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VOL. IV. TORONTO, OCTOBER, 1858. No. 10.

THE UPPER CANADA LAW JOURNAL

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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LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Trinity Term, 22nd Victoria, 1858.

During the Term of Trinity, the following Gentlemen were called to the degree of Barrister-at-Law:—

George Palmer, Esquire. | John McBride, Esquire.
Robert John Wilson, Esquire. | Nicol Kingsmill "
Thomas Wardlaw Taylor, Esq.

On Tuesday, the 31st day of August in this Term, the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows:—

University Class:

Mr. Clarkson Jones.

Junior Class:

Mr. Thomas Ferguson.
" Martin O'Gara.
" Alexander Robertson.
" Robert Smith.
" Daniel Davis Hobson.
" Frederick Charles Ridley.
" James Macgregor Stevenson.
" George Taylor Denison, Junior.
" William James Scott, Junior.
" Richard Knill Martin.
" William Fuller Alves Boys.
Mr. Hugh McMahon.
" Thomas O'Brien.
" Alexander Rocke Robertson, Jun.
" Robert Fraser.
" George Edwin Duggan.
" George Willis Lount.
" Charles Edward Pegley.
" Michael Sullivan.
" Arthur Henry Sydere.
" Simon Bolivar Newcomb.
" James Fairfield.
Charles Patrick Higgins.

NOTE.—Gentlemen admitted in the "University Class" are arranged according to their University rank; in the other classes, according to the relative merit of the examination passed before the Society.

Ordered—That the examination for admission shall, until further notice, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripedes, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Farnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric, and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively. *Mathematics.* (Euclid, 1st, 2nd, 3rd, 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd, 3rd and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 3, 4, and 5: and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class:

In the same subjects and books as for the University Class.

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books or Legendre's Geometrie 1st and 3rd books, with the promblems; and such works in Modern History and Geography as the candidates may have read: and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

Ordered—That in future, Candidates for Call *with honours*, shall attend at Osgoode Hall, under the 4th Order of Hil. Term, 18 Vic., on the last Thursday and also on the last Friday of Vacation, and those for Call, merely, on the latter of such days.

Ordered—That in future all Candidates for admission into this Society a Students of the Laws, who desire to pass their Examination in either the Optime Class, the University Class, or the Senior Class, do attend the Examiner at Osgoode Hall, on both the first Thursday and the first Friday of the Term in which their petition for admission are to be presented to the Benchers in Convocation, at Ten o'clock A. M. of each day: and those for admission in the Junior Class, on the latter of those days at the like hour.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament, 20 Vic. chap. 63, and the Rule of the Society of Trinity Term, 21 Vic. chap. 1, made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries, 1st Vol.; Smith's Mercantile Law: Williams Real Property; Williams on Personal Property; Story's Equity Jurisprudence; The Statute Law, and the Practice of the Courts.

NOTICE.—A thorough familiarity with the prescribed subjects and books will, in future, be required from Candidates for admission as Students; and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

NOTICE.—By a rule of Hilary Term, 18th Vict., Students keeping Term are henceforth required to attend a Course of Lectures to be delivered, each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

ORDERED.—That the Subjects of the Lectures, for Michaelmas Term, be as follows: Specific Performance—S. H. Strong, Esquire; Agency—J. T. Anderson, Esquire.

ROBERT BALDWIN,
Trinity Term, 22nd Victoria, 1858. *Treasurer.*

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 newspaper 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 and 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.

Legislative Council,
Toronto, 4th September, 1857.

EXTRACT from the Standing Orders of the Legislative Council.

Fifty-ninth Order.—"That each and every applicant for a Bill of Divorce shall be required to give notice of his or her intention in that respect specifying from whom and for what cause, by advertisement in the official Gazette, during six months, and also, for a like period in two newspapers published in the District where such applicant usually resided at the time of separation; and if there be no second newspaper published in such District, then in one newspaper published in an adjoining District; or if no newspaper be published in such District, in two newspapers published in the adjoining District or Districts."

J. F. TAYLOR,
10-tf. Clerk Legislative Council.

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IS published monthly in the City of Toronto, at $4 per annum if paid before 1st March in each year; $5 if paid afterthat period.

It claims the support of Judges, Lawyers, Officers of Courts, Municipal Officers, Coroners, Magistrates, and all concerned in the adminstration of the Law, on the following grounds:—

1st. It is the only Legal Periodical published in Upper Canada.

2nd. Each number contains Reports of cases—many of which are not to be found in any other publication.

3rd. Chamber Decisions are reported expressly for the Journal.

4th. Each number contains original articles on subjects of professional interest.

5th. Each number contains articles in plain language for the guidance and information of Division Courts, Clerks, Bailiffs and Suitors, and Reports of cases of interest to all whose support is claimed.

6th. Each number contains a Repertory of English decided cases on Points of Practice.

7th. It is the only recognized organ of intercommunication between Lawyers, Officers of Courts, and others concerned in the administration of law.

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9th. It circulates largely in *every* City, Town, Village and Township in Upper Canada.

10th. It exchanges with more than fifty cotemporary periodicals published in England, the United States, Upper and Lower Canada.

11th. It has now reached the fourth year of its existence, and is steadily increasing the sphere of its usefulness.

12th. It has advocated, and will continue to advocate sound and practical improvements in the law and its administration.

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MACLEAR & CO., *Publishers*, Toronto.

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REMITTANCES.

September, 1858.—J. R. C., Rochester, U. S., $1; W. D., Ottawa, $0 50; R. B. S. Calsterville, $2; J. M., Glanford, $1; A. A. Lloydtown, $4; Mun. of Sydenham, $10

REMITTANCES RECEIVED AT BARRIE.

September, 1858.—T. N. G., Oshawa, for vols. 2 & 3, $10; W. McM., Berlin, vols. 2 & 3, $10; J. P. C., Brampton, vol. 3, $5; E. R. M., Guelph, vol. 3, $5; J. K., Port Hope, vols. 2 & 3, $10; C. C. S., Toronto, vol. 3, $5; R. C. D., Napanee, vol. 3, $5; J. L. D., Port Hope, vols. 2 & 3, $10; J. C., Melford, vols. 2 & 3, $10; J. M., Sandwich, vols. 2 & 3, $10; L. D. R., St. Cath., vol. 2, $5; J. R., Whitby, vols. 2 & 3, on acc't, $8; D. E. McJ., Cornwall, vols. 2 & 3, $10; J. T. P., Cornwall, vol. 3, $5; A. B., Amherstburgh, vol. 3, $5; J. T. D., Sarnia, vols. 2 & 3, $10; J. McM., Kingston, vol. 3, $5; N. G. H., Whitby, vols. 2 & 3, $10; J. M., Warwick, vol 3, $5; J. F., Norwood, vol. 3, $5; A. A. B., Guelph, vol 3, $5; J. ... R., Kingston, vols. 2 & 3, $10; H. L. H., Brockville, vols. 2 & 3, $10; E. H. S., Smithfield, vols. 2 & 3, $10; C. P. T., L'Orignal, vol. 3, $5; J. H., Brighton, vols. 2 & 3, $10; C. H. S., Perth, vols 2 & 3, $10; J. S. W., Chatham, vols. 2 & 3, $10; T. G. Toronto, vols 2 & 3, $10; W. R. F. B., Perth, vols. 2 & 3, $10; J. C., Owen Sound, vol. 3, $5; J. A. Sandwich, vol. 3, $5; P. G. N., London, vol. 3, $5; S. M. C., L'Orignal, vols. 2 & 3, $10; R. L., Kemptville, vols. 2 & 3, $10; C. A. D., Berlin, vol. 3, $5; J. C., Cobourg, vols. 2 & 3, $10.

DIARY FOR OCTOBER.

1. Friday ..... University College, Michaelmas Term begins.
2. Saturday... Chancery Examination at Niagara and Brockville ends.
3. SUNDAY... 18*th Sunday after Trinity.*
4. Monday... County Court Term commences.
5. Tuesday .. Chancery Examination at Hamilton and Ottawa commences.
9. Saturday... County Court Term ends. Chancery Ex. at Hamilton & Ottawa ends.
10. SUNDAY... 19*th Sunday after Trinity.*
11. Monday ... Toronto Fall Assizes.
12. Tuesday ... Chan. Ex. at Barrie & Cornwall commences.
16. Saturday... Chancery Examination at Barrie and Cornwall ends.
17. SUNDAY... 20*th Sunday after Trinity.*
24. SUNDAY... 21*st Sunday after Trinity.*
30. Monday... Articles, &c., to be left with Secretary of Law Society.
31. SUNDAY.. 22*nd Sunday after Trinity.*

"TO CORRESPONDENTS."—*See Last Page.*

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. Hilton & 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.

Parties indebted cannot even say in excuse that they have been taken by surprise, for they have had full notice of an intention to compel payment by suit, and ample time has been given to anticipate any action being taken; and we now for the last time call attention to the matter, as all accounts, WITHOUT EXCEPTION, *which remain unpaid after the 20th of this month, will be placed in Court, and many will be put in suit immediately.*

The Upper Canada Law Journal.

OCTOBER, 1858.

POLITICAL LAWYERS.

Two qualities necessary to success in the practice of the Law are patience and industry. Without these the possessor of the greatest intellect cannot accomplish much in our profession.

The faculties to be used more than any other are the reflective faculties. The profession of the law is emphatically a profession of thought. A man to be thoughtful, that is to exercise his reflective faculties and in so doing cultivate them, must be as much as possible removed from the excitement of the world. The more quiet and secluded he is, the more likely he is on knotty points of law to reach correct conclusions; of course we do not underrate a knowledge of the world as an essential qualification of an advocate, or of any professional man who in the path of duty is led to mix himself up with the affairs of the world. But we desire to prove that there is a certain line of conduct suited to each profession, and that a departure from that line of conduct unfits the man to discharge his duties with success to himself, or advantage to those who may find it advisable to consult him. And we desire to prove that the pursuit of politics by one of our profession is a departure from the path of duty, and makes a Lawyer less a Lawyer.

The Lawyer who leaves his office where the public have a right to find him, to take part in the feverish excitement of political squabbles, is unjust to himself and to the public. He is unjust to himself because his equanimity is disturbed, and it is with difficulty that he can again "settle down to business." He is unjust to the public, and more particularly to that portion of it which constitutes his clients, because they have reason to expect that when he is wanted for business he is to be found in his office, and not heard of through the columns of party newspapers. Each such swerving from the path of professional duty, is destructive of the lawyer's reputation as a lawyer. He becomes more and more tired with the monotony of his office—which before was to him a solace and a pleasure. He is, though to all appearance assiduous to his duties, painfully expectant of some fresh political breeze to fan his hankering after political fame. Though corporeally present in the office, he is mentally absent.—Business becomes a bore, and clients become bores. Of this the effect is certain and natural—clients one by one begin to drop away.

Another view of the subject is this, the lawyer, like the judge, should not be of any political party. He, to be successful in his practice, ought not to enlist under the banner of any creed or party. So sure as he does, he makes enemies. The very men who while he addresses them in the bar-room in the most finished style of stump oratory, though for the time they applaud him, learn afterwards to disrespect him. Familiarity breeds contempt. The veil which protects self-respect and dignity being removed, the opposite qualities are invoked. In brief, the lawyer who is a political hack, destroys his professional usefulness.—On the contrary, the lawyer who in patience and calm dignity pursues his path of professional duty, is respected and patronized. In him confidence is reposed. In him every man of what creed or party soever finds a respository and an oracle. Like Justice, he is blind to every creed and party. Like Justice, his purity is unalloyed with the dross of worldly scum. This we submit is as near perfection as humanity can attain. How few attain it? Our readers can answer the question for themselves. We do not intend to have it understood, that a lawyer who follows politics is at all times and always his own enemy. But we wish it to be understood that a lawyer must be either one thing or the other—a lawyer or a politician. Without doubt, the law is a high road to political honors and to fame. Not merely the highest offices in the land—judgeships, but other offices equally high without the pale of the profession, are within grasp of the political lawyer. If his object be to attain these, let him with all his might throw himself into the political arena. Let him tear himself from his office and never afterwards look back to it. If he do this with a

will, he may succeed—one or the other should be his object With the object of his life in view, he ought to fight firmly and pertinaciously. That man may succeed—but not as a lawyer. The man against whom we inveigh is he who stands with one leg in his office and the other on the hustings—the man who between two attractions is distracted and destroyed. He is neither one thing nor the other—neither lawyer nor politician.

The training of an advocate well befits him to enter any arena. With a knowledge of the world, and a habit of speaking in public, he may push his way to the highest post among any body of men. Knowing his power, the temptation is great to follow the most glittering bait. All however, is not gold that glitters. Better far to keep to ones office till real gold is acquired, and then having served oneself to serve ones country. A man to have an independent mind is not less likely to be without it when he has an independent pocket. When independent both in mind and pocket, he is of the right material to make a useful public man. He enters politics—not so much as a trade as a profession. His object is more to serve his country and less to serve himself. And with this object he is more likely to command public respect than without it. We have no wish to harrow the feelings of any, by referring to the career of many, who might have made successful lawyers had they not been allured by the blandishments of politics. Their whole life was dependence, and their end was poverty, This came from entering politics in order to earn a livelihood, instead of entering with a livelihood in order to real fame and real usefulness. The young man of talent and learning who abandons an honorable profession and certain success, for the more questionable and more fickle political arena, often lives to regret when regret is too late.

Of course in these remarks, we have neither been personal nor do we wish them so to be interpreted. Our advice is general, and we give it for what it is worth. Those who follow it will not, we are confident, have less reason to be grateful to us. Those who do not will not, we are sure, censure us.

The ideas we have expressed have been long seeking for expression Having given them utterance, we feel we have done our duty. The immediate cause of our doing so is a short and deserving article headed "Law and Politics," in other colums, for which we are indebted to the *Philadelphia Ledger*—an old and much respected periodical published in the city whose name it bears. The force of the writer's observations will not we think be powerless amongst ourselves. The necessity for them is nearly as strong in Canada as in the United States. We ask for the article an attentive perusal.

THE ACT FOR THE ABOLITION OF IMPRISONMENT FOR DEBT.

This important Act is now law, and a word in season on some of its provisions will be more acceptable to the readers of the *Law Journal*, than the promise of an elaborate Treatise at a future day.

A leading object of this Act is to abolish arrest on mesne process, except in certain cases. This is effected by doing away with a creditor's uncontrolled right to arrest his debtor, and by restricting arrests to cases where a Judge is satisfied that there is good cause for believing that the defendant, unless apprehended, will leave the Country with intent to defraud his creditors.

Several of the clauses are copied from the English Act, 1 & 2 Vic. cap. 110. The first and second sections of our Act are very similar to the Imperial Act; but there is a difference in an important point, and to this the attention of the practitioner will now be directed.

Sec. 1.—After the first day of September, in the year of our Lord One Thousand Eight Hundred and Fifty Eight, no person shall be arrested upon mesne or final process in any civil action in any of Her Majesty's Courts in Upper Canada, except in the cases and in manner hereinafter provided for.

"*In any of Her Majesty's Courts.*" These words obviously embrace not merely the Superior Courts of Common Law, but also the County Courts: but do they extend to the Court of Chancery? No doubt the Court of Chancery as one of Her Majesty's Courts would in terms be within the designation employed; but then the words immediately preceeding, "arrested on *mesne* or final process," might seem to point to process of the Common Law Courts. The Act will doubtless receive a liberal construction in favor of liberty; and it is apprehended that every process issued from the Court of Chancery may in one sense properly be classed under one or other of these heads, and that process for the arrest of a defendant virtually for non-payment of a debt can no longer be issued from the Court of Chancery without special order.

The second section of our Act is taken from the third section of the Imperial Act, but has been very materially altered from its original in several places. The practitioner should therefore be cautious how he acts on the decisions under the English Act. They may not be applicable to our law, for example, a portion of section two reads thus,—"show," &c., "that such party or plaintiff has a cause of action against such person to the amount of twenty-five pounds or upwards, or has sustained damages to that amount, and shall also by affidavit shew *such facts and circumstances* as shall satisfy the Judge that there is good and probable cause for believing that such person, unless he be forthwith apprehended, is about to quit Canada *with intent to defraud his creditors generally or the said party*

or plaintiff in particular, it shall be lawful," &c. The words of the English Act are, "shall by affidavit of himself or some other person show to the satisfaction of a Judge of one of the said Superior Courts that such plaintiff has a cause of action against the defendant or defendants to the amount of twenty pounds or upwards, or has sustained damage to that amount, and that there is probable cause for believing that the defendant or any one or more of the defendants is or are about to quit England, unless he or they be forthwith apprehended, it shall be lawful," &c.

Under this section of the English Act it has been held that the affidavit besides alleging the deponent's belief must state facts sufficient to induce belief in the Judge. Our Legislature has not left this point to judicial construction but has expressly required that *facts and circumstances* sufficient to satisfy the Judge,—in other words to induce a belief in his mind, must be shown by affidavit.

There is also an additional ground necessary to be laid to warrant the order for arrest which is not required in England. It must be shown that the party is about to quit Canada *with intent and design to defraud his creditors*, &c.

It will be seen from what has been said, that the English decisions upon this point will be of little value to us. As regards arrests under the new Act, the cases will be rare, where a party can shew facts and circumstances strong enough to warrant an order, — indeed if a debtor has no declared what his intentions are, it is difficult to conceive a case in which an arrest can be ordered.

What is required of a party seeking an order to arrest his debtor?

He must show to the satisfaction of the Judge,

1st. A cause of action to £25 at least.

2nd. Such *facts* and *circumstances* as shall *satisfy the Judge* that there is *good* and *probable* cause for believing that the defendant, unless *forthwith* apprehended, is about to quit Canada with intent to *defraud his creditors*, &c

And this is made more emphatic by a special order to direct that the person, &c., *so about to quit Canada with intent* as aforesaid shall be held to bail, &c.

Until the clause has been acted on for some time, it would be quite impossible to advise a client with any degree of confidence as to what particular facts and circumstances would induce a belief on the judicial mind of an intended departure out of Canada with a fraudulent design.

CHANCERY REPORTS.

Our thanks are due to Thomas Hodgins, Esq., LL.B., of the Equity bar, for Chancery decisions reported in this number. Owing to the valuable aid of Mr. Hodgins, we hope from time to time to lay before our readers Chancery adjudications of interest and utility.

LEGAL PRETENDERS.

In England there is a class of men commonly known as "Legal Pretenders." The definition is strongly descriptive of their avocation. They pretend to do what they are incompetent of doing, that is of transacting legal business of various kinds. The most numerous of the class are "collectors."

Evasions without number are resorted to by these disingenuous busy bodies to terrify their victims. Mere dunning is abandoned for the more effectual mode of coercion. Notices instead of simply requiring payment of money generally bear upon their face the Royal Arms, and other insignia of authority. The formality of a writ is often closely observed, so as when practicable to add deception to pretension. The system is not only unfair to the legal profession but unjust to the public. Costs are exacted, and when the debtor is sufficiently susceptible of fear in dread of consequences most dire, the costs in amount are made to exceed for the work done anything that a professional man would think of charging. Notwithstanding exposure, the craft appears to flourish, and flourish per force of its very impudence and imposture.

