action at the date of passing this by-law was 13 & 14 Vic., ch. 48 The 4th sub-section of the 18th section provides, "that any alteration in the boundaries of a school section shall not go into effect before the 25th December next after the time when it shall have been made," but there is no enactment that this shall be expressed on the face of the by-law. The legislature having established the rule, and the by-law saying nothing inconsistent therewith, the latter will take effect according to the rule, and the omission to make such a provision in the by-law, cannot be deemed an objection to it in any form.

Then as to the other two objections, they are precisely of that class which should be promptly urged. Of course, if there be no notice that such proceedings are being taken, there can be no charge of laches or delay. But it is difficult to understand the relator's alleged ignorance of the passing of the by-law, or his alleged want of notice, not of the by-law being passed, but "of the intended step or application," when he admits he heard of the petition, and attended the meeting of the township council, and opposed the by-law, which was then under discussion. He does not pretend that he then objected to the petition on any ground now suggested, or urged a want of proper notice.

Under these circumstances, we think it better to adhere to our decision in *Hill* v. *Municipality of Tecumseth*, 6 U.C. C. P. 297, and to refuse to quash this by-law on account of the delay in making the application It was not even made in the term following the 5th November, 1860, when the relator admits he knew the by-law was passed, the first day of which term was the 19th of November.

Per cur.—Rule discharged.

WILSON v. BRECKER.

Trespass—Arrest—Evidence of—Not legally sufficient—Constructive—Power of attorney—Responsibility for an arrest committed under.

Plaintiff brought a suit in Chancery against T. S. and S. W. which was referred to arbitration, and an award made thereon against plaintiff for £120 to S. W., and £154 to defendant. This award was made a rule of court by an *ex parte* order, and an attachment was issued by S. W. for both sums of money, the defendant having previously assigned all his interest in the award to S. W., and given him a general power of attorney to collect the amount. The only evidence of the arrest and imprisonment was given by the sheriff, who swore that "the attachment was received in his office on the 31st January, 1859, and the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol" It further appeared that the attachment was endorsed by the solicitor of S W. as his solicitor only.

Held, 1st. That although there was no sufficient proof of an *actual arrest*, nevertheless sufficient evidence was given to warrant a jury in deciding that the plaintiff was constructively (at least) arrested by submitting to the process, and actually confined to gaol thereunder.

2nd, That the power of attorney given by defendant to S W being a general power to collect the money due on the award, and to do all acts relating thereto, he S. W. must be presumed to have been acting for the defendant, who was therefore responsible for the arrest. (C P. E. T. 24 Vic)

TRESPASS for assault and false imprisonment.

Plea.—Not guilty.

The case was tried before McLEAN, J., at Toronto, in February, 1861.

It appeared that the plaintiff brought a suit in Chancery against the defendant, Tobias Switzer, the younger, and Seth Wilson. The suit was referred, and an award was made directing plaintiff to pay a specific sum to defendant, and another sum to Seth Wilson. The award was made a rule of court by an *ex parte* order, after which an attachment was issued against the plaintiff for non-performance of the award. The attachment was afterwards set aside with costs, and the court directed that the plaintiff should be discharged from custody.

To prove that plaintiff was arrested on this writ of attachment, is sworn by the sheriff, that the attachment was received in his office on the 31st January, 1859, "the plaintiff was arrested on that attachment on the 16th February, 1859, and committed to gaol." The sheriff received the writ from Messrs. McDonald and Brother, who endorsed it as solicitors for Seth Wilson. The gaoler proved that the plaintiff was brought to gaol in custody, on the 17th February, 1859, on an attachment in a suit in Chancery of Tobias Switzer and others, and remained in custody on the same process until the 3rd of May following. The writ of attachment was put in, and annexed thereto was a warrant under the sheriff's hand and seal, directed to several persons, the sheriff's bailiffs, commanding them to execute the writ. It had thereon an endorsement as follows:—"Mr. Sheriff: If the within named Moses Wilson pays you the within mentioned sums of £120 and £154, with interest thereon, from 26th January, 1859, together with your own fees, poundages, and incidental expenses, you may discharge him on this suit. Yours, &c., McDonald & Bro., for defendant S Wilson." This and other endorsements on the writ were proved to be in the handwriting of one of the partners in the firm of McDonald & Bro. The sums mentioned were stated by the certificate of the registrar of the court to be £120 to Seth Wilson, and £154 to the defendant, Samuel Brecker, for non-payment whereof the now plaintiff was directed to be attached. The precipe for the attachment mentioned both these sums, payable as above, and was signed McDonald & Bro., defendants' solicitors. The answer of the now defendant in Chancery was filed by A. Crooks, as his solicitor, but his name did not appear in any subsequent proceedings. There was a power of attorney given by Brecker to Seth Wilson, to ask, demand, recover, &c., of and from the plaintiff, and all other persons whom it might concern, the sum of £150, with interest, appointed to be paid to Brecker, by the award in the Chancery suit, and to appoint an attorney or attorneys, and to do and perform all other acts, matters, and things necessary in and about the premises the same as Brecker could do if personally present. On the defence it appeared that Brecker had assigned to Seth Wilson all his interest in the moneys payable under the award, and had given the power of attorney in furtherance of the assignment, both which documents were in the hands of Messrs. McDonald & Brother. There was put in evidence another order of the Court of Chancery in the same cause, restraining the plaintiff from further prosecuting the action against Seth Wilson and Alexander McDonald, who were sued jointly with defendant Brecker for the alleged trespass.

The learned judge told the jury that if defendant gave sufficient authority to his agent, Seth Wilson, to proceed in making an arrest for the enforcement of the amount due, and his agent made such arrest, the defendant would be liable, if it were illegal. That it appeared the defendant had in truth no interest in the money, and did not interfere otherwise than by giving authority to Seth Wilson to enforce payment.

The defendant's counsel objected that the defendant was not sufficiently connected with the issuing of the attachment. That Seth Wilson must be presumed to have acted solely for his own benefit, the papers being signed only by McDonald & Brother, as solicitors for him That the power of attorney only authorised

Wilson to do what was necessary to collect the money, but not to make any illegal arrest under the attachment; the fact that the plaintiff was in gaol not establishing an arrest in this particular case

The jury found for plaintiff—damages, $200.

In Hilary Term last, *M. C. Cameron* obtained a rule *nisi* for a new trial, the verdict being contrary to law and evidence, and for misdirection in telling the jury, under all the circumstances, that defendant was liable by reason of the power of attorney he had given to Seth Wilson, and that such power was sufficient to make defendant liable, although it did not in terms authorise Seth Wilson to cause an arrest of plaintiff, and in directing that there was sufficient evidence that plaintiff was arrested on the attachment.

In Easter Term *Eccles*, Q C, shewed cause.

