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THE

UPPER CANADA LAW JOURNAL

AND

LOCAL COURTS GAZETTE;

FROM

JANUARY TO DECEMBER, 1855.

VOLUME I.

EDITED BY

JAMES PATTON, ESQ., BARRISTER-AT-LAW, AND OTHERS.

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THE UPPER CANADA LAW JOURNAL,

AND

LOCAL COURTS GAZETTE;

EDITED BY JAMES PATTON, ESQ., BARRISTER-AT-LAW, AND OTHERS.

OUR PROSPECTUS.

About the middle of January, 1855, will be published the first number of a Monthly Periodical under the above title; it will contain about 20 pages of reading matter, with four pages added for Advertisements and matters not of permanent utility. When bound it will present nearly the appearance of the English "Jurist."

"THE LAW JOURNAL" will be wholly and exclusively a Legal Publication, and the Conductors of such a work, it is almost needless to say, can have, editorially, no politics.

It will embrace Reports of Cases, Articles on the Law and its Administration, Information for the Assistance of Officers of the Local Courts, Sheriffs, Magistrates, Coroners, Municipal Bodies, and extracts from English Periodicals on Legal subjects, having reference to the position of our Provincial Laws.

REPORTING DEPARTMENT.

In this will be found in reference to the Law and Practice of the Division Courts, as they appear or can be procured, Reports of such cases as may have been heretofore settled, as also those arising in future, comprising:

1. Cases decided in the Superior Courts in England.
2. Cases decided in the Superior Courts of Upper Canada.
3. Selections from English County Court Cases.
4. Cases determined in the Division Courts of Upper Canada.

The English Superior Courts decisions will comprehend Cases decided on enactments similar to our own Division Courts Laws, and the selections from the decisions of the County Court Judges of England will be of a like character; whilst such decisions of the County Court Judges of Upper Canada of general importance as can be procured will receive special attention. When deemed necessary, English Cases will be accompanied with Notes, showing their bearing on our Laws. In reference to the County Courts, Law and Equity side, and Courts of Quarter Sessions, there will also appear in the "LAW JOURNAL," the Cases determined in the Superior Courts at Toronto.

GENERAL DEPARTMENT.

Under this head will appear practical Articles on the Law and its Administration; the County and Division Courts, their advancement, working and improvement; and especially with a view to the information of Officers, Clerks, Bailiffs, and Suitors; Local Institutions and Local Administration by Magistrates, Municipal Bodies and others; the just interests of the Profession; and the improvement of the Law by "cautious, gradual, and permanent reform for the love of excellence." The doings of the day, within the scope of the Publication, will also engage attention as occasion may require and space permit, and suitable extracts from the leading Periodicals will be given.

CORRESPONDENCE AND CONTRIBUTIONS.

A space will be afforded to elicit whatever experienced Officers or Practitioners may be able to set down for the information of others, whose doubts lead them to query; thus giving, as it were, the advantages of a Monthly conference on the many difficult points which are constantly arising: also, for queries on points of Practice, &c., which the Conductors of the "LAW JOURNAL" will gladly aid in resolving. Any Correspondence received by the 27th December, instant, will be noticed in the first issue.

REVIEWS.

Legal Works issuing from the Press of this Province, or of the United States (where the latter bear on our Provincial Enactments or Provisions) will also be reviewed.

The Division Courts having stood the test of more than thirteen years trial, and the Law respecting them arrived at a settled state, it seemed that the time had arrived when a Publication specially devoted, (whilst embracing the other Legal matters before alluded to) to advance their value and efficiency, could be produced. Before entering on this undertaking, a proposal of a Periodical, on the basis which this Prospectus includes, was submitted to the Committee of Judges, appointed to frame General Rules of Practice for the Upper Canada Division Courts, and the same met with their approval, as the following extract from a letter, dated in March last, will show:—

"The Commissioners have perused your Communication with lively interest, and recognize in the plan of Publication, which you propose, a source of great public utility in advancing the sound administration of Justice in Courts, which, from their local character, so immediately comprehend the interests evolved from the masses of a peculiarly industrious and progressive People—that a judicious system of Reporting decisions, whether English or Provincial, could not fail to prove materially useful to all persons connected with these Courts, from the Judges, who preside over them, individually and unaided, to the Suitor or his Agent—combined, moreover, as your Reports are intended to be, with practical articles elucidating the Law and indicating the proper Practice."

Since that period, all the County Court Judges in Upper Canada were communicated with, and have individually (with one or two exceptions where no replies have been received) expressed themselves most favourably towards the undertaking.

The expense of getting up and conducting a Law Journal is always very considerable; one Editor alone could not accomplish the work, and every care will be taken by the Conductors to give such information as will enable the Officers of the Court to act with confidence and safety, and the Public to derive the full advantages the Local Courts are calculated to confer; whilst it is hoped that the Publication will be useful to the Profession generally, especially to those Members resident in the Country, who have not the advantage of reference to any Library, or of conference with others on such subjects.

The price will be 20s. per annum, if paid on or before the 1st of March in each year; if after that period, 25s. This will barely save from loss, with a subscription list of 600; and being specially an organ of communication in respect to Local Courts—whilst comprising at the same time the other features alluded to—from the Judges, Officers, and Suitors, of those Courts, as well as from Magistrates, Municipalities, and the Legal Profession at large, we beg to solicit support, and exertion to obtain subscriptions to the "LAW JOURNAL."

ADVERTISEMENTS.

It is considered that from the nature of this Periodical, and hoped that from the extent of its Circulation through this Province, it will afford an excellent medium for Legal or Commercial Advertisements, or Sales of Land, whether private, by Auction, or under process of the Courts of Law or Equity.

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DIVISION COURTS.

OFFICERS AND SUITORS.

Under the above heading, it is intended to set down, in every number of this Journal, matters having special reference to Clerks and Bailiffs; also information for persons suing or being sued in the Courts, with the desire of making the *Law Journal* practically useful to all.

OFFICERS.

The officers of these courts have important and responsible duties to perform, often so situated that it is impossible for them to procure advice, they must frequently act on their own unaided judgment—to assist that important and numerous body in the discharge of their several duties will be our constant aim. With a view to this, the matters which more immediately concern them, such as Procedure—officer's Rights and Duties—Forms—Fees—will receive attention, and from time to time hints will be given for their assistance and advantage. Officers having large courts will have large experience, and attention will be given to communications from them tending to make this department extensively useful.

CLERKS—*Arbitration.*—Under the New Rules, every care seems to have been taken by the Commissioners to secure the successful working of the law of arbitration, extended to the Division Courts by the Act of 1853.

A form for the Order of Reference, and for the Award (Forms 25 and 26) are given.

When a cause is referred to arbitration, the Clerk, of course, furnishes to the parties or their arbitrators the order of reference. We would recommend the general form of award to be given also; for if arbitrators are left to draw it, and a copy of the rules is not at hand to guide, some mistake will be made in the form that may vitiate the award, or the award be in such ambiguous language that the clerk will be at a loss to know whether or not he should enter up judgment upon it. The terms of every reference will of course be according to the agreement of the parties,—confined to the subject matter of the suit, or embracing other differences—the costs in the discretion of arbitrators, or no power given over costs, as in cases where costs are "to abide the event of the suit"—and Clerks should, whenever opportunity occurs, explain this to arbitrators, to prevent mistakes. We do not mean to say that there is any legal compulsion to do so, but it is manifestly proper for the officer to assist in carrying out the object of the Legislature by facilitating this desirable method of settling differences.

Clerks will see, by looking at the 4th section of the Extension Act and the 69th Rule, that they are empowered to enter up judgment *without any order of the Judge*, upon production of the award with an affidavit of the execution thereof—both documents to be filed. It is probable that in most cases the Clerk will be called upon to draw up this affidavit and swear the witness to it; at all events he will be bound to see to its sufficiency before he enters judgment. Now no form for such affidavit is contained in the general forms, (indeed it would make them inconveniently lengthy to give a form suited to every particular circumstance) we, therefore, furnish one—no doubt an unnecessary work for some clerks, but there are many in remote divisions to whom it may be acceptable.

Form of Affidavit of Execution of an Award.

In the —— Division Court for the County of ——

Between A. B., Plaintiff,
and
C. D., Defendant.

E. F., of the —— of ——, in the County of —— Yeoman, maketh oath and saith that on the —— day of ——, A.D. 18 , this deponent was present and did see G. G. duly sign and execute the *above* Award; that the name G. G. at the foot of the said Award is the proper handwriting of the said G. G.,* and that the name E. F. subscribed to the said Award as the Witness thereto is of the proper handwriting of this deponent.

Sworn before me at ——
in the —— this —— day of
—— A.D. 18 .
——
Clerk, &c.

E. F.

When the award is brought in sworn to, it should be seen that it has been sworn before an authorised person, viz., before a judge, a clerk, or a commissioner for taking affidavits in the Superior Courts, (Extension Act, Sec. 33), for unless it appears to be so sworn it will not warrant the judgment. The 46th rule points out the *formal requisites* in an affidavit. A form (No. 27) is provided for entering the judgment in the Procedure Book, which must be followed in substance, and the entry should be

*NOTE.—Though it is the best course, it does not seem absolutely necessary that there should be a *subscribing* witness to the execution of the Award.

dated on the day when award and affidavit are filed with the clerk. The time of issuing execution will be governed by the terms of the award.

Forms.—It will be necessary to procure a supply of Forms under the New Rules. For the general benefit, but more especially respecting clerks whose business is small, we would suggest that some one clerk in a county should get printed a supply for all, first ascertaining the quantity that each would take: by this means every one would have his forms at one-third less than if procured singly. True, there might by this mode be an additional blank or two in the number of the division, and place of sitting, but that is a trifling consideration when the saving is taken into account.

Speaking of Fees, it really seems hard that Clerks should be obliged to pay out of their own pockets for forms which the Government receives a fee on. In the Superior Courts it is not so, and we think that a general representation of this hardship on officers might meet with a favorable response.

Bailiffs.—*Service of Process and matters connected therewith.*—The chief duty of Bailiffs is to serve process, and, as the proper and timely service of the summons is the basis of every proceeding in the courts, where the business is large it will be absolutely necessary for every bailiff to make out a list of the summonses he receives for service, with columns for date and mode of service—a little ruled book that might cost 3d. would serve for a couple of hundred cases. As soon as practical after a service is made, the date of service and, in cases where the service is not required to be personal, the name of the individual to whom the copy of summons is given, and his or her connection with the defendant should be carefully noted.

In what Bailiffs call "house service" there is some laxity in ascertaining the name of the person to whom the copy of Summons is delivered: this is wrong, and whenever possible the name should be found out, and the relation in which the party stands to the defendant—as wife, daughter, &c.,—noted down.

Bailiffs should carry with them a good supply of blank Confessions, and pen and ink to take them—for it is the right of parties to execute a confession before them, and pen and ink is not always to be had in the out-of-the-way places officers have to go to. In taking a confession the sum confessed should be inserted in words, at length, and not in figures; and the paper should be kept clean. We are told that in some counties bailiffs have a species of leather pocket-book with four divisions, one for summonses, one for confessions, one for executions, and one for subpœnas and other papers: this seems a simple and easy plan for keeping the papers uninjured, and for avoiding mistake or confusion—but experience is the best teacher. In these little matters of detail it may be thought we are too minute, but we write for a numerous class, and to some our remarks may be of use.

SUITORS.

The practice, if it ever prevailed, of "shaking money out of a debtor," no longer exists; men are pointed to the law to obtain their rights, and the Law Courts of the country are open to all. If men are going a journey they first enquire the road; if they set about working a "machine," they inform themselves beforehand how it is to be done; otherwise they stand a chance of losing their way in the one case, or getting their legs and arms crushed in the other. Now if people wish to use the Law Courts with advantage they must in some way inform themselves how to do so, or they stand a chance of suffering in pocket for their folly; and many frequently raise a cry against the law and its ministers when they have themselves only to blame. We purpose, then, under this head, giving from time to time, in plain familiar language, information that may be the means of saving time and money to suitors in Division Courts.

Arbitration.—Under any circumstances arbitration is a commendable method of settling differences which arise in the course of business dealings: between members of the same family it cannot be too strongly recommended, and we every day see Judges advising relatives, parties to a suit, to consent to a reference to arbitration.

Hitherto the common and not unreasonable objection to an arbitration lay in the difficulty and expense attending it: to exemplify, let us suppose a case of dispute respecting an unsettled account of £50, on which an amount or balance of £24 is claimed. In proceeding to arbitrate upon it the usual course was to execute mutual bonds to abide by the award of certain named arbitrators, with a clause consenting that the submission should be made a Rule of the Superior Courts at Toronto—

without this witnesses could not be compelled to attend, and arbitrators had no power to administer oaths to witnesses or parties. To secure the attendance of witnesses application had to be made to a lawyer to obtain a proper order, and affidavits had to be drawn upon which to ground a motion before one of the judges of the Superior Courts at Toronto, and this order was served on the witness in the same manner as a subpœna. Then—to step aside from the direct proceedings—if the witness refused to obey the order there was a long proceeding, still before the Superior Courts, to put him in contempt. But, supposing witnesses to attend and the arbitration gone on with and award made, what were the necessary steps to obtain the sum awarded? Two remedies were open, one to attach the party for not obeying the award, the other by suit on the bond and award. If by attachment, it was necessary to move, in one of the Superior Courts, to make the submission a rule of Court; then to serve copy of rule and award, and personally or by letter of Attorney to demand amount awarded: this done, affidavits of service and of the demand were made out, and upon them a Rule obtained calling on the party to shew cause why an attachment should not be issued; if no sufficient cause were shewn an absolute order was made, the attachment issued was given to the Sheriff, and the party in default was by him arrested—if by suit, there was the dilatory and needlessly expensive action on the award. There are many other collateral matters which might be noticed, but we have said sufficient to prove the inapplicability of such a mode of arbitration as respects small demands. It is not generally known, we apprehend, that the Division Courts offer an easy and cheap medium for reference to arbitration; we will, therefore, proceed to shew how simply the law of arbitration can be worked out through them. It may be done after this manner:

In the above supposed case (or in any matter within the jurisdiction of Division Courts) the plaintiff goes to a Clerk, lodges his claim, which is entered and a summons issued, to give the Court jurisdiction, and served—indeed it would seem that service may be dispensed with. At the Court day the parties verbally consent to an arbitration, and an order upon it is at once made out—or the consent may be given by an Agent or handed in in writing—the Clerk, who is on the spot, issues subpœnas for witnesses (who, by the way, can be punished by summary process in the same Court if they fail to attend) and under the order the arbitrators have power to administer oaths to the witnesses. When the Award is made and lodged with the Clerk of the Division Court, with an affidavit that it was signed, a *Judgment* is entered upon it, and execution may issue and be given to the bailiff as on any ordinary judgment.

Now, not to speak of delay, the costs made up under the old proceeding would be about £6, while in the Division Court they would not exceed 15s.

In order *to trace out clearly* the way of proceeding, at the risk of repetition, we add—

PRACTICAL INSTRUCTIONS FOR REFERENCE TO ARBITRATION BY PARTIES HAVING MATTERS OF DIFFERENCE WITHIN THE JURISDICTION OF DIVISION COURTS.

Let the Plaintiff make out his account or claim in the same form as for suit; bring to the Clerk of a Division Court, tell him to enter it and proceed, but inform him of the intention to arbitrate. At the next sittings of the Court let Plaintiff and Defendant attend, and inform the Judge of the agreement to arbitrate. *If inconvenient to either party to attend personally*, make out a written consent and let both sign it, and send by some person who will hand it to the Judge when the cause is called on at Court. The consent may be as follows:

Form of Consent, on reference to Arbitration.

In the ——— Division Court for the County of ———
Between A. B. Plaintiff,
and
C. D. Defendant.

It is hereby agreed by and between the said parties to refer all matters in difference in this cause (*and if so agreed add* "and all other matters within the jurisdiction of this Court, in difference between the said parties") to the Award of G. G. (*or* "to the Award of G. G. and S. L, and, in case of their disagreement, to the Award of such third person as they shall appoint") so as said Award be made in writing ready to be delivered to the parties entitled to the same on or before the —— day of ——— A.D. 18 . And it is further agreed that the said Award may be entered up as the Judgment in this cause. [*Add any other terms agreed on, as* "and that all Costs shall be in the discretion of the Arbitrator" *or* "Arbitrators", *or* "that the costs of this action and of this reference shall abide the event of the suit," &c.]

Given under our hands this ——— day of ——— A.D. 18 .
A. B.
C. D.

The person who hands in the Consent can bring back the Order of Reference, and the Arbitrators can then proceed in the matter.

In our next number will be some instructions to arbitrators and parties, for the due and orderly holding of an Arbitration.

For the present, we must take leave of Suitors, hoping what we have said may facilitate the amicable, and inexpensive settlement of differences

concerning "small demands:" and it is gratifying to be able to add that the privileges pointed out suitors owe to three high *Ministers of the Law*—The Hon. Mr. Justice Draper, the author of the Local Courts system; the Hon. Mr. Justice Burns, who suggested the element of arbitration in Division Courts; and the Hon. Mr. Justice Richards, the author of the Act of 1853, by which the law of arbitration was extended to these courts.

ON THE DUTIES OF MAGISTRATES.

(SKETCHES BY A J. P.)

For the "Law Journal."

BEFORE entering on this subject, the writer wishes to have a word with such Justices of the Peace as may read the *Law Journal.*

GENTLEMEN:—

Permit me to introduce myself as a limb of the law in days gone by, but for years past "one of Her Majesty's Justices of the Peace."

Having spent a considerable period of my life in the performance of the duties belonging to Lawyer and to Magistrate, I have acquired something, at least, by experience; and such items of information as I have in respect to duties of a Magistrate I am willing to throw together and lay before you as my leisure permits—and I know that Magistrates require all the assistance they can receive—but let me say that, as "there is nothing new under the sun," neither is there pretense to originality in my intended sketches. Some of you, or others, may desire to look more closely into the matter I purpose treating, so I must give some "authorities," that the soundness of positions laid down may be the more *readily tested.*

I wish now to say something by way of introduction, and will take leave to be a little prosy, as I work "without fee or reward."

If antiquity lends *honor* to an office, you, gentlemen, may justly claim it, for that of a Justice of the Peace was created more than 500 years ago; and including as it does great and extensive powers, intended to promote the well being of society, it is honorable in itself.

Justices of the Peace are defined to be "Judges of Record appointed by the Crown within certain limits for the conservation of the peace, and for the execution of divers things comprehended within their commissions and within the divers statutes committed to their charge."