An observer of the Canadian population who has paid attention to our description of the English pretenders, will have little difficulty in agreeing with us when we say that as a class they are not confined to England. Occasional indications of their existence among ourselves are not wanting. We have more than once seen circulars emanating from Canadian pretenders, which would not disgrace an expert of the mother country. At present, we have none at hand, but the first we can lay our hands upon we shall publish as an illustration of our remarks.

A man to whom a debt is due has a perfect right to ask for payment. It may be admitted that he has also a right to ask for payment through an agent or third party. But that agent has no right to enforce payment through false pretences.

Our object, however, is not now so much to deal with this class of legal pretenders, as to deal with a different class of the same genus well known to us, though unknown in England—we mean "conveyancers." In England, the conveyancer is a lawyer, specially trained to this branch of the profession, and who in life makes it his peculiar and sole avocation. He is learned and reliable. In Canada, the conveyancer is the nearest schoolmaster, some broken down tradesman, or a grocer's clerk with an hour or two unemployed. He is unlearned and unreliable. His idea of perfection is to be able to get hold of a blank so as in one place to fill in a name, in another a sum of money, and in divers places to add "s s" and "ys" or "ies." This done he has earned his money. He knows no more of the contents of

his handiwork than does the fly on the chariot wheel. He draws a deed as the fly of yore propelled the chariot and kicked up a great dust. Talk to him of Premises, Habendum or Reddendum. These he affects to despise because beyond his comprehension. Hence the glorious medley of deeds for leases, and estates, for years conveyed by deeds in fee simple. Hence the simple minded farmer, who fearing the approach of death, and intending to leave his property in certain proportions to his faithful wife and hopeful family, often dies r. ally thinking that he has done so, when in fact he leaves it to nobody, or if to any body to the Courts as a legacy, abounding with latent and patent difficulties. Hence the bereaved wife and fatherless children instead of having a comfortable support are driven out upon the world, after expensive but fruitless endeavors to construe the will, and upon the face of it to tell the testators meaning. And worse than all, the author of the mischief—the mock conveyancer—if known is responsible to no tribunal, and is wholly regardless of the sufferings he has caused. He was ignorant of the laws, and the testator knew it. He undertook only to do his best and he did it With this, the testator was satisfied and he died.

Those who employ "conveyancers" instead of regularly admitted lawyers, to prepare legal documents, fancy they save money by so doing. How vain the fancy is, is only told when it is too late to supply a remedy. And if the object be more than selfish, if it be to cheat the lawyer of his gains, that object is not attained. We remember reading of a dinner party which took place some time since in London. It was a bar dinner, and attended by members of the profession exclusively. One of the toasts drank was "the man who prepares his own will." If the profession were really anxious for the utmost litigation, they could not choose a better plan than that of allowing every man to be his own or his neighbour's lawyer. The consequences of his acts affect rights of property, and in so far as they do so, give rise to interminable law suits.

We write in the interest of the public, not of the profession, when we maintain that something must be done to check the loose system of conveyancing prevalent in Upper Canada. We were glad to see the bill for the purpose introduced during the session before last, by the present Speaker of the Legislative Assembly, and during last session by the Hon. Mr. Patton. And we were sorry to find that each bill from some cause or other died a natural death almost as soon as born. It may be that owing to the existing simplicity of titles to real estate in Upper Canada, the mischief is little felt. But every day alters the case. The mischief is being more and more felt as the world grows older. We begin to find complaints on the subject even in the lay press. We are satisfied that the complaints will increase until the remedy is pplied, and that the sooner it is applied the better for the country.

HARRISON'S C. L. P. ACTS.

When, in May 1856, Mr. Harrison announced his intention to edit and pu ish an edition of the "Common Law Procedure Act, 1856," it was not intended that the work should exceed 400 or 500 pages, and the price fixed was $5 per copy.

The work, however, grew under his hands; and when it became obvious that instead of 400 or 500 pages, it would probably contain double that number, it was determined to issue the work in monthly parts, till the whole should be completed. This the editor, notwithstanding the increased cost of publication, resolved to do, without increase of price, provided the subscription money were paid in advance.

In pursuance of this determination, several parts, of 96 pages each, were issued, when the amending acts of 1857 became law. Mr. Harrison, anxious to consult the convenience of the profession, and to make his work as useful as possible, then proposed to include the acts of 1857, with notes, in his original work, at an increased cost of $2 per volume, making the price of the acts of 1856 *and* 1857 $7 per copy. He, through his publishers, sent circulars to subscribers to the original work, announcing his intention, and undertaking to carry it into effect provided two-thirds of the subscribers agreed to his terms. Two-thirds did so; but for the reasons mentioned in his preface, the project of annotating the acts of 1857 was abandoned, and it was then determined to publish those acts without notes, and to reduce the price of publication from $7 to $6. In this form the work was at length published and distributed.

Subscribers therefore received their copies, with the acts of 1857 in addition to the matter originally promised, and for this were charged an additional sum of one dollar per copy, to cover increased cost of publication. With this arrangement the bulk of the subscribers were well satisfied, and have without hesitation paid the extra dollar; but some subscribers, either not understanding the reason of the increased charge, or, understanding it, and determining to take advantage of Mr. Harrison, have, we are sorry to learn, declined to pay more than $5, the price at which the work was first announced! It is painful to us to advert to such a circumstance. Mr. Harrison, relying upon the generosity of a liberal profession, and upon the honor of brother-practitioners, did much more than he originally promised, expecting that those for whom he toiled would not see him suffer in consequence. It is, however, a plea-

sure to him to state, that with respect to *few—very* few, he has been deceived; and he hopes that after this explanation of his motives and of his services, the few will be reduced to none. The sum of one dollar to each individual subscriber is a petty gain, while in proportion to the number who profit by it, it is more or less a loss to Mr. Harrison. It is hoped that after this explanation, there will not be one man in the profession so unmanly as to refuse to pay the additional dollar: should there be, we shall be both grieved and surprised, and, for the benefit of those inclined to become authors, shall without compunction, if so desired, publish their names in the columns of this journal.

THE GREAT WESTERN RAILWAY COMPANY.

When this Company advertised for a Solicitor, at an annual salary, after the fashion of a tradesman who advertises for "a hand," we took occasion to express our doubts as to the propriety or practicability of the proceeding.

Of the *impropriety*, indeed, it must be confessed we had little doubt. The hire of a solicitor, body and bones, at an annual salary, appeared to us to be not only something new in the practice of the law, but something which savored of a studied insult to the profession. Much to our surprise, however, "a bargain was struck."

Very naturally, the *impracticability* of the proceeding from this time began to develope itself. The Company, through its solicitor, sued right and left, and was sued right and left. Then in the course of time arose, among other things, the question of costs. The Company succeeds in an action, either as plaintiff or defendant. To whom do the costs belong? The judgment in due form awards that the Company (plaintiffs or defendants) do recover *their* costs. Is the Company to be allowed to speculate in law costs? Is it to be allowed to pay a solicitor £500 per annum for his services, and to receive the fruits of his experience and of his labor, as the planter does that of his slave? The speculation, if allowable, might not indeed be a bad one; but to trade in law costs would certainly be a proceeding as novel as the hiring of a solicitor, and, on grounds of professional etiquette, as little justifiable.

The Courts, however, have intervened, and we hope put an end to the bartering. The Court of Common Pleas has decided that in the case supposed, the Company is not entitled to any costs beyond moneys actually and *bona fide* disbursed, and that the solicitor or attorney is paid in full for *his* services by his salary. Such is, after all, the "practicability" of hiring, in its naked form, when the contract is made between solicitor and client. It will be a famous thing for the unsuccessful party in a suit to be compelled to pay only £2 3s. 4d., when otherwise £12 10 might have been collected from him. Every person so situated will, we are confident, thank the Company for its kind consideration; but every man who has at heart the dignity of his profession must see throughout a meretricious union between a trading corporation and a solicitor of the courts, which appears to be as dishonorable in the one as it is degrading in the other.

In this number we are not able to give more than a summary of the decision, which years since we foresaw. It arose out of a case of *Jarvis* v. *The Great Western Railway Company*, which is briefly reported elsewhere. It was an appeal to the Court of Common Pleas from an order of Mr. Justice McLean, and was not decided without the utmost deliberation. At present we do not profess to give more than the facts and the result; on a future occasion we may be able to publish *in extenso* the judgment of the court.

THE SURROGATE COURTS ACT.

We understand that the Judges appointed under this act are now engaged in framing suitable rules and forms for the new Courts. Two of these gentlemen — Mr. Justice Burns and Mr. Vice-Chancellor Spragge—acted some years ago as Surrogate Judges, and Judge Gowan has for years past filled, and still fills that office. From their familiarity with the subject, and their knowledge of the great public inconvenience that existed under the old law, we have no doubt that the new procedure will be of the most simple and expeditious nature in **non-contentious cases — all in fact that the public can** desire. We shall at last have a uniform and intelligible practice.

HISTORICAL SKETCH OF THE CONSTITUTION, LAWS AND LEGAL TRIBUNALS OF CANADA.

(*Continued from p.* 200.)

The successor of de Vaudreuil was the Marquis De Beauharnois, a natural son of Louis IV. of France. His appointment was made on 11th January, 1726. During his rule an angry correspondence arose between himself and Governor Burnet of New York, as to the erection of Forts at Oswego and Niagara. The English erected a fort at Oswego, and the French, to counteract it, erected one at Niagara. Each colony was jealous of the other. Notwithstanding repeated and mutual protests, the two forts were allowed to be maintained; and the French, baffled in their intended removal of the fort at Oswego, erected one at Crown Point on Lake Champlain. From this point they spread devastation among the British, driving them in-

land and laying their farms in waste. Saratoga, within forty miles of Albany, was burnt to the ground, and the inhabitants were either put to the sword or taken into captivity

Dupuy, the Intendant, and successor of Begon, shortly after his arrival in Canada, returned to France. M. Hocquart succeeded him on 21st February, 1731. With the exception of occasional skirmishes between the English and French, and some acts of insubordination among the Indians, nothing deserving special notice occurred until 1744. In this year an important law reform was made. The King of France, knowing that all laws and ordonnances of the mother country were not suited to the condition of the colony, by letter ordered that no edict or law should be in force in the colony unless registered among the records of the Superior Council at Quebec, and that none should be registered unless directed to be so by the King himself. Of this the consequence was very beneficial. The Canadian lawyer was enabled with some certainty to advise his client, and the result was a diminution of litigation.

This was a great reform. No sooner was it enacted than another of almost equal importance was made. The numberless holidays directed to be observed by the Church, instead of being productive of good produced idleness and dissipation. Men neglected their ordinary employments, and industry was in great part forsaken. The colony, in consequence, began perceptibly to suffer. These things having been represented to the King, he, on 17th April, 1744, by letter of that date, commanded the Bishop of Quebec to suppress many Fête days, which the Bishop of course did. Good was the result and well displayed the wisdom of the monarch by whose direction it was accomplished.

The inhabitants now had both time and disposition to till the land. When attention was thoroughly directed to agriculture, the inconvenience of the prevailing divisions and sub-divisions of land became manifest. An effort was made to work a reform in this respect. To understand the nature of it, it will be necessary to explain the nature of the tenure then existing, and which in its chief forms still exists in Lower Canada.

It is presumed that the reader has heard of the Seigniories of Lower Canada, and the attempt now made to abolish them. Every Seigniory is a Fief; and if the Fief or Seigniory is held of the Crown, the lord of the Seigniory is deemed the King's vassal. The larger number of Fiefs, however, are not held directly of the Crown, but are held under other Fiefs. In that case they are Fiefs *servans*, and their seigneurs pay *fay* and *hommage* to the Seignior Suzerain, the lord of the feif, dominant under which they directly hold. Every vassal, according to feudal custom, is obliged to render fealty and homage to the superior lord or king on becoming proprietor of such a Fief. Each Fief in general pays, or is expected to pay, a fifth (called *Quint*) to the monarch or seignior dominant whenever it changes proprietors by bargain and sale, or under any agreement in the nature of or equivalent to a sale. This fifth is or ought to be paid by the purchaser on admission to homage, and is equal to one-fifth of the purchase money. The Crown, however, of grace, usually abates one-third of the fifth. When a fief changes proprietorship under a succession, no seignorial dues are payable. When it descends to a collateral, or is the subject of a donation, the *relief* is payable to the *seignior dominant.* Such is the tenure of Fiefs as introduced to Canada under the Custom of Paris.

A Fief which pays a relief or mutation fine to the Crown on each change of proprietor is said to be held by the custom of *Vexin le Francois.* This differs from the *Quint,* inasmuch as it is only one clear year's income of the Fief. All owners of fiefs are in theory military tenants, and the services, also theoretical, are mentioned in the oaths of fealty and homage. The system is one which had its origin in military times, and has survived the purpose of its inception.

The rights of the Seignior are to be learned in all cases from the original grant from the Crown. In this Province they consist principally of the right to hold courts, already noticed; the right to limit the right to trade with the Indians; the right to grant lands to be held of the Fief in *Roture* at such annual *Cens et Rentes* as can be procured. The *Cens* entitle the Seignior to a mutation fine known as *Lods et Ventes,* which means one-twelfth of the purchase money on a change of ownership. Another right is tha of Banality, or exclusive Mills, at which the tenant must grind his corn, and for which he must pay the Seignior one-fourteenth of each bushel.

On the descent of a Fief, though there is a description of primogeniture, it differs from that of England. Each fief is divisable into small portions, and each portion in its turn becomes a distinct fief. The Crown has no right to refuse as its vassal any heir of the last possessor for that part which by law he inherits. Besides, on descent the division is not an equal one among the children of the deceased owner. If there be two sons, or one son and one daughter, the eldest son inherits two-thirds of the Fief, and is entitled moreover to the principal manor-house and grounds adjoining. Where more than two children succeed, the eldest son has only one-half of the Fief. Among females or collaterals there is no right of primogeniture; and in collateral succession, when there are males and females in equal degree, the females do not inherit.

The seignior *servant* has no right to sell a part of his fief without the assent of his seignior *dominant.* A sale without such assent may be made void. But this does not pre

vent the Seignior granting *arriere* Fiefs, or Fiefs to hold of himself, rendering homage and fealty. This by the law is called *Jeu de Fief*, and extends no farther than two-thirds of the whole Fief. A grant for a greater portion might work a forfeiture.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

Preston, 13th September, 1858.

GENTLEMEN,—The very kind manner in which you have been pleased to receive my former communications on Division Court matters, encourages me again to bring under your notice a certain omission in the Division Court Acts, on account of which plaintiffs are sometimes debarred from obtaining their just claims.

The subject I refer to is *Books of Account* of absconding or concealed debtors.

By the 64th section of the Division Court Act of 1850, the property liable to seizure under warrant of attachment is stated to be such as is liable to seizure under execution for debt; the 89th section of the same Act defines the goods and mentions as exceptions only the wearing apparel and bedding of such person and his family, the tools and implements of his trade to the value of five pounds; from this it has been inferred that books of account are not exempted from seizure and therefore have several times been seized under warrants of attachment. (And I may here remark that such seizure in certain cases has proved the most valuable portion, and been the means of causing the removed or concealed debtor, to pay his debt and release the books of account.) These books of account together with the other goods seized, are thereupon handed over to the custody and possession of the Clerk of the Division Court, who keeps them until they are released or sold. At the day of sale however, no bid happens to be made on such books, although they may contain a number of unsettled accounts, and it being known that there are several parties who are owing the absconded debtor, and are prepared to pay, provided a proper receipt is given to them: yet there being no person authorized to grant such receipt, such accounts are not paid nor the books sold; they remain in the hands of the Clerk of the Division Court, without being of any benefit to either party. Different however it would be if the Division Court Act authorized plaintiffs to collect book accounts of a debtor, in the same manner as they are authorized to collect cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money seized under execution for debt; or if at the time of issuing a warrant of attachment out of a Division Court, a similar warrant against the goods and chattels of such debtor had been issued out of the Superior Courts, in that event the Sheriff, under the Common Law Procedure Act, would be entitled to receive from the Clerk of the Division Court all such goods and chattels as have been placed in his custody, belonging to such absconding, removed, or concealed debtor, and in that case, such book accounts would be collected by due course of law, but it is not often the case that writs of attachment against the same person are issued out of both the Superior and the Division Courts.

And since only so much as will be necessary to pay the claim and costs is required to be collected, it may in many instances be an easier and more expeditious matter to collect several book accounts of an absconding debtor, through the Division Court, than to collect an amount due on a bond or mortgage; the latter may have been given for one large sum, and it may therefore be necessary to enfoce payment for the whole amount, while the former, *i. e.*, the book accounts only a portion requires to be collected to satisfy the judgment and costs.

Would it therefore not be judicious to extend the 90th clause of the Division Court Act of 1850, so as to include also books of account?

I may here mention that I have several of such books of account now in my possession. They were handed over to me as goods attached together with a number of other articles. All the other articles were sold in due course of law, but the books remained in my possession for want of buyers. I had several parties offering to pay the respective accounts against them in the books, upon the condition that I would give them a receipt and indemnify them against further claims on that account; not being authorized to do so, I very naturally declined to conform to those conditions, the result was that since the proceeds of the other goods did not cover the claim, the plaintiffs did not get the full amount due to them. And what is a Clerk to do with the books? He has no authority to hand them over to the Sheriff, unless the Sheriff has also a writ of attachment against the same party. By the 66th section the Clerk is bound to take into his charge and keeping all property seized under warrant of attachment, but I am at a loss to say what a Clerk eventually is to do with such property which at the day of sale finds no buyer, merely for want of a certain authority by which such property might be made very valuable. The 71st section is here not applicable since it refers to a residue which may remain after satisfying judgment and costs.

Another subject on which I would beg leave to make a few remarks, is "*Undefended Suits*" brought before the Judge at the sittings of the Court.

It is a well known fact that by far the greater portion of the suits entered in a Division Court are non-contested cases;—but a very small number virtually requires a decision from the judge, and call into activity his superior abilities, his talent and his knowledge of the law. From a calculation which I have made of several thousand suits, I find the following proportion:—

Of 150 suits entered, there are 70 either paid, withdrawn or not served, of the remaining 80 which were brought into Court for trial, 70 suits were undefinded, and only 10 defended. Notwithstanding the large number of suits, to which no defendant appears, the Judge is required to pass judgment in each of them in open Court, the names of parties must be called and then judgment is rendered by default.