Cameron supported his rule on the ground that defendant did not himself employ the solicitors or authorise the arrest, and that Seth Wilson never employed the solicitors on behalf of the defendant, and it was the direct act of the solicitors that caused the arrest. That Wilson had authority or interest to the extent of £120, and that anything beyond that was mere excess, and the plaintiff's claim was limited to damages for this as an excess on the part of Wilson, and that there was no arrest of plaintiff proved. He cited *Roe* v. *Birkenhead &c., Railway Co.*, 7 Exch. p. 36, per Parke, B; *Wilson* v. *Twaman*, 6 M. & G. 236; *Blessley* v. *Sloman*, 3 M. & W. ..0; *Cooper* v. *Harding*, 7 Q. B. 928.

DRAPER, C. J.—The cases of *Berry* v. *Adamson*, 6 B. & C. 528, and of *Arrowsmith* v *Lemesurier*, 2 N. R. 211, are as strong as any that have been suggested to shew that there was no sufficient evidence of an arrest, but in my opinion this case goes much further; the plaintiff was conveyed to gaol, and was certainly in custody there under this writ, and detained for several weeks; it is true there is no proof of an actual arrest by the officer, but I think there is enough to warrant the jury in finding either that the plaintiff was arrested in fact or constructively by submitting to the process, which would be sufficient to prove an arrest according to the case cited in Bull, N. P. 92. It is to be observed that the plaintiff obtained his discharge from custody under this writ of attachment, by an order of the Court of Chancery, and there is no pretence that he had been arrested or taken under any other writ.

I feel no difficulty in saying that the defendant is sufficiently connected with the issuing of the attachment, to make him responsible. He had a claim against the plaintiff—he assigned it to Seth Wilson, giving him a very full power of attorney to enforce payment, and Seth Wilson placing the assignment and power of attorney in the hands of his own solicitors, authorises the proceedings to collect, as well the sum awarded to himself, as that awarded to and assigned by the plaintiff. I look on this act as an act authorised by the defendant just as much as if he had gone to the solicitors and had given the same directions that Seth Wilson did. In my opinion it makes no difference that the solicitors were employed by Seth Wilson only, for he had the defendant's authority to employ any person whom it might be necessary to employ to collect the debt. Suppose it had been paid, is there any doubt but that the defendant would have derived the very result he contemplated by his assignment to Seth Wilson? I think this conclusion abundantly sustained by the principles contained in *Collet* v. *Foster*, 2 H. & N. 356; *Gauntlett* v. *King*, 3 C. B. N. S 59; *Warner* v. *Reddiford*, 4 C. B. N. S. 180.

See also *Jarman* v. *Hooper*, 6 M. & G. 827; *Rowles* v. *Senior*, 8 Q B. 677; *Semple* v. *Keen*, 3 H. & N. 753; *Freeman* v. *Rosher*, 13 Q B. 780.

Per cur.—Rule discharged.

HOWLAND v. JENNINGS

Promissory note—Interest recoverable at the rate drawn after maturity till payment

Held, that interest is recoverable on a promissory note at the same rate for which it is drawn over six per cent. till payment

(C. P., E T., 24 Vic)

Declaration on a promissory note, dated 17th January, 1860, for £100, made by the defendant and payable to the plaintiff one month after date.

Plea—Non-fecit.

At the trial, at the Toronto Assizes, in April last, the plaintiff proved the note sued upon, which was as follows:—

$400. KLEINBERG, 17th January, 1860.

One month after date, for value received, I promise to pay H S. Howland, Esq., or bearer, the sum of four hundred dollars, with interest, at twenty per cent per annum.

The only question was whether the plaintiff was entitled to recover interest at the rate mentioned on the promissory note from the date till payment, or only at that rate until the note fell due, and from thence at the ordinary rate of six per cent per annum. A verdict was taken for the plaintiff for the full amount, with leave to defendant to move to reduce it.

In Easter Term *Bull* obtained a rule *nisi* accordingly.

McMichael shewed cause, contending it was a loan of money at a specified rate of interest till paid, and that the defendant ought not to be allowed to take advantage of his own wrong by making default, defending the action on a false plea, and so changing the contract into a loan for upwards of a year, at six per cent for the much larger part of the time. He cited *Morgan* v. *Jones*, 8 Exch. 620.

Bull contra referred to Mayne on Damages 69; *Dickenson* v. *Harrison*, 4 Pri. 282. Sugd. V. & P. vol. 2, p. 816; *Upton* v. *Lord Ferrers*, 5 Ves. 801.

DRAPER, C. J.—The case of *Keene* v. *Keene*, 3 C. B. N. S. 144, is decisive on the question. If the defendant had taken the trouble to look at it, this motion need not have been made. It is referred to in the last edition of Chitty on Bills, p. 439, Note 7.

Rule discharged.

IN CHANCERY.

Reported by RICHARD SNELLING, ESQ., Student-at-law.

METCALF v. KEEFER.

Assignment for benefit of creditors—Title derived under 13 Eliz. and 22 Vic.

A trader having become involved made an assignment of his whole property for the equal benefit of all his creditors. This instrument contained a provision that the creditors should execute before they should become entitled to the benefit of it—that the trustees should be at liberty to retain 2½ per cent on all monies received by virtue of the assignment as a remuneration for their services—that they might in their discretion employ the assignor (Debtor) in the performance of the trusts at a salary of £300 a year—and that they should complete any building contracts already entered into by assignor—to employ workmen and mechanics—pay salaries and wages—make advances—*before* they should make any distribution of the estate amongst the creditors.

The plaintiff purchased the property in question in this cause from the Trustees, and the defendant contracted to purchase the same from the plaintiff.

Held, 1 That the assignment was not fraudulent and void as against creditors under 22 Vict., ch 96.

2. That the provision requiring creditors to execute did not create a preference.
3. That the allowance to the trustees was not a preference within the Act.
4. That the clause authorising the completion of contracts before making a dividend might delay creditors. *Maulson* v. *Peck*, 18 U. C., Q. B. 113.

The facts of this case appear sufficiently in the judgment of the court.

Adam Crooks for plaintiff. *Strong* for defendant.

ESTEN, V. C. (before whom the case was argued.