A very learned writer finds in the name "*Justice* of the Peace" something "to put them in mind (by their *name*) that they are to do justice (which is to yield to every man his own according to the law and statutes of the Realm) without respect to persons;" and goes on to say, "It shall not be amiss shortly to put our Justices of the Peace in mind how justice may be perverted, many ways, if they shall not arm themselves with the fear of God, the love of truth and justice, and with the authority and knowledge of the laws and statutes as, namely—*By Fear,* when fearing the power of another they do not justice.—*Favour;* when they seek to please their friend, neighbor, or other.—*Hatred or Malice* against the party or some of his.—*Covetousness;* when they receive or expect gift or reward.—*Perturbation of Mind;* as anger or such like passion.—*Ignorance,* or want of true understanding of what is to be done.—*Presumption;* when without law, they, presuming on their own wits, proceed according to their own will and affections.—*Delay,* which is in effect a denying of justice.—*Precipitation,* or too much rashness—when they proceed hastily, without due examination and consideration of the fact and material circumstances, or without hearing both parties.

"These are worthy directions for all Justices of the Peace, and other Magistrates, that they carry themselves in their places uprightly and indifferently, not uttering their own conceits, nor upon the sudden to overrule things; but after deliberate consideration, and consultation, then to proceed to execute the authority committed to them."

Such are the things to be kept in regard by those who engage in that "most ancient and most honorable office."—That it sometimes falls into mean and unworthy hands in the present day may possibly be, but so it was, and worse, in times past. We read of "Basket Justices" in Queen Elizabeth's time—men who could, as it were, do nothing without a present, yet "who for half a dozen of chickens would dispense with a whole dozen of penal statutes;" and in the reign of George the Third, of "trading justices," who sustained by infamous conduct the name given to them. The poet Cowper, intimating the accessibility of some country Justices to baits, thus wrote.

> * * * * Examine well
> His milk-white hand; the palm is hardly clean;
> But here and there an ugly smutch appears:
> Foh! 'twas a bribe that left it; he has touch'd
> Corruption. Whoso seeks an audit here
> Propitious, pays his tribute, *game, or fish,*
> *Wild fowl, or venison, and his errand speeds.*

And some of you may recollect hearing in your younger days the dogrel of a rustic muse in the shape of a communication to a certain "old boy," from a "trading, business-creating Justice."

> I'm going on as you could wish, small quarrels thick and plenty;
> I trace them out, from bush to bush, nor am I one bit dainty.
> Tho' worthless the complainant be, tho' perjured thief or swindler—
> If the defendant's got the brass, I'm whack into his timber.
> A judgment's said to end all strife, but music's talk don't damage;
> For from one cause, upon my life, I most times four can manage.
> The loser's always very wrath: I hint there's satisfaction—
> That plaintiff broke some law, or that did some one of his faction.
> If this don't do, I've another dodge; thus, sweet revenge present them:
> Why don't you information lodge; and swear the peace against him?
> If in the case there's nothing new that my keen scent can find out,—
> Why there are witness, and its blue or some contempt I'll find out.
> The scoundrels sa; 'tis all for gain I suckl . litigation;
> And that I send my setters round, a share-their compensation;
> But law is clear—I'm bound t' exact the costs or victim's worry—
> By George the Second's Act I'm backed—so fan small sparks to fury.
> My righteous plans may sometimes fail, or shiners hard to quarry—
> Then I advise a settlement—for quarrels feeling sorry.
> Old Brimstone grinned, well pleased to hear. &c. &c.

We may allow something for poetic license, but it is a melancholy fact that wretches have been in existence "who," to use the words of a celebrated moral writer of some 60 years ago, "made it their object to create business for their own emolument, turning the exercise of their authority into an iniquitous traffic, and prompted, encouraged, and shared in the extortions of their agents.

Fervently it is to be hoped that no such character ever lurked in our ranks, and I am sure we all would say "God

forbid that such villians should ever find their way into any Commission." If they ever should, of this I am sure, no honorable man would contaminate himself by voluntarily associating with them in any proceeding.

But not to speak longer of men "seducible by corrupt motives to pervert the course of Justice," let us turn to a subject which is looked upon as something of an "open question,"—I mean as to a Magistrate accepting the usual Fees. Permit me to give you a couple of extracts from two writers on the subject:—

"An entire and rigid abstinence from anything that bears even the most distant appearance of profit to himself," is thus urged upon Magistrates.

"It is impossible for a Justice to produce the full and salutary effects of his office without possessing the esteem and confidence of the neighborhood in which he lives; but it is impossible to obtain this esteem and confidence without being altogether disinterested, totally free from every bias, and of hands and heart perfectly pure. I know indeed that *fees accustomed* and *costs limited by statute*, are mentioned and allowed of in the oath of office; but, gentlemen, as far as yourselves are concerned, touch them not; make an open, a solemn, an absolute renunciation of them all, and avoid as much as possible not only the crime, but even the very suspicion of gain.

If peradventure it seem hard that men should thus devote their time and labour to their country without the least consideration of advantage to themselves, all I can say is, that if the respectableness of the office itself, the esteem and confidence of all honest men, and the consciousness of being perpetually employed in *doing good*, be not thought by any persons reward sufficient, I would advise such by no means to undertake it. And, gentlemen, I advise this also for the sake of the public, being thoroughly persuaded that men who have not greatness of soul, liberality of spirit, and delicacy of sentiment enough to feel the sweets of such a reward, will never execute this office with that dignity, credit and authority, which must always accompany a due and proper discharge of it.

On the subject of fees (says another writer) it may be added, that the magistrate himself may, on many occasions, show a very laudable spirit of liberality, by remitting or purposely contriving to lessen his own, where the party aggrieved labours under extraordinary circumstances of hardship or distress.

To abstain in general from receiving the common fees of office (a custom which benevolent magistrates have sometimes been desirous of adopting, with a view to render justice attainable with perfect facility and without charge) would not apparently be attended with effects beneficial on the whole. The immediate consequence would be an immediate increase of business to the magistrate himself; and what would be still worse, an increase no less immoderate of squabbles and contentions among the *poor*, who would carry every frivolous dispute—every angry word to the nearest tribunal, with equal loss of temper and of time, if they knew beforehand that their complaints and invectives might be poured forth, and their resentment eventually gratified, without the payment of a farthing.

He who is disinterested enough not to wish to accept even that small compensation for his trouble in administering the laws which the ordinary fees afford, will be likely to appropriate them to some charitable and useful purpose; and thus render a much greater servic· to the public than he would have done by declining to receive them."

The rigid application to Canadian Justices of all that is above urged, may admit of some question; men of undoubted honor take different views of the matter, and none can accuse a magistrate of *wrong* in pocketing fees, while the law permits it; so let every one act according to his conscientious convictions on the subject.

Where a clerk is employed what has been said would have no bearing; the magistrate's care would then be confined to keeping a watchful eye that nothing but lawful and reasonable fees were taken.

There is one point more which may not be passed over altogether—as certain trades are subject to peculiar diseases, so it is said every situation in life influences the dispositions of those placed in it. The office of a Magistrate has, like other things physical and moral, its peculiar distempers. A quotation will sufficiently explain. It is from the writer already referred to, and the object of his writings was "to apply moral truths to practical purposes."

"The nature of a magistrate's authority and the mode in which it is exercised have an obvious tendency to produce some very undesirable alterations in his character, by implanting new failings in it, or by aggravating others to which he may antecedently have been prone. His jurisdiction is extremely extensive, and comprises a multiplicity of persons and cases. The individuals who are brought before him are almost universally his inferiors; and not uncommonly in the lowest ranks of society. The principal share of his business is transacted in his own house, before few spectators, and those in general indigent and illiterate. Hence he is liable to become dictatorial, brow-beating, consequential and ill-humoured; domineering in his inclinations, dogmatical in his opinions, and arbitrary in his decisions. He knows, indeed, that most of his decisions may be subjected to revisals at the Sessions, or that he may be called to account before the Court of King's Bench; but he knows that the objects whom he may be tempted to aggrieve are usually too humble, ignorant and timid, to think of seeking redress, except in very palpable and flagrant cases, and frequently too poor to be able to undertake the task of seeking it in any. In consequence, moreover, of being perpetually conversant, in his official capacity, with the most worthless members of the community; destined, as it were, to register every crime perpetrated within many miles of his habitation, and witnessing petty acts of violence, and knavery and fraud, committed by men who had previously maintained a tolerably good character in their neighborhood; he may readily acquire the habit of beholding all mankind with a suspicious eye, of cherishing sentiments of general distrust, and of looking with less and less concern on the distresses of the common people, from a vague and inconsiderate persuasion that they seldom suffer more than they deserve. Against these snares and temptations, which beset him on every side, and will infallibly circumvent him in a greater or less degree, if he rests in heedless inattention, or in false ideas of security, let him guard with unremitting vigilence. If they are suffered to undermine those better resolutions, and supplant those better purposes, with which he entered upon his office, let him not think that he shall escape from the circle of their influence when he quits the limits of his justice-room. They will follow him into every scene of private and domestic life. The habits of the magistrate will infect the conduct of the husband, the father, the friend, and the country gentleman; they will render him arrogant and overbearing, sour and morose, impatient of contradiction, obstinate in his designs and undertakings, gloomy, suspicious and unfeeling, uncomfortable to all around him, and more uncomfortable to himself."

In conclusion.—A very cursory view of the duties of Magistrates will show the immense power, for good or evil, which they possess. They are numerous, scattered over the whole Province, their authority as ministers of justice is awfully extensive—embracing either for preliminary investigation or final adjudication every crime the law takes cognizance of:

the legislature has given to them large powers for the trial (without a jury), and punishment of offenders in almost innumerable cases, and every sessions brings new subjects within their jurisdiction.

The powers given to Magistrates (said the celebrated Sir William Blackstone, ninety years ago) from time to time. have *heaped upon them such an infinite variety of business*, that few care to undertake, and fewer to understand the office. And he adds that "they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate that, without sinister views of his own, will engage in this troublesome service."

"Conservators of the Public Peace,—Guardians of the Public Morals," we have indeed most extensive, arduous, and responsible duties to perform; but having voluntarily undertaken a trust, it becomes us to execute it to the best of our ability, and so to demean ourselves that the dignity of the station may be sustained, and that we may command respect for the laws by faithful, honest, and intelligent administration.

POWERS GENERALLY OF JUSTICES OF THE PEACE.

The authority of a Justice of the Peace to take cognizance of offences against the law has usually been considered under two heads—*Ministerial* and *Judicial*.

Acting *Ministerially*, his duties are of a preliminary character: receiving information, in cases of felony and misdemeanor—issuing summonses and warrants to bring parties charged before him—taking the depositions of witnesses—the examination of alleged offenders, and bailing or committing for trial.—Acting *Judicially*, the magistrate not only issues process to bring the parties before him, but *tries and determines* the matter of complaint without the intervention of a jury, and inflicts punishment upon the party by fine or imprisonment.

This, then,—*The Judicial Authority of Justices of the Peace out of (Quarter) Sessions*,—it is now proposed to consider in some of its details; their powers for the preservation of Peace, and their Ministerial Authority generally, will form another head.

U. C. REPORTS.

GENERAL LAW.

REGINA EX REL. LUTZ v WILLIAMSON.

Deputy-Reeve disqualified for seat in County Council—Writ issued in outer county returnable in chambers at Toronto—12 Vic. ch. 81 sec. 22—16 Vic. ch. 181 sec. 28.

A county court judge has authority to direct a writ for the trial of a contested election to be made returnable before the judge in chambers at Toronto, and in that case it is the duty of the relator to see that the papers are transmitted.

A township councillor, being a contractor with the county, and having been elected a deputy-reeve, was held disqualified from taking his seat in the county council.

[CHAMBERS.]

In this case, a writ issued to shew cause why and by what authority the defendant claimed to use, exercise, or enjoy the office of deputy-reeve of the township of Saltfleet; and, as such deputy-reeve, of county councillor for the united counties of Wentworth and Halton; and the relator claimed that he ought to be declared duly elected to the office.

The ground of disqualification alleged against the defendant was, that he purchased, in November 1853, from the municipal corporation of the United Counties, the Hamilton and Stoney Creek Road, and to secure the purchase money, £4500, the defendant executed a mortgage upon the road, with covenants for payment by instalments over a period of ten years; and so had a contract with the corporation.

The defendant raised two objections, but did not dispute the fact which it was said constituted his disqualification, nor question the correctness of the conclusion that the facts did constitute such disqualification in law.

The writ was issued by the order of the Judge of the County Court for the united counties of Wentworth and Halton, returnable before the judge in chambers in Toronto. It was contended that the county judge had no such power, and that, if he directs a writ of summons to issue from the superior court, he should make it returnable before himself. The statute has made no provision for transmission of the papers from the deputy-clerk in the outer county; and it was argued, that therefore, and because the statute does provide that, after judgment given by the county court judge, he shall deliver, or cause to be delivered, into the court out of which the writ may have issued, the judgment, with all things had thereon, it was intended by the Legislature that the judge of the county court should make such writs as he may issue returnable before himself.

BURNS, J.—After giving the statute the best consideration I can, I am of the opinion the county court judge has the power to direct the writ to be returnable before the judge in chambers. When it is considered that no such writ can issue from the county court, but must be a writ from one of the superior courts, and which writs are to be furnished from the principal officer to the deputies in blank, it would seem the Legislature supposed the writ might come back before the judges of the superior court in chambers, upon the fiat of the judge of the county court. It is very true that there is no provision in the statute for transmission of papers from the office of the deputy to the judge's chambers; but I look upon that as a matter of practice, which may be provided for by a rule of the judges; and when a writ has been ordered by a county court judge to be returnable before judges' chambers, it would be the duty of the relator to see that the papers were sent up, or to provide for an order for the purpose, if there should be any difficulty, until a rule was made upon the subject. I regard that as a matter of practice, and not as indicating the will of the legislature that the county court had not the power to direct the writ to be so made returnable. It may have been supposed it was more convenient for parties to obtain the writ within the precincts of the county than to send to Toronto for it, and, at the same time, that it might be optional to have the writ returnable before the county court judge, if his duties would permit of hearing the matter, or to make the same returnable in chambers. The proviso with regard to a defendant disclaiming leads me to suppose strongly that it was so intended; and the defendant is under no difficulty, for the writ must inform him where it is returnable. If the county court judge should make it returnable before himself, he may name some particular place in the county to hear the parties. When it is considered what various duties the county court judge has to perform, and that those duties call him to different parts of the county at times when it would be most inconvenient that he should have forced upon him the duty of hearing a contested election, and when we see from the Municipal Corporation Act, and other acts, that the legislature very well knew, and have legislated upon the fact, that there is always one judge in chambers to attend to such and other matters that might be brought before him, it is by no means too much to suppose that it was left discretionary with the judge of the county court to order the writ to be returnable in chambers. The granting of the fiat is an *ex parte* proceeding, and the judge has merely to see that there are legal grounds for questioning the election, and, as to that,

it may be suppose! he can do so without inconvenience to the public in the discharge of his other duties.

The second objection is, that there is no such office as county councillor; that it is as deputy-reeve the defendant holds a seat in the council of the united counties, and though he may have a contract with the corporation of the county, that does not disqualify him from being a township councillor, and the township council may elect him their deputy-reeve if that body pleases to do so. I do not find the term *county councillor* used anywhere in 12 Vic., ch. 81, or the subsequent acts. In the previous acts the members of the body were designated and spoken of as district councillors. The 132d section of 12 Vic., ch. 81, the disqualifying clause, contains an exception with respect to the payment of councillors. The term councillor then could apply to no other than a member of the county council, for none of the corporations named had the power given to pay the members. The 25th section of 16 Vic., ch. 181, has substituted town-reeve, or deputy-reeve, or *township* councillor, because this first gave the township councillors power to pay themselves. Had the writ not used the word county councillor, but stopped with complaining of his election as deputy-reeve, I apprehend it would have been sufficient. The election of the defendant as a township councillor is not complained of, but what is contended for is, that he, having a contract with the corporation of the counties, is not eligible to sit in that body as a member thereof; and I am of opinion that is so. The 33d section of 12 Vic., ch. 81, enacts that the reeves and deputy-reeves of the several townships shall constitute the municipal council for the county. The 25th section of 16 Vic., ch. 181, disqualifies a person having a share or interest in any contract with or on behalf "of the township, county, village, town, or city in which he shall reside, to be, or to be elected alderman or councillor for the same, or for any ward thereof." Here, again, the word *councillor* must be applied to the county, otherwise the introduction of the word *county* becomes nugatory; and if that were so, then it would follow that every member of the county council might be a contractor with the corporation—a construction which cannot be contended for. The words of the act are so framed, that if, after a person be elected, he enters into a contract with the corporation of which he is an alderman or councillor, he thereby becomes disqualified to sit any longer as a member of the council; and that must apply to the council of the county as well as of any of the other named corporations in which the words alderman or councillor is applicable. The township of Saltfleet may retain the defendant's services as a councillor of the township, but the municipal council cannot elect him as deputy-reeve to serve in another body with which he has a contract that disqualifies him from being a member of the latter body. The 37th section of 16 Vic., ch. 181, declares, that an election of deputy-reeve shall be an election for the purpose of being liable to be complained of as other elections.

I think the defendant must be removed from the office of deputy-reeve, and that there should be a mandamus to the township council to elect another deputy-reeve. There is nothing by which I could declare the relator entitled to the office, for he does not say that any one voted for him. He says he was a candidate, but he does not say that he voted even for himself. Besides, it does not appear that the township council were aware that the defendant was disqualified.

The relator must have his costs.

REGINA EX REL. DAVIS V. CARRUTHERS.

Contested election—Contract with corporation—16 Vic. ch. 181, sec. 25.

When it appeared that the defendant, at the time of his election as councillor, had a claim upon the city for certain work done by him under a contract with the corporation.

Held, that he was disqualified.

At the last election held for St. David's Ward, in the City of Toronto, on the 2nd and 3rd of January, 1854, John Carruthers was elected and returned as a councillor. At or very near the conclusion of the election, on the last day, a written protest was delivered in by the relator against his election, on the ground that he had a contract with the corporation which he had performed, and under which he had claims against the corporation which were still unpaid; and that he had also another contract then open between him and the corporation, which he had not yet fulfilled.

Mr. Carruthers was nevertheless returned duly elected, and the election was contested on the above grounds.

The affidavits filed on both sides shewed that in October, 1853, Mr. Carruthers had a contract with the corporation to turnpike and do other work on one or more streets of the city: that he had finished his work in November, and some time before the election had had the work certified by the city surveyor: that at the time of the election he had not received payment for his work, and the accounts given in by him, shewing the quantity of work done and the amount due to him, had not been passed.