By this practice the time of the Judge is considerably taken up, and since it is customary to call the suits according to number, it frequently happens that parties to a contested suit are delayed and thereby subjected to loss of time, and to unnecessary expense; particularly if the sittings of the Court extend over one day. Plaintiffs in particular sometimes suffer materially under the present practice. Take for instance a merchant who has entered a large number of book acounts for suit, he is required to be in Court with his books and with his witnesses in order to be *prepared* to prove his claims *in case* any defence is made, he is not certain that a defence will not be offered, and is therefore obliged to be ready for an eventual contest, he loses his own time and that of his Clerk as witness, he may have even taken out subpœnas for his witnesses and thereby increased the costs, finally his suits are called, but not a single defence made or even if a few of his suits are contested, he has no doubt, had unnecessary loss of time and expense and incurred costs for witnesses which were not required, though he was obliged to incur the same in order to keep himself on the safe side. Had the plaintiff however known the exact suits in which a defence was in-

tended to be made, he would only have been required to prepare himself with proof for those particular suits, and thereby saved himself time and expense.

These inconveniences might be obviated if the defendants were obliged to give notice of defence a certain time before the trial or hearing; in that case the Court would exactly know the number of undefended cases, and the calling of the names of parties to suits, as also the entering of judgment on the same in open Court, would amount to a mere formality, which could then be easily be dispensed with and a more suitable plan be adopted for the rendering of judgment in such suits. Parties to contested suits would not need to be detained until mere formalities were gone through with, but their suits might be proceeded with at once without interruption.

Would it therefore not promote the convenience of plaintiffs without encroaching on the privilege of defendants, and at the same time lessen the present very arduous duties of the Judge, (who is now required almost mechanically to pronounce and sign a number of judgments,) if defendants who intended to defend a suit were required to give to the Clerk of the Court, a certain time before the trial or hearing, notice of such intended defence, in a similar manner as defendants are at present required to give notice of set-off or other statutory defence by the 43rd section of the Division Court Act of 1850, and that all such suits on which no such notice is given should be considered as undefended suits, and the Clerk of the Court be authorized, immediately after court, to sign judgment on the same for the amount claimed, and also in suits in which a confession of judgment has been given; but that the defendants should have the right of appeal on such judgments, in the same manner as they now have under the 84th section of said act. By the introduction of this amendment, one of the objections raised by parties who are opposed to having the jurisdiction of the Division Courts extended, would at the same time be overcome. This objection is, that the Judge would not *have time enough to attend to all the suits in one day in case the* jurisdiction should be extended, and that therefore the expenses of suitors in the Division Courts would be materially increased if its sittings were extended over one day. But if the Judges were relieved from attending to the great bulk of undefended suits—if that work could be performed by another person, the Judges then might employ their time at the sittings of the Court only with such business as actually required their superior ability, talent, judgment, and knowledge of the law, and the jurisdiction of the Division Courts might be extended.

Believe me, Gentlemen, to remain,
Respectfully yours,
OTTO KLOTZ.

[Again we have our intelligent correspondent Mr. Klotz, with his usual ability, discussing some very important points in the Division Courts law. He is not like many persons who selfishly hoard up any knowledge they possess, for their own personal purposes. A thinking man, and possessing the capability of presenting his ideas in a clear way, he contributes his quota of information for the general good. We should like to see other Clerks follow his example. We are not prepared to adopt his view of the law in one or two particulars, as set forth in the above paper, and we doubt the value of the remedies proposed. Mr. Klotz, however, is fairly entitled to a hearing, and his remarks, we trust, will elicit further discussion on the subject.]

To the Editors of the Law Journal.

London, August 30th, 1858.

GENTLEMEN,—Would you be good enough in your next issue if not troubling you too much, to answer the following query.

If "A." becomes insolvent, and assigns his stock in trade, accounts, notes, &c., to "B." for certain purposes and trusts, is it proper for "B." to sue the *accounts in his own name* as assignee of "A."

By "Addison on Contracts" I take it that this mode of procedure is improper; but at a recent sittings of the Division Court held here, the acting Judge held that it *was proper*, basing his decision on some recent case set forth, as he alleged, in the C. C. Reports, but which I cannot find therein.

I am, your obedient Servant,
"A STUDENT."

[The assignee of a mere chose in action cannot properly maintain an action thereon in his own name, and there is nothing in the Division Courts Act which sanctions the practice. On the contrary, provision is made to meet the case of suits *in the name* of parties no longer interested in the subject matter of the suit.

The 89th section of the Act provides amongst other things, that "securities for money" may be taken in execution; and the following section, 90, shows how such securities are to be dealt with, enacting that they may be sued on by the plaintiff "*in the name of the defendant*, or in the name of any person in whose name the defendant might have sued for the recovery, &c.," and "that it shall not be competent for the defendant in the original cause to discharge such suit in any way without the consent of the plaintiff or of the Judge." And the Division Court Rule, No. 19, requires this cautionary notice in suits brought in the name of a party not beneficially interested.

"The defendant is informed and cautioned that A. B. (*the beneficial plaintiff*) only has power to discharge this suit, the subject matter of this suit having been seized in execution."

With all respect for the acting Judge in London, we must think that he was wrong in allowing the suit to proceed in the name of the assignee if the objection was taken. We are aware of no case in our own Courts upon which a decision permitting the assignee of an ordinary chose in action to sue in his own name could be based. The right is recognized without limit in the Courts of the State of New York, where it has produced much complication and confusion.

We would be sorry to see such a rule established in any of our Courts. The Law in this particular is administered according to our notion of it in all the Division Courts of which we have personal knowledge, and we notice that Judge Gowan, in his Analytical Index to the D. C. Law, gives a special heading to "Choses in action."

It is possible that our correspondent may have mistaken the Judge's ruling. If the case was styled "A. B. assignee of C. D. or E. F.," the Judge on the objection being taken would probably at once amend by striking out the words, "A. B. assignee of." Or if no objection was taken by the defendant, the Judge would not be called upon himself to except to the form of the proceeding.]—EDS. L. J.

To the Editors of the Law Journal.

VIENNA, Sept. 4, 1858.

GENTLEMEN,—You will oblige by answering the following question, in your next issue.

Under the Division Courts Act (judgment summons) a Judge has it in his power to commit a debtor to the common gaol, &c. Will the new Act of 22nd Vic. cap. 96, affect the above?

Yours, &c.,
SEMPER IDEM.

[The new law for the abolition of arrests in certain cases does not touch the Judgment Summons sections in the Division Courts Act. The 22 Vic. cap. 96, relates only to the Superior Courts, including the County Courts, and to actions therein. The first section alone has *general* application, and reads thus: "After the 1st September, 1858, no person shall

be arrested upon *mesne or final process,"* (terms obviously relating to process of the Superior Courts, *capias, ca sas.* &c.) in any civil action in any of her Majesty's Courts in Upper Canada (these are terms inapplicable to the Division Courts, and including only the Courts of Common Law, the Courts of Chancery, and the County Courts), *except in the cases and in the manner hereinafter provided for."* The act then prescribes the mode in which a Judge's order may be obtained for writs of *capias* and *ca sas* from the Superior Courts; and there can be no color of ground for supposing that the letter of the act touches the judgment summons clauses in the Division Courts Act. The provision referred to relate to *arrests for debt;* the provisions of the Division Courts Act to punishment for *fraud.* The principle is essentially different.—EDS. L. J.]

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

(*For the Law Journal.*—BY V——.)

[CONTINUED FROM PAGE 205, VOL. IV.]

Should it happen that a Bailiff having a ground of defence either under the 107th section of the Division Courts Act, or under the 24th section of the Division Courts Extension Act, has omitted from some cause to give the notice required to enable him to avail himself of such defence, he may apply for an adjournment to enable him to do so under the 26th section of the Extension Act, which empowers the Judge holding any Division Court if he think it conducive to the ends of justice to adjourn the hearing of any cause in order to permit either party to "serve or give any notice which may be necessary to enable such party to enter more fully on his defence upon such conditions as to the payment of costs, admission of evidence, or other equitable terms as to him may seem meet."

In addition to the protection already spoken of in respect to actions brought against Bailiffs for acts done in the performance of their duty, a valuable one under the 107th section remains to be noticed. It is that the plaintiff shall not recover in any action if tender of sufficient amends shall have been made before such action brought, or if after action brought a sufficient sum of money shall be paid into Court with costs, by or on behalf of the defendant."

First, as to defence of *tender of amends before action brought.*

Where an officer finds that he has acted illegally, as by a a seizure of a third party's property, (which of course he should give up as soon as he discovers his error), or the like, he ought at once to take the precaution of tendering to the party injured, a sum of money amply sufficient to make amends for the trespass or wrong committed, that such party may have no excuse for bringing an action.

In making the tender care should be taken to produce the cash, and the offer should be unconditional and unqualified, or in all probability it would be held to be no legal tender. It is not always easy to determine what would be an adequate sum to compensate the party, but it is better in this particular to be on the safe side, and tender something beyond what would make amends for the illegal act and its consequences to the party injured. An officer himself may have an independent private claim, or note or account against the party and think it will be sufficient to propose to credit the sum offered by way of amends on such claim; or if the note or account is insufficient for the purpose to tender a part and the note or account for the residue; but this is not a good tender, for as before mentioned the amount must be offered in cash. If an action is brought after tender made, the amount offered should be paid into Court (actions in the Division Court are now referred to) and a notice of defence under the Statute in the form before given should be served by the defendant, inserting specially "that before this action was brought sufficient amends were tendered by him to the Plaintiff for the matter alleged against him in the Plaintiff's claim, and that the amount so tendered, viz., £——, hath been paid to the Clerk of the Court for the plaintiff." The defendant must be prepared to prove at the trial the fact of tender, should the plaintiff proceed with the action. Unless the plaintiff be able to prove a claim exceeding the amount tendered he cannot recover in the action. It may be observed in addition, that although a a party may in the first instance refuse to accept the sum tendered, yet if he alter his mind at any time before action commenced, and state to the officer that he is willing to accept in satisfaction the sum previously offered, and the officer does not pay him, the legal benefit of the previous tender is lost.

Payment into Court.—On this point there is little to be said If an officer has not tendered amends and an action is commenced against him, and there is no defence to the same he should pay into Court a sum sufficient to cover the utmost claim that can be proved against him, with the costs up to the time of such payment, and give notice similar to that in case of tender of amends to the plaintiff, leaving him to proceed for any further claim on his part.

As a practical suggestion we would recommend officers on claims against them for unascertained damages, to lay the matter before one or two disinterested and respectable neighbours, ask their opinion as to the amount of damages sustained, and then tender and pay into Court something more than the amount they fix, and afterwards call them if required as witnesses at the trial.

THE MAGISTRATE'S MANUAL.

BY A BARRISTER-AT-LAW —(COPYRIGHT RESERVED.)

[*Continued from page* 206, VOL. IV.]

V.—HEARING OR INVESTIGATION.

Form of statement of Accused.—Whatever the accused after being cautioned as already mentioned, chooses to state, should be taken down in writing, and his statement may be in the following form:*

Province of Canada, (*County* or *United Counties, or as the case may be*) of ——

A. B. stands charged before the undersigned, (*one*) of Her Majesty's Justices of the Peace, in and for the (*County* or *United Counties, or as the case may be*) aforesaid, this —— day of —— in the year of our Lord ——, for that the said A. B., on ——, at ——, *&c. as in the caption of the depositions;*) And the said charge being read to the said A. B. and the witnesses for the prosecution C. D. and E. F. being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything, in answer to the charge?

* 16 Vic. c. 179, Sch. N.

You are not obliged to say anything, unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial." Whereupon the said A. B. saith as follows: (*Here state whatsoever the prisoner may say, and in his very words as nearly as possible. Get him to sign if he will.*)

A. B.

Taken before me, at ——, the day and first year above mentioned.

J. S.

Statement not to be Sworn—The statement when taken is to be signed by the magistrate, and by the accused if he is willing to do so. But whether signed by the accused or not, it must appear upon the face of the statement, that the accused has not been sworn. Where the statement concluded, "taken and *sworn* before me," it was rejected when tendered as evidence, though the words "and sworn" had been inadvertently inserted.*

Witnesses for defence.—It is for the prisoner, his attorney or counsel to decide whether it is advisable at a preliminary investigation before a magistrate to call witnesses for the defence. If a commitment be probable, it might be well to advise the accused to withhold his defence until the trial in the Superior Court, so as to avoid the risk of needlessly prejudicing his case. This, however, is matter of discretion for the prisoner and not for the magistrate. If the prisoner, his counsel or attorney has grounds to believe that he can satisfy the magistrate of his innocence, and so either procure his discharge or admission to bail, he will of course call witnesses. When he does call witnesses their depositions are to be taken down in writing in the same manner as those for the prosecution. So the prosecutor may in like manner cross-examine the witnesses for the defence whenever their evidence in chief is finished.—(Stone's Petty Sessions, 276).

Remanding Prisoner.—If from the absence of witnesses or from any other reasonable cause it become necessary or advisable to defer the examination or further examination of witnesses for any time, the magistrate may by warrant from time to time remand the accused. The remand may be for such time as the magistrate in his discretion shall deem reasonable, *not* exceeding eight clear days at any one time. If the remand be for a period not exceeding three clear days, the magistrate may verbally order the constable to continue to keep the accused in his custody and to bring him before himself or such other magistrate as may be acting at the time appointed for continuing the examination. In all cases the magistrate has power to order the accused to be brought before him or before any other magistrate of the same territorial division at any time before the expiration of the time for which the remand is made. †

Form of Warrant remanding accused.—When a warrant to remand is necessary, it may be in this form:—

Province of Canada, (*County* or *United Counties, or as the case may be*) of ——.

To all or any of the Constables or other Peace Officers in the said (*County* or *United Counties, or as the case may be*) of ——, and to the keeper of the (*Common Gaol* or *Lock-up House*) at —— in the said (*County, &c.,*) of ——.

Whereas A. B. was this day charged before the undersigned (*one*) of Her Majesty's Justices of the Peace in and for the said (*County* or *United Counties or as the case may be*) of ——, for that (*&c., as in the Warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.; These are therefore to command you the said Constables or Peace Officers, or any one of you in Her Majesty's name, forthwith to convey the said A. B. to the (*Common Gaol* or *Lock-up House*) at ——, in the said (*County, &c.,*), and to deliver him to the Keeper thereof, together with this Precept; and I hereby command you the said Keeper to receive the said A. B. into your custody in the said (*Common Gaol or Lock-up House,*) and there safely keep him until the —— day of —— (*instant*), when I hereby command you to have him at ——, at —— o'clock in the (*fore*) noon of the same day before (*me*) or before some other Justice or Justices of the Peace for the said (*County* or *United Counties, or as the case may be,*) as may then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the mean time.

Given under my Hand and Seal, this —— day of ——, in the year of our Lord, ——, at ——, in the (*County, &c.*) of —— aforesaid.

J. S. [L. S.]

Admitting accused to bail instead of remanding him.—The magistrate may in his discretion instead of remanding the accused to prison until the day fixed for further examination, admit him to bail in the meantime. The accused may in such case be discharged upon entering into a recognizance with or without sureties in the discretion of the magistrate. The condition of the recognizance will be for the appearance of the accused at the time and place appointed for the continuance of the examination.*

FORM OF RECOGNIZANCE.

† Province of Canada, (*County* or *United Counties or as the case may be*) of ——.

Be it remembered, That on the —— day of ——, in the year of our Lord ——, A. B. of ——, (*laborer*), L. M. of ——, (*grocer*), and N. O. of ——, (*butcher*), personally came before me, (*one*) of Her Majesty's Justices of the Peace for the said (*County* or *United Counties, or as the case may be*), and severally acknowledged themselves to owe to our Lady the Queen the several sums following, that is to say: the said A. B. the sum of ——, and the said L. M. and N. O. the sum of ——, each, of good and lawful money of this Province, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, Her Heirs and Successors if he the said A. B. fail in the condition endorsed.

Taken and acknowledged the day and year first above mentioned, at —— before *me*. J. S.

CONDITION.

The condition of the within written Recognizance is such, that whereas the within bounden A. B. was this day (*or on —— last past*) charged before me for that (*&c. as in the Warrant*): And whereas the examination of the Witnesses for the prosecution in this behalf is adjourned until the —— day of —— (*instant*); If therefore the said A. B. shall appear before me on the said —— day of —— (*instant*), at —— o'clock in the forenoon, or before such other Justice or Justices of the Peace for the said (*County* or *United Counties*) of —— (*as the case may be*) as may then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, then the said Recognizance to be void, or else stand in full force and virtue.

Notice of Recognizance.—As usual when a recognizance is taken, the magistrate should give to the accused and his sureties a notice thereof which may be in this form:—

Province of Canada, (*County* or *United Counties, or as the case may be*) of ——.

* Rex v. Rivers, 7 C. & P. 177.
† 16 Vic., cap. 179, sec. 13.

* 16 Vic. cap. 179, sec. 13.
† Ib. Schedule, Q. 2.

Take notice that you A. B. of ——, are bound in the sum of —— and your Sureties L. M. and N O. in the sum of ——, each that you A. B. appear before me J. S., one of Her Majesty's Justices of the Peace for the (*County* or *United Counties, or as the case may be*) of ——, on —— the —— day of —— (*instant,*) at —— o'clock in the (*fore*) noon, at ——, or before such other Justice or Justices of the same (*County* or *United Counties or as the case may be*) as may be then there, to answer (*further*) to the charge made against you by C. D., and to be further dealt with according to law; and unless you A. B. personally appear accordingly, the Recognizances entered into by yourself and Sureties will be forthwith levied on you and them.

Dated this —— day of ——, one thousand eight hundred and ——.

J. S.

Proceedings upon breach of recognizance.—Should the accused not appear at the time and place mentioned in the recogizance, the magistrate or any other magistrate who may then and there be present may certify upon the back of the recognizance the non-appearance, and transmit the recognizance itself to the County Crown Attorney for the territorial division within which the recognizance was taken. Thereupon the recognizance may be proceeded upon in like manner as other recognizances. The certificate is to be deemed sufficient *prima facie* evidence of non-appearance.*

Form of Certificate.—The certificate may be in this form :—

I hereby certify that the said A B. hath not appeared at the time and place, in the above condition mentioned, but therein hath made default, by reason whereof the within written Recognizance is forfeited. J. S.

Order of proceedings before a Magistrate.—To prevent confusion on a preliminary investigation, the following summary of the order of proceedings may be given :—

1st. Prosecutor's attorney to open case.

2nd. Deposition of prosecutor's witnesses taken.

3rd. Accused invited at the close of each witness' examination, to put questions to the witness, such cross-examination being distinguished in the deposition from the examination in chief.

4th. When case for prosecution completed, depositions to be read over to and signed by witnesses.

5th. Attorney of accused to address the bench, if case for proscution be completed, or if not completed and remand intended, to state his objections to a remand.

6th. If evidence insufficient, the accused to be discharged

7th. If evidence incomplete, the accused to be remanded or bailed to a future day.

8th. If evidence sufficient and case completed, depositions to be read over to the accused.

9th. Magistrate to caution accused.

10th. Statement of accused to be taken down and read over to him.

11th. Witnesses of accused (if any) to be heard and their depositions taken.

12th. Cross-examination of witnesses for accused.—(Oke's Magistrate's Synopsis, 659).

* 16 Vic., cap. 179, Sec. 13.

COMPETITION OF LAW AND EQUITY.

