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VOL. VII. TORONTO, FEBRUARY, 1861. No. 2.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

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

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STANDING RULES.

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

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

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

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

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

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

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

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

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

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

OPINIONS OF THE PRESS.

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

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

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

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform; responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette, May 19th*, 1859.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1859.

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

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

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

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

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

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

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

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

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

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

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

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

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

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

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

THE UPPER CANADA LAW JOURNAL, &c.

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

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

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

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

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

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

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

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

DIARY FOR FEBRUARY.

3	SUNDAY	*Septuagesima*
4	Monday	Hilary Term commences
5	Tuesday	Chancery Exam. Term, Toronto, commences. Last day for notice for Sandwich and Whitby
8	Friday	Paper Day, Q. B.
9	Saturday	Paper Day, C. P.
10	SUNDAY	*Quinquagesima*
11	Monday	Paper Day, Q. B.
12	Tuesday	Shrove Tuesday. Paper Day, C. P. Last day for notice Chan. Exam. Chatham and Cobourg
13	Wednesday	Ash Wednesday. Paper Day Q. B. Last day for serving writ for County Court
14	Thursday	Paper Day, C. P.
16	Saturday	Hilary Term ends.
17	SUNDAY	*1st Sunday in Lent*
19	Tuesday	Chancery Ex. Term, Sandwich and Whitby, commences. Last day for notice London and Belleville
23	Saturday	Last day to declare County Court
24	SUNDAY	*2nd Sunday in Lent*
26	Tuesday	Chancery Ex. Term, Chatham and Cobourg, commences.
28	Thursday	Sittings of Court of Error and Appeal commence.

IMPORTANT BUSINESS NOTICE

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

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

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

TO CORRESPONDENTS—*See last page*

The Upper Canada Law Journal.

FEBRUARY, 1861.

NOTICE.

Subscribers desirous of availing themselves of the discount of one dollar on the Subscription money to the Law Journal, are reminded that in order to secure the discount payment must be made on or before 1st March proximo. The terms are $4 per annum for one year's subscription, if paid on or before 1st March—otherwise $5, without abatement.

ADMINISTRATION BONDS.

Liability of Sureties.

It is seldom if ever that intending sureties, before executing bonds, examine their contents with a view to determine the nature or extent of the responsibility which they are about to incur. This remark is perhaps more true of administration bonds than of bonds of any other kind.

The signing of an administration bond is deemed "a mere matter of form," and the giving of it is in general looked upon simply as an act of kindness to a friend. Little is ever afterwards thought of the liability incurred until in all probability the commencement of a suit. Then the "mere matter of form" assumes the proportions of "a dread reality," and every effort is made to frustrate its legitimate effect.

We purpose to make some observations on the nature and effect of an administration bond, and incidentally on the liability of those who become parties to it.

The administration bond owes its origin to two English statutes, the one (21 Hen. VIII cap. 5, s. 3) which directed the Ordinary, the person then authorised to grant administration, "taking surety of him or them to whom shall be made such commission," and the other (22 & 23 Car. II. cap. 10, s. 1) which further provided that "all Ordinaries, as well as the Judges of the Prerogative Courts of Canterbury and York for the time being, as all other Ordinaries and Ecclesiastical Judges, and every of them having power to commit administration of the goods of persons dying intestate after 1st June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the Ordinary."*

"The condition of the bond, which to this day is little altered, was required to be in the following form:

The condition of this obligation is such, that if the within bounden A. B, administrator of all and singular the goods, chattels and credits of the said deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to the hand or possession or knowledge of him the said A. B, or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of —— Court, at or before the —— day of —— next ensuing. And the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands or possession of the said A. B, or into the hands and possession of any other person or persons for him, do well and truly administer, according to law. And further, do make or cause to be made a true and just account of his said administration, at or before the —— day of ——. And all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined or allowed by the Judge or Judges for the time being of the said Court, shall deliver and pay unto such person or persons, respectively, as the said Judge or Judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint. And if it shall appear that any last will or testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making

* These acts were made perpetual by the stat. 1 Jas. II., cap. 17.

request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto requested, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court; then this obligation to be void and of none effect, or else to remain in full force and virtue."