On the 13th of January the committee on public works having passed one of the accounts, gave authority to the chamberlain to pay it. Another account for another portion of the work was presented to the committee on the 14th of January, but no order was then made upon it, though it was certified by the city inspector to be correct.

It was sworn by the clerk to the committee on public works, that the work on the contract had been all done, and had been measured and certified for some days before the election; and that there had been no dispute, and is not any dispute, between the corporation and committee in relation to the contract. The money, however, was not yet paid, so far as appeared, and the corporation had not allowed either of the accounts till after the election.

The relator also charged that Mr. Carruthers had given in a tender for other work, not long before the election, which the corporation had accepted, and that no part of the work had been done; and he relied upon both as being existing contracts at the time of the election, in which Carruthers had then an interest.

The 25th section of 16 Vic. ch. 181, provides "that no person having by himself or partner any interest or share in any contract with or on behalf of the township, county, village, town, or city in which he shall reside, shall be qualified to be or be elected alderman or councillor for the same, or any ward therein.

ROBINSON, C.J.—The question as to each of these contracts is, did it exist at the time of the election? If it did, Mr. Carruthers not only had an interest in it, but was solely interested in whatever could be claimed from the corporation under it.

As to the first contract, it seems rather rigorous to insist upon the disqualification, if it be true that the work is all done, and the amount settled and ordered to be paid; and it would seem more rigorous still, if it were shewn (which it is not) that the money has been paid since the election, so that Mr. Carruthers can have no claim against the corporation under it.

But we must decide the case upon a view of the position in which the candidate stood when he was elected. Was he then qualified? That is, in strictness, the question; for if he was not, he can no more overcome the effect of a disqualification then existing by anything done after the election, than he could entitle himself to be returned upon a property qualification subsequently acquired. At the time of the election he certainly had an interest in this contract with the corporation, and an interest of the plainest kind; for, according to his own account, he had done all his work, but had not been paid for it. He had therefore a plain claim under the contract—not large, certainly, but for something above a hundred pounds, according to the accounts which he had rendered. If I could determine that the statu

statute does not apply unless where some disputed claim is likely to arise under the contract, yet I could not take upon myself to decide that this was a case where there could be no dispute. No person can pronounce that a dispute might not arise at any time before the money is actually paid. I could suggest several grounds of contention that might possibly be yet advanced; and the intention of the enactment is, that in case of any dispute of the kind the council shall be composed of disinterested parties. At any rate, a person having a contract with the corporation, under which he has claim upon the city which has not been satisfied, has plainly an interest in a subsisting contract—such an interest as he could sue upon; and I can do no otherwise than say that at the time of his election Mr. Carruthers was disqualified. The language of the act is too distinct to admit of any other application. This being so, as I think, it is of no consequence how the case stands as regards the other alleged contract.

It would not be proper to adjudge that Mr. Davis should take the seat as having the next highest number of legal votes; for I cannot hold that the electors had such notice of the disqualification as to authorize my holding that they acted perversely in voting for Mr. Carruthers, and therefore should be looked upon as having wilfully thrown away their votes. Notice should have been given at the commencement of the election, or at least so early as to admit of some other candidate being set up with a possibility of success, if the voters had been so inclined, after they learned that an objection existed to the candidate for whom they came to vote. This was not an objection that the electors must be supposed to have been necessarily aware of.

My judgment is, that the defendant hath usurped and does usurp the office, and that the relator shall recover his costs.

U. C. COUNTY COURTS.

(Reported by H. Bernard, Esq.)

(County of Simcoe.—J. R. Gowan, Judge.)

POVEY v. CAISSE—*Pleadings—Nol. Pros.—Costs.*

An action brought on Common Counts.—Defendant pleaded, 1st,—except as to £5 10s. parcel, &c., non assumpsit; 2d—except as to £5 10s., parcel &c., set-off; 3rd—as to £5 10s., residue, &c., payment into Court.—Replication, to 1st and 2d pleas—Nolle Prosequi; to 3rd, acceptance of money.

On application for revision of Taxation, and to allow Defendant the costs of two first issues, under Provincial Act 7, Wm. 4, ch. 3, s. 25 (same as Eng. Act 3 and 4, Wm. 4, ch. 42), the following cases were cited:

Goodee v. Goldsmith—2 M. & W. 202, 5 Dowl. 288, S. C. Coates v. Stevens—3 Dowl. 784. Topham v. Kidmore—5 Dowl. 676.

PER JUDGE GOWAN: The plaintiff has abandoned his cause of action on the general issue, and set-off, and the defendant is, under the statute cited, entitled to his costs on those issues. The plaintiff will take costs on the third plea; but the defendant will deduct his costs of the first and second pleas.

[NOTE.—Under Rule XIII Easter 5 Vict. (English Rule 1 Vict), 48 hours is allowed after taxation for payment of costs before judgment entered, on plea of payment into Court. In this case, defendant availed himself of the Rule, and having paid within that period, saved the expense of Roll, and entry of Judgment.]

(County of Simcoe.—J. R. Gowan, Judge.)

CAMERON v. THOMPSON.

Cause of action over £25—Unsettled account—Jurisdiction—Costs.

This was an action on the common counts. The plaintiff's particulars were for items of an account for goods sold, &c., extending from

	£	s.	d.
January 1850. to October 1851.	£42	7	8
Interest on account rendered.	8	15	0
	51	2	8
Credit, By Cash,	1	5	0
	£49	17	8

Defendant pleaded, 1st, General issue; 2d, as to £25, parcel &c., set-off, and under demand served particulars of set-off.

	£	s.	d.
1850. March. To a horse sold. &c.	£20	12	6
To interest on same	4	7	6
	£25	0	0

The defendant called no witnesses, having proved the sale of the horse in cross-examination, and on the trial, 21st Nov., 1854, the jury returned a verdict for plaintiff. Damages, £9 3s. 1½d.

This amount being within the jurisdiction of the Division Court, plaintiff's counsel moved for a certificate for County Court costs, which the Judge was inclined to grant; but on application of defendant's counsel, the same came up on argument on summons in chambers.

On behalf of defendant, it was urged that this case was within 13 and 14 Vict. c. 53, sec. 26. That the account was made up to rather more than £50, especially by a large sum for interest, which was doubtful, and contingent at least on proof of the items of the account; and that the credit of cash, 25s., which reduced it below £50, being ignored by defendant, and looking to the small amount of the verdict, the Court would exercise discretion in saying how truthful the account was. That if the Court considered the real amount due by defendant to plaintiff was a balance under £25 of an "unsettled account" to a less amount than £50, the plaintiff was within proviso of sec. 26. That the proof of its being an unsettled account lay to some extent in the fact of a set-off of £25 being pleaded, and proved; whereas had it been a *payment*, such would have constituted it a settled account.

The plaintiff's counsel replied that the account was lengthy, extending over some period of time, and was fit subject for investigation in the County Court, on which, apart from the question under the 26th sec. of act cited, the Court would exercise its discretion as to granting certificate; 2ndly, that had the sum claimed as the price of the horse been treated and proved as a *payment*, that would have rendered the balance recovered by plaintiff a fixed sum within the jurisdiction of the Division Court.

THE JUDGE said: The amount of the account sought to be recovered, and of which the plaintiff gave reasonable evidence, was £49 17s. 8d., but the jury gave a verdict for £9 3s. 1½d. only, having deducted the defendant's claim on set-off from the plaintiff's demand, or such portion as they thought was established in evidence; they must therefore have considered that the plaintiff proved his account to £29 odd, at least—an amount beyond the jurisdiction of the Division Court; for the statutable right to set-off does not extinguish the plaintiff's claim. Referring to the 23rd sec. of 13th and 14th Vic. ch. 53, the Judge said he considered the term "balance" meant—the amount due after allowing for *payment* on account, or what is equivalent in law to payment—or where a balance is struck by the parties. The proviso in the 26th sec., that no unsettled account exceeding £50 should be sued for in the Division Court, he did not think affected the point, as the plaintiff could not be considered as suing for *a balance* under £25, having in effect recovered more: and that in any case he was disposed to exercise the general power vested in the

Judge to certify that this was a fit case to be withdrawn from the Division Court and commenced in the County Court.—Certificate granted, with costs of application. Cases referred to by the Judge:—

Woodhams v. Newman, 1 Cox & Mac: 231.—Turner v. Berry, 5 Ex. 858.—Avards and wife v. Rhodes, 20 L. T. Rep. 251.

MUNICIPAL CASES,

(Digested from U. C. Reports.)

From 12 Victoria, chapter 81, inclusive.

ELECTIONS.

I. ***Right of Returning Officers to close the Poll—Summons by one relator against the whole corporation.*** **12 Vic., c. 81, s. 159.**

DRAPER, J.—Under the 159th section of the 12th Victoria, chap. 81, to entitle a Returning Officer to close the poll, two things must combine:—First, that he should see that all the electors intending to vote have had a fair opportunity of being polled; second, that a full hour at one time shall have elapsed without the tender or giving of a vote by a qualified elector; and even though such full hour has elapsed without a vote being either tendered or given, the returning officer is not bound to close the poll, nor is he justified in doing so, should he perceive that electors have not had a fair opportunity of voting.

Semble—That it is no part of the design of the act 12 Vic. ch. 81, to give any greater or more extensive right to parties suing out under it a writ of summons in the nature of a *quo warranto* than they before possessed at common law, or under the British statute; and therefore, that a writ of summons issued by one relator against the *whole body of a corporation* must be discharged.

Reg. ex rel. Lawrence v. Woodruff et al. 1 Cham. Rep. 119. 8 U. C. R. 337.

[NOTE.—Under 13 & 14 Vict. c. 64, sched. A. No. 23, and subsequently by 16 Vict. c. 181, sec. 27, amending that section, whenever the grounds of objection against any election shall apply equally to all or any number of the members of any such municipal corporation, the relator may proceed by one writ of summons against all such members.—*Ed. L. J.*]

II. ***Power of Judge under summons in the nature of a quo warranto.*** **12 Vict. c. 81, sec. 146.**

Where a summons in the nature of a *quo warranto* was issued against a defendant, under sec. 146 of 12 Vic. c. 81, to shew cause wherefore he had usurped the office of councillor, &c. *Held per* DRAPER J. that the authority of a Judge in chambers upon this summons extended only to an adjudication of the validity of the *election complained of*, and that he could not further decide upon the validity of the relator's election.

Semble, That as soon as the judgment under this summons, ousting the defendant, has become final, the course for the relator to take will be to apply to the municipal corporation to admit him, and, if they refuse, then to apply to the Court of Queen's Bench for a Mandamus.

Reg. ex. rel. Gibbons v. McLean, 1 Cham. Rep. 125.

[NOTE.—The 12 Vic. c. 81, s. 146, on which this case was decided, was repealed and re-enacted with additions by 13 & 14 Vict. c. 64, sched. A, No. 23, and the latter is now repealed, and another section substituted by 16 Vic. chap. 181, sec. 27, under which, as well the validity of the election complained against as the validity of the alleged election of the relator or other person, may be embraced in the same writ.—*Ed. L. J.*]

III. ***Illegal conduct of Returning Officer—Costs.*** **12 Vic. c. 81.**

Where a Returning Officer during the first day of polling received 51 votes for the relator, and 32 votes for the defendant; and on the second day no more votes were polled, yet the returning officer, in the absence of the candidates, after the votes had been received and recorded without objection, reviewed the poll book and compared it with the assessment roll, and upon his own view of the matter struck off votes, declaring the two candidates equal in number, and giving the casting vote in favor of the defendant, returned him as the councillor for the ward.—*Held per* BURNS J.: That the election or rather the return of the defendant must be declared void, and that as the defendant or his agents from their own shewing, were privy to, if not instigating the returning officer to his illegal course, the defendant must pay the costs.

Reg. ex rel. Dundas v. Riles. 1 Cham. Rep. 198.

IV. ***Qualification of Relator—Acquiescence by Relator in illegal election—Costs.*** **12 Vic. c. 81.**

BURNS J.—It is not necessary that a relator, who is a candidate, should shew in his application to oust the defendant that he himself is qualified for the office.

Acquiescence of a candidate in an irregular election, disqualifies him from afterwards becoming a relator to dispute same, but the absence of objection being made by the relator as to what the returning officer proclaimed he intended to do is not such acquiescence.

The Returning Officer having apparently acted from a mistaken idea of his powers and authority in such a manner that the return was illegal, and the defendant not appearing to have been instrumental in or accessory to producing such result, costs were not given against the defendant.

Reg. ex rel. Mitchell v. Adams. 1 Cham. Rep. 203.

V. ***Incorrect copy of Collector's Roll given to Returning Officer—How he may act—Rights of Electors—Statement of relator in affidavit as to usurpation of office.*** **12 Vict., c. 81, s. 146.—13 & 14 Vict., c. 64.**

Held per BURNS J., (and subsequently confirmed on appeal by the Court of Queen's Bench, Hilary Term, 1851,) That under the 12 Vic. c. 81, sec. 122, those persons whose names, on enquiry made by the returning officer, are found to be on *the collector's roll*, though omitted accidentally or otherwise from the verified *copy of the roll* required to be furnished by the collector to the returning officer at the opening of the election are legally entitled to vote. *Held* also, that persons whose names are inserted in the copy of the roll, but not on the collector's roll, are not legally entitled to vote.

In an application by a relator against the return of a municipal councillor—under the amended Municipal Act, 13 & 14 Vic. c. 64, sched. A. No. 23 (a), it is not necessary to state in the affidavits sustaining the relator's case that the defendant has either accepted or acted in the office it is alleged he has usurped.

Reg. ex rel. Helliwell v. Stephenson. 1 Cham. Rep. 270.

[NOTE.—(a) & (b) Repealed, and re-enacted in many particulars by 16 Vict ch. 181, sec. 27.—*Ed. L. J.*]

VI. *Teste of summons in the nature of a quo warranto—Construction of clause—What a sufficient acceptance of office.* 12 Vic. c. 81—13 & 14 Vic. c. 64, sched. A. No. 23.

Held per DRAPER J.—That if a summons in the nature of a *quo warranto* is not tested on the day it is issued, it is an irregularity; but if an appearance be entered, the irregularity is thereby waived.

Semble, That the words in 12 Vic. ch. 81, sec. 116, as amended by 13 & 14 Vic. ch. 64, sched. A. No. 23 (b), do not require the writ ordered by the Court in Term time to be sued out in Term time; but that if the application be made in Term, the Court shall give the order for the writ; if in vacation, a *fiat* shall be given by a Judge for it.

A public declaration of acceptance of office made in presence of the returning officer and the electors, directly after the returning officer had published the result, is a sufficient acceptance under the statute 13 & 14 Vic., ch. 64, sched. A. No. 23.

There is no necessity for taking out a distinct rule or order for the allowance of the recognizance.

Reg. ex rel. Linton *v.* Jackson. 2 Cham. Rep. 18.

TO CORRESPONDENTS.

A CLERK.—You can refuse to receive the account if you "cannot make out one half of it." How can you copy so that it will be intelligible to defendant? Look to the 14th Rule, it is in point.

T. T.—Your suggestions are partly met. We will note carefully the Municipal decisions as they appear.

R. G. W.—We do not understand the 11th Rule to require a Bailiff to make out any List—the affidavit will show "the mode of service." If service is not *made*, the reason for non service is to be endorsed on the back of the summons. No set form of words is necessary.

A COUNTRY PRACTITIONER.—The state of facts enable you to frame the action either in tort or for breach of contract, and as the damages are under £5, by bringing contract you can prevent the case being withdrawn from the proper quarter to determine the points of law, which alone appear to be in question.

J. B.—An Executor de son tort "is liable to be sued in the Division Courts." The mode of proving a party Executor is a matter of evidence merely, and in two counties at least we know it was always so held under the Act: but whatever question there might have been on the point has been set at rest by the 70th of the New Rules, which plainly recognizes their liability as Defendants.

THE LAW JOURNAL.

JANUARY, 1855.

SINCE the present Division Courts were instituted, their jurisdiction has been greatly enlarged, and the late labours of the Commission have given us a complete code of procedure. The Rules having like force with the Act of Parliament are eminently calculated to secure uniformity of administration, a necessary element to the safe and effective working of local and independent tribunals,—now dotted over the whole country, they are literally granting "the petition that justice may be brought to every man's door." As Courts to which the ninety-nine out of the hundred resort—affecting as respects the ordinary business transactions of life so many and such varied interests—the importance of their doings must be recognized, and every effort to promote their efficiency be deserving of support. The design of the Publication has this primarily in view, but to secure more enlarged usefulness we include also the concerns of all the local courts (County, Surrogate, Quarter Sessions, and Magistrates' Courts), and local authorities in the administration of the law (Magistrates, Coroners, Sheriffs, Clerks of the Peace, County Court and Surrogate Court Clerks, as well as Councillors and Municipal Officers); all these officers will, from time to time, find something to interest them in our columns. Thus, by embracing subjects of value and interest to various classes, we hope for that support which will enable us to enlarge, and improve upon our original design. We commence, though on an unbeaten track, under most favorable auspices, for, as mentioned in the Prospectus, the Commissioners, as a body, and the County Court Judges, individually, have expressed themselves warmly favourable to the undertaking—and from various other quarters we are assured of a cordial support.

In addition to the Reports mentioned in the Prospectus it is the intention to add Notes of cases on General Law. The original articles will have what is practical in view, and our regular contributors will be, if possible, all men thoroughly conversant with their subjects, and made aware of the desire to regard mainly what is useful and practical in matter, as well as in the manner of dealing with it. As a means of intercommunication the *Law Journal* will be decidedly valuable. Though there are so many County Judges, yet all acting separately, the knowledge of a valuable decision is now confined to the Judge's own circuit, whereas through the medium of this Journal all interested may have the benefit of his researches; and by opening our columns for communication and queries on practical points, we are giving advantages that could not otherwise be obtained. For further details we refer to the Prospectus, and the contents of this number.

In the first number of a work of this kind, it must be borne in mind that imperfections are almost unavoidable, and experience may indicate a better arrangement of the subjects so as to give to each its due share consistent with the design traced out: we will, therefore, be ever ready to consider friendly suggestions for improvement.

Opposed to the interests of no class; devoted exclusively to legal subjects; entering on a widely-extended field for useful operations, and at a heavy and continuous outlay, we look for generous support: and from our Co-Journalists in the Province, who occupy another field of labour, we bespeak that sympathy which every effort to be useful may fairly claim.

COUNTY COURTS.

ARBITRATION.

THE feeling in favor of arbitration as an inexpensive and satisfactory mode of settling long disputed accounts, and differences having their origin in family quarrels, is every year becoming stronger

and gaining new converts; even compulsory arbitration, under Judicial direction, is now part of the law of England. The jurisdiction of our County Courts is unaccountably limited in respect to the law of Arbitration; and while pointing out the defect we will shew how, in our judgment, it should be remedied.