Mr. Atherton's Bill for the amendment of the Common Law Procedure Act was probably suggested by the fear that Equity, as improved by the Bill of the Solicitor-General, would become a dangerous rival of Common Law. Yet this very Bill is a most unmisteakable proof of the tendency towards a fusion of law and equity. It does not, indeed, add to the equitable jurisdiction of the Courts at Westminister, but it proposes to transform the whole common law machinery into the likeness of the Court of Chancery. Our own belief has long been, that the improvement of our Courts will gradually lead to an absolute identification of the two rival judicial systems which now exist, and that this can only be effected by the absorption of the narrower in the larger system, and by the acknowledgment in all courts of the rights and the principles which have developed and established by the Chancellor's equitable jurisdiction. But, if the change is to be successful, it must be brought about by the gradual infusion of equitable principles into the common law courts, not by any sudden attempt to convert machinery devised for one purpose into the very different organisation which has grown up on a different foundation. Mr. Atherton's Bill jumps over fast at the final result. It grapples with none of the difficulties of the case, but leaves everything to be worked out by a staff of judges, who have not hitherto shown much alacrity in adopting the enlarged principles of courts of equity.

The actual position of the law by which the procedure of the common law courts is regulated is a curious illustration of this. Equitable pleas are allowed; but, by some means or other, a defence which would certainly succeed before a Vice-Chancellor more often than not breaks down when urged in the uncongenial atmosphere of Westminister Hall. The failure is, no doubt, partly due to the fact, that the precise and scientific theory of pleading, which, after its wretched failure under the strict *regime* of the "New Rules," has still been retained in a modified and we believe a merely transitional shape, is wholly unsuited to the larger and more liberal doctrines of courts of equity. When certain specific facts give settled defined rights, it is possible to bring a quarrel to definite issues of law and fact. But how is pleading be of any use where the question is, whether a series of dealings are or are not consistent with good faith, or whether the circumstances are such as to justify the court in exercising a discretionary power of granting an injunction on terms, or a decree for specifying performance? *The extension of the law so as to embrace all equity, which we look to see at some future time,* must be preceded by the adoption of the system of pleading at large, which, however wanting in theoretical precision, is found to work so satisfactorily in courts of equity. The object of all pleading is only this, to secure that every case shall be tried on the merits. Now, we assert, without fear of contradiction, that every case in Chancery is now decided on the merits. Let the pleader be as clusmy as he may, he really cannot imperil his client's interests by his want of skill. Under the common law system, it used to be rather the exception than the rule for a case to be decided purely on the merits. At least, as often as not, what the Courts determined by elaborate judgments was whether Mr. A. or Mr. B. was the better pleader, not whether plaintiff or de

fendant had the better right. Modern changes have enormously diminished this evil, and have done so just in proportion as the oldest strictness of pleading has been abandoned. But the evil is not yet quite eradicated, and never will be so until the innovations reach the goal to which they have been long tending, in the absolute abandonment of special pleading. Partly from the want of harmony between this system and the doctrines of equity, and partly from the reluctance of the bench to adapt itself to new ideas, the large equitable jurisdiction given to the courts of law has produced much less benefit than was expected from it. This is the ground of Mr. Atherton's proposed amendments. Let us examine the mode in which he attempts to remedy this mischief, and see whether it is likely to lead to happier results.

The Common Law Procedure Act of 1854 enacted that in all cases of breach of contract, or other injury, on which an action for damages could be maintained, the Court might issue a writ of injunction; and that in any action, except replevin and ejectment, a writ of mandamus might be claimed to enforce the fulfilment of any duty in which the plaintiff was interested. The judges have not exercised the power very freely, and the present Bill seeks to change this disposition by re-enacting the same clauses in different words, the only alteration being that the power is to extend to all cases where a court of equity would have jurisdiction which practically repeals the restriction as to replevin and ejectment, but in other respects leaves the law much where it was. If the judges were likely to obey a second mandate of the Legislature in a different spirit from that in which they received the first, there might be some use in repeating the enactments which have hitherto proved so ineffectual. The third and fourth clauses of Mr. Atherton's Bill are very different in their tenor. The third clause says almost in so many words, that a court of law is henceforth to give the same relief as the Court of Chancery, and to make and enforcehe *same decrees, and exercise the same* powers. Now we venture to submit, that a general direction of this kind must prove a failure. If equity jurisdiction can be grafted on to law it will grow there; but simply to issue an edict that the Common Pleas or the Exchequer is henceforth to be a Court of Chancery, and is to work out the new duties as well as it can, is to pave the wayfor one of two results. Either the jurisdiction will be tacitly dropped, or the whole equity system will be corrupted by being thrown bodily into the hands of courts and officers uttterly unprepared by any previous association for the administration of this class of business. Bit by bit the common law courts may be inoculated with equity. But there is more haste than good speed about Mr. Atherton's project. The fourth clause curiously illustrates the absurdities which are involved in this crude and sweeping method of reform. It actually directs a court of law, in certain actions of ejectment, to restrain the setting up of the legal title as a court of equity now does. It is intelligible that a court which recognizes trusts should restrain the setting up in another court which refuses to acknowledge equitable estates of a title not equitably good. But what can surpass the absurity of a Court issuing an injunction against the production of particular evidence before itself? The whole system of injunctions is the consequence of our double courts acting on diverse principles. But to perpetuate the sham conflict, when the whole jurisdiction is merged in one tribunal, is the most whimsical contrivance that ever was dreamed of. If courts of law are to adopt the doctrines of equity, let them regard the real beneficial interests brought before them, a course which must lead to the abolition of the privileges of the legal estate. But, to say that a Court is to do violence to itself, and exclude the fact of an outstanding estate, because, if admitted, it would not know how to give precedence to an equitable interest, is to establish a system of fictions far exceeding in absurity the old myth of John Doe and Richard Roe.

The machinery clauses of the Bill are framed in the same happy disregard of the real exigencies of the case. Masters of the Queen's Bench and other courts are straightway to become chief clerks, just as judges are to become Vice-Chancellors; but no provisions are inserted, or apparently thought about, to harmonise these new functions with the unaccommodating rigidity of common law pleading and practice. The judges are to do all this by orders as well as they can; and, as their experience lies wholly in another field, they will not be very grateful to Mr. Atherton for the task he wishes to cast upon them.

The end and object of this bit of legislation is undeniably good, but many a cautious step and much thoughtful labour must intervene before the goal, which Mr. Atherton is so eager to reach, can be arrived at, without some lamentable disasters on the road.—*Solicitor's Journal.*

LAW AND POLITICS.

Jurisprudence, next to the moral law, is the noblest branch of that general law "whose seat is in the bosom of God and whose voice is the harmony of the world." One of the oldest of the sciences, we behold in it an aggregate of the wisdom and experience of ages; and viewed in its relations to the interests of society it yields only to theology in importance. Presenting itself as the proudest achievement of the human intellect it forms, in its latest and most sublime development, a theme for study worthy of the loftiest powers, and requiring the earnest application of *all* who would master its intricacies.

He who approaches the study of the law with the intention of becoming one day an expounder of it, sets for himself a task which will lay all of his resources under contribution. He commits himself to a struggle which, if pursued faithfully to the end, will allow none of his forces to lie by in reserve. If he have a just sense of the responsibility of the office to which he aspires, the amount of labor to be performed before he can conscienciously say that he is fitted to exercise its duties, appears almost Herculean. No end of crabbed technicalities, precise definitions, dry formulas, and abstract principles must be mastered before he reaches even the door of the treasure-house that encloses its mysteries.

But suppose him to have mastered these, and entered upon the practice of the law. Is his work done? Can he now say, "Soul take thine ease?" Far from it. He has now become the professed votary and sworn interpreter of a science which demands a more profound investigation and unwavering attention than, perhaps, any other. Sur-

rounded by clients whose property, honor, nay, perhaps life even depend upon him, his study and application becomes, or should become, only the closer and more anxious. The reading of a thorough-paced advocate, one ready for every emergency, is almost unlimited—a life time is scarcely sufficient for its requirements.

The labor of the lawyer being so vast, his profession so elevated, must not this "dabbling in politics," which has of late years become so common, interfere seriously with his duties? The celebrated pulpit orator, Henry Ward Beecher, in an addres to a class of young men about to step from the college curriculum into the active duties of life, after giving them sound advice for their guidance in the pursuit of each of the professions, closed by saying "Some of you will be politicians. To such all I can say is, May God help you!" And all that *we* can say to both the political lawyer and his client is, May God help you!

To prevent misunderstanding, we would here draw a dividing line. There are two kinds of politicians, very different in their characters—those who study polities as the science of government, and those who study it as an art. The former are statesmen; the latter partizans. The former an ornament to the profession; the pursuits of the latter are far from conforming to the elevated standard it should ever maintain.

We have nothing to say against any man playing the game of politics whose tastes may lead him so to do; but that one immersed in it can at the same time pursue the practice of the law, with the calm, intelligent, and upright spirit it demands is, we conceive, utterly impossible. No two paths can be more widely divergent than those of the lawyer and the partizan office-seeker. A character for stern and unflinching adherence to the principles of truth, honor and justice is indispensable to every lawyer who would succeed and become worthy of the name. We are all sufficiently acquainted with the life of the political "wire-puller," to know that his career, forcing him

"Too and back, lackeying the varying tide,"

is far from fostering the growth of any such elements of character. The greedy thirst for political power *multos mortales falsos fieri subegit*, says Sallust, and lawyers when they become smitten with it, are no exceptions to the remark.

The law is a jealous mistress, and he who would woo her with any hope of success, must approach her with no divided love. Let this be remembered by every lawyer, let him pursue his profession with an eye single to its greatness and importance, allowing nothing to draw him aside from the full and conscientious performance of his duties, and he may rest assured that his colaborers will never have cause to blush for his inefficiency.—*Legal Intelligencer.*

The attention of Clerks of Municipalities is directed to sec. 1 of the Act of last Session for the Registration of Debentures (cap. 91). It is thereby made the duty of every Municipal Clerk, *within three months after the passing of the Act*, (16 August, 1858), to transmit to the County Registrar a copy of *every* By-law heretofore passed, under the authority of which any money may have been raised by the issue of Debentures, together with a return in the form there given.

U. C. REPORTS.

COMMON PLEAS.

IN BANC

Reported for the U. C. LAW JOURNAL.

TRINITY TERM, 1858.

Before the Hon C J DRAPER, the Hon MR JUSTICE RICHARDS, and the Hon MR. JUSTICE HAGARTY.

JARVIS v. THE GREAT WESTERN RAILWAY COMPANY.

Costs—Salaried Agent.

The Defendants engaged the exclusive services of an Attorney, in consideration o a certain annual salary, and under no consideration whatsoever was he to charge them *costs* for such services. The Defendants further stipulated with their Attorney that in all cases where costs were directed to be paid to them they should accrue to the benefit of the Attorney, less such disbursements as should have been paid by them in the prosecution of the proceedings.

Held, that under such an agreement the Company was not entitled to costs beyond the actual and necessary disbursements of the cause

An action on the case had been brought by the plaintiff against the defendants, when a verdict was found for the defendants. On the 23rd July, the defendants taxed their costs. On the taxation it was objected on behalf of the plaintiff that no costs could be allowed the defendants except such costs as they had paid or were legally liable for. The Master overruled the objection, and taxed the costs as between party and party.

On the 31st July the plaintiff obtained a summons calling on the defendants to show cause why the Master should not be ordered to revise his taxation.

On the 4th August the summons was heard and discharged with costs, by Mr. Justice McLean.

On the 25th August a Rule Nisi was obtained from this Court for the defendants to show cause why the order of Mr. Justice McLean, and all proceedings had or taken thereunder should not be set aside, and why the Master should not be ordered to revise his taxation of the costs, by disallowing to the defendants all charges save those which the defendants paid or for which they were legally liable to or chargeable with by their Attorney.

Several affidavits were filed on behalf of the plaintiff tending to show the agreement that existed between the defendants and their Attorney as to costs.

Two affidavits were read on the part of the defendants. One the affidavit of their Attorney, the other the affidavil of the Managing Director of the Defendants, which principally went to corroborate the statement contained in the former.

The plaintiff cheifly relied on the statement contained in the affidavit of the Defendants' Attorney, and as the judgment of the Court was to a great extent founded on the admissions contained therein, we extract from the affidavits two of the principal paragraphs which to the terms of the agreement that existed between the defendants and their Attorney.

"That the costs against the plaintiff in this cause are mine, that is, such as are disbursements by the defendants, and have not been paid out by me, I shall have when collected to reimburse them, but such costs as have been taxed to me as the attorney's costs in the cause are mine, and are due to me, and will not become the property of the defendants under any circumstances whatever.

"That the engagement I have with the defendants does not in any way affect my right to costs in any cases in which costs may be recoverable by me, but that I am paid a salary in lieu of rendering any bills of costs as against them only.

M. C. Cameron showed cause against the rule, and contended that the defendants were justified in entering into such an agreement as set forth in the affidavits, without in any way destroying their right to receive full costs from the plaintiff.

Adam Wilson, Q C., and *Anderson*, in support of the rule submitted that such an agreement utterly debarred the defendants from recovering costs from the plaintiff beyond the amount for which they themselves were liable to their attorney, namely, actual disbursements and that the statements in the affidavit of the attorney as to the "costs being his," were wholly unsupported by authority, in no case are costs directed to be paid to the attorney, nor is the attorney to be considered otherwise than as the agent of his principal or client. If the principal as was laid down in *Doely v. The Great Northren Railway Co.*, 4 Ellis & Bl., 341 could not recover costs against the opposite party, his attorney could be

in no better position. The language of the judgment obtained by the defendant ought to be conclusive on the question "that the plaintiff take nothing by his said writ, &c., and that the defendant (*not* his attorney) do recover against the plaintiff for his costs.

The Court made the rule absolute.

CHANCERY.

(Reported by THOMAS HODGINS, LL. B., Barrister-at-Law.)

(IN BANC.)

BALDWIN V. DUIGNAN.

Registry Act—Mortgage for purchase money—Absence of endorsed receipt not notice—Priority.

A mortgage for unpaid purchase money not registered before other mortgages cannot obtain priority where the subsequent mortgagees have no actual notice of the vendor's lien. The absence of an endorsed receipt for the purchase money is not actual notice to the subsequent mortgagees.

The plaintiff executed a deed of conveyance of certain land to the defendant, and took from him a mortgage for the amount of the purchase money. The conveyance was registered; but the mortgage was delayed for the defendant's wife to bar her dower. In the meantime, the defendant mortgaged the property to others who registered their mortgages and thus obtained priority. This suit was instituted to obtain for the mortgage by which the unpaid purchase money was secured, priority over the subsequent mortgages on the ground that the absence of a receipt for purchase money, was notice to subsequent mortgagees of the vendor's lien.

Hector for plaintiff.

Roaf for defendants Sanderson and Leveridge.

ESTEN, V. C.—I do not think the plaintiff has any *locus standi*, and I think he must be postponed to Sanderson and Leveridge, and must redeem them. There is I think no lien; it is excluded by the mortgage, although not executed by Mrs. Duignan, and for that, and other reasons perhaps not registered. The plaintiff must therefore rely on his mortgage, which is clearly void at law, and also, I think, in equity. The absence of an endorsed receipt being constructive notice of the money not being paid, and consequently of the lien, which there was not, cannot be sustained. The defendants are not driven to rely on the surrender of the deeds, which however assisted the legal fraud, although all the title deeds may not perhaps have been delivered to them.

SPRAGGE, V. C.—I think this case is governed by the Registry laws. Apart from the circumstance of the plaintiff's mortgage being worded to secure unpaid purchase money, it is the ordinary case of the subsequent of two mortgages being first registered, and so obtaining priority—which priority could only be affected by actual positive notice; and which notice is not shown in this case. Then, does the circumstance of the first mortgage being for unpaid purchase money take it out of the ordinary rule? I cannot say it does, or how it can, for registration without actual notice is, to a purchaser for value, a protection against prior claims, legal or equitable. It is difficult to put a stronger case than the one of most frequent occurrence: that of a prior purchaser who has paid his purchase money and has a conveyance; of course the case of a prior mortgagee forms part of the same rule, being a purchaser *pro tanto*. I do not see any good ground for the exception either in the form of a vendor's lien, or whether it rests upon the ordinary equity of a vendor whose purchase money has not been paid, or whether he has, for his more effectual protection, secured it by a mortgage. The absence of the endorsed receipt could, at most, be constructive notice not affecting the purchaser having a registered conveyance.

I have not thought it necessary to consider the effect of a vendor being, as here, also mortgagee and allowing the title deeds to remain in the hands of the mortgagor, or rather delivering them into his hands,—for the purchase and the mortgage appear to have been one transaction.

PARKS V. BROWN.

Security for costs—Death of Infants' next friend within Jurisdiction.

Where during the progress of a suit it occurs that all parties reside out of the jurisdiction, there may be an application for security for costs. (25th June, 1858.)

In this case it appeared that the Infants were the only parties residing within the jurisdiction of the Court,—their next friend having died, and no new guardian having been appointed.

Macgregor moved for an order for security for costs.

G. Morphy opposed the motion. The next friend of the infants had only just died, and enquiries were being made as to who was their nearest relation within the province so as to have another guardian appointed.

THE CHANCELLOR thought the application should be granted, as all parties to the suit, resided without the jurisdiction of the Court. But that should the infants be able to find another next friend within the province, application might be made to discharge the order.

CHAMBERS V. CHAMBERS.

Opening Publication.

Where publication has passed and neither party has moved in the suit, the Court will use a discretion to open or enlarge publication.

(24th Sept., 1858.)

In this case the Bill was filed 6th October, 1851. Plaintiff examined some witnesses at Kingston in May 1852. Another examination was agreed upon by the solicitors of both parties to be held there in August 1854, on condition of the Plaintiff's paying the expenses of the Defendant's counsel proceeding there; but owing to the late arrival of the letter enclosing the necessary amount the Defendant's counsel could not attend, and no examination took place.

Cattanach (for *C. W. Cooper*,) moved for leave to open publication, and read affidavits of Cooper and Plaintiff, stating that the delay had been occasioned by negociations for settlement between the parties.

Hodgins opposed the motion, and read the affidavit of Mr. Whitrock, formerly solicitor for the defendant, which stated that no new negociations for settlement had taken place between the time of examination and *his ceasing to act as defendant's solicitor* in 1856; and that plaintiff had little, if any interest in the suit. The reason defendant had not dismissed Plaintiff's bill was that feeling his position sure, he had not moved.

ESTEN V. C., I consider it advisable to grant the order on payment of the costs of this application. It appears that Plaintiff examined witnesses in 1852, when I suppose publication closed, and obtained a new appointment for 1854; but owing to facts very indefinitely stated in the affidavits, the examination did not take place. From 1854 to 1858 either party could have moved, and the defendant not having done so, and as he believes his case strong, it will not injure his position to open publication on plaintiff paying the costs of the application.

COMMON LAW CHAMBERS.

Reported by A. MCNABB, Esq., B. A.

BANK U. C., V. VANVOORISH AND ARNOLD.