Upon dissecting this condition it will be found that the duties of the administrator, and for which the sureties become responsible, are the following:

First—To make a true and perfect inventory of all and singular the goods, chattels and credits of the deceased.

Second—To exhibit the inventory in Court at or before a day limited for the purpose.

Third—To well and truly administer according to law.

Fourth—To make a just and true account of his administration, at or before a day limited for the purpose.

Fifth—To make distribution of the goods, chattels and credits, that shall be found remaining upon the account, the same being first examined or allowed by the Judge or Judges for the time being of the Court.

Sixth—To render and deliver the letters of administration upon the discovery and approbation of a will of the deceased, in the manner described.

A Probate and Surrogate Court were, in 1793, established in Upper Canada (33 Geo. III. cap 8). The former was a court as to jurisdiction extending to the whole Province, and the latter were local courts co-extensive with the districts in which situate. If the intestate died possessed of goods, chattels and credits, in more than one district, letters of administration were issued from the Probate Court; but if in one district only, then from the Surrogate Court of that district. The Judge of Probate, and every Surrogate in his district, upon granting letters of admistration of the goods of persons dying intestate, were required (as by the act 22 & 23 Car. II.) "to take sufficient bonds of the respective person or persons to whom any administration is to be committed, with two or more able sureties, respect being had to the value of the estate, in the name of the Governor, Lieutenant Governor, or person administering the government of the province." (sec 12.) The condition of the bond was given, and was almost word for word the same as that above set forth as prescribed by the English statute 22 & 23 Car. II.

In 1858, the Probate Court of Upper Canada was abolished, and the jurisdiction at the time of its abolition exercised or exercisable by it was transferred to the several Surrogate Courts of Upper Canada, of which one was established in each county. (22 Vic. cap. 93.) By section 45 of this act, it was provided that every person to whom any grant or administration should be committed should give bond to the Judge of the Surrogate Court from which the grant was made to enure for the benefit of the Judge of the Court for the time being, with one or more surety or sureties, as might be required by the Judge of the Court, conditioned *for the due collecting, getting in* and administering the personal estate of the deceased; which bond was required to be in such form as might be prescribed by the rules and orders under the act; and in cases not provided for by the rules and orders the bond was required to be in such form as the Judge of the Surrogate Court should by special order direct By section 46, the bond was required to be in a penalty of double the amount under which the estate and effects of the deceased were sworn, unless the Judge in any case should think fit to direct the same to be reduced, in which case it was declared lawful for the Judge so to do; and it was also provided that the Judge might direct that more bonds than one should be given, so as to limit the liability of any surety, to such amount as the Judge might think reasonable. By section 44 of the same act, it was provided that so much of the English acts of 21 Hen. VIII., cap. 5, 22 & 23 Car II., cap 10, and 1 James II., cap. 17, "as requires any surety, bond, or other security to be taken from any person, to whom administration shall be committed, shall henceforth cease to extend to or be in force in Upper Canada."

On 29th November, 1858, the Rules and Orders having been made were promulgated, and by Rule 27 it was provided that the bond to be given upon any grant of administration, should be according to the forms 16 and 17 thereto subjoined, or in a form as near thereto as the circumstances of the case admit. The condition of the bond is substantially the same as that already noticed. In some particulars, however, not unimportant, there is a difference which we shall proceed to describe.

The duties of the administrator (as in the foregoing condition under the English Statute of Car II.) are made six in number, viz.:

First—To make an inventory of "*all the personal estate and effects, rights, and credits*" (not "goods, chattels, and credits," as in the old form of condition) of the deceased.

Second.—To exhibit the inventory so made "*when lawfully called on in that behalf*" (not on a day fixed for the purpose, as in the old form of condition).

Third.—To administer the personal estate, &c., according to law, "*that is to say, do pay the debts which the said deceased did owe at his decease.*"

Fourth—To make a just and true account of his administration "*whenever required by law so to do*" (not on a day fixed for the purpose, as in the old form of condition).

Fifth.—To make distribution to such person or persons "*as shall be entitled thereto under the provisions of any act*

of Parliament now in force or that may hereafter be in force in Upper Canada."

Sixth.—To render and deliver the letters of administration upon the terms *and under the circumstances* mentioned in the old form of condition.