By the 8th Victoria, chap. 13 Sec. 47, County Court Judges either "at the sittings for trial or in Term time" are empowered by consent of parties "to order any *cause* to be referred to arbitration by Rule of Court, which rule shall have the same effect and be enforced by the same means as if the same had been granted by the Court of Queen's Bench *in a cause depending* in that court."

The power of reference is confined to *causes in* the County Court, and to the subject matter each *cause* involves. The time when a reference can be made, is after nearly all the usual costs in a cause have probably been incurred. If parties chose to refer *before any action is brought*, by indentures, mutual bonds, or the like, to render the reference effectual under the 7 Wm. IV. Chap. 3 Sec. 29, the instrument of submission must contain an agreement that the submission shall be made a rule of one of the Superior Courts at Toronto, and in such Court the ordinary proceedings to secure attendance of witnesses and enforce award, &c., must be had. Whatever the amount in dispute is, such submission cannot be made a rule of the County Court: and yet it seems to us that there is strong ground for claiming the extension of this privilege to them. Country practitioners at all conversant with the expense and delay of the present mode of proceeding will, we are satisfied, agree in this opinion.

If the jurisdiction in ordinary of County Courts covers demands to one hundred pounds, why not allow an arbitration jurisdiction to the same amount, and in references *before* as well as after suit commenced? Why not give the County Courts equal power with the Inferior Courts (See 16 Vict. chap. 177, Sec. 4,) and, as Courts of Record, coordinate authority with the Superior Courts so far as the County Courts' jurisdiction extends?

The remedy we suggest is to enlarge the provisions of the 29th, 30th, and 31st sections of the stat. 7th Wm. IV. chap. 3, so as to make their enactments applicable to the County Courts, as respects causes of action cognizable in them, or in reference to certain (specified) causes of action for sums not exceeding £100, and thus enable a reference to arbitration without the necessity of bringing a suit in the County Court, or being compelled to resort to the courts at Toronto for ultimate proceedings. It seems to us that there can be no possible objection to this change. The Judges of the County Courts already possess more important powers, both as respects subject matter and amount; and we do not think that the number of cases it would bring to County Courts would indicate the number withdrawn from the Superior Courts—but, even if it was so, that would furnish no sufficient argument against a beneficial alteration.

CORONERS.

The office of Coroner may be made a valuable instrument in the discovery of crime, or at least in obtaining such information as will assist in tracing a criminal act to its real source. The facts and appearances as developed on an Inquest, under an intelligent coroner, may often prove the innocence of a suspected party—by shewing that the death was occasioned by the deceased's own wilful act, or by accident, &c.; and not unfrequently they may bring home proof of guilt against a person that would otherwise escape. The value of a coroner's investigation, however, depends on the presence not merely of judicial talents but a competent share of medico-legal knowledge also. There are several coroners in this Province who are medical men, (one at least we know of high standing in his profession, and of large experience as a coroner), such men are best qualified to give useful hints as to what should be observed in case of death under suspicious circumstances—as the things to be noticed in respect to the position, appearance, &c., of the body; the disposition, &c., of articles near it; the Post Mortem, &c. Now, if any Coroner conversant with the subject would undertake to set down some Notes for the assistance of his co-coroners, it would be a great aid to them, and calculated to enhance the value of the office; and we would gladly give them insertion in the *Law Journal*. We hope some Medical Gentleman may be induced to meet our suggestion: he could divide the subject into two or more parts, and the trouble would thus be spread over as many months.

THE JANUARY NUMBER.—The January number of the *Law Journal* will be sent to Practitioners, Magistrates, and Officers of the Local Courts in each County, whose names have been returned to us as willing to subscribe: we purpose, also, sending it to numerous influential parties interested in the administration of the Law, for their approval. Such as may not desire to subscribe will have the kindness *to return this number, with their address distinctly noted;* otherwise we will feel at liberty to enrol their names as Subscribers, upon the terms set forth in the Prospectus. Magistrates, Municipal Officers and others, desirous of subscribing, who—from their address not being made known to us—have not received the present number, can, (on application to Mr. JOHN HOGG, Barrie), be supplied, as a large edition has been struck off for that purpose.

EQUITY AND COMMON LAW COURTS IN ENGLAND.—In the Notes of English decisions we have adopted the common usage of giving only the initial letters of the several Equity and Common Law Courts: thus L. C., Lord Chancellor's Court;—L. J., Lords Justices;—M. R., Master of the Rolls;—V. C. K., Vice-Chancellor Kindersley;—V. C. S., Vice-Chancellor Stuart;—V. C. W., Vice-Chancellor Wood;—Q. B., Queen's Bench;—B. C., Bail Court;—C. P., Common Pleas;—EX., Exchequer;—EX. CH., Exchequer Chamber;—and C. C. R., Crown Cases Reserved.

JUDGES' SALARIES.—We see by the English papers that it is the intention of the Lord Chancellor to increase the salaries of certain County Court Judges to £1500 per year, including the Judges of the Metropolitan Districts, and those who preside in Courts elsewhere in which the largest amount of business is transacted. The lowest salary paid is equal to $7880 per year, while the maximum salary to our County Judges is $2000 yearly, for a greater amount of work and labour: indeed, in addition to business similar to the English Judges, our Judges have that pertaining to *two Courts more* to discharge.

TO OUR READERS.—We confidently rely upon the kind exertions of the Profession, and of the Division Court officers, in each County, to add to our Subscription List. To many members of the Profession throughout the Upper Province we are already greatly indebted, and in publicly expressing our acknowledgments for their kindness, we trust that as their good will was shewn while the Prospectus only was in existence, now that they have the Journal itself to judge from, they may be induced to use their influence in promoting its circulation.

SKETCHES BY A J. P.—We beg leave to thank a J. P., and commend his "Sketches" to our readers. J. P. deals very delicately with his order, and we admire his *charity* in supposing that no unprincipled Magistrate exists in Canada. But, though we yield to no one in our respect for the Magistracy generally, we fear there are few Commissions that do not include one or two such.—Our next issue will probably carry the "Sketches" as far as INFORMATION.

MUNICIPAL REPORTS.—For the Municipal decisions in this issue, we are indebted to late numbers of the "Practice Court and Chambers Reports," by J. Lukin Robinson, Esq.

OUR MONTHLY REPERTORY.—Under this head will be set down matter more especially interesting to the Profession. So far as space permits they may feel assured that we will care for their information and advantage. The leading feature will be Notes of important recent decisions on General Law.

GENERAL INDEX.—To facilitate future reference, it is our intention to furnish a GENERAL INDEX at the close of each Volume of the *Law Journal*; parties, therefore, desirous of having the work bound up should, after persusal, carefully put away each number, otherwise they will incur the risk of losing some of the sheets, and thus having an imperfect volume.

SURROGATE COURT.

(Notes of English cases in relation to)

PREROGATIVE COURT—*Ekins v. Brown and others.—May 29. and June 6, 1854.*

The paraphernalia of the wife of a deceased testator held not to be part of the estate of her husband so as to constitute bona notabilia.—It is only the balance of a partnership account after payment of debts, that can be treated as assets in examining the question of bona notabilia.

In this case a will was proved in the Court of the Archdeacon of Northampton, and the question raised was whether the testator possessed, at the time of his death, assets without that jurisdiction sufficient to constitute *bona notabilia*, and thus render a Prerogative Probate necessary and the Archidiaconal Probate void. The widow had separated from her husband, and resided in the neighbourhood of London, and not within the Archdeaconry at the time of her husband's death; and she had then in her custody certain trinkets, a table-cloth, shawl, &c.—Sir JOHN DODSON said: "In examining the nature of the articles I am led to the conclusion that they are for the most part to be considered, after the death of her husband, not as part of his effects but as paraphernalia belonging to the widow herself.—Upon the death of her husband I apprehend they become the property of the wife." Deceased was also co-partner in a racing mare out of the local jurisdiction, value £30, but deceased owed on account of this partnership upwards of £260. Whether the £15 moiety of the value of the mare could be treated as assets when a larger sum was due from the estate was the question, and upon this point Sir JOHN DODSON was of opinion that the property which the executor took amounted to nothing at all; so that, upon the whole case, it was pronounced that there was no proof of *bona notabilia*, and the prayer that the probate should be brought in and revoked was rejected with costs.

PREROGATIVE COURT.—*In the Goods of Thomas Trash.—Nov. 6th, 1854.*

T. T. not having been heard of since 1826, administration, as having died intestate, granted to his widow so as to enable her to receive a debt due to him under a decree of the Court of Chancery.

In 1822 Thomas Trash left England for the East Indies, and in 1826 he wrote a letter to his wife, but no tidings had been heard of him since that time—the widow moved for "letters of administration to her husband as having died intestate in or about the year 1826." Advertisements had been inserted in August, 1854, in a newspaper in extensive circulation in the vicinity of the place where he had lived in England, in the *Times* and the *Shipping Gazette*, but no information had resulted therefrom.

Sir JOHN DODSON granted the motion.

DIVISION COURTS.

(*Reports in relation to*)

ENGLISH CASES.

C.P. BLOWER *v.* HASTON. *Nov.* 20, 1854.

County Court Interpleader—High Bailiff omitting to deduct his Costs out of proceeds under 118th Rule, no right of action for his costs, &c.

This was a special case. The plaintiff was the high bailiff of the Co. C. of Staffordshire, holden at Newcastle-under-Lyne, who, under a writ of *fi. fa.* issued out of that court under 9 & 10 Vict. c. 95, s. 104, authorising the execution of such writ in a district out of the jurisdiction of the court in which the judgment was obtained, had seized the goods of one Moran to satisfy a judgment obtained against him in the Co. C. of Liverpool. The defendant was the plaintiff in the original suit at Liverpool. After the high bailiff had seized the goods a claim to them was put in by a third party, and the high bailiff obtained an interpleader summons, that the claim might be adjudicated upon. The goods were detained by him till after the trial of the interpleader; that was determined in favor of the defendant, the then plaintiff; and the judge ordered that the costs of the interpleader proceedings should be paid by the claimant. The goods were sold and the proceeds were paid into court, and the money was afterwards taken out by the then plaintiff without deduction having been made by the high bailiff for his costs under the 148th rule of practice, which says that when the claim to any goods or chattels taken in execution, or the proceeds or value thereof shall be dismissed, the costs of the bailiff shall be retained by him out of the amount levied, unless the judge shall otherwise direct. The plaintiff then brought an action for his costs against the present defendant, who had taken the money out of court. And the question for the court was, whether the plaintiff, having omitted to deduct his costs out of the sum levied, could sustain an action for them against the defendant.

H. Mills for the plaintiff.—The plaintiff has a right to fees under the statute of Elizabeth, and may bring an action for them; and the right to deduct them does not take away that remedy. By the 118th section the judge may make such order as to the costs of the interpleader as to him shall seem fit. He ordered the claimant in the interpleader to pay the costs of the then plaintiff. The costs of the high bailiff are part of those costs, and he may recover them from him by action. [MAULE, J.—The 118th section does not impose any duty upon the high bailiff, he may take out an interpleader summons or not, as he chooses.] The 145th and 146th rules show that it is his duty to do so. [MAULE, J.—They do not impose on him any duty. Sect. 37 gives the bailiff a right to fees generally. The 118th section speaks of the costs of interpleader, and gives the judge the right to say what costs the one party shall pay to the other; and by the practice of the court the losing party pays the costs of the high bailiff. The officer taxed these costs. [MAULE, J.—Supposing he might have brought an action against Mary Collins. Having paid the money over to the defendant, can he bring an action against her?] He earned his fees, and has a right of action for them. [MAULE, J.—Having paid the money over to the defendant, under what head of money paid can he recover it back?] As fees to which he is entitled.

MAULE, J.—They are not fees at all, but costs which the judge has ordered to be paid by Mary Collins. A fee means something to be paid by one person to another for something done for him. But this would be a fee for something done by the plaintiff as a duty to himself.

Mellish, for the defendant.—First, the defendant is not liable to pay at all. By the 118th section the judge may order that the costs should be paid, or that they should not be paid. He has not ordered the defendant to pay them, and the plaintiff cannot have them from him. Secondly, having paid the money over, he cannot recover it back. The 118th rule cannot give any such right, if it is not given by the Act itself. [He was stopped by the court.]

JERVIS, C. J.—Assuming for the purposes of the argument that the high bailiff might have deducted his costs from the proceeds of the goods, I am of opinion that he, having omitted to do that, and having paid the whole into court, and not having applied to the judge to have the amount of his costs deducted, has no right of action against the defendant. Mr. Mills says the costs are fees to which he had a right, and that that right is not taken away by the 118th section, which authorises the high bailiff to deduct his costs from the proceeds. But they are not fees but costs of doing what he did in executing the writ; and on that ground I decide.

MAULE, J.—Assuming the right of the high bailiff to deduct his costs, if he had done that the court would have dealt with the residue. He has not done so, though knowing all the circumstances of the case. He has not applied to the court, but allowed the court to distribute the money to other persons; and he now seeks to recover his costs from the defendant, the plaintiff in the original suit. This does not come under any of the well known heads of money had and received to the use of a person, nor under any precedent to that effect, and he cannot say that there was any implied undertaking making it so. These costs are no more fees than they are rent or interest of money. It appears to me a desperate shift to get money, to which, if the plaintiff had once a right, he has left the time for enforcing it go by.

WILLIAMS and CROWDER, JJ. concurred.

[The 7th sec. of the Division Court Extension Act is taken from the 118th sec. of 9 & 10 Vic., and is in substance the same; and the 54th U.C. Rule corresponds with the English Rule 148. The English Rule 145 is similar to the U.C. Rule 53. The English Rules 146 and 147 were unnecessary, the matter in them being covered by the provisions in our statute. —*Ed. L. J.*]

TAYLOR *v.* THE CROWLAND GAS COMPANY. *Nov.* 23, 1854.

EX. *County Court—Corporation—Costs.*

Quære, whether the County Court Acts apply to corporations?

M. Chambers, Q.C. (*Tapping* with him) moved for a rule calling upon the defendants to shew cause why the master should not tax the costs of the plaintiff herein.

This was an action brought by the plaintiff against the above company to recover certain fees, &c., due to him for services to the company before and after registration. The claim of the plaintiff was for £22 1s., for which amount he obtained a verdict; but, in consequence of part of his demand being for conveyancing, which it was held he was not entitled to recover (see 23 L. T. Rep. 194 and 146), his damages were reduced to the sum of £7 odd, which amount, it had been contended, did not entitle him to his costs, inasmuch as he should have sued in the Co. C.

It was now argued that, under the 9 & 10 Vict c. 95, s. 128, and the 15 & 16 Vict. c. 54, s. 4, the plaintiff was entitled to his costs—first, because many of the shareholders resided more than twenty miles from the defendant; secondly, because the cause of action did not arise wholly, or in some material point within the jurisdiction within which the defendants dwelt or carried on their business; and thirdly, because the cause of action was one for which no plaint could have been brought in the Co. C. [POLLOCK, C.B.—The shareholders are not the defendants, but the corporation; where is the business of the company transacted?] At Crowland; but it would be idle to sue the corporation in the Co. C.; for, in the event of there being no effects, the plaintiff would be

unable to proceed against the individual shareholders under the 7 & 8 Vict. c. 110, s. 66. [PARKE, B.—It is a great question whether or not the Co. C. Act applies to corporations; what mode of service is there? ALDERSON, B.—It is certainly very inconvenient that it should apply.] *Rule nisi.*

[The Division Court Act (sec. 23) gives jurisdiction "for or against any person or persons, *bodies corporate* or otherwise," but contains no express provision as to the mode of service on a Corporation:—the Practice of the Superior Courts, then, would apply. At least, in a late case, *Lee v. The O. S. and Huron R. R. Company*, in the First Division Court of the County of Simcoe, JUDGE GOWAN is understood to have said, that in the absence of any provision for the service of Division Court process on Corporations, he thought the Statutory provisions regulating service of process of the Superior Courts on Corporations might be resorted to in aid.—*Ed. L J.*]

(Ely County Court.)
Sep. 1854.
SAYER *v.* COLE.
Practice—Plea puis darrein continuance.

Action for assault. The case had been ripe for trial at the preceding court, since which time the magistrates had dismissed the case, with a certificate, which had been before them before the entry of the case in the Co. C., although sought to be withdrawn.

The defendant's attorney put in the certificate in bar of the action.

Naylor, who was counsel for the plaintiff, argued that the putting in the certificate was in the nature of a plea *puis darrein continuance*, which could not be pleaded after a case was ripe for trial, but adjourned at the instance of the defendant: (*Dowson* v *Levi*, 4 B. & Ald. 249.) Again, pleas *puis darrein continuance* should be verified by affidavit.

His HONOUR considered the certificate a bar, and thought the verification by a witness to the signatures was sufficient.

(Cambridge County Court.)
Sep, 28, 1854.
EVANS *v.* DYSON.
Set off—Money paid and received.

Action for work and labour, &c. To this the defendant pleaded as a set-off that the plaintiff had received £5 of him to teach him to brew, but that he had neglected and refused so to teach him.

The attorney for the plaintiff urged that this was not the subject of set-off, there being no "mutual debt."

Naylor, counsel for the defendant, contended that the set-off was for "money had and received to the defendant's use," and was therefore in the nature of a debt, and liable to be set off.

His HONOUR considered that the set-off must be a separate action.

(Leeds County Court.—T. H. Marshall, Judge.)
Sept. 27, 1854.
RANSON ET AL. *v.* YORK AND NORTH MIDLAND RAILWAY COMPANY
Carriage of Goods—Dispute as to charges—Costs not allowed where judge disagrees with the verdict of jury.

The action was to recover a certain amount which it was alleged was unfairly overcharged on the carriage of goods for the plaintiff. A jury was called. The facts need not be stated as they involve no question of importance, but the jury returned a verdict for the defendant. On being applied to for costs, the JUDGE said: "I am not satisfied with the verdict, and therefore I cannot give costs."

[In our Courts the Judge has a like power under sec. 83. stat. 13 & 14 Vic. ch 53, and we are aware of its being exercised more than once in cases where a perverse verdict was rendered.—*Ed. L.J.*]

(Halifax County Court.—J. Stansfield, Judge.)
Oct. 18, 1854.
RHODES P.O. *v.* HARTLEY AND OTHERS.
Execution—Priority of landlord.

A landlord is not entitled to a priority in respect of rent due over a creditor who has issued execution in a Co. C. judgment, unless the creditor gives notice to the bailiff as provided by the Co. C. Acts

This was an action brought by the plaintiff (high bailiff of the Co. C.), against John Hartly, constable, James Ore, J. Robinson, and James Howarth, auctioneer, Halifax, for a wrongful conversion.