Judgment—Appearance—Costs.

Where an appearance is entered in due time, and judgment as for want of an appearance is signed—and defendant is guilty of laches and no affidavit of merits judgment will not be set aside.

A summons was issued on 15th March, calling on plaintiff's to shew cause why the judgment signed in this cause and the writ of execution and all subsequent proceedings thereon; should not be set aside, so far as relates to defendant Arnold, on the ground, that judgment was signed after an appearance had been entered for Arnold within the proper time after service of the writ of summons.

The action was brought to recover the amount of a promissory note made by defendant Arnold, and endorsed by defendant Vanvoorish. The summons (a specially endorsed one) was served on both defendants on 7th December last, and an appearance was duly entered on behalf of Arnold on 14th December, and final judgment was signed against both defendants on 19th of same month as in no appearance had been entered for either. A *fi. fa.* was issued on 12th January, and placed in the hands of sheriff of Oxford of

13th January. Defendant Arnold stated in his affidavit that he was not aware of any judgment having been signed against him, until the fourth day of March, and that then he heard of it through *his attorney Edward Martin*, who discovered in searching the Registry office that a certificate of judgment had been registered there—the delay in applying between the 4th and 15th of March, was satisfactorily accounted for.

Jackson, showed cause. Defendant swore positively that he had had no notice of the proceedings; that he had proceeded regularly, and that after he had appeared, the power given by the statute to sign judgment without declaring was gone. Mr. Jackson contended that such judgment was a nullity, and if a nullity, that he could apply at any time to set it aside. That probably the sheriff had several executions against the defendant, and that he did not understand the Deputy Sheriff as referring to this cause, and therefore it could not be said he had a knowledge of the plaintiff's proceedings in the action and that he had so sworn. He cited *Roberts* v. *Spurr*, 5 Dowl. P. C. 351.

Gibson, S., contra.

He submitted that defendant had not applied in time to set aside the judgment; the same having been signed on 19th December, and did not apply to set it aside until nearly 3 months after That the Deputy Sheriff of Oxford swore positively that, three or four days after the receipt of the writ of *fi. fa.* by the Sheriff, he saw defendant Arnold, and informed him that such writ was in the Sheriff's hands for execution, and that Arnold replied that he would try and arrange it. And that as there was no affidavit of merits, judgment could not be set aside after the defendant was clearly guilty of laches. He cited *Holmes* v. *Russel*, 9 Dow. P. C. 487, *Weedon* v. *Garcia*, 2 Dow. N. S. 64.

RICHARDS, J.—I must assume that defendant Arnold was informed as far back as the month of January, that the *fi. fa.* in this cause was in the Sheriff's hands; of course this must have escaped his recollection, when he made the affidavit filed on his behalf. If he was so informed, then he is too late to move to set aside the judgment if the signing of the judgment were *not* a nullity. and I cannot say I consider the signing of judgment a nullity under the facts shown. If the plaintiffs had declared, and defendant had pleaded and plaintiffs had signed judgment, by mistake—overlooking the plea that judgment could not be treated as a nullity, it would only be an irregularity. The case in 9 Dowling seems to me very strong authority for plaintiffs; there no notice whatever of any proceedings was given to defendant, and the first intimation he had of any proceedings against him was an execution: but because he neglected to apply in due time and there was no affidavit of merits, the judge refused to set aside proceedings; holding that they could not be treated as nullity. Coleridge J., gave a mode of testing whether an objection be a nullity or an irregularity, he says, "If he can waive it, it amounts to an irregularity; if he cannot it is a nullity." I think this irregularity could have been waived and therefore defendant by his laches has waived it and cannot now set aside the judgment.

The case referred to by the defendant in Dowling, only shews that, under the old practice, proceeding to judgment when defendant had not appeared, and no appearance had been entered for him, was an irregularity amounting to a nullity, as no proceeding in the nature of a judgment could be had until the party was in court. But under the C. L. P. Act, I apprehend after the time for entering an appearance has passed the party is deemed to be in court.

I am of opinion the summons must be discharged. The only doubt I have is as to the costs; a summons being moved with costs, as a general rule, is discharged with costs: but as this is the first case, I am aware of, of this kind, since the C. L. P. Act, let the summons be discharged without costs to either party.

WILLIAM PATERSON MCLAREN, ADAM BROWN AND JOSEPH BURTON, FOLINGSBY, *Judgment Creditors.* ABRAHAM SUDWORTH, JOSEPH SUDWORTH, AND WRIGHT SUDWORTH, *Judgment Debtors*, and MATHEW SNARRY, *Garnishee.*

Garnishee—Debt due—Rent—Affidavit.

Where the debt alleged to be due or accruing due by the garnishee to the judgment debtor, was in respect of rent, arising out of land mortgaged with a power of sale, and power to receive rent &c. and at the time of the application no rent was in fact due, and an action of ejectment had been commenced by the mortgagee for the recovery of possession of *the land mortgaged. Held not* to be a case for an attaching order on the garnishee.

Quære. Whether under s. 191 of C. L. P. A. 1856, an affidavit of information and belief is sufficient, or whether it is not necessary that the affidavit should state positively that the garnishee is indebted to the execution debtor.

Semble. An exparte order will not at all events be granted on an affidavit of information and belief, as to a debt due by the garnishee when no application for an oral examination of the defendant has been made.

This was a summons to show cause why an order could not issue to attach the debt due or accruing due from Martha Snarry, the Garnishee, to Abraham Sudworth; and why proceedings should not be had to enforce payment, &c. Judgment was entered 2nd January, 1858. The summons was obtained on an affidavit of D. G. Miller, sworn 19th July, 1858, that judgment was entered 2nd January last, for £1503 15s. 8d. damages, and £3 15s. 5d. costs in assumpsit. That £1000 and upwards was owing on the judgment. That execution had issued, and no goods had been seized as he believed. That defendants had no goods *as he believed*, which could be seized—that every reasonable effort has been made to realize the amount, without success. That he *believed* Martha Snarry was indebted to Abraham Sudworth or defendant, in a sum of money part due or accruing due, under contract of tenancy by her, of a messuage and premises of Abraham Sudworth, in Woodstock, which might be made available as he believed, to apply on the residue of the monies unsatisfied, but he could not state the precise terms of the tenancy or the amount of rent to be paid. That the action was not brought against defendant as an absconding debtor, and that defendants and Martha Snarry resided within the Jurisdiction of the Court.

And on affidavit of John Andrew, agent for plaintiffs, sworn 19th July, 1858. That above £1000 was due on plaintiffs' judgment, and that plaintiffs had made every exertion in their power to get paid That *he believed* Martha Snarry was indebted to Abraham Sudworth in a sum of money for rent, but could not state the exact sum. That he knew she was tenant of Abraham Sudworth, of a messuage and premises on Sudworth's block, on Dundas Street, in the town of Woodstock, paying rent therefor. That she had been such tenant more than a year, and he believed at the yearly rent of £20.

The application was opposed on affidavits, 1st, of Abraham Sudworth one of the judgment debtors, that the judgment was not registered until 4th of January, 1858, that he was only liable as surety and endorser for the other judgment debtors, that he believed an arragement, such as was spoken of in an affidavit of Wright Sudworth, made in this cause on an application against one John Andrew as Garnishee, was made for the payment of the claim in this cause; that the statements in the affidavits were true with respect to this arrangement, to the best of his knowledge and belief, and was made without reference to him, and that he had not consented to or ratified it, that the alleged debt on this application was for rent alleged to be due to him from Martha Snarry.—That she was a tenant of his of certain premises of his in Woodstock. That the rent was payable as stated in her affidavit.—That no rent would be due or payable to him until 14th October next. That at the time of issuing the *writ of attachment* and summons on this application, and of making the affidavit on which the summons was granted, there was not nor has their since been, nor is there any debt due to him by Martha Snarry. That on 29th December, 1857, he was indebted to the Bank of Montreal in £1867 18s. 9d., and made a mortgage to them of the land out of which the rent issues. That the mortgage money became payable in full on 18th June 1858, and was still unpaid. That the mortgage contained a power of sale which might be exercised without notice or time being given. That the Bank had attempted to exercise the power but failed for want of purchasers. That the attorney of the Bank threatened to eject the tenant unless she attorned to the Bank. That the mortgage was registered on 30th December, 1857, and contained a power on default to enter and take the rents, and that an action of ejectment had been commenced by them against the tenant Snarry.

2nd affidavit of Martha Snarry,—that the alleged claim was rent of a building she occupied as tenant to Abraham Sudworth, That the rent was £15 per annum, payable quarterly on 14th July,

October, January and April, that the last payment was made on the 14th inst., that she was not indebted to him in any sum of money and further disputed and denied her liability to him. Sworn 24th July 1858.

DRAPER, C. J. C. P.—In this case no order absolute to attach debt has gone. An order nisi is made, and on the cause shewn I am to determine—if this alleged debt due or accruing due from Martha Snarry, to one of the judgment or execution debtors, is shewn to be a proper subject for attachment in her hands.

It struck me at first that the affidavits filed for the execution creditor, did not comply with the C. L. P. Act 1856, s. 194, for they did not state positively that the Garnishee was indebted to the execution debtor as that section requires, but only that the deponent is informed and believes it to be the fact. It was urged that it might be extremely difficult if not impossible to obtain such a knowledge as would enable a party to swear positively to the existence of a debt, and the case of Stokes v. Grissell, 14 C.B. 678, may afford some colour for this argument. But I should hesitate before I gave an exparte order on an affidavit on information and belief, as to a debt due by the Garnishee when no oral examination of the debt had been applied for.

It is not, however, necessary to determine the case on this ground. I have to determine whether the order to attach should be granted, and for this purpose the only question arising is, whether on the whole affidavits there is a debt to be attached.—The affidavit of the Garnishee not merely disputes but unequivocally denies any present debt. The only claim advanced on the execution creditors part is that there is a debt for rent due or accruing due. As to rent past due, payment is sworn to by the Garnishee and confirmed by the execution debtor. As to the future, the execution debtor's affidavit shews it will most probably never accrue as a debt due him, for he swears the premises are mortgaged, that the day of payment is passed, and default made, that the mortgages have a power on default to enter and receive the rents and to sell, and that they have commenced an ejectment against the Garnishee—the tenant. According to the affidavits, when the judgment was entered and registered, the execution debtor had only an equity of redemption in these premises subject to the payment of the mortgage. The creditor could acquire by the judgment followed by execution no greater right than his debtor had, and if the debtor's title to the rent is either gone or merely contingent on the act of the mortgagee, how can the creditor attach the rent issuing from these premises at a future day, and fix the tenant with an absolute liability to pay him? By the time the quarters rent accrues due, the reversion expectant on the determination of the term may be if it is not already absolutely vested in other parties or the tenant may be evicted. I think clearly that this is no case for an attaching order on the Garnishee. It may be well to observe that though the 194th sec, authorises the attachment of debts due or *accruing due*, yet the Garnishee is only to be called upon to shew cause why he should not pay the *debt due*, saying *nothing* about *accruing* due.

I refer to Westoby v. Day, 2 E. & B. 605.
Hirsch v. Coates, 18 C. B. 758.
Ames v. Trustees of Birkenhead Docks, 1 Jur. N. S. 529.
Jones v. Thompson, 4 Jur. N. S. 338.
Johnson v. Diamond, 1 Jur. N. S. 938.
Holmes v. Tutton, 5 E. & B. 65.
Turner v. Jones, 1 H. & N. 878.

THE SAME JUDGMENT CREDITORS AGAINST THE SAME JUDGMENT DEBTOR, AND THOMAS BONER, GARNISHEE.

The affidavits by defendant and the garnishee in this case presented the same question as in Martha Snarey's case. The judgment creditor's affidavits were not before the learned judge, but the parties admitted them to be similar.

DRAPER, C. J., C. P.—The order must be refused, for reasons given in the other case.

SAME CREDITORS v. SAME DEBTORS, AND JONATHAN MARTIN, GARNISHEE.

This case stood on the same footing as the last, except that the rent was sworn to be paid in advance up to the 20th August next. In all other respects it was similar, and was similarly disposed of.

SAME CREDITORS v. SAME DEBTORS; SAMUEL WILSON, GARNISHEE.

The affidavits for plaintiffs were in substance the same as in Snarey's case. The rent was supposed to be £2 per month. Abraham Sudworth made an affidavit as in the former case. The tenant swore he owed no rent; had a receipt for rent till June, 1859, and would owe no rent until then.

SAME CREDITORS v. SAME DEFENDANTS: GEO. PARR, GARNISHEE.

Similar case for plaintiffs. Tenant stated to have been two months in possession, at £2 per month. Same answer. Rent paid up to 10th August, 1858. Tenant a *sub-tenant* to one Gainer, who rents from Abraham Sudworth.

SAME CRED'RS v. SAME DEF'TS.; MARTIN SKINNER, GARNISHEE.

Similar case for plaintiffs. Tenant believed to be a tenant at 35s. per month; has occupied for two months. Same answer. Rent paid to 10th August, 1858.

SAME CREDITORS v. SAME DEBTORS; SAMUEL PLATT, GARNISHEE.

Similar case for plaintiffs. Similar answer. Rent paid to 1st August.

SAME CREDITORS v. SAME DEBTORS; SAMUEL BURGESS, GARNISHEE.

Similar case for plaintiffs. Garnishee swore he took the premises in August last for a year, by parol, at £20 per annum. He agreed to pay quarterly or at the end of the year, as Abraham Sudworth might wish. Same statement as to ejectment and claim of Bank of Montreal as in all the others.

SAME CRED'RS v. SAME DEBTORS; PARKER & HOOD, GARNISHEES.

Similar case for plaintiffs. Rent said to be £125 per annum. In answer, Abraham Sudworth swore as to the arrangement between the creditors and debtors, as in Snarry's case; and further, that the garnishees were his tenants; that the rent was paid in full to 1st September next, and was so paid on 5th May last. That at the time of making the affidavit for attachment and service of the order there was no money due from garnishees to him. Confirmed statements in garnishee's affidavit as to a mortgage, and swore default was made in payment in November last. Parker, one of the garnishees, swore: That their rent is payable quarterly on 1st March, June, September and December in each year. That they had paid their rent (on 1st May last) in full to 1st Sept. next. That their was not now any rent due to Abraham Sudworth, the landlord. That he believed Abraham Sudworth, on 7th November, 1856, mortgaged this property to Joseph Sudworth for £300, payable 7th November, 1857, and that the mortgage was on the same day assigned by Joseph Sudworth to Hughes and McVea. Both mortgage and assignment were registered 8th November aforesaid (1856 or 1857). That mortgage contains a power for mortgagees, on default, to enter and take possession of land and receive rents. That default was made on 8th November, 1857. That on 22nd July, 1858, before service of the order nisi, Hughes & McVea served them with a notice (copy annexed) not to pay rent to Ab'm Sudworth, but to pay the same and the arrears to their attorney, or such other person as shall be duly authorised to receive the same.

DRAPER, C. J., C. P.—The same principle must apply here as in the other cases. It is sworn no rent is due now. And when any falls due, unless the affidavits are false, it will be due to strangers to this cause. There is, therefore, neither a debt due nor accruing due to be attached.

All the foregoing orders must be discharged, and, as far as regards the garnishee, with costs—as the facts might have been ascertained by oral examination of Abraham Sudworth, before taking this proceeding.

SAME CREDITORS v. SAME DEBTORS; JOHN ANDREW, GARNISHEE.

The usual attaching order was issued in this case on 17th July, 1858, with a summons to the garnishee and Abraham Sudworth, to show cause, &c.

It was granted, on affidavit setting forth the recovery of judgment, that garnishee (as he believed) was indebted to Abraham Sudworth for rent due on May, 1858, and that Abraham Sudworth had distrained. Also (as he believed), that garnishee was indebted for rent of other premises due on the same day, and that Abraham Sudworth had distrained.

Cause was shown, on affidavit of Abraham Sudworth, similar to that in former cases as to the arrangement. He also referred to and confirmed the statements in an affidavit of Wright Sudworth, annexed to his own, and swore that the mortgage referred to in that affidavit was overdue and unpaid. That for the benefit of the mortgagees, who were from November last entitled to the rents, he distrained for the rent, and the garnishee had brought two actions of replevin in respect of the distress, alleging that no such rent was due, which actions were then pending. That he believed the garnishee and the judgment creditors were acting in collusion to prevent the mortgagees recovering the rent.

Wright Sudworth swore that the debt due plaintiffs was reduced to about £500. That Abraham Sudworth was liable to them as endorser and surety for the other defendants, who carried on lumber business. That in March last they (Wright & Joseph) leased the said mill and some land to William Wilson for a year, at £1,500; that Wilson entered and executed a *surrender* to one Shephard, to whom defendant Joseph (as he understood) gave a quit claim deed of said mill and land. That (as he believed) such surrender and quit claim were made to Shephard as agent for the execution creditors and for their benefit. Shephard told him so. That an arrangement had been entered into between Joseph Sudworth, the plaintiffs, and Shephard, that Joseph Sudworth should work the mill and sell the lumber, and that the proceeds, except $2½ per M. for the expense of manufacturing, should be paid to plaintiffs on their claim. That Joseph S. had gone into possession and was manufacturing lumber on their terms. That the mill would manufacture 60,000 feet per week, which would sell at $8 per M.

That the alleged debt of garnishee to Abraham Sudworth was for rent on a store and saloon—there was no written lease. The rent of the store (he was informed) was £82 10s., and on the saloon £182 10s. That ten days ago (10th July, 1858,) Abraham Sudworth distrained and garnishee replevied, on the ground no rent was due, which suits of replevin are pending. That on 7th November, 1856, Abraham Sudworth mortgaged the saloon property to defendant's brother Joseph for £300, payable in a year. On the same day Joseph assigned to Hughes & McVea for £258. Mortgage and assignment registered before plaintiff's judgment. In January last that Hughes & McVea recovered judgment against Abraham Sudworth for the amount of the mortgage. That default in payment was made in November, 1857. Mortgage contains covenant for mortgagee to enter and take rents after default. That he believed the distress was made for the benefit of Hughes & McVea. That plaintiffs and garnishee were colluding. That under the arrangement he believed the plaintiffs would be paid their claim in three months.

James Hughes confirmed on affidavit all the statements in the foregoing affidavit relative to himself and McVea, and that the distress was made under the direction of their Solicitor, for their benefit; and believed plaintiffs and garnishee were colluding to injure mortgagees.

William Wilson swore he took a lease from Joseph & Wright Sudworth of a steam saw mill and 200 acres of pine land in the County of Oxford—rent, £1,500. That about ten days ago he agreed with one Shephard, at request of Joseph Sudworth and of plaintiffs, to surrender his term to Shephard, (assign, surrender and release are the words of the instrument.) That he gave up possession immediately. The assignment showed plaintiffs to be parties to the arrangement—as they, with another person, agreed to pay certain accounts due by Wilson, stated in a schedule.