This is an amicable suit instituted in order to obtain the opinion of the Court upon a doubtful title, the purchaser declining to complete his purchase without the opinion of the court expressed in favor of the title. The question arises upon an assignment made by Mr. White, a builder, of his whole property for the equal benefit of all his creditors. The instrument contained a provision that the creditors should execute before they should become entitled to the benefit of it, that the trustees should be at liberty to retain two and a half per cent. on all monies received by virtue of the assignment as a remuneration for their care and trouble in the execution of the trusts, that they might in their discretion employ Mr. White in the performance of the trusts at a salary of £300 a year, and that they should complete any building contracts already entered into by Mr. White, in order to the winding up of the estate, and they were authorised to employ workmen and mechanics for this purpose, and to make such advances as should be necessary, and to deduct and pay all salaries and wages that might become necessary, and repay all advances that might be made

under this trust, before they should make any distribution of the estate amongst the creditors. The plaintiff purchased from the trustee the property in question in this cause, being part of the trust estate. Mr. Keefer has contracted with the plaintiff for the purchase of the same estate, and the question is, whether he can make a good title to it, which is considered to depend upon the validity of this assignment. The *bona fides* of the assignment is not impugned, but the question is, whether its provisions are not of such a nature that it must be deemed fraudulent and void against creditors under the 13 Eliz. or the 22 Vic. ch. 96, and whether the deed bearing upon its face the marks of its own invalidity any purchaser of the estate must not be deemed to have notice of it.

I will consider the question with regard to the 22 Vic. ch. 96. 1st. In my opinion this statute has produced no alteration in the law except to avoid preferential assignments. In all other respects it is a transcript of the 13 Eliz., and if the assignment in question in any case contain no provision for preferring one creditor to another, I apprehend it cannot be deemed void on any ground, on which it could not have been considered void previously to the passing of this statute. It is argued in the present instance that the provision requiring the creditors to execute the deed makes a preference. I cannot agree to this opinion. Supposing the deed to be wholly unobjectionable in all other respects, what can be more reasonable than that the creditors should intimate their assent to it, so that the trustees may proceed with confidence, and know whom to pay? It must be intended that the creditors will always be known; it will be the duty of the trustees to notify the assignment to them, and if it be wholly free from defects in all other respects, and the creditors churlishly refuse to execute or otherwise to intimate their assent to it, they postpone themselves, they are not postponed by the deed. It appears to me that they might with equal reason refuse to receive their money, and argue for a preference. It is then argued that the provision of an allowance of two and a half per cent. to the trustees who are creditors is a preference within the meaning of the Act. I must dissent likewise from this proposition. It is not a preference of their debts, but a recompense for their trouble. They yield a distinct consideration for it. To the creditors it may be a matter of great importance that competent persons should be induced to act as trustees by the prospect of remuneration, then otherwise it might be impossible to procure any persons to assume so onerous an office. Suppose the trustees not to be creditors the notion of a preference would be inadmissible. Can it make any difference that they are creditors if their services as trustees constitute a distinct consideration for the allowance? If indeed it exceed in amount what is reasonable the question may admit of a different consideration, but that cannot be said in the present instance. These remarks dispose of the question so far as it regards the 22 Vic. ch. 96.

As regards the 13 Eliz., the deed is objected to on account of the provision relating to the employment of White at a salary, and the completion of the contracts and settlement of the business. The first objection is, I think, untenable. Many cases have occurred in which a similar provision for the employment of the debtor has been considered unobjectionable. It is in fact a very common circumstance in these assignments. It may be advantageous to the creditors to secure the services of the debtor in the settlement, collection and realization of his own estate, and it cannot be expected that he will render these services for nothing. He must be maintained during the time. The remuneration, it is true, must not be unreasonable in point of amount. In the present case the allowance is fixed at £300 a year, as a maximum this cannot be doubted, for as the trustees were not obliged to employ White at all, they could fix his remuneration at any sum they could mutually agree upon not exceeding £300 a year. They could, however, go as high as this sum, and the question is whether that would be excessive. In the abstract I should think it would not be so, considering the respectable station Mr. White occupied, the value of the estate, and the nature of the services he was expected to perform. It is impossible, however, not to perceive that Mr. White's services were required principally for the completion of the contracts into which he had entered, and therefore the provision for his employment and remuneration must be considered in some degree in connection with the other provisions contained in the deed in relation to these contracts. The point chiefly relied upon as rendering the deed void was the provision for completing the contracts and closing the business, viewed under the aspect of creating a partnership between the trustees and creditors *quoad* third persons, and rendering the creditors liable for the debts which might be contracted in carrying this provision into effect. I do not think this ground of objection tenable. The case was compared to that of *Owen* v. *Boddy*, 5 A. & E. 28, from which, however, I think it differs very materially in these respects. In the case of *Maulson* v. *Peck*, 18, U. C., Q. B. 113, it seems to have been suggested that a partnership *inter se*. might exist in such cases. But of course no such result could occur under ordinary circumstances. The only objection that can be ordinarily made in such cases is that the creditors accepting the benefit of the assignment by subtracting from the funds to which third persons giving credit to the trustees, look for the payment of their debts, become partners as to such persons, that is, entitle them to treat them as partners, not that any partnership actually exists, or that any partnership *inter se* takes place. It is well known that any receipt of a share of the profits of a business, as such, makes the person so receiving a partner *quoad* third persons upon the principles I have mentioned. This might have occurred in *Owen* v. *Boddy*. The business might have been carried on for years. The profits of good years would have been divided annually, and when a bad year came or a loss occurred the fund would be gone to which the creditors looked for the payment of their debts. The creditors therefore who had subtracted from that fund would be liable for such debts, in other words, would have been partners *quoad* third persons; and this is a risk which a creditor cannot in reason be required to incur, and therefore a deed containing such a provision or framed upon such a principle, is considered fraudulent and void against creditors. The case of *Hickman* v. *Cox*, 18 C. B. 618, was a similar case to *Owen* v. *Boddy*, and stronger. In both these cases the trade might have been continued for years and the creditors were to be paid their debts out of the profits. The cases of *Janes* v. *Whitebread*, 11 C. B. 106, and *Joates* v. *Williams*, 7 Ex. 205, were distinguished from *Owen* v. *Boddy*, on the ground, that the continuance of the business was merely auxiliary to its winding up. It is true some doubt was expressed in *Coates* v. *Williams*, and the court was divided in opinion, but perhaps the doubt had reference to the correctness of construction put upon the clause in question in *Janes* v. *Whitebread*, as to whether the continuance of the business was to be merely auxiliary,—to the winding up or absolute at the option of the trustees. Supposing, however, the principle enunciated in *Owen* v. *Boddy* and *Hickman* v. *Cox*, to be ultimately affirmed, it cannot apply to a case like the present, involving as it does only one transaction or set of transactions. In this case the creditors becoming parties to the deed can never subtract from the fund devoted to the payment of the debts incurred in completing the contracts. By the express provisions of the deed every possible expense incurred in the completion of the contracts is to be paid before the creditors are to receive anything. All salaries, wages, hire, and advances, and doubtless all debts incurred in carrying the contracts into execution, must be paid before any distribution can take place amongst the general body of creditors, who therefore can never diminish or subtract from the fund to which these persons giving credit to the trustees look for the payment of their claims. In the present instance the creditors, if the provisions of the deed were performed, never could become partners with the trustees, and therefore this ground of objection to the deed appears to me entirely to fail. Viewed, however, in another light, the provision in question appears to me so objectionable, that, if it depended upon me, I cannot compel Mr. Keefer to accept the title to this estate. What I mean is, that this provision, as imposing upon the creditors an unreasonable delay in the distribution of the estate, must be deemed, so far as they are concerned, to render the deed void. The objection is not the same as the one I have been considering, although it is in one respect analagous to it, where a partnership, *quoad* third person, will be created. The deed is held void because the creditors cannot reasonably be required to incur such a risk, and therefore if the deed be upheld they are delayed, inasmuch as they can neither