Mr. Rhodes stated that he was under the necessity of bringing this action to determine the right of landlords to a priority of rent. The circumstances attending this case were singular, inasmuch as Mr. Stocks persevered in selling the goods taken, he insisting he had a right to do so. As high bailiff of that court he (Mr. Rhodes) had been commanded to levy on the goods of one William Crowther, at Northowram, which by his bailiffs he had done, and left the goods at Mr. Woodhead's, the Shoulder of Mutton Inn, Northowram, there to remain until sent for for the purpose of selling. He subsequently sent for the same, but was informed that Mr. Stock's bailiff had sold them. He immediately informed the parties they had done wrong, and must pay him the amount of execution. They refused—and hence the action. He had no occasion to inform his Honour, but it was perhaps necessary for Mr. Stocks to know, that that rule of law which obliged the sheriff before distraint to inquire if any rent was due, and if due to pay the same before levy, was by the Co. Courts Act repealed, and in its stead the landlord was now obliged to give notice in writing to the bailiff making the levy that rent was due, whereupon the bailiff was then bound to distrain as well for the landlord's claim as for the amount of execution; but of this claim neither Mr. Stocks nor his agent thought proper to give the requisite notice, and when he informed the latter that they ought to have done so, he replied that Mr. Stocks had told them differently.

Stocks, on behalf of the defendants, stated that until that moment he was not aware but that the same rule of law that was applicable to the sheriff was likewise the law in the Co. C. The facts were, that he wanted some rent of Crowther, and had given instructions for a distraint on Crowther's goods, which the defendants made, and at the same time were informed that the bailiffs of the Co. C. had previously levied on the goods, and taken them to the Shoulder of Mutton, which was likewise his property; he certainly thought that, seeing the goods were there unsold, and that rent was due to him, he had a right to have that satisfied first, and that he was under no obligation to give notice.

His HONOUR, in giving judgment, said the verdict must be for the plaintiff. It was quite clear that a different rule of law prevailed in the Co. C., and that now to entitle the landlord to a priority it was necessary, in the language of the Act, that notice in writing must be given by the landlord or his agent to the bailiff making the levy that rent is due, whereupon the bailiff is then bound to levy as well for the landlord as for the execution-creditor. Such notice was not given; therefore the judgment of the court must be for the plaintiff for the amount sought.

[Sec. 6 of Division Court Extension Act repeals also the statute of Anne, and is the same in substance as the Imperial Act 9 & 10 Vic. c. 95.—*Ed. L. J.*]

(Southwark County Court.—Geo. Clive, Judge.)

Oct. 26, 1851.

LEE *v.* THE BRIGHTON AND SOUTH COAST RAILWAY COMPANY.

Liability of a Railway Company for loss by the abstraction of money from a parcel in transitu.

This was an action brought by Mr. Wm. Lee, the chancery barrister, to recover £3 10s., abstracted from a parcel whilst in the possession of the above company.

Denny, the barrister, appeared for the complainant; the company was represented by their solicitor, Mr. Faithful.

From the evidence of Mr. Lee and his witnesses, it appeared that on the 27th June, he (Mr. Lee) assisted by his laundress, Mary Sims, made up a parcel in a blue bag, at his chambers in Farrar's-buildings, Temple, and addressed it to "Mrs. Lee, No. 101, Lansdowne-place, Brighton." Amongst the articles, and quite in the centre of the parcel, was a package of tea, under the cord of which a letter, containing £3 10s. was fixed. The parcel was given to Mr. Lee's clerk, a Mr. Jones, who had not seen it made up, and who was also not aware of what it contained, to be taken to the Brighton Railway station at London-bridge, to go by the express train. Jones further swore that he delivered and paid the booking, carriage, &c., 1s. 2d., at soon after half-past four o'clock in the afternoon. When it arrived at its destination, and opened by Mrs Lee, no money was found, although every other article was safe. Mr. Lee subsequently applied to the company about the matter, but was so evasively answered and put off, that he was compelled to adopt the present proceedings to recover his money.

Faithful hoped that the company would not be rendered liable for moneys that might have been abstracted or lost, previous to its being booked at the railway office. To show that it could not have been abstracted while in the possession of the company, he would call the manager of the parcel office, a most trustworthy man, who received the parcel, and also others who had the parcel under their notice, to testify to the fact.

The first witness, George Mitchell, said—I have been manager of the parcels department for the last three years, and have been in the service thirteen years. I remember receiving Mr. Lee's parcel on the day in question, about three minutes before five o'clock. I will not swear to the exact time, but am certain that it had not been booked in the office fifteen minutes before five o'clock. I mention the former time because the entry of Mr. Lee's parcel is made after another entry, which must have been made in the "Way-book" at that time.

By the JUDGE—Did you notice the parcel, and in what condition it was?

Witness.—Yes, your honour, I did, it was quite secure, and I entered the fact in the book at the time.

The guard of the train and the delivery porter at Brighton also testified that from its being taken from the booking-office until its delivery at Mrs. Lee's residence at Brighton, no person could by any possibility have meddled with it, and that it was in the same state as when received. They more particularly noticed the parcel because Mr. Lee was in the habit of sending in such a way weekly for above four years past.

The JUDGE (to Mrs. Lee).—Did you notice the condition the parcel was in when you received it?

Mrs. Lee.—Yes; I remarked, and called the attention of my maid-servant to the loose and slovenly manner in which it was tied and sealed up.

The JUDGE.—In this case I must, from the admission of the parcel-manager, that the bag was well secured when he received it, decide in favour of the complainant; but I must at the same time say that, considering the cheap and secure way in which money can at present be sent, much indiscretion has been used in transmitting the money in the way it was sent.

Denny.—Your honour's decision includes the usual costs?

The JUDGE.—Considering the whole matter, I cannot allow any costs but what has been incurred for witnesses.

MONTHLY REPERTORY.

Notes of English Cases.

(Commencing November, 1851.)

COMMON LAW.

C.P. BABONEAU *v.* FARRELL. ***Nov.* 4.**

Slander—Innuendo—Words not actionable per se.

The declaration stated—that the plaintiff was a manufacturer of asphalte, and was employed to lay new asphalte in a certain court, and that he had duly performed the work; yet the defendant, well knowing the premises, spoke, &c., these words: *"The old materials have been relaid by you in the* asphalte work (describing the place) and I have seen the work done," thereby meaning that the plaintiff had been guilty of dishonesty in the conduct of his trade, by laying down again the old asphalte materials instead of the new, according to his contract. Plea: Not Guilty. At the trial the Judge asked the jury, "Do you find the words proved?" but did not ask them if they found that the words were used in the sense of the innuendo.

Held, that he was right.

C.P. GRIFFITHS *v* TEETGEN. ***Nov.* 4.**

Seduction—Plaintiff's Servant.

Plaintiff's daughter went to assist in keeping the defendant's shop during the temporary absence of the defendant's wife, for which she received remuneration. Whilst there she was seduced by defendant.

Held, that there was nothing in those facts inconsistent with her being the plaintiff's servant when the seduction took place.

EX. ATKINSON *v.* NEWTON. ***Nov.* 8.**

Slander—Question for Jury—Meaning of words of slander.

At the trial of an action by A. against B. for slander, A. proved the words used to be, "You're a thief, and robbed J. C. of his money," while B. proved the words to be, "You've got J. C.'s brass." The fact was, J. C. had lost money, and it was thought A. had found it.

Held, that the Judge rightly told the jury they were to consider whether A.'s version or B.'s version of the words used was correct, and if they believed A., they were to find a verdict for him; and that he was not bound to tell them that the finding of J. C.'s money was no felony in itself, and that, if they were of opinion that B. intended not to impute a felony, but merely the circumstances of J. C.'s money being found, then they were to find for the defendant.

C.C.R. REGINA *v.* SIMPSON. ***Nov.* 11.**

Larceny—Stealing from the person—7 Wm. 4 & 1 Vic. c. 87, s. 5—Severance of property.

The prosecutor carried his watch in his waistcoat pocket, the chain attached passing through a button-hole of the waistcoat, and being there kept from slipping through by a watch key. The prisoner took the watch out of the pocket and drew the chain out of the button-hole, but his hand being seized,

it appeared that, although the chain and key were drawn out of the button-hole, the point of the key had caught up another button, and was thereby suspended.

Held, that the evidence was sufficient to warrant a conviction for stealing from the person.

Q.B. WILLINS v. SMITH. *Nov.* 10.

Infant, acknowledgment by—Statute of Limitations—9 Geo. 4, c. 14.

Where an infant contracts for necessaries, and whilst an infant makes a promise to pay within six years before the commencement of the action :—

Held, that such promise is sufficient to take the case out of the statute, the infant being originally liable.

C.C.R. REGINA v. SHARP AND OTHERS. *Nov.* 11.

Venue—7 Geo. 4, c. 64, s. 13—Felony in respect of property in a waggon employed in a journey.

S. and C., carmen of the Great Northern Railway Company, left the station in Middlesex to proceed to Woolwich, in Kent, with one of the company's waggons; and before starting, the usual oats, &c., for provender for the horses were given out to them and placed in the waggon in nosebags. At Woolwich they took the nosebags from the waggon, and delivered them to B., an ostler, for 6d. Upon an indictment at the Middlesex sessions of S. and C. for stealing the oats, &c., and of B. for receiving, they were found guilty.

Held, that the case was within 7 Geo. 4, c. 64, s. 13; and that though the offences were committed in Kent, the prisoners might be tried in Middlesex.

C.C.R. REGINA v. ROBINS. *Nov.* 11.

Larceny—false pretences.

A quantity of wheat, not the property of the prosecutors, having been consigned to their care, was deposited in one of their storehouses under the care of a servant, E., who had authority to deliver only to the orders of the prosecutors, or C., their managing clerk. The prisoner, a servant of the prosecutors, at another storehouse, by representation to E. that he had been sent by C. for some of the wheat, and was to take it to the Brighton Railway, which representation was entirely false, obtained the key from E., and was allowed to remove five quarters, which he subsequently disposed of for his own use, the prisoner assisting to put the five quarters in the cart in which it was conveyed away, and going with it.

Held, upon the facts above, that the prisoner was guilty of larceny.

EX. BROADWOOD v. GRANARA. *Nov.* 11.

Innkeeper's lien—guest's goods—goods hired by guests.

A., a travelling musician, went to G.'s hotel and took apartments. A few days afterwards A. hired a piano from B., who sent it to the hotel, and G. knew that it was merely hired for a temporary purpose from B.

Held, that G. had acquired no lien over the piano for payment of A.'s hotel bill.

C.C.R. REGINA v. BEESTON. *Nov.* 11.

Evidence—Deposition before Magistrate—admissibility of, at trial—11 & 12 Vic. c. 42, s. 17—same charge.

A deposition properly taken under 11 & 12 Vic. c. 42, s. 17 before a magistrate on a charge of feloniously wounding, is admissible in evidence against the prisoner on his trial for murder, the deponent having subsequently died of the wound.

To render a deposition so taken admissible at the trial of a prisoner, it is not a condition that the charge on which he is indicted must be identically the same as that made against him before the magistrate; but the question is, whether the charge was such that the prisoner had full opportunity before the magistrate for cross-examination as to the circumstances appearing at the trial? If the charge on the two occasions be substantially different, such deposition will not be receivable at the trial.

Q.B. WEBSTER v. JOHNSON. *Nov.* 11.

Executor's assent to legacy—Concealment of will.

Where a devisee of premises for life is appointed executrix by the will and conceals it, and takes out letters of administration under which she enters upon the premises and occupies as next of kin, claiming the whole :—

Held, that such entry and occupation are not evidence of an assent to the legacy, but rather of dissent, as she claimed the whole interest in the premises as next of kin.

C.C.R. REGINA v. WEST. Nov. 11.

Larceny—lost property—finding.

A purchaser at the prisoner's stall left his purse on it. A stranger pointed out the purse to the prisoner, supposing it to be her's, and reproved her for carelessness, when she put it in her pocket and afterwards concealed it, and on the return of the owner denied all knowledge of it. Upon the indictment for larceny, the jury found that the prisoner took up the purse knowing it was not her own, and intending at that time to appropriate it to her own use, but that when she took it she did not know who was the owner; whereupon she was convicted.

Held, that the conviction was proper; that the purse so left was not lost property.

Q.B. DUNBAR v. SMUTHWAITE. Nov. 14.

Shipping contract—Plea of unseaworthiness.

The plaintiff shipped goods on board defendant's vessel, the defendant undertaking that the vessel should be seaworthy at commencement of the voyage. In an action on the contract the declaration alleged "that the vessel was not seaworthy at the commencement of the voyage, whereby the plaintiff was prevented from insuring;" to which a plea "that *before* any damage, loss, or prejudice accrued to the plaintiff, the vessel was made seaworthy" was held no answer to the action, and bad on demurrer.

EX. JAYNE v. HUGHES. Nov. 18.

Deed, from what time it speaks—Statute of Limitations.

A deed is presumed to speak not from the date it bears, but from the day on which it is in fact executed, unless the language clearly indicates another period as that which is referred to. If the deed, therefore, contains an acknowledgment of the title, the Statute of Limitations, 3 & 4 Wm. 4, c. 27, s. 14, begins to run only from the date of execution.

EX. POTTINGER v. NEAVES. Nov. 24.

Bill of Exchange—Notice of dishonour—real address.

A. sued B. on a bill of exchange, the defence being that there had been no notice of dishonour. A., who knew Y. to be the real address of B., proved at the trial that B. had told him to send the notice to X., while B. contradicted that evidence. The fact was, that A. sent the notice to X., and it did not reach B. before the writ was served.

Held, the proper question for the jury was, whether they believed that B. had told A. that the notice, if sent to X. would be sufficient?

Q.B. HODGSON *v.* HARRISON. Nov. 25.

Insolvent Debtor's Act, discharge under—Insufficient entry of debtor in schedule.

Where, to an action on a bill of exchange, the defendant pleaded discharge under the Insolvent Debtor's Act, and it was proved that the bill on which the action was brought was not set out in the schedule, nor the name and address properly inserted therein, and the jury found for the plaintiff; the Court refused to disturb the verdict.

CHANCERY.

V.C.K. MATHISON *v.* CLARKE. Nov. 4.

Trustee—Auctioneer—Mortgagee in possession.

An assignee of a mortgage, being one of a firm of auctioneers, sells under a power contained in the mortgage deed, and charges for personal trouble and commission. On the question whether he was entitled to those charges,—

Held, that so far as and when he was mortgagee in possession he was a trustee, and the rule of equity applied, and he was therefore not entitled to charge for personal trouble during that period.

V.C.K. WINCH *v.* GRANT. Nov. 6, 8.

Executor's right to retain money.

By antenuptial contract confirmed by will after marriage, monies are settled on the wife, but never paid. The husband dies, appointing two executors. The wife dies, and appoints the same two persons her executors, against whom a suit is instituted in respect of a breach of trust of the husband, and they claim, as the wife's representatives, the sum settled.

Held, that they could retain their own debt on her behalf, in priority to other creditors of equal degree.

V.C.K. BOYSE *v.* ROSSBOROUGH. Nov. 7, 8.

Jurisdiction—Foreign judgment.

Testator by his will devised his lands in Ireland and England to B. The will was disputed by A., the heir-at-law, who filed his bill in Ireland to set it aside. An issue had been directed and a verdict given against the will, and a motion for a new trial refused. B. files a bill in England to have the will established, and to have it declared that the English estate passed under it.

Held, that the proceedings in Ireland were no bar to B.'s obtaining an issue in England to try the validity of the will, the verdict in Ireland having no authority to conclude the question as to the English estates, although pronounced upon the same will.

V.C.K. BANKS *v.* DAVIES. Nov. 17.

Chose in action—Trade.

Where there is property of the wife, and the husband is under age, application of such property for trading purposes *must be made the subject of a special order.*

V.C.K. WEEKS *v.* TAYLOR. Nov. 18.

Injunction to restrain using judgment at law.

On motion for an injunction to restrain an action of ejectment, the injunction was granted on an undertaking that, judgment being allowed to go in the action, such judgment should be dealt with as this Court should direct. The plaintiff at law then brought an action of trover for the fixtures, and sought to use the judgment as conclusive evidence of his legal title. Upon motion for an injunction to restrain such use of the judgment, motion refused with costs.

Semble. A judgment allowed to be taken on the terms of an injunction being granted and to be dealt with by this Court, is not given de bene esse, but on admission of legal title.

V.C.K. ANDREWS *v.* PUGH. Nov. 16, 18.

Injunction—Partnership.

P. is employed by A. as his agent, and in that capacity deals with customers, but no distinct agreement is come to as to terms; and after two years P. sets up a partnership, and gives notice to dissolve, and sends a circular to the customers. A. files a bill for an injunction, and P. by his answer admits that no partnership was intended, but sets it up as the means of being remunerated.—*Held*, no partnership.

Semble, although partnership quoad the public is primâ facie evidence of partnership inter se, it may be rebutted by evidence.

L.J. HATCH *v.* SEARLES. Nov. 18.

Conway's Case.

Bill of Exchange—Acceptance in blank—Indorsee—Notice.

In the administration of a testator's estate, it appeared that he had given an acceptance in blank, which had been indorsed to the claimant.

Held, that the indorsee, who knew of the fact of the acceptance being in blank, must be taken to have such knowledge of the circumstances of the case as he would have acquired if he had made proper enquiries, and that he was in no better position than the drawer.

V.C.S. RE CABLE. Nov. 24.

Practice.

Where a small fund in court belonged to two married women, who died, each leaving a husband surviving, an order was made for payment out of court of the fund to the two husbands, although they had not taken out administration. (a)

M.R. BYAM *v.* BYAM. Nov. 13, Dec. 4.

Trustee—Marriage Articles—Discretionary power.

By marriage articles a power of disposition was given to the wife, with the consent of the undersigned trustees.

Held, that new trustees appointed by the Court might give the required consent.

V.C.K. ADAM *v.* WHEATLEY. Dec. 4.

Demurrer—Constructive agreement.

A. agrees by letter and verbally to take land on a building lease, and a rough draft is prepared, and fair opy and plan made, after which a new clause is inserted at A.'s request, and agreed to by the defendant's (the landowner's) solicitor,

[NOTE.—(a)—RE CABLE.—The last number of English Reports, received since the foregoing was in type, shews that the *Order of V.C.S.* has been disallowed by the Lord Justices, Lord Justice KNIGHT BRUCE saying: "There is a reason beside the formal one why the order should not be allowed. After the wife's death the husband is not liable to pay her debts contracted before marriage; but such property as he receives as administrator is applicable to this purpose. If he were allowed to receive it as her husband, and such a debt were to appear, the assets would be gone in a wrong direction."—*Ed. L. J.*]

all along acting for him; after which, A. having called for completion of the agreement, the solicitor declines to complete. On bill filed for specific performance, and demurrer for want of equity,—

Held, that as no copy of the agreement was signed, and as it clearly appeared that the plans had still to be settled, and therefore the premises were not defined, the demurrer must be allowed.