DRAPER, C. J., C. P.—As to the arrangement, the plaintiffs do not ask for time to answer the affidavits on that point. It certainly would appear inconsistent with what is stated that the plaintiffs should be at liberty to press their execution while receiving the benefit of such an arrangement. But I do not think it is necessary to dispose of the case on this ground—otherwise I should call for further proof.

The attaching order has been granted, and the garnishee is called on to shew cause why he should not pay, and so is Abraham Sudworth. The garnishee does not appear to resist the application—in other words, he admits, by the default, a debt due to Abraham Sudworth. It is sworn the only claim between them is for rent; and for this rent it is also sworn Abraham Sudworth has distrained—and the garnishee has replevied, denying that he owes him rent. So that, as between himself and Abraham Sudworth he denies liability, while he admits liability—by not disputing it—as between himself and the judgment creditors. He may find that an order on him to pay, made in this proceeding, would not help him in the replevin suit, or protect him against the claims of the mortgagees.—(Vide *Ames* v. *Trustees of Birkenhead Docks*, 1 *Jur. N. S.* 529.) By his non-appearance execution may be issued against him for the debt.—C. L. P. Act, 1856, s. 196. His not disputing the liability prevents the application of the 197th sec.

The affidavits appear to me to show there is no debt to attach, and if so none to be paid; for the rent, if the affidavits are true, is not *in truth* a debt due to Abraham Sudworth, though the garnishee may be in no position to set that up in the replevin suits. And no order that I could make will bind the rights under the mortgage, for the 198th sec. makes payment by the garnishee a valid discharge only as against the judgment debtor.

There is also among the papers, though it was not produced on the hearing, an affidavit of garnishee admitting that Abraham Sudworth did have a claim for rent, but swore it had been paid, as set forth in the affidavit.

STANDING ET AL v. TORRANCE ET AL.

Writ of summons—Special endorsement—Interest—Merchant's account.

In an action on a merchant's account, where the writ was specially endorsed claiming interest and defendant did not appear. *Held*, that his non-appearance was an admission of the charge for interest.

Plaintiffs reside in London, England, defendants reside in Toronto. Plaintiffs sent out an account against defendants, to be sued here. The writ was specially endorsed for the amount of the open account, viz., so many pipes of wine, so much, &c. &c. The writ was served, and owing to some neglect no appearance was entered, and judgment was signed for the amount of the account and about £5 interest, calculated from the time the account would fall due, about six months after the purchase. They applied to set aside the writ on various grounds, the chief being that judgment was signed for interest, and that there was no contract to pay same, but there was no affidavit of merits. *Jackson* shewed cause, citing *Radway* v. *Lucas*, Ex. Rep., and contended that, as an almost universal thing, interest was charged by merchants after six months; and that the writ having been specially indorsed for the interest, the not appearing to the writ admitted the claim for interest to be correct, and that judgment was regular. BURNS, J., decided it was so, and discharged the summons with costs.

DIVISION COURTS.

BISHOP v. HOLMES.

An original summons and one for oral examination, under the 21st clause of 13 and 14 Vic., cap. 53, cannot be issued together and at the same time.

Unless the defendant *personally* appear at the trial, the 94th clause gives no power to examine him, or for the summonses to issue together.

LONDON, 25th June, 1858.

In this suit the defendant had been served with an original summons and also with a summons for oral examination, under the 91st clause of the above Act, at the same time both returnable at the June Court, a Judgment order for payment in fourteen days was made against him on the former and upon the Defendant being called upon to be examined under the latter.

Mackintosh appeared on his behalf and submitted that the two summonses could not be issued and served together, and that therefore the Court had no power to examine him, —he objected.

1st. That the judgment was not an unsatisfied judgment or order within the meaning of the 91st clause of 13 and 14 Vic., cap.

53, and that no judgment at all much less an unsatisfied one was existing.

2nd. That it did not assume the form of a judgment nor had the effect thereof until the time limited for payment had stopped the order for such payment having till then only the effect of a verdict in one of the Superior Courts to which it is analogus.

3rd. That it did not under any circumstances become a statutory sense an unsatisfied judgment until the fi. fa. had been returned *nulla bona*, or some attempt had been made at levying and failed. He cited as to this, C. L. P. Act, 1856, Sec. 193 and 194, Twine v. Mercer et al, coram, Robinson, C. J., in Chambers, 8th December, 1856; McDowel v. Hutchison et al. coram, Richarde, J., in Chambers, 28th January, 1858.

Robertson for the plaintiff, submitted that the course pursued was perfectly regular even under the 91st clause, but relied on the 94th clause of the same Act as putting the case beyond a doubt, that section of the statute giving the power as he contended either to issue and serve both at the same time or in the alternative in the event of a defendant personally appearing at the trial to examine him without service at all, and that it was clearly the intention of the Legislature to favour the course pursued herein, he therefore asked that the defendant should be committed to custody for contempt in not obeying the Judgment summons.

Mackintosh, in reply, contended that the true meaning of the 94th clause was to be found in its marginal note which only gave power to examine where the defendant personally appeared, that where the section and its marginal note did not tally the latter was law, such a case had already occurred under the 52nd section of this very Act, and the marginal note was upheld by McPherson v. Forreter, 11 U. C., 2 B. 362. He submitted that Rule 17 and forms 54 and 55 also shew meaning of clauses in dispute.

Judgment was reserved and given on 29th July.

Small, Co. J.—I have very carefully examined the 91st and 94th clauses of the Act in question, and think that unless the defendant personally appear at the trial (which was not the case here), I can neither examine him nor take any action against him in this matter.

The Judgment summons must therefore be discharged.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

ROCHESTER, N. Y., Sept. 1858.

GENTLEMEN,—As your valuable journal aims to throw light on points of legal controversy, will you have the kindness to give some, in regard to the following statements?

Some fourteen years since one H. and myself entered into a partnership in business, H. acting as "sleeping partner," at the same time carrying on a large business of his own. In the course of time I desired to withdraw. We therefore chose two men as arbitrators to settle the matter. H. proposed that I should throw off one-third of the accounts to allow for bad debts, and that he would carry on the business in his name. I consented, and by so doing brought myself in debt to H. about £70—the business barely paying—for which I gave a note. *H. gave me his bond to pay all claims; he, also,* to collect all dues. Thus ended the matter for three weeks, when H. told me he had discovered some more claims against the firm. The arbitrators met again and brought me £34 more in debt, making £104 to pay; I required time, as I was without means. I gave H. four separate notes of £26 each, payable in 6, 12, 18, and 24 months, signed jointly by my brother and myself. The £70 note I desired H. to give back to me as it was *included in the four notes.* H. said the note was not with him then, but he would hand it me in a day or so (at the same time the note was passed off and beyond his control!) at farthest. H. gave me a writing to this effect.

Two of the four notes was paid before due, the remaining two are unpaid as yet, but have offered time after time—providing H., or those who hold those two £26 notes, would give me ample security in regard to those *claims* against the firm, and return the £70 note, my just due.

H. failed in some months after we dissolved, and took the benefit of the Bankruptcy Act. The creditors immediately turned to me for pay—H. being largely in debt before we formed a partnership, not to my knowledge however, and as a matter of course paid a small dividend.

Now, Gentlemen, I am both able and willing to pay that which is legal, but not illegal.

Please to inform me the proper mode of procedure to bring the matter to a final close.

Yours truly,

J. R. C.

[The conduct of H., upon the showing of our correspondent, was very reprehensible. Had he not obtained a certificate of bankruptcy, he would, we take it, have been bound to furnish the requisite security. *His negotiation of the £70 note in* bad faith would also have rendered him liable to the consequences of his act. But his whole conduct, as well as the legal effect of the certificate of bankruptcy upon his conduct, must be governed *by the laws of the State of New York.* And as we, as editors of the *Upper Canada Law Journal*, neither profess to understand the laws of that State, nor to know the mode of procedure adopted in its Courts, we find ourselves wholly unable to advise our correspondent in his difficulty. We doubt much, if able, whether we should be willing to do so. Our purpose is not to advise individual correspondents, but by answering individual communications to give information to the great mass of our subscribers. Whenever our opinion is asked upon a state of facts, of interest only to the writer, our course is to refuse the information sought. The money enclosed by our correspondent is applied in payment of his subscription to this Journal—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—I presume you have heard of the high-handed proceedings of the Court of Chancery in suspending a Barrister and Solicitor of the Court for some hasty words used by him to a brother Solicitor in the Master's Office in Hamilton; but for which he on the spot apologised to the Master, and with which apology the Master expressed himself completely satisfied.

I hope gentlemen you will take this matter up and inform the profession—nay, every member of it, through yours, the only legal periodical in Upper Canada, whether they are slaves or freemen; and if slaves, the best means of acquiring their freedom. The feeling in the profession, so far as the case is known, is, that the gentleman who was so summarily dealt with, has been cruelly treated. Others are as subject as himself to be similarly treated, and all therefore have an equal

interest in probing the recent proceedings of the Court of Chancery to the very bottom,

A Solicitor.

Toronto, September 22nd, 1858.

[Rumors have reached us about the case to which our correspondent alludes. We agree with him that it is a case in which the profession have a deep and lively interest: but as at present informed, we are not in a position to speak as to its merits. In our next issue we hope to be able to enter fully into an examination of the questions involved. Until we know the whole facts, and have had time to study the law as applicable to the facts, we shall not be prepared to censure or to praise the proceedings of the Court of Chancery in the matter. —Eds. *L. J.*]

MONTHLY REPERTORY.

CHANCERY.

V. C. K. *March* 18

The Marchioness of Townsend *v.* The Earl of Harrowby.

Settlement—Construction—Covenant to settle after acquired property Power of appointment—Separate use—Reversion.

Where a woman in an ante nuptial settlement joins in a covenant with her future husband to settle after acquired property to which she or he in her right shall become entitled, in possession, reversion, remainder, or expectancy, that covenant does not apply to a general power of appointment and a life interest given to her under a will, but does apply to a reversionary interest to which she is entitled under the same will, so far as her husband, in the event of his surviving her, would be entitled to her right.

A power of appointment, a life interest, and a reversion given to a married woman by one will are as distinct as if given by three separate instruments.

V. C. S. Bonser *v.* Bradshaw. *March* 30.

Bill by heir against a devisee of a disputed will—Motion for issue devisavit vel non.

An issue *devisavit vel non* was granted, as to a will alleged to have been forged, on an interlocutory application by an heir-at-law who was plaintiff in a suit against the devisee under the supposed will.

M. R. Brace *v.* Wehnert. *March* 2.

Specific performance—Covenant to build.

Where an agreement for a lease contained a stipulation that the tenant should build a house of the value of £1400, according to a plan to be approved by the lessor, specific performance was refused.

Quære, whether a decree could have been made in the absence of the condition as to approval.

V. C. S. Burdus *v.* Dixon. *March* 29.

Devise by Mortgagee—Mortgaged lands considered as real estate.

A mortgage in fee with a power of sale proposed to convey the land comprised in the mortgage to a trustee for himself, and remained in possession for five years, and till his death. He made by his will a devise of all his real estate in general terms.

Held, that the testator having by his acts treated the land in question as real estate, it passed as such under the general devise.

V. C. W. Hutchins *v.* Osborne. *March* 25, 26.

Will—Construction—Appointment.

Certain houses were assigned by settlement upon the marriage of J. and M. to trustees upon trust, to pay the rents to M. for her life, for her separate use, and after M's. death, upon trust for such person or persons, &c., as J. by deed or will should appoint, or give the same, and in default of appointment, and subject thereto if any, upon trust for such persons as under the Statute of Distributions might be or become entitled thereto.

J. by his will after certain bequests to S. his son, by a former marriage, gave all his residuary estate whatsoever and wheresoever (subject to the payment of the above mentioned legacies, and also subject as to such parts thereof respectively, as were comprised in the settlement to the trusts, thereby declared, which indenture he ratified and confirmed in all respects), and every part thereof to M., her executors, administrators, and assigns, absolutely.

Held, that this residuary bequest to M. operated as an execution of the power of appointment by will reserved to J. by the settlement.

V. C. W. Lloyd *v.* Purves. *March* 24.

Production of document—Protection.

An injunction had been obtained restraining the defendants, whose title to the surface land was admitted, from interfering with or working certain mines claimed by the plaintiffs. Upon a motion by the defendants for production of documents in plaintiffs' possession, the plaintiffs stated in their affidavit in opposition that the documents in question showed the title of themselves and other defendants in the same interest to the mines and minerals exclusively, and that none of them in any manner showed that the defendant applying had or ever had any estate, right, title, or interest, in the mines and minerals.

Held, that these documents were entitled to be protected from production.

V. C. S. Morris *v.* Morris. *March* 17, 18.

Right of plaintiff to an account—Lapse of time—Tenant for life—Pulling down Mansion house—Equitable waste.

An estate having been settled in 1819, subject to a mortgage debt, for which the personal estate of the settler was primarily liable, and the mortgage debt having been paid shortly afterwards by the sale of part of the settled estates, and a bill being now filed for an account of the personal estate, and the answer and evidence making a *prima facie* lease to show that the whole of the personal estate had been exhausted in payment of the debts.

Held, that the plaintiff was not at this distance of time entitled to the account payed without meeting the *prima facie* case raised by the answer.

A tenant for life of settled estates pulled down the family mansion house and re-built it in another part of the property. It appeared that the settler had contemplated the abandonment of the mansion, and that the settlement contained powers of sale and exchange, and also a power to grant building leases comprising the land on which the mansion was built.

Held, that the tenant for life was not under the circumstances, chargeable with equitable waste.

The case of *The Duke of Leeds v. Amherst*, 2 Ph. 117, commented on.

V. C. S. Strong *v.* Strong. *April* 16.

Vendor and purchaser—Sale in lots—Covenant to produce deeds—Costs—Petition—Payment out of Court.

Although by the practice of conveyancers the costs of covenants to produce title deeds which cannot be delivered up, fall on the vendors, yet where, by the conditions of sale of property in lots, provision is made for the largest purchaser to have the deeds, and to covenant to produce them to the purchaser of smaller lots, without reference to the manner in which the costs are to be paid, each purchaser and not the vendor, is bound to bear his own costs of such covenants.

A purchaser is entitled to his costs of appearing upon a petition for paying his purchase money out of Court, although he is informed in the notice of the petition that he is not required to appear, and that the petitioner will object to his costs of appearance.

M. R. BELL v. CLARKE. *April* 21.

Covenant to bequeath—Construction.

On a covenant to devise and bequeath one full fourth part of all the real and personal estate which the covenantor should die possessed of.

Held (having regard to the context) that a fourth in value, and not an undivided fourth, was meant.

V. C. W. FERIS v. GOODBURN. *April* 23, 24, 26.

Ademption of legacy—Presumption against double portions—Admissibility of parol evidence.

A legacy given by way of portion by a testator to his adopted daughter, to be paid on marriage, (she being at the date of the will unmarried.)

Held, to be deemed *pro tanto* advances made to her husband subsequent to the marriage, she having married in the testator's life time.

M. R. GREAVES v. WILSON. *March* 15, 16.

Specific performance—Conditions of Sale—Rescinding.

Under a condition that, if the purchaser should within the time limited, show any objection and insist thereon, the vendor should be at liberty to rescind.

Held, that the vendor was not entitled to rescind immediately on receiving the requisitions without giving the purchaser an opportunity of waiving any that were untenable.

Held, also, that what the requisition ultimately insisted on, was merely that mortgagees should join, the vendor was not at liberty to rescind on this ground.

Semble, that he might rescind on account of requisitions which would be tenable in the absence of any condition as to rescinding, even though he might not be able to satisfy them, if such requisitions should be of an unreasonable character in respect of expense or otherwise.

V. C. K. LAW v. THROPE. *April* 20, 21.

Construction—Children and their issue—Period of distribution.

Where a testator gives residuary property to trustees, upon trust, to pay the interest to one for life, and after her decease divide the same among her children and their issue; such children and their issue, to be entitled as amongst themselves to the benefit of survivorship, and accruer of surviving shares, all the children coming into *esse* during the life time of their mother are entitled as tenants in common, with benefit of survivorship.

L. J. SWINFEN v. SWINFEN. *March* 16, 18, 25., *April* 22.

Attorney and client—Authority to compromise—Specific performance

An attorney has no authority to compromise a suit without the consent of his client. If an agreement to compromise is sought to be enforced in a court of equity, the case will be tried on the ordinary principles which guide the court in cases of specific performance.

M. R. CHEALE v. KERWOOD. *April* 21.

Specific performance—Nudum pactum.

An agreement by A. to transfer shares to B. in consideration that B. will bear all future liabilities arising out of them, is *anudum pactum*.

If money had passed either from A. to B., or from B. to A., there would have been sufficient consideration to support the contract on either side.

V. C. S. GARRETT v. MELHUISH. *April* 27.

Shipping—Freight—Damage in transitu.

The Shipper of goods cannot resist a demand for freight, upon the ground that such goods were damaged *in transitu*, even in a case where the effect of such damage may have been to render them totally unfit for use. His remedy lies in an action for negligence against the shipowner.

V. C. W. JOHNSTON v. MOORE. *April* 27.

Will—Construction—Conversion—Postponement—Produce—Partnership capital.

Testator gave all his real and personal estate to trustees upon trust, as soon as conveniently might be, to sell the real estate and such part of the personal estate as should be in its nature saleable, and directed them to collect and convert into money such part of his personal estate as should not consist of money, to invest the proceeds and pay the annual income to his wife during her life. The trustees were also authorized to postpone the sale, calling in, collection, or conversion, of any part of testator's real and personal estate, as they should think fit, and to pay the rents dividends and *produce* of the same, or any part thereof not sold, called in, collected, and converted, to the same person, &c., and in the same manner as the income arising from the proceeds of the sale, &c, would be payable. Testator who died in November, 1856, was a member of a partnership, which by the articles was to continue till the 1st of January 1858, it being provided that, upon the death of any partner during the term, the partnership should not cease, but the representatives of the deceased partner should be entitled to his share in the capital and profits up to the expiration of the term; and that the survivors should pay to the representatives the balance appearing to his credit at the end of the term by three equal yearly instalments from the end of the term, with interest at 5 per cent. in the meantime on the unpaid balances.

The executors did not sell or call in after his death the testator's interest in the partnership.

Held, that the widow was entitled to all the balances standing to the credit of the testator's account upon his partnership, capital as "produce" of the capital, under the postponement clauses, and also to interest at 5 per cent. upon the capital and balances.

M. R. MORRIS v. MORRIS. *May* 1.

Power of sale—Time—Postponement, in order to avoid sale at disadvantage—Infant.

An infant, *cestui que trust*, aged 10 years, who was entitled upon marrying or attaining 21, to the proceeds of certain real estate which was directed to be sold so soon as conveniently might be after the death of a tenant for life, filed her bill upon the death of such tenant for life, praying that the trustees might be at liberty to postpone the sale, upon the ground that the property was likely to increase materially in value.

Ordered, that the sale should be postponed until the futher order of the Court.

V. C. S. RAWLINS v. WICKHAM. *May* 1, 3, 4.

Partnership—Contract—Misrepresentation—Fraud—Costs.