'ake the property in execution nor accept the benefit of the deed. It may be, however, that although no such result arises, the trusts are of such a nature as to cause some small delay in the distribution of the estate and creditors are thereby directly delayed, and also justified in reason in declining to execute the deed, and thereby if the deed be upheld indirectly hindered. There is no doubt that in all cases of this sort some restriction and delay are imposed upon the creditors, and nevertheless the deeds are upheld as tending to the general good of all. But it would not be difficult to imagine a case in which the distribution of the estate might be postponed for such a length of time, and so unreasonably, that the courts would be compelled to infer an interest to delay or hinder creditors. Such a deed would doubtless be void as against them. Thus we have seen that a provision for the winding up of the estate of the debtor, although it necessarily involves some delay and restriction, is held good, because it tends to the general benefit of all the creditors. The stock in trade of the debtor, sold at once by auction, would be comparatively sacrificed; likewise if new goods were purchased from time to time so as to make, in the language of trade, a proper assortment, good prices would be obtained, and the creditors generally benefited.

The cases of *Maulson* v. *Peck* and *Taylor* v. *Whittemore*, 10 U. C. Q. B. 440, were cases of this description, and probably the cases of *Janes* v. *Whitebread*, and *Curtis* v. *Williams*, were so likewise. I apprehend that the provision involving delay must upon the whole turn to the advantage of the general body of the creditors, otherwise the deed cannot be supported. If it tend rather to the benefit of the debtor than of the creditors, if it may occasion a delay in the distribution of the estate unreasonably great, or more than commensurate with the advantage expected to result from it, I should entertain great doubts of the validity of such a deed.

In the present case I think nothing more is intended than that subsisting contracts should be completed, such parts of the estate as may be necessary for this purpose are to remain involved for the present. I do not attach any weight to this circumstance, because the materials on hand might be employed in this way perhaps more profitably than in any other; although probably the difference would not be very great, and the other articles are not of so much importance but that they might be advantageously used in the same way. The only advantage however to the creditors that I can discover in this provision consists in the slight increase in the value of the materials and in the profits to be derived from the completion of the contracts. The former is hardly worthy of attention, the latter is problematical and uncertain. On the other hand, it is impossible for me to say what delay may not be occasioned by the completion of these contracts. It may involve months or a year or more for ought I know. During all this time the distribution of the estate may be suspended. At all events the trustees will not be compellable to pay a farthing to the creditors. It is true the rest of the estate may and must be realized and converted into money, and the trustees may be disposed to pay the expenses attending the execution of the contracts and to distribute a dividend amongst the creditors at the same time. But it may happen that such large advances may become necessary for the completion of the contracts, and their issue as regards profits or loss may be so doubtful that the trustees may not in justice to themselves be disposed to make any distribution among the creditors. The advantage to the creditors of this provision is not very clear or decided, but to Mr. White it is considerable. If these contracts be not performed he will be liable to actions and he might very naturally stipulate for protection against them. Mr. Crooks argued that persons recovering judgments in such actions would be creditors under the deed, and that it would be advantageous to the other creditors to exclude them by performing the contracts. I doubt this, I mean I doubt whether they would be creditors under the deed.

Upon the whole I entertain so much doubt upon this point that I think I ought not to force this title upon the purchaser; at the same time this is doubtless a question of fact, and I am quite in the dark as to the real facts of the case. The advantage to the creditors of the completion of the contracts may be so clear and decided according to the actual facts of the case as bring the case within the principle of *Janes* v. *Whitebread* and *Maulson* v. *Peck*. The point too was not raised in argument, and though suggested by myself, I doubt whether the learned counsel for the defendant was much surprised by it. I do not think it was taken in any other case except in that of *Maulson* v. *Peck* or *Taylor* v. *Whittemore*, by Mr. Wilson, Q. C., and then it did not seem to attract the notice of the court. It would be a great satisfaction to me if the case could be carried to the Court of Appeal. My own impression is, that if in point of fact these contracts are so many and of such a nature that probably much time will be consumed in their completion, and the trustees may incur such liabilities that they may not feel justified in distributing the estate until they are finally settled, or if the issue as to profit and loss is doubtful, the deed cannot be upheld.

I should not entertain confidence in the validity of the deed unless the circumstances were such as to make it clearly for the benefit of the creditors that the contracts should be completed. Some discussion arose during the argument as to when any judgments that might be obtained would attach upon the property which is an equity of redemption. It is quite clear that under the 12 Vic., ch. 78, they would not attach until delivery of the writ to the sheriff. As to when judgments generally attach upon lands under the 13 & 14 Vic., ch. 63, it is unnecessary to express an opinion, although I have a very clear one, and shall be prepared to express it when necessary. In the present case any creditor whose debt existed at the date of the deed may obtain judgment and deliver his writ to the sheriff, when, if the deed is void to creditors, he will be entitled to treat the property as White's and proceed to a sale of it, and the sheriff's vendee will be entitled, as between him and Mr. Keefer, should he complete the purchase, to redeem the estate. White's concurrence in the sale to Metcalf does not seem to mend the matter.

CHAMBERS.

Reported by ROBERT A. HARRISON, Esq., *Barrister-at-Law.*

COTTON v. MCCULLEY.

Ejectment—Variance between writ and precipe—Effect thereof.

Held, that the fact that an original writ of ejectment contains a more full or more extended description of the premises sought to be recovered than contained in the precipe, is no ground to set aside either writ, copy or service.

(October 3, 1861.)

On 17th September plaintiff's attorney filed a precipe for the writ of ejectment in this cause, in the following form:—

IN THE QUEEN'S BENCH.

"Required a writ of summons in ejectment for James Cotton against Patrick McCulley, of the Township of Toronto, in the County of Peel, to recover possession of water-lot number one on the east side of the River Credit, in the Village of Port Credit, of the County of Peel, being the corner lot at the intersection in Toronto and Brock Streets in said Village of Port Credit, as shown on a plan of said Village made by Stoughton Dennis, Esq, Deputy Provincial Land Surveyor.

(Signed,) "JAMES PATERSON,
"*Plaintiff's Atty.*"

On the same day a writ of summons in ejectment was issued on this precipe; the writ described the *locus in quo* in the same manner as described in the precipe.