L.C. EADS. v. WILLIAMS. Nov. 11, 13, 14, 15, Dec. 2.

Specific performance—Mining lease—Award—Delay in filing bill.

Plaintiff agreed to lease a coal mine to the defendant on such terms as two arbitrators, or, in case of their disagreement, an umpire, P., might fix. An award was signed, and possession having been previously taken, specific performance was sought on the footing of the award.

Held, that the award was bad, on the ground that one of the arbitrators signed against his own opinion, in deference to the opinion of P.

Semble, that an award to be signed by two arbitrators must be signed by the two contemporaneously.

Three years and a half delay in the filing of the bill after possession had been given up, is a complete answer to a suit for specific performance.

M.R. MILLER v. CHAPMAN. Dec. 4.

Will—Construction—Uncertainty.

Testator devised a reversion equally between his children living at the death of the tenant for life, or such others as would have been entitled at the death of their parents.

Held, that the surviving children took, to the exclusion of a grand-child whose father died after the testator, but before the tenant for life.

L.J. BAKER v. READ. Dec. 7.

Sale of trust property to a trustee—Acquiescence—Lapse of Time.

A testator devised a farm to his son, to be valued by A., and one-third of the valuation to be paid to the plaintiff. In 1833 A. bought the farm himself for £750, and paid one-third to the plaintiff, who accepted it. In 1850, A. being dead, the plaintiff filed a bill to set aside the sale for inadequacy of consideration.

Held, that considering the lapse of time, and the death of A., the plaintiff was too late, and the bill was dismissed.

V.C.S. HERRING v. MILES. Dec. 9, 11.

Specific performance—Agreement—Statute of Frauds—Waiver.

A. and B. agreed to grant mutual leases upon terms stated in a letter by A.'s solicitor, and accepted by B.'s solicitor. A.'s solicitor sent B.'s a draft of a formal agreement, which was returned by B.'s unaccepted, as he considered the agreement already definite and binding. Both A. and B. had antecedent knowledge of the title, and B. appeared to have acted on his knowledge.

Held, that there was a waiver of objections to the title on the part of B., and that A. was entitled to specific performance.

CORRESPONDENCE.

To the Editor of the "Law Journal."

DEAR SIR,

Under our Statute 14 & 15 Vic., ch. 11, sec. 2, is it competent for the officers therein named "to bind as an apprentice," &c., a "minor, who may be an orphan," &c., when the minor is under the age of 14? That is to say, do the words "as aforesaid" in that section, following the words "put and bind," refer as well to *the age at* which a minor may be bound, as to the *mode* of binding, and to the period *till* which the minor may be bound?

If we substitute for the words "as aforesaid" their equivalent in section 1, and read the 2nd section so as to include *only* minors *not* under the age of 14, we must read it somewhat as follows: "It shall and may be lawful," &c., "to put and bind," as an apprentice by written indenture to any master mechanic, &c., with the consent of such person, and with the consent of the minor, any minor not under the age of 14 who may be an orphan, &c., for any term not to extend beyond the minority of such apprentice. And such apprentice, &c., to end of sec. 2; and then we must make the words "not under the age of 14," which *precede* "put and bind" in the first section, follow them in the second.

Again, if the second section includes only minors not under 14, the difficulty strikes one, in the case of *orphans*, of discovering their age.

Again, the section does not say "any *minor as aforesaid.*"

The object of the statute is simply to enable articles of apprenticeship to be entered into for less than seven years without reference to age, so far as it is stated in the preamble.

And while it would seem very reasonable that children who have parents, &c., should be supported by them until the age of 14, the same reason would not apply to orphans dependant for support on public charity.

Again the statute, 14 & [illegible] Vic. ch. 35, which incorporates the House of Industry at Toronto, and the statute 16 Vic., ch. 71, amending the act incorporating the Orphan's Home, &c., gives these societies power to bind as apprentices *any* children under their charge, *without reference to the age* of such child; and in the 16 Vic. ch. 71, reference is made to the "Apprentice Act."

Yet if minors under 14 may be bound, they may be clearly so bound for any *term not to extend beyond the majority of such apprentice.* They may consequently be bound for a much longer period than seven years, which would not seem to be in the provisions of the act; and moreover, this very circumstance would seem to shew that in such a case the apprentice, and the master of such apprentice, could not be said to be held in the same *manner* as if such apprentice had been bound by his or her parents. Perhaps some of your correspondents will be able to answer the doubt satisfactorily, as it is very likely to be of some practical importance.

Truly yours,

A. N.

To the Editor of the "Law Journal."

SIR,

The Law regards Drunkenness as a punishable vice, and Judges, court after court, proclaim Intemperance as the prolific mother of crime; I am therefore, I hope, within the range of your Journal, in asking a legal question, having in view the discouragement of it. At Vendues or Auction sales, the party who calls them gives whiskey without stint to the bidder,—and sometimes others, who have articles to sell, also drug their dupes; and while under the influence of liquor, the idiots bid off or purchase articles at double their price. It is a common practice.

Now the question is,—suppose that intoxicated men buy things at an extravagant price, are they, when they come to their sober senses, at liberty to repudiate the thing or not? The law, I know, does not make drunkenness an excuse for crime, or, as a general thing, a ground for retracting a bargain, but in the case I put, would not the turpitude on the part of the seller annul the sale, particularly in a Division Court?

Yours,

A PRACTITIONER AND FRIEND OF TEMPERANCE.

[If a party be in a state of *complete* intoxication, so that he does not know what he is doing when he enters into a contract, the fact would be a good defence—See Cook *v.* Clayworth, 18 Ves. 12—Gore *v.* Gibson, 13 M. & W., 626. The same if a party were induced to drink *in order to take advantage of him*—(see the cases noted in Harrison's Digest—Contract: Intoxication). The case you put would probably turn on a question *of fact*, and such evidence should be adduced as would satisfy the Judge "that the party was induced to drink in order to take advantage of him." *Ed. L.J.*]

THE STUDENT'S PORTFOLIO.

[For our young friends a space has been reserved, and we trust that the gleanings which will be presented to them, *monthly*, may prove interesting and instructive. The extracts given will be necessarily brief, but may serve to encourage reflection, (as well as incite to solid and extended reading) among those of our Student friends who desire not to *pick up* the law as a trade, but to study it as a profession—to qualify themselves for that dignified calling, "which has, amongst things temporal, no superior or equal."—*Ed. L. J.*]

So natural is the union of Religion with Justice that we may boldly deem there is neither where both are not. For how should they be unfeignedly just whom religion doth not cause to be such; or they religious which are not found such by the proof of their just actions? If they which employ their labour and travail about the public administration of justice follow it only as a trade, with an unquenchable and unconscionable thirst of gain; being not in heart persuaded that justice is GOD's own work, and themselves his agents in this business; the sentence of right GOD's own Verdict, and themselves his priests to deliver it; formalities of justice do but serve to smother right, and that which was necessarily ordained for the common good, is, through shameful *abuse*, made the cause of common misery.—*Hooker's Eccl. Pol., Book V., Chap. I.*

[The following is from a recent work—"The Advocate"—only in part published.—*Ed. L. J.*]

EDUCATION—MORAL TRAINING.

Assuming that all needful preliminary education in classical and scholastic acquirements has been obtained in youth, (and wanting which, it would be unwise to adventure upon the profession) we take the student at the point in his career when he quits the school or the college, and invite him to follow us through a brief review of the course of education which it is desirable he should adopt for the purpose of preparing him for the profession of an Advocate. That course of education will be conveniently considered under the three heads into which it naturally divides itself, viz.: his MORAL, his INTELLECTUAL, and his PHYSICAL training.

Foremost we place the MORAL TRAINING of the Advocate, because foremost in importance to the successful discharge of his duties is the *mens conscia recti;* and next to that, his reputation among his fellow men—wanting either, his intellect will be shorn of half its influence. Let the aspirant set up in his own mind the ideal of a good man, to which he should ever strive to approach nearer and nearer, remembering always that the loftiest courage and the grandest eloquence proceed from a profound consciousness of rectitude of purpose, and that the confidence of others can only be secured, and their emotions awakened, by the *reality* of sincerity and feeling in himself. Shams of every kind have no lasting success in any pursuit, least of all in the profession of an Advocate, where any art, other than that which is properly *nature cultivated*, fails to make more than a passing impression of admiration at the *skill* of the *performer*:—only a genuine *man* can be a great *Advocate*.

The character to which a student should aspire is that of a Christian Gentleman, of whose portraiture let us attempt a brief and rudely pencilled sketch.

It is not true that "the manners make the man," on the contrary, as the *man* is, so are the *manners;* manner is but the mind seen in action; coarse manners never can accompany a refined mind, nor the graces of a gentleman conceal the spirit of a savage.

(TO BE CONTINUED.)

OFFICIAL APPOINTMENTS.

COUNTY JUDGES.

ALEXANDER LOGIE, of Hamilton, Esq., Barrister-at-Law, to be Judge of the County Court of WENTWORTH.—[Commission dated 16th October, 1854.] [Gazetted 23rd Dec. 1854.]

JOSEPH DAVIS, of Osgoode Hall, Esq., to be Judge of the County and Surrogate Courts, for the County of HALTON.—[Gazetted 27th, Dec., 1854.]

COUNTY AND SURROGATE COURT CLERKS.

LACHLIN McDONALD, of Cornwall, Esq., to be Clerk of County Court of STORMONT, DUNDAS, and GLENGARY.—[Gazetted 25th Nov., 1854.]

HUGH JOHNSTON, of Goderich, Esq., to be Clerk of County and Surrogate Courts of HURON and BRUCE. [Gazetted 25th November, 1854.]

WILLIAM L. P. EAGER, of Milton, Esq., to be Clerk of County and Surrogate Courts of HALTON.—[Gazetted 6th January, 1855.]

SHERIFFS AND CLERKS OF THE PEACE.

LEVI WILSON, Esq., to be Sheriff, County of HALTON.—[Gazetted 27th Dec., 1854.]

GILBERT T. BASTEDO, Esq., to be Clerk of the Peace, County of HALTON. [Gazetted 27th Dec., 1854.]

NOTARIES PUBLIC IN U. C.

DONALD BETHUNE, the younger, of Bowmanville, and JOHN STUART, of Sandwich, Esquires, Barristers-at-Law, to be Notaries Public in U.C.—[Gazetted 18th Nov. 1854.]

PHILIP TURNER WORTHINGTON, of Cobourg, and WILLIAM SHERWOOD, of Brockville, Esquires, Attornies-at-Law, to be Notaries Public in U.C.—[Gazetted 25th Nov. 1854.]

ROBERT JOHN EVERIT, of Belleville, Esquire, Barrister-at-Law, and PATRICK GEORGE NORRIS, of London, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—[Gazetted 2nd Dec. 1854.]

CHARLES HENRY POWELL, of St. Catharines, Esquire, Barrister-at-Law to be Notary Public in U.C.—[Gazetted 27th Dec. 1854.]

CORONERS.

JOHN WESLEY NORRIS, of Cookstown, Esquire, M.D., to be an Associate Coroner for the County of Simcoe.—[Gazetted 18th Nov. 1854.]

GEORGE NIEMEIER, of New Hamburg, Esquire, and HENRY ORTON, of New Hope, Esquire, M.D., to be Associate Coroners for the County of Waterloo.—Gazetted 18th Nov. 1854.]

JOSEPH CORBERT, of Orangeville, Esquire, to be an Associate Coroner for the County of Simcoe.—[Gazetted 16th Dec. 1854.]

DAVID WAUGH, of Stratford, Esquire, to be an Associate Coroner for the County of Perth.—[Gazetted 16th Dec. 1854.]

JONATHAN VAN NORMAN, Esquire, to be Coroner for the County of Halton.—[Gazetted.

LAW SOCIETY OF UPPER CANADA,

Osgoode Hall.

The following gentlemen were called to the degree of Barrister-at-Law, in Michaelmas Term, 18th Vic.:—

Joseph Hutton, Charles Sidney Cosens, Robert Newton Light, Esquires, on 20th November; Charles Frederick Elliot, Tunis Love Snooks, Jacob Dockstader Buell, Charles Henry Powell, William Sherwood, George Levack Mowat, Esquires, on 25th November; and John Creasor, Junior, Esquire, on 28th November.

On Tuesday, 28th November, the following gentlemen were admitted as students:—

Messieurs Ernestus Crombie, B.A., and William Lawrence Lawrason, B.A., in the UNIVERSITY CLASS; and in the JUNIOR CLASS—Messieurs Ward Hamilton Bowlby, Edmund John Senkler, Michael Harris, Joseph Deacon, John Davison, William Horace Radenhurst, David Creasor, George Beecher Harris, John Macbeth, James Hanvey.

DIED.

Of consumption, at Aiken, South Carolina, where he had gone for change of climate, Arthur Ardagh, son of the Rev. S. B. Ardagh, M.A., of Barrie, aged 19. [Deceased commenced the study of the Law under the Editor of this Journal, and by his rectitude and application gave bright promise of an honourable career, and possession of high moral principles, and amiable qualities, endeared him to a large circle of friends.]

DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*Attachment of Debtor's Goods.*—An important branch of the duties of clerks is preparing affidavits for, and suing out *Warrants of Attachment.*

It is presumed that Clerks will be applied to, except in cases of pressing emergency where it may be indispensable to resort to Justices of the Peace: indeed, as a general rule, parties have no guarantee for the regularity of the proceeding unless they employ an officer instructed in and familiar with the requirements of law; and as Magistrates seldom trouble themselves with such matters, and are not entitled to make any charge for drawing the affidavit and suing out the attachment, it is not probable their services will be sought save where the defendant's property would be lost unless instant action was taken, and the clerk's office happens to be at a distance. The right to seize a party's property on the plaintiff's affidavit, or his agent's, unsupported by other testimony, of the debt and state of facts giving right to attach, though a salutary provision of the law, is liable to abuse; and being an *ex parte* proceeding the rules regulating the right must be strictly observed.

Let us turn to the 64th sec. of the Division Court Act. We find there that to warrant an attachment there must be (to confine ourselves to main points):

FIRST.—A claim for a sum not less than 20s. and not exceeding £25, for *debt* or *damages* arising upon contract, express or implied; or upon a *judgment;* but a plaintiff, though not at liberty to divide a cause of action, may abandon the excess of his claim over £25, and go for that amount only.

SECOND.—One of the following grounds must in fact exist as respects the debtor:

I. An absconding from the Province, leaving personal property, &c.

II. An attempt to remove personal property, &c., out of Upper Canada; *or*, from one County to another; *or*, from Upper to Lower Canada, with intent, &c.

III. A keeping concealed in Upper Canada to avoid service of process.—Any one of these grounds will be sufficient.

THIRD.—An affidavit or affirmation must be made according to Form No. 22 in the Schedule of Forms, or to the same purport: and this affidavit should come up to the formal requisites set forth in the 46th Rule.

The *application* for an attachment, to a clerk, may be—to the clerk of any Division Court of the county wherein the debtor was last domiciled—or where the debt was contracted,—and may be sued out either before or after the service of an ordinary summons from the Division Court. If sued out before action commenced, the affidavit is not entitled in the cause; if sued out after, it should properly be entitled the same as in a summons.

By framing a form of affidavit in lieu of that contained in the Act, the Commissioners have set at rest several serious questions as to what allegations the affidavit should contain. Looking, then, at the Form (No. 22) as the general guide, we purpose showing the variations necessary to meet the facts and circumstances of particular cases:—

First,—as to the statement of *the cause of action.*

Second,—as to *the character in which the plaintiff sues.*

Third,—the *alterations* necessary in the body of *the affidavit*, and in the *Jurat* (the name given to certificate of oath "Sworn before me," &c.)

The Statement of the cause of action.—The form No. 22 supposes a cause of action *for goods sold and delivered*, and gives the form of words to suit it; the directory part following is in these terms, "or other cause of action, *stating the same in ordinary and concise language*" (in substance the same direction as in the old form schedule D); and the statement of the cause of action must come up to this requirement. As forms will be given to meet cases most likely to arise, there will be no necessity to examine the meaning and effect of this direction, only remarking that a complete cause of action on the part of the plaintiff against the defendant at the time the affidavit is made must be disclosed therein, and that causes of action by and against parties in different rights cannot be joined together—the second division of the general rule (No. 69) showing an exception.

The underwritten forms are varied to suit as well where the plaintiff as his agent makes the affidavit.

CAUSES OF ACTION, CONCISELY STATED.

[A.B. stands in the place of the plaintiff's name; C. D. in the place of the defendant's name; and E.F. in the place of the plaintiff's servant's or agent's name.]

1. *Goods sold and delivered.*—For goods sold and delivered by this deponent (*or*, by the said A.B.) to the said C.D., at his request.*

2. *Particular chattel sold and delivered.*—For a gelding, (*or* a mare, *or* a cow, *or* a light waggon,) sold and delivered by this deponent (*or* the said A.B.) to the said C.D., at his request.

3. *Goods sold, delivered to a third party.*—For goods sold by this deponent (*or* the said A.B.) to the said C.D., and at his request delivered to one ———

4. *For an estate sold.*—For a messuage and lands, with the appurtenances, sold and conveyed by this deponent (*or* the said A.B.) to the said C.D.

*This is the form given by the Commissioners.

5. *For crops sold.*—For a crop of grass (*or* wheat, &c.,) sold by this deponent (*or* the said A.B.) to the said C.D., and by the said C.D. had and taken to his own use.

6. *For boarding and lodging.*—For meat, drink, washing, lodging, and other necessaries found and provided for the said C.D. by this deponent (*or* the said A.B.)

7. *For boarding, &c., for third parties.*—For meat, drink, washing, lodging, and other necessaries, found and provided for divers persons by this deponent (*or* the said A.B.) at the said C.D.'s request.

8. *For hire of goods.*—For the use and hire of a span of horses and waggon (*or* as the case may be) by this deponent (*or* the said A.B.) let to hire to the said C.D.

9. *For use and occupation of a house, &c.*—For the said C.D.'s use and occupation by this deponent's (*or* the said A.B.'s) permission of a certain dwelling-house, lands and premises (*or* as the case may be) for one year now elapsed.

(TO BE CONTINUED IN THE MARCH NUMBER.)