V. and B. who were partners together as bankers, received R. into co-partnership with them, having previously made to him various untrue representations as to the position and prosperity of their firm, which was in fact, at the time, in an extremely critical position.

Held, that the contract must be set aside *ab initio*, but without costs; the plaintiff's conduct not having been entirely free from blame, and the allegations of fraud contained in his bill, being of a character unwarranted by the circumstances of the case.

It is no answer to a charge of misrepresentation, that the plaintiff might by inquiry have detected the untruths complained of; it being in the very nature of misrepresentation to check inquiries which might otherwise have been made.

V. C. S. SCOTT v. THE CORPORATION OF LIVERPOOL. *April* 19.

Building Contract—Arbitration clause—Jurisdiction of ordinary tribunals, how far excluded—Award—Contract.

The plaintiffs a building firm, had contracted for and undertaken the execution of extensive works for the defendants, the corporation of Liverpool. The contract provided, that every dispute

or difference which might arise between the contracting parties should be referred to and settled by the engineer of the defendants, without whose certificate also, as to the sufficiency of the work done, no money was ever to be paid to the plaintiff's. The contract also provided for its summary determination by the defendants, in case of neglect or delay on the part of the plaintiff's. The defendants put an end to the contract on the ground of alleged neglect, &c., upon a bill filed by the contractors, alleging fraud on the part of the engineer, in unduly withholding certificates, and praying an account of work done, &c.

Held, per Stuart V. C., confirming the opinion of *Erle J.*, that the case of the plaintiff had wholly failed upon the evidence.

Bill dismissed with costs.

L. C. PERRY HERRICK *v.* ATTWOOD. *Dec.* 17, 18, 22, 23.

Mortgagee—Priority—Negligence—Possession of title deeds —13 Eliz. cap. 5.

A person taking a legal mortgage without the title-deeds, is not thereby postponed to a subsequent mortgagee without notice, but with the deeds, unless the first mortgagee has been guilty of fraud or gross negligence.

But if the deeds were left with the mortgagor to enable him to raise another sum to take precedence of the mortgage debt of the party so leaving them, he will be postponed to any subsequent mortgagee, even though his mortgage may not have been within the understanding between him and the mortgagor.

An executor and trustee who had retained monies of *cestuis que trust* in his hands, with their consent, and without being pressed so to do, gave them a mortgage of his own estate by way of security, but it was agreed at the time that he should retain the title-deeds for the purpose of making another mortgage which should have priority; he did not make that mortgage, but made several others of much larger amount.

Semble, the first mortgage was within 13 Eliz. cap 5.

V. C. S. STURGE *v.* MIDLAND RAILWAY COMPANY. *Jan.* 28.

Specific performance—Railway Company—Contract to grant free pass—Waiver—Demurrer.

S., a corn merchant carrying on business in the immediate vicinity of the defendants' line of railway, signed an agreement, whereby, in consideration of receiving from the defendants yearly, during so long as he should carry on business at his then establishment, a free pass over their line, he promised, so long as the scale of charges of the defendants and of a certain Canal Company bore the same proportion to each other which they then did, to have his corn carried by the defendants in preference to the said Canal Company. Subsequently at the request of the defendants he made a money payment, by way of nominal consideration, for the said pass, which the defendants after the lapse of some years ultimately refused to renew. Upon his bill for specific performance of the said agreement (which had never been executed by or on behalf of the said railway company).

Held, that the agreement was unilateral in its nature and uncertain in its terms, and could not be specifically enforced. A general demurrer for want of equity accordingly allowed.

M. R. WHITLEY *v.* LOWE. *Jan.* 14, 15, 18.

Statute of Limitations—Acknowledgment by payment.

A suit for the winding up of partnership accounts was instituted between the representatives of deceased partners. A receiver was appointed in June, 1834, and by common consent paid the assets which he got in to the repesentatives of one of the deceased partners, and the suit was not further prosecuted.

The executors who received these payments claimed a further debt from the estate of the other partner, which was barred by Statute unless the receiver's payments were sufficient to take it out of the Statute. There was an independent claim for a lien which the evidence was not considered by the Court to establish, and it was held that payments by the receiver within 20 years did not take the case out of the Statute.

V. C. S. VINT *v.* PADGETT. *Feb.* 20, 22.

Mortgage—Foreclosure—Redemption.

A. being seized of two estates, X. and Y., mortgages X. to B., and afterwards mortgages Y. to C. He subsequently mortgages his equity of redemption both in X. and Y. to D. The two original mortgages ultimately become vested in V., who files his bill to foreclose D.

Held, that D. was not entitled to redeem X. without also redeeming Y.

V. C. S. EDDELS *v.* JOHNSON. *March* 19.

Will—Omission of name—Rectification—Administrative Debts—Liability of lands specially divided.

A testator having six children makes a specific devise to each of them by name. In a subsequent part of his will he makes a specific gift to two of them A. and B. and gives the residue of his estate "to his said four children" mentioning only C. D. and E.

Held, that the name of the omitted child F. ought to have been inserted and that F. was entitled to one fourth of the residue.

Where a testator's personal estate is insufficient for the payment of debts, and there is no duration as to the payment of debts in the will, the real estate specifically devised as well as that comprised in the residuary gift must contribute rateably with the personal property specifically bequeathed in payment of such part of the debts as remain unpaid.

V. C. W. HALLIWELL *v.* PHILLIPS. *March* 18, 19.

Equitable waste—Ornamental timber.

In the case of woods or plantations standing upon property which has been acquired by various purchases at different periods, the fact of the purchaser not having cut down the woods is not sufficient of itself to lead to the inference that they were left standing for ornament.

Some act is necessary to show the intention of the purchaser in such a case to impress an ornamental character upon the timber.

COMMON LAW.

EX. LEY ET AL *v.* PETER.

Statute of limitations—Tenancy at will—Authority of Land Agent.

The defendant's grandfather had been owner of two undivided thirds of a meadow and held the other third under a lease which expired in 1818. The father of defendant, and defendant succeeded in their turn; and at the time the action was brought the defendant was owner of the two thirds, and occupied the whole, no rent having been paid since 1818. The only evidence relied upon for the plaintiffs, was a letter of the land agent who managed the defendant's property written within 20 years of the action being brought in which he said, the defendant "would no doubt accept a lease of Ley's one third at a fair rack rent." *Held*, in ejectment for the one third.

First. That this was not an acknowledgment of title within 3 & 4 Wm. IV. ch. 7 sec. 14, as not being signed by the person in possession, but only by an agent.

Secondly. That the land agent has no authority by virtue of his employment, as such to write such a letter. MARTIN B. *dissentiente.*

Thirdly. That the letter was no evidence of the tenancy at the will of the plaintiff.

Q. B. BARING ET AL *v.* GRIEVE. *April* 23

Statute of frauds—Guarantee—Consideration not expressed.

The defendant wrote and signed a letter in 1845, addressed to the managing committee of Lloyds thus: "I engage to hold myself responsible for any debts which my son may contract in your establishment connected with the same." *Held*, that no consideration appeared on the face of the document which was therefore void as a guarantee under sec. 4, of the statute of frauds.

C. P. BERWICK v. HARSFALL ET AL. *April* 22

Evidence—Lost written document—Parol evidence of contents—Who to construe.

Where it is proved that a written document is lost and its contents are then proved by parol evidence, it is for the judge and not the jury to interpret the meaning of such contents as so proved.

C. P. PUGH ET AL v. SPRINGFIELD ET AL.

Guarantee—Damages—Joint agreement.

A. B. and C., the plaintiffs having each a separate interest in certain property took a covenant from F. that he would execute certain works thereon, by a day fixed and a guarantee by G. and H. the defendants for the performance of this covenant.

Held, that the damages which the plaintiff's had incurred separately could be recovered under the guarantee in a joint action.

C. C. R. REGINA v. FRANCIS GRIFFITHS. *April* 24.

Forgery—Alteration by a master of a receipt for money for the purpose of charging the company.

It was the duty of the prisoner, a Railway Station master, to pay B for collecting and delivering parcels and the company provided a form in which the charges were entered by the prisoner under the heads of "Delivery" and "Collecting" respectively. The prisoner having falsely told B. that the company would not pay for delivering, but only for collecting, continued to charge the company for collecting and delivering; and in order to furnish a voucher after paying B's. servant the sum entered in the form for collecting and obtaining his receipt in writing for that amount without either his or B's. knowledge, put a receipt stamp under this servants name and put therein in figures a larger sum than he had paid being the aggregate for collecting and delivering.

Held, that the prisoner was guilty of forgery.

C. C. R. REGINA v. MOAH. *April* 24.

Forgery—Letter of recommendation.

A false letter of recommendation by which by uttering it to a chief constable the prisoner obtained a situation as constable is the subject of forgery at Common Law.

BRAMWELL, B., *dubitante.*

EX. BELL v. FEATHERSLINE. *April* 27

Bill of Exchange—Onus of proving consideration—Accommodation bill—Evidence of fraud.

In an action on a bill by indorsee against drawer the defendant pleaded that the bill was delivered to one W. for the purpose o W. getting it discounted and paying the proceeds to the defendant and without any consideration; that in violation of this purpose and without the authority of the defendant, W. indorsed the bill to the plaintiff without value or consideration. At the trial the defendant proved that the bill was accepted by R. for his the defendants accommodation, that he delivered the bill indorsed in blank to W. on the terms mentioned in the plea, and that he had not received any proceeds from W. By the evidence addressed for the plaintiff it appeared that when W. gave the bill to the plaintiff he represented that the bill was his (W's.)

Held, that there was sufficient evidence of fraud to throw the *onus* of proving consideration on the plaintiff; that the judge therefore ought to have left the evidence to the jury and was wrong in ruling that the defendant had failed to make out any case.

Q. B. FARINA v. SILVERLOCK. *April* 29.

Trade mark—Infragement of a fraud—Knowledge of defendant.

Where a person prints and sells labels having the peculiar registered trade mark of another firm.

Held, that such person is liable in an action at the suit of the owner of the mark if he prints and sells such labels, knowing that they are to be used for the fraudulent purpose of being applied to spurious imitations of the plaintiff's goods.

Q. B. BEARDSALL v. CHEETHAM. *May* 3.

Practice—Consolidation of actions brought by an Attorney on separate bills.

Where an Attorney did different kinds of professional work for a client, and after all the business was transacted, sent in a bill for one part of the business, and subsequently sent in a bill for the other part, and commenced an action for the first part of the business before the expiration of a month in respect of the delivery of the second bill and after that expiration, commenced an action for the other part, the Court (*dissentiente* ERLE, J..) consolidated the two actions.

EX. ROSS v. BURGESS. *May* 1.

Compulsory order of reference—Power of Court to set aside award, or to remit case to arbitrator.

The Court has no more power to set aside an award, or to remit a case back to the arbitrator when the reference is compulsory under the Common Law Procedure Act, 1854, than where the reference is by consent.

EX. LINFOOD v. LAKE. *April* 30.

Action—False imprisonment—Pleading—Mitigation of damages—Evidence admissible under general issue.

In an action for false imprisonment, evidence is admissible in mitigation of damages under the general issue showing that the plaintiff has committed a misdemeanour; provided it does not afford a justification of the trespass alleged.

EX. MANLEY v. THE ST. HELENS RAILWAY AND CANAL COMPANY. *Jan.* 26

Tort—Immunity of trustees for public purpose—Canal Company—Parliamentary works—Insufficiency of—Bridge connecting highway intersected—Effect of recital in Act of sufficiency of works.

Certain projectors of a Canal were empowered by Act of Parliament, 28 Geo. II., cap. 8, and 2 Geo. III., cap. 56, to make a canal, and in its construction to intersect highways, and to connect the parts of the highway so intersected by a sufficient swivel or other bridge. The Company amongst other works, made a swivel bridge connecting a highway intersected by the canal. By a subsequent Act, 11 Geo. IV., cap. 50, it was recited that "the navigation cut or canal, and the other works authorised to be made by the said recited acts have long since been made and completed" While the swivel bridge was open to allow for the passage of a boat on the canal, a passenger on the highway fell into the canal and was drowned. It was a dark night and there was only one lamp near the bridge, and no fence, when the bridge was opened to screen the canal from the highway nor any watchman to warn passengers thereon. The canal was used by the public with boats, on the payment of certain rates or tolls to the Company for the privilege. The Company had not any servant at the bridge; it was opened by the boatmen themselves; and when the deceased fell into the water the boat had not passed the bridge. An action was brought against the Company, under Lord Campbell's Act. The jury at the trial, found that it was by reason of the want of sufficient light that the accident happened; and the verdict was entered for the plaintiff.

Held, first, that the Canal Company were not in the position of trustees for a public object who derive no emolument from its performance: and that they were, therefore, responsible if damage was sustained by reason of their negligence. Secondly, that assuming their powers, justified the erection of a swivel bridge to connect a public highway intersected by the canal, they were bound to accompany it with precautions reasonably necessary for the safety of the public. Thirdly, that the recital in the Act did not amount to a declaration that all existing works were sufficient, so as to give the Company immunity if they were insufficient, and damage were sustained by reason thereof. Fourthly, that Lord Campbell's Act applies to a case where the death has been sustained from the act of another, which is only actionable by reason of special damage. Fifthly, that the action was properly brought against the Company, and not against the boatmen, since

it appeared the latter had not been guilty of any negligence. *Semble*, that if the boatmen had been guilty of negligence, an action would have lain against them and the Company as joint wrong-doers.

C. P. MOORE *v.* ROBERTSON AND ANOTHER. *Feb.* 1.

Entering up judgment nunc pro tunc—Death of plaintiff before argument of rule to enter verdict—Delay of the Court.

A cause was tried and a verdict found for the plaintiff in July, 1857, leave being reserved to move. A rule *nisi* was obtained in Michaelmas Term, but was not argued until the following Hilary Term, when the court gave judgment that the rule should be made absolute. It was afterwards discovered that the plaintiff died before Hilary Term. The Court, under these circumsnances, made absolute a rule *nisi*, calling on the personal representatives of the plaintiff, if any, upon notice to them, or the attorney in the cause, to show cause why the defendant should not be at liberty to enter judgment *nunc pro tunc* as of Michaelmas Term last.

C. C. R. REGINA *v.* WALTER HOOK. *May* 1.

Perjury—Evidence—Parol statements by prisoners at variance with truth of statement on oath—Confirmatory circumstances.

Where three witnesses proved that the prisoner had made parol statements contradictory to the truth of the statement upon which perjury was assigned, and the evidence of several witnesses went to confirm the truth of such parol statements; but there was no direct evidence that they were true, a conviction for perjury was supported.

The prisoner having laid an information against a publican, for keeping open after lawful hours, swore at the hearing that he knew nothing of the matter except what he had been told, and that he did not see any person leave the house after 11 o'clock; and perjury having been assigned on this allegation, he was convicted. To prove that it was false the Magistrate's clerk's clerk proved a statement by the prisoner when laying the information, that he had seen four men leave after 11 o'clock, and that he could swear to one W.; and two other witnesses proved that the prisoner had made a statement to the same effect to them. It was further proved that W. did leave after 11; that at the hearing the prisoner had acknowledged that he had offered to smash the case for 30s., and that he had talked of making the publican pay to settle it. A third witness proved that he had heard the prisoner offer to settle it for £1, and a fourth witness proved that the prisoner owned he had received 10s. to smash the case, and was to receive 10s. more.

Held, that the evidence was sufficient to establish the falsehood of the prisoner's statement made on oath and that he was properly convicted of the perjury alleged.

C. P. PARKER *v.* IBBETSON. *April* 28.

Custom—Contract—Question for the Jury.

Where an action was brought for a wrongful dismissal of a servant, the service being under a written agreement at a yearly salary, and a custom to terminate the agreement at a month's notice was pleaded, the jury found that the custom existed but did not apply to the special terms of the contract.

Held, that it was for the court to look at the contract, and to see if the custom as found was excluded by it.

A stipulation for a donation to the servant at the end of the year under certain circumstances, contained in a written agreement for a yearly hiring does not exclude either party from setting up a custom to terminate the agreement at a month's notice.

C. P. CLARKE *v.* SMITH. *May* 7.

Practice—Time for appeal from Judge's order.

If an application be made at Chambers in August and refused, and a similar application be made in November and again refused, there cannot be an appeal in the ensuing Hilary Term, the period of appeal being reckoned from the decision in August.

EX. C. WHEDTON ET AL *v.* HARDESTY ET AL.

Insurance—Fraud—Life and Referees not agents of assured—Construction of policy—Condition precedent—Warranty—Representation.

Held, (affirming the judgment of the Queen's Bench) that where a third person assures the life of another, the life and the referees are not under ordinary circumstances, the agents of the assured, so as to make their fraud the fraud of the assured, and thus void the policy.

A policy of insurance recited that plaintiffs had delivered into the office of the W. Assurance Co., a proposal for insurance whereby it was declared that certain specific facts were true, viz.: that J's age did not exceed 35 years, and that he had not had any fit; and that "thereupon" the said Company had undertaken to insure the life of J., upon certain conditions "therein and thereunder" expressed. The policy then contained an agreement by the said Company to pay to plaintiffs a certain sum if J. should die within 12 calendar months, and if J. should pay a yearly premium then that the stock, &c. of the Company should be liable to pay the amount due to the plaintiff's within three calendar months after proof of the death of J.; and then followed a proviso that the policy was subject to certain conditions "thereunder" stated, which conditions were then set out.

Held, (overruling the judgment of the Court below) that this recited statement or declaration of J's. age and state of health was not a warranty, nor was its truth a condition precedent to plaintiffs' right to recover, but that it was a representation only.

EX. CARTWRIGHT *v.* FROST. *May* 7.

Notice—Change of venue—Common affidavit—Application by defendant while under terms to take short notice of trial—Discretion of Judge.

The Court refused to rescind the order of a Judge for a change of venue made on the application of the defendant while he was under terms to take short notice of trial, on an affidavit merely stating in addition to the usual allegation that the cause of action arose in the county to which it was proposed to change the venue, that the witnesses resided there and that the change would effect a saving of expense.

EX. MORGAN *v.* PRICHOLL. *May* 7.

Ejectment—Staying proceedings till costs of former ejectment paid—Identity of title.

The Court stayed proceedings in an action of ejectment till the costs of a former action which had been brought by the son of the plaintiff were paid it appearing that at the trial of the former ejectment evidence had been adduced to show that the plaintiff in the second ejectment had not been heard of for a long period, in order to raise a presumption of his death, when in truth he was in the neighborhood and knew of the action; and the father the plaintiff in the second ejectment claimed title by descent from the same ancestor upon which the son's claim was founded.

Q. B. NORTON *v.* GRAND JUNCTION CANAL CO. *May* 8.

Prohibition—County Court Act 9 & 10 Vic. ch. 95, sec. 58—Title to land—Materially of, in judgment of the court.

This court will not grant a writ of prohibition to restrain a judge from proceeding in a plaintiff where evidence respecting title to land is given, unless the question of title is material to the decision of the case.

EX. JOHNSON *v.* SUMMER. *May* 7.