On 19th September, on a precipe in the same terms as the above a concurrent writ of ejectment was issued. The copy of the concurrent writ served contained a description the same as that above given, with this addition, "said lot being composed of all that parcel of land and marsh containing by admeasurement twenty acres, situate on the north-east side of the River Credit, and bounded on the west and north-west by the north-western boundary of the town plot, on the north and north-east by Lot and Brook Streets, and on the south-east by Toronto Street."

Harman, for defendant, obtained a summons on plaintiff to show cause why the service of the copy of the concurrent writ of summons and the concurrent writ itself should not be set aside for irregularity, in containing words of description of the premises sought to be recovered not inserted in the precipe on which the original writ of ejectment was issued, or in the precipe on which the concurrent writ was issued.

J. Paterson showed cause. He submitted if there was any irregularity that the papers filed only showed the irregularity to be in the copy filed, and that the summons in asking to set aside the original writ asked too much (*Chalkley* v. *Carter*, 4 Dowl. P. C. 480). But assuming the concurrent writ to be the same as the copy, he contended that the application should have been to set aside the original and not merely the concurrent writ and copy. (*Edwards* v. *Danks*, 4 Dowl. P. C. 357, Arch. Prac., 9 Ed., 1380.) He also contended that in fact there was no irregularity either in the concurrent writ or service, the precipe being no part of the proceedings in the suit but a mere memorandum for the information of the clerk who issues the writ. He pointed out that no discrepancy between the original and concurrent writ, or between the concurrent writ and its copy was shown, and submitted that if the concurrent writ followed the original it was sufficient, and that if the original was irregular the application should have been to set it aside. He submitted that the fact of the description in the writ or copy being more extended than in the precipe was not of itself an irregularity.

DRAPER, C. J.—The objection taken in this case is, that a concurrent writ of summons contains a more full description of the premises than is contained either in the precipe for the writ or in the precipe for the original writ—as defendant expresses it—that the concurrent writ contains "words of description of the premises sought to be recovered not inserted in the precipe."

It does not appear, nor is it objected, that the copy of the concurrent writ served deviates from the original, *i. e.* the concurrent writ, nor that the concurrent writ itself differs from the original first writ. Nor is it objected or shewn that either of the writs is altered since they were issued, that is, that the words contained in the copy served were not in the original of that copy when it was issued in the first instance.

As it would be at least an irregularity if not a contempt to alter the process of the court without authority, I must assume it has not been done until it is shewn to have been done, and then the question is, whether if the writ before it leaves the officers hands is more extended in its terms than the precipe, it becomes thereby irregular?

I take it no officer, at least since the Common Law Procedure Act, would issue a writ without a precipe. And the English Practice before the modern changes required a precipe for every original writ, *latitat*, and *capias*, as well as for the writ on which the proceedings to levy a fine or suffer a recovery were founded; but I have not discovered an instance in which if a writ was regular on the face of it it could be objected to for variance from the precipe, which, although required, is not a step or proceeding in the action.

On the simple ground taken, viz., that the copy of the writ, which in the absence of proof to the contrary, I take to be a true copy, contains a more full or more extended description of the premises than the precipe shows, I think there is no ground to set aside any thing, either, writ, copy, or service, and I therefore conclude this summons must be discharged.

Summons discharged.

DIVISION COURT CASES.

IN THE FIRST DIVISION COURT OF THE COUNTY OF GREY.

(Before His Honor F. T. WILKES, County Judge.)

DARAGH v. DUNN.

Fisheries Act—Exemption Act.

Held, 1. That all Her Majesty's subjects have a right to take bait or fish in any harbour, river, or public water in Upper Canada (not duly set apart by the Governor in Council for the natural or artificial propagation of fish), so that in so doing they trespass not on Crown lands or beaches, or by their place, time, or mode of fishing contravene any provision of the Fisheries Act, or any regulations made by the Governor General under its provisions, and applicable not merely to individuals but equally to all Her Majesty's subjects.

2. That a boat in lawful use by a person owning the same, though not a fisherman by trade, is exempt from seizure under an execution for debt.

(August 12, 1861.)

The defendant, a bailiff of this Court, was sued for having, during December or January last, seized and sold, under execution, a boat used by the plaintiff in his occupation as a fisherman, contrary to the form of the statute

At the trial during last June sittings it appeared that plaintiff is by trade a turner, and has for several years resided in Owen Sound, and carried on that trade upon his own premises in that town, over his shop being placed conspicuously a sign with his name and occupation, "Turner," painted thereon; that for several years he has devoted the mornings and evenings in the spring of the year to fishing with nets or lines in Owen Sound Bay or Harbour, and also some weeks in the fall to fishing excursions to places beyond; that on these occasions, and for these purposes, he made use of the boat in question; that he frequently sold fish, the result of these catchings, remaining over after the wants of his own family were supplied; that during the latter part of the fall and the winter just passed the bay was frozen over, as it usually is, so as to prevent him following this occupation, the ice having taken last fall about the end of November, and that the boat was about that time laid up for the season, and was shortly afterwards, some time in December, seized by the defendant under an execution against the goods of plaintiff issued out of this court.

The defendant contended:—

1. That plaintiff was by occupation a turner and not a fisherman, since he gained his living chiefly by turning, and was known only as being a turner by trade.

2. That the boat was not in ordinary use at the time of the seizure, citing the 13th section of the Fisheries Act, Con. Stat. Can cap. 62, as shewing that fishing boats and apparatus could not be considered in ordinary use except during the fishing season, which is in that section supposed to be from 1st of May to 1st of November, and in the present case the fishing season had terminated a considerable time before the boat was seized.

3. That under the Fisheries Act, and the Government Regulations passed in conformity with its provisions, such use of the boat by the defendant must be considered unlawful, as the waters wherein he fished were closed against him by being leased by Government, and he had not the proper sanction of a fishery officer or the written permission of the lessees as required by By-law No. 7 of the Regulations.

The Judge directed the jury that the object of the Legislature in exempting certain articles from seizure in satisfaction of debts was to relieve debtors who were liable to be deprived by execution against their goods of the means of subsistence or of obtaining a livelihood, and that the debtor's occupation in the meaning of the statute (23 Vic., cap. 25, sec. 4, sub. sec. 6,) is the calling or pursuit followed by him for a living. That if the plaintiff during any portion of his time was in the habit of fishing, not for pleasure but for the sake of the results in the way of assisting in his support, and was accustomed to use the boat in this pursuit, he was protected by the Act in his possession of it for this purpose against any seizure in execution for debt. That the discontinuance of fishing owing to the termination of the fishing season, whether by the severity of the weather or the advance of winter, or by any other cause, did not deprive him of that protection, the boat still being in ordinary use within the meaning of the Act though laid up to await the return of the fishing season. That the analogy attempted to be drawn from the 13th section of the Fisheries Act would not hold, since that provision was made, not so much for the protection of the fisherman as for the protection and encouragement of fishing as a branch of industry, which it was of public importance specially to foster, there being under the 13th section no limit as to the value of the fishing vessels and apparatus protected. With respect to the other point, no evidence of the facts alleged being produced, it was withheld from the consideration of the jury.