BAILIFFS.—*Attachment.*—Bailiffs' duties in respect to attachment do not need the same full notice as those of clerks; we will refer to them briefly, and give the necessary forms under the Statute, which are not contained in the schedule of forms prepared by the Commissioners. If the warrant of attachment be placed in the bailiff's hands by the party or a magistrate, he should take care to have all his lawful fees, as well as the fees for appraisement, paid to him before he undertakes to act, for having once begun he must go on with the proceeding—but where the warrant is sued out of his own or some other court, he may be sure the clerk will have the fees secured to him. Also, enquiry should be made by the bailiff as to the property intended to be seized, and, if perishable, it will be proper for him to require security under the 70th sec. of the Act before he seizes; but in general, on receipt of a warrant directed to him, the bailiff is forthwith to execute the same; that is to say, he is to proceed with all diligence to seize such personal estate and effects of the debtor as may be taken under the ordinary writ of execution, or a sufficient portion thereof to *secure* the sum mentioned in the warrant, with costs. A difficulty may occur with respect to other creditors coming in afterwards, and it is not easy to lay down any rule as to the amount of property the bailiff should attach. If he has knowledge of other creditors coming in, it would seem proper to seize enough to cover the claims of all; but in any case let the bailiff take ample property to cover, at a forced sale, the debt and costs in the case in which he acts. It may be that an enlarged meaning ought, in construction, be given to the word *secure*, as used in the 64th sec.,—but we will not pursue this point at present, as it opens several nice questions. Having seized, the bailiff's first duty is to make an Inventory of the property, which may be in the following form:—

An Inventory of goods and chattels (property and effects) by me this day seized and taken, in the Township of ——, by virtue of a warrant of attachment issued by T.L., Clerk of the —— Division Court of the County of ——, (or as the case may be), on behalf of A.B., for the sum of ——, against the personal estate and effects of C.D.: that is to say,—one lumber-waggon, one plough, &c., (stating all the articles seized).

Dated this —— day of ——, A.D., 18 .

B. F.,
Bailiff of the —— Division
Court, County ——

The inventory made, the bailiff, within 24 hours thereafter, calls to his aid two freeholders, and swears them to appraise the property seized. This form of oath may be administered by the bailiff, viz.:

You and each of you shall well and truly appraise the goods and chattels, property and effects, mentioned in this Inventory (*holding it up in his hand*), according to the best of your judgment. So help you God.

A memorandum thereof should be then endorsed on the inventory, as follows:—

On the —— day of ——, A.D. 18 , T.T. of ——, and N.N. of ——, were sworn by me well and truly to appraise the goods, chattels, property, and effects mentioned in this Inventory.

B.F.
Bailiff.

The freeholders then examine the property as pointed out to them by the bailiff, and having valued the same their appraisement should be endorsed on the inventory, in the following form:—

We, the above-named T.T. and N.N., being duly sworn by the Bailiff above-named to appraise the goods, chattels, property, and effects mentioned in this Inventory, to the best of our judgment, and having examined the same, do appraise the said goods and chattels, &c., at the sum of ——.

Witness our hands this ——
day of ——, A.D. 18
T.T.
N.N.

[This and the next preceding form may be written on a separate piece of paper and attached to the inventory, if inconvenient to endorse.]

The *Warrant of Attachment, Inventory,* and *Appraisement* are to be returned promptly to the clerk's office, and the property seized is to be forthwith "*handed over* to the custody and possession" of the clerk. Where the chattels are ordinary movable property, there will be no difficulty in doing this, but suppose a schooner or other vessel is seized, it cannot literally be handed over, &c., and it seems to us that the proper construction in such case is, that the bailiff is to do all that is possible under the circumstances towards a *handing over*, as, to go with the clerk to where the vessel is moored, and being on board the same, to hand a chip or the like as a *significant* act of possession to the clerk, who leaves a person in charge for safe keeping. As in the previous question it will not do to enter into any nice discussions here, our present object being in reference to more practical points. Should third parties advance any claims to the goods attached,

or for rent, it will be for the bailiff's interest to sue out Interpleader Summonses at once, unless the plaintiff gives him an ample indemnity.

SUITORS.

ARBITRATION.—*Instructions for the due and orderly holding of.*—We will suppose arbitrators to be in possession of an order of reference from the Division Court, and to have accepted the reference; their first duty, then, is to appoint a day for meeting. In this, the convenience of all parties should be consulted, and as far as practicable met; and the day, hour, and place of meeting should be clearly stated. To prevent mistakes, it will be better to sign an appointment, which may be to the following effect:—

In the ——— Division Court of the County of ———
Between A.B. Plaintiff,
and
C.D. Defendant.
I (or we) appoint the ——— day of ———, A.D. 18 , at 10 A.M. precisely, at (*the house of H. H.*), in the Township of ———, for proceeding on this reference.
Dated this ——— day of ———, A.D. 18 .
H.H. } Arbitrators.
R. R. }

The arbitrators should sign this appointment in duplicate, giving one copy to the plaintiff and one to the defendant,—or they may give to the plaintiff, who will serve on the defendant. A written appointment, though recommended, does not seem to be absolutely necessary; but if arbitrators should proceed without proper notice, verbal or written, the award might be set aside; and to avoid all pretence of misapprehension, a written appointment is recommended.

At the time and place named, the arbitrators having met, examine the order to see the extent of their authority. If the reference is of "*all matters in difference in this cause,*" they are to confine their investigations to the subject matter of the suit,—in other words, to the plaintiff's bill of particulars sued on, and the defendant's set off, if any. If the reference contains these words, "*and all other matters within the jurisdiction of the court, in difference between the parties,*" their enquiries are not confined to the subject matter of the suit, but should embrace all other matters *in dispute*, within the jurisdiction of a Division Court; that is to say, in general terms,—matters of contract (on claim or set off) not exceeding £25, and matters of wrong (tort) not exceeding £10. They should also look if the order of reference contains any special terms limiting their power to make an award as to costs; for though as a general rule all costs will, by the terms of reference, be left to "*the discretion of the arbitrators,*" it will sometimes be "*to abide the event of the suit,*" which means that the party against whom the award is made, is to pay all the costs, and in such case no mention need be made in the award of the costs.

When both parties appear, the best and most speedy method of conducting an investigation of this kind is, first to hear what the plaintiff has to say in explanation of his claim; then to hear what defence the defendant offers against it; then to examine the witnesses for the plaintiff, and afterwards those for the defendant—allowing to each party an opportunity to cross-question his adversary's witnesses. Before proceeding to examine witnesses, it will be well for arbitrators to narrow as much as possible the questions to be disposed of, by requiring of the parties a statement of what items or facts are admitted, and what disputed, so that no unnecessary waste of time may be incurred.

Before a witness makes his statement he should be sworn, or affirmed, and it would seem to be well if the 5th sec. of the U. C. Division Court Extension Act (16 Vic. ch. 177) were read, to shew the witness that false swearing before arbitrators amounts to perjury. The mode of administering an oath is this: the witness is caused to take the New Testament in his right hand, and the form of oath is repeated to him by one of the arbitrators; it may be as follows:

> You shall true answer make to all such questions as shall be asked of you, by or before me, touching the matters in difference referred to my award (or to the award of myself and R.R.) without favor or affection to either party; and therein you shall speak the truth, the whole truth, and nothing but the truth,—So help you God.

The witness then kisses the Testament to signify his assent, and the oath is complete. If the witness belongs to a religious body allowed by law to affirm, omit the words "So help you God," and add instead thereof "And this to do you solemnly and sincerely declare and affirm." The arbitrators should note in the minutes of proceedings, the name of every witness so sworn, or making affirmation, and on whose behalf examined. The arbitrators, it would seem, standing in the place of the Judge, may examine the parties or either of them in their discretion, where they think such a course will be conducive to the ends of justice.

(TO BE CONTINUED IN THE NEXT NUMBER.)

ON THE DUTIES OF MAGISTRATES.

(SKETCHES BY A J. P., CONTINUED.)
For the "Law Journal."

THE JUDICIAL AUTHORITY OF JUSTICES ACTING SINGLY OR IN PETIT SESSIONS.

SOME LEADING RULES.—The Judicial authority of Magistrates to convict summarily for offences is *wholly founded* on *Statute* law; if there be not some

statute expressly giving them cognizance, they have no power judicially to determine any matter of complaint: it is only an Act of Parliament can dispense with the common method of proceeding against offenders by indictment and trial *before a jury.* The particular statute, then, under which a Magistrate may be called upon to act being the source from which his power is derived, should be examined and its provisions strictly pursued, (*a*) especially as respects the person before whom—within what time and in what locality—the complaint should be laid.

The Acts for summary conviction commonly give jurisdiction to Justices of the Peace generally, which implies an equal power to all *within the limits of their respective commissions;* but jurisdiction in any particular case attaches to the first set of Magistrates, *duly authorized*, who have possession and cognizance of the fact, to the exclusion of the *separate* jurisdiction of all others. (*b*) But note, that jurisdiction is sometimes qualified in respect to the *number* or the *description* of Justices to whom it is committed, and when so qualified must be exercised in conformity with the particular enactment, or the proceeding will be void. (*c*) Thus, where authority to convict is given to two it cannot be executed by one Justice, they must be together to *hear* and *determine* the case; (*d*) and if an Act *points out* the Justice or Justices before whom the complaint to ground a conviction is to be made, its directions should be followed. (*e*) For example, where a statute gives jurisdiction to the *next* Justice, none other has authority, (*f*) but if it be to Justices *in or near* the place it is not *compulsory*, and the information may be laid before any Magistrate for the County. (*g*)

Note also a further restriction on the exercise of a Magistrate's authority. Justices of the Peace are not permitted to sit in judgment upon, or take any part in, any proceeding in which they are directly or indirectly interested. (*h*) An order of Sessions was quashed when a Magistrate who was interested in the result sat with the other Magistrates, *though he withdrew* before the decision was given. (*i*)

In every proceeding for summary conviction there is a limitation in point of *time* to the Magistrate's authority; it is generally prescribed in the statute which directs the proceeding. This period has reference either to the time of laying the information or the time of conviction. In most of the recent statutes the period for commencing the prosecution is within three months after the act complained of was committed, but the particular Act under which the information is founded should be consulted, and if no time is specially limited therein, information must be laid within six months. (*j*)

The terms used in the statutes are thus construed by the Courts. If the time limited is "within one (or more) months," without expressing that they shall be *calendar* months, the limitation must be computed according to the *lunar* month of *twenty-eight* days. If *twelve months* (in the plural number) be the limit, it means *forty-eight weeks;* but if the expression is *a twelvemonth* (in the singular number) or some *part* of a year—as, *a half*, or, *a quarter* of a year—it means a whole *calendar* year, or calendar months of twelve to the year; and when the computation is to be made from *an act done*, the day when such *act* was done is inclusive, and to be reckoned as one. (*k*) Where the words are that the offence shall be prosecuted, or that the party shall be prosecuted for the offence within, &c., or equivalent expressions are used, it is sufficient to lay the *complaint* within the time stated, although the *conviction* may not take place till the period has expired. (*l*)

If a statute, however, directs that the offender shall be convicted, or that the conviction shall be made within a limited time, the *conviction* must take place within that time, and the laying the *information* merely within the period will not suffice, (*m*) and it makes no difference that an adjournment, at the request of the defendant himself, caused the conviction to be delayed beyond the time limited. If the time for making the conviction has expired, there is no longer any authority to convict. (*n*)

A Magistrate has no coercive power out of the limits of the county to which his commission extends. (*o*) As a general rule, every complaint must be made to a Justice of the county in which the offence has been committed and the parties are living, and this at the time of the commission thereof, otherwise he will have no authority to convict summarily on matters brought before him. (*p*) But to this rule there are exceptions—for example, certain Acts give special jurisdiction as well to Magistrates of the county in which the offence is committed as of that in which the defendant *resides or is apprehended.* And by the Act 4th and 5th Vic.

(*a*) Paley on Conv. 1.
(*b*) R. v. Swainsbury. 4 T. R. 456.
(*c*) Dalt. c. 6. 4 Co. 46.
(*d*) Billings vs. Prum. 2 Bl. Rep. 1017. R. v. Howarth. 2 Bott. 610. 16 Vic. c. 178, secs. 11 and 25.
(*e*) Dalt c. 6, sec. 8. R. v. Martin. 2 Q.B. 1037. R. vs. Morrice. 1 New Sess. Ca. 585. R. v. The Justices of Hertfordshire, 1 New Mag. Ca. 236. Re *Peerless.* 1 Q.B. 143.
(*f*) Saunders' case. 1 Saunders 262. Dalt. c. 6. s. 8. 2 Keb. 559 Doug 666
(*g*) 2 Keb 559. 3 Keb 383. 1 Saunders 263 Bac. ab. tit. 9 P. L. 5. R. vs. Stapelton. Cald. 302. R. vs. Loxdale. 1 Burr. 417.
(*h*) Dalt. c. 173. R. v. Gudridge. 5 B. & C. 459 R. v. Great Yarmouth. 6 B. & C. 646. R. vs. The Cheltenham Commissioners, 1 Q.B. 467. R. vs. McIntyre, Tay. U. C. R. 21.
(*i*) R. vs. The Justices of Hertfordshire, 6 Q. B. 753.
(*j*) 16 Vic. c. 178. s. 10.
(*k*) *R. vs. Bellamy, 1 B & C. 500. R. vs. Adderly. Doug.* 446. R. v. Goodenough. 2 Ad. & E. 163. Lester vs. Garland, 15 Ves. 247. Castle vs. Burdsson. 3 T.R. 623. Burns' Justice Tit. *Time.* But see 12 Vic. c. 10.
(*l*) R. v. Barrett. 1 Salk. 383.
(*m*) Bowel vs. Benningfield, 1 Ca. & Mar, 9, R. v. Bellamy, 1 B. & C. 500.
(*n*) R. vs. Tolley, 3 East 467.
(*o*) 2 Hawk. c. 8. s. 41. Dalt. c. 6, s. 7.
(*p*) Dalt. c. 6. Sharp vs. Aspinall, 10 B. & C. 47.

chap. 24 sec. 40, misdemeanors committed on the boundaries of counties, or within 500 yards thereof, or begun in one county and completed in another, may be tried in any of the said counties as if wholly committed therein.

Magistrates' courts, like all other courts of justice, are open courts; and when they act judicially—which they do in every case of summary conviction,—whether at their own private residences or elsewhere, they must throw open their doors for the admission of the public to a reasonable extent.(q)

In all enquiries before Justices, with a view to a summary conviction, the complainant or informant may conduct his case by counsel or attorney, and the defendant has a right to the same professional assistance in making his full answer and defence.(r)

(TO BE CONTINUED.)

ON THE DUTIES OF CLERKS OF THE PEACE.

(BY A C. P. OF TWELVE YEARS' EXPERIENCE.)

For the "Law Journal."

As the Prospectus of the *Law Journal* considerately affords a space "to elicit whatever experienced Officers may be able to set down for the information of others," and being aware that some of my brethren are "young hands," a few words respecting the duties (almost "too numerous to mention,") connected with the office, may not be out of place.

I would premise that the office is one of great antiquity and honor [See 37, Henry VIII. c. 50, and Charles II. c 22, s. 9], and considered, particularly in Great Britain and Ireland, (a) of considerable importance. In the Old Country the Clerks of the Peace derive incomes of from one thousand to fifteen hundred pounds a-year. They are selected generally, from amongst private individuals, unconnected with the "Legal Profession," and can hold no other office:—"neither he, nor his deputy, may act as solicitor, attorney or agent, at any Quarter Sessions, where he shall execute the office of Clerk of the Peace, on pain of £50" Indeed, if the duties are efficiently performed, it requires the undivided attention of one person to attend to them, often from *six* in the morning until late at night,—at particular times an assistant is absolutely necessary. Every department should have its own proper officer, in order to have everything connected with it DONE WELL, and without confusion, or one duty clashing with another, as must necessarily occur in a plurality of offices.

I should, however, wish to see a District Attorney (or Prosecuting Lawyer) appointed in every County, to prepare bills of indictment for the Grand Jury—the same as Counsel for the Crown at the Assizes,—it would be rather a relief to Clerks of the Peace, who by statute are only allowed 10s. for drawing an indictment, no matter how complicated, and perhaps covering two or three sheets of foolscap. Some years ago the Clerk of the peace had to perform all the duties connected with the Assessment and Collectors' Rolls, which duties are now transferred (in my County) to 18 Township Clerks!!

I shall now enumerate some of the duties to be performed: "The Clerk of the Peace, or his sufficient deputy, must be in constant attendance on the Court of Quarter Sessions. He gives notice of its being holden or adjourned: issues its processes; records its proceedings; and does all the ministerial acts necessary to give effect to its decisions. It is his duty when prosecutors do not choose to seek professional assistance, to draw bills of indictment. It is his duty to read the Acts directed to be read in sessions: to call jurors; to call the parties under recognizance, whether to prosecute, plead, or give evidence; to present the bills to, and receive them from the Grand Jury; to arraign prisoners; to receive and record verdicts; to administer all oaths, and make true entries of all proceedings." To grant certificates, *gratis*, from the records of any conviction, or pardon granted. By 4th & 5th Vic. ch. 12, to publish returns of convictions quarterly, and fix up a schedule of such returns in the Court-House, and in a conspicuous place in his office; also, to transmit to the Inspector-General a true copy of all such returns within his County. To make lists of land claims once in every three months, and affix them in some conspicuous part of the Court-House, and cause the same to be proclaimed at Quarter Sessions, and give certificates thereof; also to transmit to the Clerk of the "Commissioners," on the 10th of June and 10th of December, lists of claims, in detail. To return annually to the "Board of Registration and Statistics" copies of births, deaths and marriages, as filed in his office. To furnish triplicate lists of convictions at sessions or before justices, enumerating the different crimes and *sex*, *sentences*, fines paid to Treasurer, prosecutor, or municipality; also estreats of fines and forfeited recognizances, for Sheriff, and Receiver-General. To transmit returns of all inquests and public officers to the "Blue-Book" office.

To receive and examine reports of selectors of Jurors, and give certificates. To arrange *alphabetically*, say, three thousand names—*seven entries* for *each name*, viz.:—*Number*, *name*, *description* (as *East ½*.) *Lot*, *Concession*, *Township*, *addition* (as Gentleman, &c.) These entries to be made *three* times—the *rough copy*; the *Jurors' Book*; and *copy*, for Clerk of the Crown. Three thousand ballots to be prepared to correspond with the numbers. Twenty certificates to write. Then the balloting the jury lists—making about *seventy thousand entries* before the work is completed.—For other duties, see "Judges Tariff of Fees."

"The Clerk of the Peace should also make a return to the Crown Officers, of all forfeited recognizances, in order that the parties in default may be prosecuted thereon.