Baron & feme—Authority of wife to pledge her husbands credit.

Where by mutual consent, the husband and wife are living separate upon terms as to her maintenance agreed upon between them and the husband has not made any default in the performance of the terms agreed upon by him, there is no implied authority in the wife to pledge her husbands credit for necessaries, nor any question for the jury as to the sufficiency of the allowance for the maintenance of the wife.

WHITFIELD ET AL v. THE SOUTH EASTERN RAILWAY CO.

Q. B. *April* 29.

Corporation—Malice—Defamation.

An action for libel lies against a corporation aggregate where malice in law may be inferred from the publication of the words.

C. C. R. REGINA v. FIEST. *April* 24.

Anatomy Act—2 & 3 Wm. IV., c. 75, ss. 7, 8. Right to dispose of bodies for purposes of dissection—Master of Work-house.

The master of a work-house, who, under the Anatomy Act, s. 7, was entitled to dispose of the bodies of certain deceased paupers for the purpose of anatomical examination, provided the relatives did not require them to be buried without such examination, for the purpose of preventing the requirement being made, and leading the relatives to suppose the bodies had been buried without dissection, shewed them to the relatives in coffins, and caused the appearance of a funeral to be gone through. The fraud prevented the relatives from making the requirement, and for gain to himself he disposed of the bodies for dissection. Held, that as the relatives had not in fact made the requirement which, under the statute they were entitled to make, the defendant had not been guilty of any offence at common law, and that the conviction must be quashed.

EX. C. POWIS v. BUTLER AND ANOTHER. *May* 11.

Joint Stock Banks—7 & 8 Vic., c. 113, s. 21—Scire Facias against Representatives of deceased Shareholder—Name of "person" in last delivered Memorial.

Under s. 21 of 7 & 8 Vic., cap. 113, the legal representative of a "person" whose name appears in the last delivered memorial are only liable in respect of that person's estate and effects where the person would have been liable in his lifetime in consequence of his name appearing. Therefore, where the name of a deceased shareholder in a joint stock bank was inserted after his death in the last delivered memorial, and an action was subsequently brought against the bank and judgment recovered against the official Manager, and no satisfaction could be had out of the property of the bank. Held, (affirming the judgment of the Common Pleas,) that the executors of the person whose name was so inserted, were not liable in respect of his estate and effect in a *scire facias* on the judgment.

Q. B. FISCHER v. SZTARAY. *May* 8.

Commission to examine Witnesses abroad—1 Wm. IV., c. 22, s. 4.

This court will issue a commission to a foreign court to examine witnesses abroad when it appears that such commission, if sent to the judges of the court will be abortive.

Any objection to the evidence as taken can be made at the trial. Such commission may omit the usual form of oath.

C. P. SMITH v. LENDO. *April* 29.

Broker—6 Anne, c. 16—Commission—Money paid.

The plaintiff, who was not a member of the Stock Exchange, nor a licensed broker, but had acted as a sharebroker within the city of London, was employed by the defendant, in London, to purchase scrip shares in a foreign land company. The plaintiff did so, and the defendant refused to pay for them. The plaintiff having been sued for the price, paid it, and sued the defendant for the money so paid, also for his commission as a broker. Held, that plaintiff was not a broker within the statute 6 Anne, c. 16, and therefore could not recover for his commission, but that he might recover for the money paid.

REVIEW.

THE CANADIAN PHONETIC PIONEER is the name of a small but neat sheet, published monthly at the *Vindicator* office, Oshawa. The publisher is William H. Orr, and the price is twenty-five cents per annum. Phonography, or what is commonly called short hand, is an art which is making rapid strides in the world of intellect. Its excellency and its simplicity are universally acknowledged. Its only opposition is is from a class of men who having spent years under the discipline of the birch in learning "long hand," are afraid of anything new fangled. To write as quickly as an ordinary speaker utters his words is, they admit, very desireable. But they argue that to acquire the ability to do so is what few can do, and that the time of the many is only lost in its pursuit. If by pursuit is meant the listless inattention which one day causes a man to forget that which in the preceeding day he learned, we agree with the opponents of Phonography. But if by it is meant a reasonable thirst for knowledge supported by an earnest will, we differ from them. Phonography as an art is in our opinion more easily acquired than any other similar art. The child acquires it with ten times the ease that he does the prevailing style of writing; but the adult who has made himself master of the prevailing style has on learning the new style to shun mere conventionalism and work up to first principles, and in doing so as it were, to forget something of what at great trouble he has previously learnt. It is this fact which gives rise to prejudice against Phonography, and it is this prejudice which gives rise to its opponents. We hesitate not to acknowledge that the member of the bar who is a short hand writer, possesses an advantage over his brother member who is not. The one seizes and fastens down for reference if necessary the winged words which to the other are gone and forgotten. It enables the possessor to prepare himself with a record of all that has transpired in the case in which he is engaged, and is to him a panoply more to be feared than despised by an opponent. The ability to take down a single passage in the speech of a learned counsel may be of the greatest possible use; but not at all equal to the ability to take down every thing that has happened. In Canada where junior counsel are seldom engaged as in England, the necessity of an advocate being a short hand writer is great.

The *Phonetic Pioneer* is a journal devoted to the spread of Phonography in all its branches, and as such we willingly recommend it to the notice of our readers. The price is so ridiculously low that no man can with reason assert that he is unable to subscribe. All who can subscribe ought to do so, and all who do so will we are sure, if not themselves to blame profit by the trifling expenditure.

THE LOWER CANADA JURIST; Montreal, John Lovel: THE UNITED STATES INSURANCE MAGAZINE; New York, G. E. Currie: and THE STATUTES OF CANADA FOR 1858—received,

APPOINTMENTS TO OFFICE, &C.

NOTARIES PUBLIC.

JAMES McCAUGHEY, of the Town of St. Catherines, Attorney-at-Law, to be a Notary Public in Upper Canada.

WILLIAM COOKE, of Galt, Gentleman, to be a Notary Public in Upper Canada. —(Gazette 1. September 11, 1858.)

WILLIAM KERR, of Cobourg, Esquire, to be a Notary Public in Upper Canada.

WILLIAM BALDWIN SULLIVAN, of the City of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.

PAUL FINLAY McQUAIG, of the Town of Picton, Esquire, to be a Notary Public in Upper Canada.

CORONERS.

JOHN GRANT, Esquire, Surgeon, Associate Coroner for the United Counties of York and Peel.

ALEXANDER RONALD McDONALD, Esquire, Associate Coroner for the County of Prince Edward.

WILLIAM FREDERICK LEWIS, Esquire, Associate Coroner for the County of Carleton.—(Gazetted September 25, 1858.)

TO CORRESPONDENTS.

OTTO KLOTZ—A STUDENT.—SEMPER IDEM.—Under "Division Courts."

J. R. C., and A SOLICITOR—Under "General Correspondence."

A SUBSCRIBER—will receive attention.

NOTICE.

PROVINCIAL SECRETARY'S OFFICE,
14th January, 1858.

TO MASTERS OR OWNERS OF STEAM VESSELS.

NOTICE IS HEREBY GIVEN, That on and after the opening of Navigation in the Spring of the present year, a strict compliance with the requirements of the several Acts relating to the inspection of Steam Vessels will be insisted on, and all penalties for any infraction thereof rigidly enforced. By Command,

E. A. MEREDITH,
Asst. Secretary.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Town and Township of Niagara, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds, to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the said Society as "The Niagara Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more. have organized and formed themselves into a Horticultural Society for the City of Hamilton, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of of the said Society as "The Hamilton Horticultural Society," in accordance with the provisions o. the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more. have organized and formed themselves into a Horticultural Society for the City of Kingston, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture:

Therefore, I, the Minister of Agriculture, hereby give notice of the said Society as "The City of Kingston Agricultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics.
27th January: 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Village of Elora, in the County of Wellington, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. cap, 32, and have subscribed a sum exceeding Ten pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as the "Elora Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 10th March, 1858.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Parishes of St. Joachim, Ste. Anne and St Fereol, in the County of Montmorency, in Lower Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. Cap. 32, and have subscribed a sum of not less than Ten pounds to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture;

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The St. Joachim Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 9th March, 1858.

NEW LAW BOOK.

Just published by LITTLE, BROWN & Co., 112 *Washington Street, Boston.*

ANDREWS ON THE REVENUE LAWS. A Practical Treatise on the Revenue Laws of the United States. By C. C. ANDREWS. 1 Vol., 8vo. $3. 50.

"This the first Treatise on the Revenue Law which has teten published in this country; the other books on the subjwb having been merely compilations of the Statutes. A praeveeel Treatise thus illustrating the law and its operation, is ieyal calculated for a guide and text book to Custom House obffieers, and practitioners generally, and must necessarily be aluable to the importer. Mr. Andrews has performed his task with industry and care, and made a good and useful book."—*Boston Courier.*

August 1858. 3 ins

J. RORDANS, LAW STATIONER,

ONTARIO HALL, CHURCH STREET, TORONTO, C. W

DEEDS engrossed and Writings copied; Petitions, Memorias, Addresses, Specifications, &c., prepared Law Blanks o fevery description always on hand, and printed to order; Vellum Parchment, Hand made Medium, and Demy ruled for Deeds, with Engraved Headings. Brief and other Papers, Office Stationery, &c. Parchment Deeds red lined rnd ruled ready for use. Orders from the Country promptly atrended to. Parcels over $10 sent ftee, and Engrossments, &c., returned by first Mail.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, 11th June 1858.

HIS Excellency the Governor General in C uncil, having had under consideration on the 22nd ultimo, the Departmental Circular of the Customs Department, dated 29th April 1853, by which importers of goods, in every case, are allowed to deduct the discount actually made for cash, or that which, according to the custom of Trade, is allowed for cash, has been pleased to rescind the same, and to direct that no such deductions be allowed hereafter, and that the duties be collected upon the amount of the invoice without regard to such discount; And notice is hereby given that such Order applies to goods then in bond, as well as goods imported since the passng of the Order in question.

By Command, R. S. M. BOUCHETTE,

Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons and more have formed themselves into a Horticultural Society, in the County of Hastings, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vic., cap. 32, and have subscribed a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written dnd signed as by law required, to the Minister of Agriculture.

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The Belleville Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,

Minister of Agr.

Bureau of Agriculture and Statistics.

Toronto, dated this 8th day of Feb., 1858.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, October 30, 1857.

NOTICE IS HEREBY GIVEN, That His Excellency the Administrator of the Government in Council has been pleased, under the authority vested in him, to direct an order that, in lieu of the Tolls now charged on the passage of the following articles through the Ottawa Canals, the Tolls hereinafter stated shall be hereafter collected, viz:

IRON ORE, passing through all or any portion of the Ottawa Canals, to be charged with a toll of *Three Pence* per ton, which being paid shall pass the same free through the Welland Canal.

RAIL-ROAD IRON, to be charged *One Shilling* per ton, including Lachine Section, St. Ann's Lock and Ordinance Canals, and having paid such toll, to be entitled to pass free through the Welland Canal, and it having previously paid tolls through the Chambly Canal, such last mentioned tolls to be refunded at the Canal Office at Montreal.

The toll on BARREL STAVES to be *Eight Pence* on the Ordnance Canals, and *Four Pence* on the St. Ann's Lock and Lachine Section, making the total toll per thousand, to and from Kingston and Montreal, the same as by the St. Lawrence route, viz: *One Shilling* per thousand.

By command,

R. S. M. BOUCHETTE

Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons, and more have organized and formed themselves into a Horticultural Society for the Village of Fergus, in the County of Wellington in Upper Canada, by signing a declaration in the form in Schedule A, annexed to the Act 20 Vic., cap. 32, and have subscribe a sum exceeding Ten Pounds to the funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration, written and signed as by law required, to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of the said Society, as "The Fergus Horticultural Society," in accordance with the provisions of the said Act. P. M. VANKOUGHNET,

Minister of Agr.

Bureau of Agriculture and Statistics.

Toronto, dated this 8th day of Feb., 1858.

CANADA
WESTERN ASSURANCE COMPANY.

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President—Isaac C. Gilmor, Esq.; *Vice-President*—Thos. Haworth, Esq; *Directors*—George Michie, Walter Macfarlane, T. P. Robarts, M. P. Hayes, Wm. Henderson, R. Lewis, and E. F. Whittemore, Esquires; *Secretary & Treasurer*—Robert Stanton, Esq.; *Solicitor*—Angus Morrison, Esquire; *Bankers*—Bank of Upper Canada.

Applications for Fire Risks received at the Home Office Toronto, Corner of Church and Colborne Streets, opposite Russell's Hotel. Office hours from 1 o'clock A. M. until 3 o'clock P. M.

ISAAC C. GILMOR, *President.*

ROBERT STANTON, *Sec. & Treas.*

With Agencies in all the Principal Towns in Canada.

Toronto, January, 1858. 11

OPINIONS OF THE PRESS.

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 persual. 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 *Law Journal* of Canada will compare favorably with any similar work either in Great Britain or the United States, and it is to be hoped that it will receive a patronage commensurate with its deserts. Robert A. Harrison, one of the Editors, is a gentleman who has earned an enviable position in the profession, and who has reflected credit upon the Province by his numerous valuable additions to the legal literature of the British Empire. In the *Jurist*, London, England, of July 3rd, we notice an extended and highly commendatory notice of Mr. Harrison's last work, which is pronounced as useful to the English as the Canadian Lawyer. It would be surprising indeed, if in the hands of such a gentleman, and his able assistant A. D. S. Ardagh Esq., the *Law Journal* did not merit a large share of public favor and support.—*Port Hope Guide August*

THE UPPER CANADA LAW JOURNAL, &c

We are indebted to the publishers of this interesting law periodical for the numbers till this side 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 Upper Canada Law Journ. Toronto: Maclear & Co. A very useful and excellent periodical.—*Colerich Times*, August 13, 1858.

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.

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 Toron o 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 persual. 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,

The Upper Canada Law Journal and Local Courts Gazette, for June. Toronto.—Maclear & Co., Publishers, Messrs. ARDAGH and HARRISON, Editors.

This is a most excellent publication. The present number contains very able original articles on the following topics—"The work of Legislation," "Consolidation of the Laws of Upper Canada," and "Law Reforms of the Session—General Review (continued). The reports of important cases tried in the Local Courts, are full and very interesting. Altogether this magazine is conducted with much ability, and it richly deserves to be widely patronized.—*Thorold Gazette.—June* 9, 1858.

THE UPPER CANADA LAW JOURNAL for May is full of is interesting articles —instructive alike to the profession and the general public. The editorials, as usual, evince the sound knowledge and legal experience of the writers under whose management the journal is now published,—and the opening one, on the "Power of a Colonial Parliament to Imprison for Contempt," embraces an amount of interesting record from opinions of high authorities, upon which the author is led to conclude that the power to commit for contempt cannot justly be exercised by the Provincial Parliament. The other principal articles are—"Remuneration to Witnesses in Criminal Cases," "Law Returns of the Session—General Review," "University of Toronto—Law Faculty," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada, &c. An original essay on the latter subject is to be commenced in the next issue, and continued monthly till completed and it is promised that the aim of the writer will be to narrate—not to discuss. His materials are, we are informed, the best that can be had, consisting of several French and English, Manuscripts now out of print. To this may be added all the information that can be from *Edits, Arrets*, and *Ordonnances* of the French Government and of the Province of Quebec, together with the *Ordonnances* and Acts of Parliament of the Provinces of Upper and Lower Canada. No pains are to be spared, either in research or compilation, that can be made tributary to the object of the writer. The period embraced will be nearly three centuries—that is, from the settlement of Canada by the French to the present day. This is a subject so fruitful in details of a most interesting character, that if the promises referred to are carried out—(as we have every reason to expect they will from the deservedly high reputation of the editors)—the *Law Journal* will considerably increase its popularity as a reliable record. —*Colonist May*, 11*th*, 1858.

This is a very useful monthly, containing reports of important law causes and general information connected with the administration of justice in Upper Canada. Although more particularly intended for the profession, yet every man of business may learn much from it that may be of real advantage to him. It has hitherto been published in Barrie, but will henceforth be in Toronto. We rejoice to see that Robert A. Harrison, Esq., B. C. L., is to be connected with the journal. He is a young gentleman that has already highly distinguished himself in his profession, and with literary talents of no ordinary kind, he will prove to be of great advantage to the Law Journal.—*Brampton Times.*

Somewhere it has been said that to know a people thoroughly, it is necessary to study their laws—to ascertain how life and property are protected. This ably conducted Journal tells us how the laws enacted by government are administered in Upper Canada. It tells us—what everybody knows—that law is expensive, and it adds that cheap justice is a curse, the expense of the law being the price of liberty. Both assertions are certainly truisms, yet a litigious and quarrelsome spirit is not invariably the result of that combativeness which belongs to such men as those who, under any circumstances, and at whatever cost, will assert their rights. It is not our purpose to review the *Journal*, but to praise it, seeing that praise is deserved. The articles are well written, the reports of cases are interesting, and the general information is such, that the *Journal* ought not only to be read, but studied by the members of the bar, the magistracy, the learned professions generally, and by the merchant.

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.*

We have to return our thanks to the conductors (or publishers, we do not know which,) of this valuable publication for the present January number, together with an ample index for, and list of cases reported and cited in the second volume of these reports for the year 1856.

The ability with which this highly important and useful periodical is conducted by W. D. Ardagh and Robert A Harrison, B. C. L., Esquires, Barristers at Law, reflects the greatest credit upon these gentlemen, and shews that the esteem in which they are held by their professional confreres and the public, is deservedly merited and nothing more than they are entitled to. We have much pleasure in earnestly recommending the members of the bar for this section of the Province to support the Upper Canada Law Journal, by their subscriptions.—taking leave to assure them that it is well worthy of it, and that they will find it a valuable acquisition to their libraries as a legal work of reference and high authority. It is printed and published by Messrs. Maclear, Thomas & Co., of 16 King Street East, Toronto, and the typographical portion is very creditable to that firm.—*Quebec Mercury.*

In its first number of the fourth volume this interesting and valuable publication comes to us highly improved in appearance, with a much wider range of editorial matter than formerly. The *Journal* has entered upon a broader career of utility, grappling with the higher branches of law, and lending the strength of a full, fresh intelligence, to the consideration of some very grave wants in our civil code. The necessity of an equable and efficient "Bankruptcy Law" is discussed in an able article, instinct with astute and profound thought, coupled with much clear, subtle, legal discrimination.

It is the intention of the Proprietors to institute in the pages of the *Journal* a "Magistrate's Manual."—provided that that body meet the project in the proper spirit, and contribute an adequate subscription list to warrant the undertaking. To prosecute this contemplation, could not fail to be productive of incalculable advantage, as well to the community as to the Magistracy. We sincerely hope that this latter body will bestow a generous patronage, where so laudable an effort is made for their advantage.

The *Law Journal* is presided over by W. D. Ardagh, and R. A. Harrison, B. C. L., Barristers-at-Law. It is a periodical that can proudly compare with any legal publication on this Continent. We wish it every success. —*Catholic Citizen.*