On this ruling a verdict was given for the plaintiff for $20.

The defendant applied for a new trial mainly on the last ground above mentioned, and partly on affidavits and leases shewing the matters of fact alleged but not proved at the trial.

WILKES, Co. J.—If under these leases it be made to appear that the plaintiff could not at the time of the seizure of his boat have lawfully used it as he had been accustomed to do for fishing without the sanction or written permission required in the By-law, and that his use of it for such purpose immediately prior to the

seizure was in an unlawful pursuit, then I think there should be a new trial, there being no pretence on the part of the plaintiff that any such sanction or written permission was ever given.

The first lease is executed by John McQuaig, Superintendent of Fisheries for Upper Canada, in favour of Thomas C. Stephens, dated 9th August, 1859, for three years from 1st February, 1859, at $4 per annum payable half yearly, and is of property described as a certain fishing station situate in Owen Sound Bay, in Upper Canada, and commencing at the shore on the side line of lots 19 and 20 in the Township of Sarawak, thence easterly to Squaw Point in the Township of Sydenham, thence southerly along the coast past the mouth of the Sydenham River to the bottom of Owen Sound Bay, thence westerly along the coast to the place of beginning, embracing the southerly portion of Owen Sound Bay, together with the right of cutting timber for fishing purposes upon the enclosed reserved Crown Lands, together with the sole right of occupation for fishing purposes, and the exclusive privileges of fishery upon the same.

The second lease is executed by Andrew Russell, Assistant Commissioner of Crown Lands, in favor of the Mayor and Corporation of Owen Sound, in the person of the present Mayor, George Snider, thereto present and accepting for the Corporation, dated 4th September, 1860, for two years from 1st February, 1860, at a rent of $4 per annum payable half yearly, and is of a certain fishing station described nearly as in the first lease except that the line runs from Squaw Point along the coast at high water mark, and includes the Sydenham river up to the foot of the first falls or dam, but excludes that portion of water near Boyd's wharf already patented. It is alleged, but not proved, that this lease was granted upon the forfeiture of the lease to Mr. Stephens for non-payment of rent. It was during the pendancy of the lease to the Corporation that the seizure of this boat was made.

By the Fisheries Act, sec. 3, sub. sec. 1, all subjects of Her Majesty, but none other, may, for the purposes of trade and commerce (and a *fortiori* for private use), take bait and fish in any of the harbours, roadsteads, bays, creeks, or rivers of the Province. By section 1, the Governor in Council may grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and may make all and every such regulation or regulations as may be necessary or expedient for the better management and regulation of the fisheries of the Province.

By section 2, "the Governor may, as occasion shall require, appoint two superintendents of fisheries, one for Upper and one for Lower Canada, whose powers and duties shall be defined by this Act and the regulations to be made under it."

By section 34, "the superintendent of fisheries may grant written permission to any person or persons who may be desirous of obtaining spawn for *bona fide* artificial or scientific purposes to fish for that purpose during the close season."

By subsequent sections power is given to the superintendent of fisheries to act as a magistrate on complaints of contravention of the Act, and certain duties are devolved upon him in reference to the bounties to be given in respect to certain fisheries, to consider which would be irrelevant to this enquiry.

By section 46, "the Governor in Council may from time to time make rules and regulations for preventing or regulating the fishing with nets," &c., &c., "in any harbour, river, or public water, within Upper Canada."

Regulations were adopted by the Governor in Council on the 16th May, 1860, of which the material portions are as follows:—

By-law No. 1. "The Crown having for the purposes of the Act 22 Vic., cap. 62, Consolidated Statutes of Canada, practically resumed and re-entered formally into possession of all fishing stations within the Province of Canada, it is pursuant to the said statute further provided, that the following regulations shall hereafter apply to the fisheries of Upper Canada, and any person or persons continuing to occupy or use directly or indirectly any such net fishing, without lease from the Crown, shall become liable to the pains and penalties imposed by the Fisheries Act, saving moreover all other recourse in like cases provided by law."

By-law No. 6. "No fishing shall be allowed in any water which may have been leased or set apart by the Crown for natural or artificial propagation of fish, except by express sanction of a fishing officer or officers."

By-law No. 7. "All other persons are forbidden to take fish for purposes of trade within the limits covered by leases from the Crown, except only by written permission of the lessees."

By-law No. 8. "The receipt, gift, purchase, sale or possession of any fish had in contravention of these regulations, shall be punishable according to law; and the article so had and all materials so unlawfully used therefor, shall become subject to forfeiture and disposed of as the law directs."

It may be observed *in limine*, that the leases put in do not appear on the face of them to have been granted by the Governor in Council, as required by the 1st section of the Act, and there is nothing in the Statute or Regulations made thereunder to enable the Superintendant of Fisheries, or the Assistant Commissioner of Crown Lands, to grant them. The leases are not under the Great Seal or the seal of the Governor, or in any way authenticated as having been granted by authority of the Governor in Council, and ought to be regarded as wanting in those *indicia* which can alone secure for such documents attention and authority as evidence in a court of justice. The lease or license to the Corporation is not under the seal of the Governor, and for that reason cannot convey to the Corporation any right to enter upon the lands described therein.

But independently of these objections to these leases, which appear to me fatal to their validity as evidence for the defence, it appears to me questionable whether by any lease or license, however formally drawn and executed, a right of fishing in any of the public waters of Upper Canada, can be conveyed to any one or more of Her Majesty's subjects to the exclusion of others.

By the common law of England, which is ours also by Con. St. U. C., cap. 9, fishing in navigable rivers or arms of the sea is common and public. *Carter* v. *Murcot*, 4 Burr. 2162, *Richardson* v. *Oxford* (*Mayor of*), 2 H. Black 182, 1 Anst. 231, 4 T. R. 437, except where by grant or prescription a several fishery exists. "Grants of this description can no longer be made by the Crown—being prohibited by King John's Great Charter, and the second and third confirmations of it in the reign of his successor." Stephens' New Commentaries, *22, 23, Am. Ed., 1843.* Our inland lakes and rivers are held to be subject, in respect to public rights, to the same rules as are applied to the seas and rivers of England. See the *Queen* v. *Meyers*, 3 U. C. C. P., 305, and cases cited. The King *jure coronæ* may grant the land upon the sea shore between high and low-water mark, and even probably below low-water mark, for the purpose of being reclaimed and converted to useful purposes of occupation, which occupation however must be carried into effect within a reasonable time. *Attorney Gen.* v. *Richards*, 2 Anstr. 614. But such grant is subject to the *jus publicum*, or public right, and if acted upon injuriously to such public right it is void, or it is a grant which does not divest the Crown or invest the grantee. *Attorney General* v. *Burridge*, 10 Price, 350, *Attorney General* v. *Parmeter*, 10 Price, 378; see also *Attorney General* v. *Chambers* v. *Rees*, 9 Eng. L. & E. Rep. 212, in Chancery.