He is *virtually*, also, the *custos rotulorum*, or keeper of the records of the County."

I have abridged the duties as much as possible, but trust I have shewn to my brethren in office (who I hope will all procure the *Law Journal*) and others, that our office is not

(q) Daubney vs. Cooper, 10 B. & C. 237. See also 16 Vic. c. 178, s. 11.
(r) 16 Vic. c. 178, s. 11.
(a) In the King's County the Hon'ble Mr. Parsons, brother to Lord Rosse, is Clerk of the Peace.

a mere sinecure, or the duties to be learned without years of practice and application.

U. C. REPORTS.

GENERAL LAW.

ORR *v.* RANNEY AND OTHERS.

Authority of School Trustees—16 *Vic. ch.* 185, *sec.* 6.

Two of the Trustees of a school section are not competent to act in all cases without consulting the third; nor can the whole body, without any reference to the freeholders, determine upon the site for the school-house, and purchase it, and impose a rate to meet the expense.*

This was an action of Trespass for taking the plaintiff's property.

The defendants pleaded that the plaintiff and the defendants, Lawrence Ranney and Thomas Rundle, before the said time when, &c.—to wit, during 1853—were and now are resident householders in school section No. 15 of the township of Westminster, and were during the said year liable to be rated and assessed for the school purposes of said section; that before and after the said time when, &c.—to wit, during the said year—one Isaac Campbell and the said Lawrence Ranney and Thomas Rundle were and now are trustees of the said school section No. 15 of the said township; and that, there being no suitable school-house in or belonging to the said school section, they, the said Lawrence Ranney and Thomas Rundle, being a majority of the said trustees of the said school section, on the 14th day of March in the said year, purchased and acquired a site within the said section for the common school therein: that afterwards, and before the said time when, &c.—to wit, on, &c.—the said Lawrence Ranney and Thomas Rundle, being the majority of the said trustees of the said section, judged it expedient to build a school-house in and for the said section on the said site; and thereupon, immediately afterwards, did cause to be built on the said site so required as aforesaid a suitable school-house for the said section; that in order to pay for the said site, and for the building of the said school-house and the incidental expenses attending the same, they, as such trustees, assessed an equal rate upon the assessable property of the said section; and thereupon made out a list of the names of all the persons rated by them for the said school purposes of such section, and the amount rated upon and payable by each person in the said section: that they did, on the 7th day of November in the year aforesaid, duly annex to the said list a warrant, under the corporate seal of the said trustees of the said section, directed to the said William Beattie, who was then the collector of the said section, by which said warrant they authorized and required the said William Beattie, after ten days from the date thereof, to collect from the several individuals in the rate-bill thereto annexed mentioned the sum of money set opposite the respective names of the said parties mentioned in the said list, and to pay within thirty days from the date thereof the amount so collected, after retaining his own fees, to the secretary treasurer, whose discharge should be his acquittance for the sum so paid; and in default of payment on demand by any person so rated, he was thereby authorized and required to levy the amount by distress and sale of the goods and chattels of the person or persons making default: that the said plaintiff, being a resident householder in the said section, was assessed and rated on the said list attached to the said warrant for £9 16s. 8d.; that the said William Beattie, by virtue of the said warrant, on, &c., did demand of the said plaintiff the sum of £9 16s. 8d., being the sum for which he was so rated and assessed, which the plaintiff neglected and refused to pay; and thereupon the said William Beattie, at the said time when, &c., seized and took the said goods and chattels in the said declaration mentioned, and sold and disposed thereof, as he lawfully might, for the cause aforesaid—which are the trespasses in the said declaration mentioned. Verification.

Demurrer.—The causes assigned sufficiently appear in the judgment.

Eccles for the demurrer. *Cameron, Q.C.,* contra.

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

The plaintiff is entitled to judgment on the demurrer, which, we believe, was conceded by the defendants on the argument. Whether the plea is to be determined upon with reference to the last school act, 16 Vic. ch. 185, sec. 6, or the former act, 13 & 14 Vic. ch. 48, as governing the trustees in the matters set forth in the plea, it would in either case be impossible to sustain the plea. The defendants have assumed that two only of the three trustees could, as the majority, do any act, however important, without consulting with the third, or giving him any notice or opportunity of uniting with, or opposing them. That is clearly not so. Then under either of the two acts (and it appears to us the 16 Vic. ch. 185, sec. 6 was the statute in force at the time, and which required to be observed in this matter) the whole body of trustees were not competent, without any reference to the freeholders, to determine upon the site of the school-house and purchase it, and impose the rate for raising the money to meet these charges; and yet the plea proceeds on the assumption that the trustees, and even a majority of them, could, without any formality, do all that they judged it desirable to do.

Judgment for plaintiff on demurrer.

[NOTE—*In reference to School Trustees, we give also the following late decision.—*Ed. L. J.*]

The Trustees of a school section being a corporation under the statute 13 & 14 Vic. c. 48, are not liable to pay for a school-house erected for and accepted by them, not having contracted for the erection of the same under seal.
[Macaulay C. J. dissentient.]
Marshall v. The School Trustees, &c., of Kitley. 4, U.C.C.P. Rep, 373.

This case is here alluded to as interesting to School Trustees. The point materially in question, as to what contracts with Corporations, are exceptions to the general rule of law, requiring the same to be under the corporate seal. arose in Clark *vs.* The Hamilton and Gore Mechanics' Institute, 12 U. C. B. R. Rep. 178. A difference of opinion existing amongthe Judges in both these cases, it is not improbable that the point may hereafter come up before the Court of Appeal.—[*Ed. L. J.*]

In re COMPLAINT OF THE MUNICIPALITY OF THE TOWNSHIP OF AUGUSTA *v.* THE MUNICIPAL COUNCIL OF THE UNITED COUNTIES OF LEEDS AND GRENVILLE.

Application for Mandamus—Entitling of affidavits.

Semble. That affidavits in moving for a rule *nisi* for a mandamus may be entitled *In re Complaint of* —— v. ——, though it is more proper to entitle them only in the court.

[QUEEN'S BENCH, T. T. 18 Vic.]

Connor, Q.C., moved for rule on the Municipal Council of Leeds and Grenville, to shew cause why a mandamus should not issue, commanding them forthwith to plank, gravel, or macadamize the road assumed by the Municipal Council between Maitland and North Augusta, in the township of Augusta, being part of the road known as the County Toll Road from Merrickville to Maitland, in the said united counties.

The affidavits were entitled as above; and, there being some doubt as to the propriety of any entitling at all at this stage of the proceedings, the court, at the request of the learned counsel, took time to consider this point before granting the rule.

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

As to entitling the affidavits, the applicant must take his chance of their being held regular, after cause shewn. At *present*, we can only say, we would grant the rule, so far as that exception is concerned.

The cases shew that if entitled as in a cause (before rule *nisi* granted), as The Queen *v.* ———, they should be rejected, but we find nothing that would shew this kind of entitling to be fatal. It is clearly unnecessary, and only entitling the affidavits in the court would be better, because then there would be no room for question; but surely these are affidavits in the matter of complaint, &c.: that is, to support a complaint by the one council against the other.

It is for the learned counsel to consider whether he will take his rule subject to the exception to the entitling of his affidavits, which of course the County Council will be at liberty to take; or whether he will withdraw his affidavits and renew his application early next term, upon affidavits free from that exception.

In re CÆSAR AND THE MUNICIPALITY OF THE TOWNSHIP OF CARTWRIGHT.

Resolutions of Municipal Corporations.

The Court has no jurisdiction over resolutions of municipal corporations, to set them aside summarily in the same manner as by-laws. [12 U. C. R. 341.].

C. Robinson moved for a rule on the Municipality of Cartwright, to shew cause why the *resolution* passed by them on the 29th of December last, respecting the pay of the councillors for the said township, should not be quashed with costs, on the ground that they have exceeded their jurisdiction and powers in passing such resolution, and that the same is illegal.

This resolution was authenticated in the same manner as by-laws are under the statute 12 Vic., ch. 81, when they are intended to be moved against.

The paper transmitted was in these words:—

"A by-law was brought in by Dr. Howe to empower the council to receive pay for their services for the present year and in future, and to receive the sum of six shillings and three pence per day."

A copy of a resolution passed in council the 29th day of December, 1853.

"Moved by Howe, seconded by Taylor, that the clause referred to in the resolution or by-law respecting the councillors' pay, where it says six shillings and three-pence per day, shall be repealed, and to only be five shillings per day, which was carried."

The clerk certified the above to be a true copy taken from the journal of the Municipal Council of the township of Cartwright; and that there had been no other by-law signed in relation to the above proceedings; and he added, at the foot of this, a certificate that there never was any by-law written; but that it was merely mentioned by Howe, and entered in the council book as above stated.

This was all certified under the date of the 7th of September, 1854.

Daniels *v.* The Municipality of Burford, 10 U. C. R. 478. Grant on Corporations 378, were cited in support of the application.

Cur. adv. vult.

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

The questions are—

1. Is this resolution *properly* before us, as to its mode of being verified.

2. If so, can we notice it, as there is no authority to bring resolutions before us, as in the case of by-laws; or should the motion be for a *certiorari*, in the first place.

3. Does a *certiorari* lie to a municipal council to return their resolutions appropriating money, or are they merely void acts, not being by by-law.

4. Have we authority to quash such resolutions when illegal.

Without going further into these points than is necessary for disposing of this application, we are of opinion that we cannot grant the rule nisi to quash the resolution. It is not before us, so that we can notice it. Nothing is said in the municipal acts of this court quashing resolutions of the councils, but only their by-laws. If they pass illegal resolutions, such acts of theirs are simply void, and we doubt not they incur a liability by so transgressing their authority. The English statute respecting municipal corporations, 7 Wm. IV. and 1 Vic., ch. 78, sec. 44, makes provision for removing resolutions or orders of municipal corporations appropriating monies, in order that, if they are illegal, a convenient remedy may be promptly obtained. We find no such provision in our statutes, and we have no common law jurisdiction over them, to set them summarily aside. They are not like the orders of justices in sessions, which are judicial acts of a court of record.

Rule refused.

GILLIS *v.* GREAT WESTERN RAILWAY COMPANY.

G. W. R. W. Co.—Obligation to fence.

The declaration averred that it was defendant's duty to keep up sufficient fences along their line of railway, and that by the neglect of such duty the plaintiff's mare, which was lawfully depasturing on the adjoining land, got upon the track and was killed. No negligence was charged against defendants in the management of their train. It was proved that the mare had escaped from her stable on another farm, and was trespassing on the lot from which she got upon the railway.

Held, (confirming Dolrey *v.* Ontario, Simcoe & Huron R. R. Co., 11 U. C. R. 600,) that the plaintiff could not recover; the defendants being bound to fence only as against the owner of the adjoining lands. [12 U. C. R. 427.]

CASE for driving defendants' locomotive over a mare belonging to the plaintiff and killing her. The declaration averred that it was the duty of defendants to keep sufficient fences upon the line of their railway, and that they neglected that duty, and that by reason of such neglect the mare of the plaintiff, which was at the time "depasturing and lawfully being in and upon certain land situate in the township of Mosa, and adjoining and abutting upon the said railway of the defendants, and to and upon the land taken and found necessary for the uses and convenience thereof, strayed and escaped out of the said adjoining land upon the defendants' railway, and was killed," &c.

The defendants pleaded that the plaintiff's mare was wrongfully and unlawfully depasturing and being upon certain lands adjoining to the said lands of the defendants, and to the said railway, which lands were not the lands of the plaintiff, but of one Richard Roe, who had not given license for the said mare to be there; that she strayed from them upon the defendants' land adjoining, and thence, at the said time when, &c., on the said railway, and then being so upon the said railway, was accidentally, without any design on the part of the defendants or their servants, killed, in manner and form, &c.

The plaintiff replied *de injuria.*

At the trial at London, before *Macaulay, C. J. C. P.*, it was proved that the plaintiff's mare had been kept in a stable on the farm of the plaintiff's father, and that she escaped out of the stable on the 8th of February last, and got upon the railway through a gap in the fence, upon a farm two lots off from that from which she escaped.

The learned Chief Justice told the jury that if the mare was

a trespasser on lot six from whence she got upon the track, she was then wrongfully there as alleged in the plaintiff's déclaration, and that the evidence seemed to establish the facts set forth in the plea, and to entitle the defendants to a verdict. The jury found, nevertheless, for the plaintiff, and £20 damages.

Becher moved for a new trial on the law and evidence, and because the verdict was perverse.

J. Duggan, shewed cause.

The cases cited are noticed in the judgment.

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

We are of opinion that we are bound in this case to grant a new trial without costs. We can draw no distinction between this case and that of Dolrey *v.* The Ontario, Simcoe & Huron Railway Company in this court, (11 U. C. R. 600,) which was decided in accordance with English authorities.

This declaration does not charge the defendants with causing the death of the plaintiff's mare by any negligence or want of skill in conducting their railway train, but rests the right to recover wholly on the defendants' breach of duty in not fencing in their track, in consequence of which the mare got on the track and was killed. The duty, it has been determined, or rather the breach of it, cannot give a right to recover to the owner of an animal which was at the time trespassing on the adjoining lands, the obligation being to fence in each case between the railway track and the adjoining close. The late case in the Court of Common Pleas in England, Wallis et al. *v.* The Manchester and Lancashire Railway (18 Jur. 268.) confirms the former decisions on this point. The defence is that the animal killed was not lawfully where she was at the time of the accident, but was wrongfully there; so that the allegation in that respect in the plaintiff's declaration was disproved, and that in the plea supported. And it follows, that when, as in this case, no negligence in the manner of using the railway track is charged upon the defendants, the action fails.

Rule absolute, without costs.

WICE *vs.* HEWSON ET AL.

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

Trespass q. c. f.—Verdict 45s.—Certificate for full costs, application therefor being made at the trial when may be granted by Judge —*Quære*. whether 22 & 23 Car. 2, c. 9—8 & 9 Will. 3, c. 11, sec. 4, are virtually repealed by 16 Vic. c. 175, sec. 26. (a)

[CHAMBERS, Nov. 1854.

BURNS, J.—The action is trespass to the plaintiff's freehold, and the plea is—Not Guilty.

The jury gave a verdict for £2 5s., and the Judge, before whom the cause was tried, has certified that the defendant's act was wilful and malicious, and that it was a proper case to be tried in the Superior Court. The certificate, it seems, was not granted until the plaintiff was about to enter judgment, though asked for at the trial. The master, in taxing, has allowed the plaintiff full costs. The defendant now moves to revise the taxation on the ground that the plaintiff was only entitled to costs on the scale of the Division Court, and that defendant would have a right to set off the difference of his costs between the two Courts, or that all proceedings should be stayed to give the defendant an opportunity to move to rescind the Judge's certificate, because he contends that the Judge should have granted his certificate before the expiration of the first four days of the term after the trial. (b) The defendant relies upon the cases of Thompson *vs.* Gibson et al, 8 M. & W. 281; and Whalley *vs.* Williamson, 5 Bing. N.C. 202.

The last point must be decided first, that is, whether it is proper to stay proceedings to give the defendant an opportunity to move the Court to rescind the Judge's certificate, because not granted within proper time. The case of Thompson *vs.* Gibson does not support the defendant's argument, because in this case the plaintiff did apply for the certificate at the trial, and the Judge delayed until he could consider it. Neither does the case of Whalley *vs.* Williamson apply, for that was a case where the Judge had rescinded his certificate, and the question was whether it had been rescinded in proper time.—C. J. TINDAL said: "The question within what time a Judge may revoke his certificate is altogether different from the question within what time he may grant it." The argument used in favor of the defendant's position, that the certificate should be granted within the first four days of the term, so that he may be advised whether or not to move for a new trial, has no force when it is considered that it is merely the judgment of the Judge, who tried the cause which is suspended, not the application for the certificate. If the latter were the case, there might be more reason in the defendant's objection, but the plaintiff, having at the trial asked for the certificate, did all he could in the matter; and if the defendant is to be guided in his intentions about moving for a new trial contingent upon the judgment as to costs, he should ascertain from the Judge what judgment on that point he intends to give. If I entertained any doubt about the right of the Judge to reserve the consideration of the question whether he will certify, though he take a longer period to determine it than beyond the first four days of the succeeding term, I would afford the defendant an opportunity to take the opinion of the Court. Reid *vs.* Gardner, 8 Ex. 651.

Then as to the amount of costs which the plaintiff should recover, I have as little doubt as upon the other question. The verdict is over 40s., therefore the case does not come within the provision of the recent stat. 16 Vic. ch. 175, sect. 26; and because it does not come within that provision, and as it is contended the stat. 22 & 23 Car. 2, ch. 9 is not repealed, therefore the plaintiff is entitled, it is said, to no more costs than damages, the verdict being under 40s. sterling. It is not material to the decision of this case to enquire whether the stat. of Charles is virtually repealed, because, supposing it is not, then it is equally clear that the stat. 8 & 9, Will. 3, ch. 11, sect. 4, is not repealed. The latter stat. enabled a Judge to certify that the trespass was wilful and malicious, and when he did so the case was taken out of the operation of the stat. of Charles. If both of the English statutes be considered as repealed virtually by our statute, then the verdict being over 40s. the plaintiff required no other certificate than to take the case out of the jurisdiction of the Court (and that he has obtained in proper time), and this is always a matter for the discretion of the Judge who tried the cause. If the statute of Charles is to be considered as not repealed, then the statute of William must be treated so also, and in such case the plaintiff has the certificate which entitles him to full costs. Wooley *vs.* Whitby, 2 B. & C. 580.

(a) On this latter Act, viz.: 16 Vic. ch. 175, sec. 26, the following case, T.T. 18 Vic., is lately reported.—[*Ed. L. J.*]

The certificate under the 16th Vic. ch. 175, sec. 26, does not necessarily entitle the plaintiff to full costs, but only to such costs as might otherwise have been recovered, and this statute does not interfere with the 21st Jac. 1, ch. 16.

Where, therefore, in an action of slander (no special damage being laid) the verdict was for 1s. damages, and the Judge certified, under 16 Vic., that the grievance was wilful and malicious, the plaintiff was restrained by the 21st Jac. from obtaining more costs than damages.—Pedder *vs.* Moore, 1 Rob. Prac. Rep. 117.

(b) The English cases shewing the legal construction which has been placed generally by the Courts there upon the word "immediately" (which occurs in the 16 Vic. c. 175, sec. 26, taken from the English Act 3 and 4 Vict. c. 24, sec. 2) are fully collected in KIMB'S PRACTICAL HINTS, a useful work, reviewed by the *Law Times* as a "learned and truly practical labour."—[*Ed. L. J.*]