The question is, Is this public common law right of fishery in the navigable waters of Upper Canada made liable by the Fisheries Act, or other statute, to be abridged by act of the Crown, and if so, how far?

The 3rd section of the Fisheries Act, sub-sec. 1, grants no new privilege, but is, as we have seen, only in affirmation of the common law, and was doubtless intended to rebut any misconstruction of the other parts of the Act to the prejudice of the public right recognized by it. The other sub-sections do indeed grant some privileges not before enjoyed except by intrusion on the Crown, but only by giving a limited use of Crown property, and thus enlarging and giving practical effect to the public rights upon such waters.

The first clause of the 1st section of the Act refers to lands of the Crown, and is no enlargement of the power of the Crown. It may well be questioned whether the term lands of the Crown be used at all in reference to lands under navigable waters. The term "Fisheries of the Province," in the following part of this section, is not in any way defined in the Act, or elsewhere, and must, I presume, mean generally the fisheries carried on by individuals in the public waters of the Provice. But both this section and section 46 must receive a construction in harmony with the

common law and the intent of the Act itself, as expressed in its whole contents, and cannot I think be intended to empower the Crown to abridge the *jus publicum* of free fishery in public waters enjoyed by all Her Majesty's subjects in common, but, on the contrary, only to regulate this right and to make its exercise more productive of results to those actively engaged in it—thus increasing the aggregate wealth and resources of the country. Under section 46 net fishing in any public water in Upper Canada might no doubt be prevented altogether by the Governor in Council under circumstances rendering such step advisable for the protection of the public interests, that is, to prevent damage to the fisheries or to increase its extent and value. This would be in analogy to sections 20, 27, 28, 30 and 31, under which fishing for certain kinds of fish is made unlawful or prevented during certain periods of the year, (called in section 34 the close season,) and so under section 46 the Governor in Council may in certain cases extend these provisions of the Act by closing entirely, or for limited periods, any public water in Upper Canada against net fishing. So under section 6, the Governor in Council may cause to be set apart any river or other water for the natural or artificial propagation of salmon, trout, or other fish, thus closing such waters entirely against fishing in any manner. And during the close season fishing can only be allowed under section 34 by written permission of the superintendent, and for the particular object pointed out in that section. But to attempt to exercise the powers granted under the 1st and 46th sections by preventing net fishing as regards some of Her Majesty's subjects and permitting it as regards others, or by regulating such net fishing with a view of such enjoyment of it by some of Her Majesty's subjects to the exclusion of others, is, I think, contrary to the spirit of the Act and beyond its meaning and intent. No power but that of Parliament can grant to any individual or corporation any privilege which may operate as a monopoly of trade or of industrial pursuit of any description, and the power of Parliament has not I think been put forth in the Fisheries Act for any such purpose. It was passed not to deter and discourage fishing by the granting of invidious monopolies to individuals, nor even principally to create a source of revenue for the Province, but to protect the fisheries as a great Provincial interest from injury and deterioration, and to encourage the proper prosecution of the fishings by all who could under the beneficial provisions of the Act find it their interest to engage in this pursuit in Provincial waters. See the heading of sections 1 to 46 inclusive. "Protection of Fisheries," and the provisions of sections 3, 13, 14, 15, 16 and 31, granting special privileges to fishermen who might engage in fishing on these waters, privileges not confined to lessees but applicable to all alike. The whole tenor of the Act is to the like effect. It is true that section 67 contemplates that a revenue may arise under its provisions from the leases or licenses of salmon or other fisheries. But this must have reference to leases and licenses on lands belonging to the Crown mentioned in section 1, including the public lands and beaches mentioned in sections 3 and 4, and cannot of itself suffice to extend the scope of the initial clause of section 1, over the great public navigable bays and other waters of the Province.

The first clause of the first section of the Act then must I think be taken by itself, and is confined to Crown fishings or fishings on Crown Lands, and has no reference to fishing carried on in public waters in boats at a distance from the shore, and where the shore or beach is not made use of for the purpose of landing the nets in drawing them in with fish, or in cutting or preparing the fish for market. The power to lease or license includes the power to impose rules and regulations as conditions upon the lessee or licensees, and in reference to Crown property capable of being thus leased, it was unnecessary to empower the Governor to make rules and regulations for its management. The second clause therefore of the first section and the 46th section do not properly apply to such Crown fisheries, but to the fisheries of the Province open and common to all Her Majesty's subjects. After granting certain privileges upon Crown Lands to the public the Act in the 4th section expressly reserves the right of the Crown to dispose or take possession of any public land or beach occupied under its provisions for fishing purposes. Such public land and beaches therefore could be resumed at any time; and by-law No. 1 of the Fisheries Regulations declares them to have been practically resumed and again formally taken possession of; and the subsequent use of these same public lands and beaches was of course subject to any conditions which might be imposed and mentioned in any lease or license of them thereafter to be granted, not so much by virtue of this Act as of the rights of the Crown as Lord of the sea.

By-law No. 1 then, I consider, declares the resumption of the lands belonging to the Crown, up to and including beaches (if any) in front of such lands, occupied for fishing purposes but not going beyond the beach, or taking in any of the permanently submerged bottom of any public water; and from the time of this resumption the Crown was in possession of all such lands and beaches for all purposes not inconsistent with the *jus publicum*, and including the purposes mentioned in the first clause of the first section of the Act.

By-laws Nos. 2, 3, 4, 5, 8 and 10 have effect only as regulations made under the latter clause of the 1st and the 46th sections.

By-laws Nos. 6 and 7 refer to two distinct classes of waters:—

1 Waters leased by the Crown.

2. Waters set apart by the Crown for the natural or artificial propagation of fish.

To take fish in the first class of waters these By-laws require:—

1. The express sanction of a fishing officer or officers; or,
2. The written permission of the lessees.

In the second class of waters:—

1. The express sanction of a fishing officer or officers.

We have seen that the first class of waters—those leased by the Crown—cannot include the public navigable waters of the Province in which there exists at common law, as well as by virtue of the 3rd section of this Act, a public right to take fish common to all Her Majesty's subjects.

The second class of waters are not made either by the Act or by the Regulations subject to lease, but are closed against all persons except such as have the express sanction of a fishing officer.

I think, therefore, that notwithstanding any leases or grants of the Crown to the contrary (of the existence of which however no sufficient evidence is given), all Her Majesty's subjects have, both at common law and by this statute, a right freely to take bait or fish in any harbour, river or public water in Upper Canada not duly set apart by the Governor General for the natural or artificial propagation of fish, so that in so doing they trespass not on Crown lands or beaches, or by their place, time or mode of fishing, contravene any provision of the Act or any regulations made by the Governor in Council under its provisions; and applicable not merely to individuals or classes, but equally to all Her Majesty's subjects.

I have found it unnecessary to consider the effect the document put in purporting to be a lease to "the Mayor and Corporation of Owen Sound in the person of the present Mayor, George Snider," would have, if in due form, and valid and admissible as a conveyance. I may say here, however, that even were the waters of the harbours subject to lease by the Crown, it does not appear to me that the lease produced would affect injuriously the case of the plaintiff. A Municipal Corporation in Upper Canada cannot, under the municipal law as it at present stands, take a lease of a fishery at an annual rent payable out of the corporation funds, that being beyond or aside from the scope of the powers conferred on such a body by the Legislature. If the lease were at all effectual as such it would be so as a lease to the inhabitants of the town individually, and would operate in favour of the present plaintiff as one of those inhabitants, having a right under it in common with the other corporators.

The plaintiff's boat then was lawfully used by him in fishing in Owen Sound Bay, and as such was exempt from seizure under this execution, and I see therefore no reason for disturbing the verdict.

New trial refused.

GENERAL CORRESPONDENCE.

Law Scholarships.

TO THE EDITORS OF THE LAW JOURNAL.

Dear Sirs,—The intentions which actuate the Law Society of Upper Canada to offer scholarships to deserving students—members of the Society—are no doubt praiseworthy; but the manner in which these prizes are distributed, and the advantages offered to one class of competitors and denied to another, are, to say the least, very objectionable. I hail this step on the part of the learned body who sit and deliberate in solemn convocation in Osgoode Hall, as an era of better things in the study of the legal profession, but I must emphatically condemn in my humble way the narrow course pursued to make those valuable gifts totally useless to a great majority of the students in Canada.

Now let me explain:—About the first of June last, almost immediately after Easter Term, an announcement appeared in the Toronto papers that the Law Society intended offering scholarships to the various members thereof, viz., £30 for the first year's men, £40 for the second, £50 for the third, and £60 for the fourth. So far so good. The examinations were to come off next Michaelmas Term. About three weeks ago came out another advertisement, stating that a Law School was established at Osgoode Hall, the lectures and readings of which commence after all the country students have left Toronto for home. Then also the term in which a candidate tries for the scholarship is not taken to have been attended by him at all.

Now what is all this but the most direct partiality to the *Toronto* students in preference to those from a distance. We all know that the majority of Law Students get no salary, and therefore are unable to spend two or three months in the year in so expensive a place as Toronto, attending readings and lectures and the ordinary terms required by law. The very fact that the Society offers prizes argues a state of comparative indigence among many of our class which these prizes are intended to remedy. But with all the advantages of living at head quarters, the Toronto students enjoy the additional ones of having access to every facility for study that it is in the power of the Society to offer. No impartial man will fail to see the unfairness of making us in the country, under so many disadvantages, compete with them, with every possible facility at their command for successful study. Give us a chance, or at least equal advantages with them, and we are perfectly willing to enter the arena and compete for the prizes. Again, why not divide the scholarship into *two* or *three* sums, and at least give us a *second* or a *third* chance? But no, here there is but *one* large prize for each year for its some 120 students. I am very happy to see so valuable and important a step taken to improve and elevate our profession, but I humbly submit to those in authority that the suggestions contained in this my letter are not unworthy of their distingnished consideration.

I am yours truly, &c.,

Woodstock, Sept. 10, 1861. A LAW STUDENT.

Mode of Addressing Judges.

TO THE EDITORS OF THE LAW JOURNAL.

Gentlemen,—May I take the liberty of asking, for the information of law students generally, and perhaps for a few unsophisticated lawyers, the proper method of addressing the Judges of the Superior Courts, or a Judge of the County Court, when meeting them *out of Chambers*.

Shall we say,—Judge, Judge Burns; (for instance) Justice Burns, Mr. Jurtice Burns, or Mr. Burns? And in the case of a County Judge, shall we say,—Judge, Judge Price (for instance), or Mr. Price.

I ask these questions as many of us country students who attend to the ordinary business of an office in Chambers and at the Division Courts, and afterwards meeting the Judge—frequently perhaps—put our foot in it, by addressing him in an unprofessional manner.

Perhaps you will better understand my meaning by asking you "What the practice is in Toronto?"

Should you favor us with an answer to the above I feel convinced the same will be received with thanks by a large number of students throughout the country, and the undersigned will feel himself under particular obligations to you.

Sarnia, Sept. 23, 1861. A COUNTRY STUDENT.

[The mode of addressing a Judge sitting in the discharge of public duty is well settled in and out of Toronto. The mode of addressing a Judge when not sitting in the discharge of public duty is by no means so settled as to be called "a practice." In fact no rule on the subject prevails in Upper Canada. It is a matter of taste. We think that to address a Judge out of Chambers as "Judge" is bad taste. It is the "practice" in the United States, but none the better on that account. "Judge will you liquor," is so said to be a common expression there, but one which good taste certainly condemns. There is no more sense in addressing a gentleman in a drawing room as "Judge" than addressing the man who retails gin cock-tails as "Colonel." To our taste, "Mr. Burns" and "Mr. Price" are much better than "Judge," "Justice," or "Mr. Justice." When speaking *of* (not speaking *to*) the judge a different rule may with propriety be observed.—EDS. L. J.]

APPOINTMENTS TO OFFICE, &C.

CLERKS OF THE PEACE.

JAMES JOSEPH BURROWES, Esquire, to be Clerk of the Peace for the United Counties of Frontenac, Lennox and Addington, in the room of JOHN WAUDBY, Esquire, deceased.—(Gazetted 7th September, 1861.)

CORONERS.

ROBERT RAMSAY, Esquire, Associate Coroner for the United Counties of York and Peel.

JOHN BOWKER, Esquire, Coroner for the Provisional District of Algoma.—(Gazetted 7th September, 1861.)

NOTARIES PUBLIC.

JAMES WEBSTER, the younger, of the town of Guelph, Esquire, to be a Notary Public in Upper Canada.

FRANK EVANS MARSON, of the town of Guelph, Esquire, to be a Notary Public for Upper Canada.

WALTER R. BROWN, of the City of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted 14th September, 1861.)

TO CORRESPONDENTS.

"A LAW STUDENT"—"A COUNTRY STUDENT"—Under "General Correspondence."