Let us now consider what would be a breach of an administration bond in Upper Canada, so as to cause a forfeiture of it. The following may be, it is apprehended, assigned as breaches—that the administrator has not made an inventory—has not exhibited it—has not well and truly administered according to law—has not made a just and true account of his administration—has not made distribution—or has not under the circumstances stated as to the discovery of a will, made a render of the letters of administration.

Under the old form of condition, most if not all of these breaches might be incurred without any previous citation (*Archbishop of Canterbury* v. *Willes*, 1 Salk. 365). The reason was that as the administrator was, by the express language of the condition, required to exhibit an inventory and to account at certain days, he was bound to do so at his peril; but now that he is only to make an inventory "when lawfully called on in that behalf," and the same to exhibit "whenever required by law so to do," and to account "whenever required by law so to do," it is believed a citation will be, in the cases specified, requsite.

A still greater change will arise as to the construction and effect of the condition that the administrator "shall well and truly administer according to law, &c." It was, under the old form of condition, held to be no breach that the administrator had not paid the debts of the intestate. Thus it was held that a creditor of the intestate was not entitled to sue upon the bond and assign as a breach, the non-payment of a debt due to him. The words of the condition, that the administrator was to well and truly administer, &c., were construed as to bringing in the account, and not as to paying the debts of the intestate (*Archbishop of Canterbury* v. *Willes*, 1 Salk. 315, *Browne* v. *Archbishop of Canterbury*, 1 Lutv. 882 b). It was said that such was the law even though a devastavit or waste were suggested (*Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 711). Now, however, by the condition of the bond it is especially provided that the administrator shall "well and truly administer according to law, that is to say, *do pay the debts which the said deceased did owe at his decease.*" If any effect is to be given to these words, the old authorities are no longer law because the branch of the condition to which they apply has been most materially altered. The old cases most unjustly limited the operation of the words "well and truly administer according to law," so that an administrator might waste the personal estate of deceased, and yet credit rs be without a remedy as against his sureties. The meaning of the words "well and truly administer according to law," is not left in doubt to be decided *by judicial interpretation*, but on the face of the obligation made to signify that the administrator shall "pay the debts which the deceased did owe at his decease." We are not aware that any case has yet arisen in which the alteration has received judicial consideration, but take this occasion to direct attention to it. It appears, so far as we understand it, greatly to widen the responsibility of sureties to administration bonds.

So under the old form of condition it was held that the neglect or refusal of the administrator to distribute the surplus or residue of the effects of the deceased among the next of kin, was not a breach of that branch which required the administrator to deliver and pay over the residue, unless there had been a previous decree or sentence of the Ecclesiastical Judge, because by the terms of the condition such decree should precede the distribution (*Archbishop of Canterbury* v. *Robertson*, 1 C & M 690); but under the form of bond now in use, no such decree appears to be required before distribution, and therefore the distribution would seem not to be made dependent upon it.

When the administrator applies to his own use the effects of the intestate so that those effects are entirely lost to the estate of the intestate, this has always been held such a breach of the bond by which the administrator undertakes "well and truly to administer according to law," as will entitle those interested to have the bond put in suit (*Archbishop of Canterbury* v. *Robertson*, 1 C. & M. 690).

In the United States it has been held that a devastavit or waste cannot be tried in an action against the administrator and sureties, brought on the administration bond (*Steward* v. *The Treasurer of Campaign County*, 4 Ohio Rep. 98; *Coney* v. *Williams et al*, 9 Mass Rep. 114); but in another state the contrary was held (*The People* v. *Dunlop*, 13 Johns, 437).

As the law stands in Upper Canada, upon a plea of *plene administravit* by the administrator, it is in the power of a plaintiff to reply lands, and if confessed, have the same sold on a judgment against the administrator. In other words, lands are here made assets in the hands of an administrator for the satisfaction of debts. In no case of which we have any knowledge, has the liability of the sureties of an administrator in respect of the waste of lands by an administrator, been determined. By the terms of the bond the sureties are liable for the due administration "of the personal estate and *effects*, rights, and credits of the deceased." Whether or not the word "effects," can be construed to extend to lands is not yet determined. It has been held in the United States, that the sureties in an administration bond are liable

only for the administration of the goods, chattels, and credits of the deceased, which were at the time of his death (*Reed v Commonwealth*, 11 S & R 411); and so they were not held liable for the act of the administrator in confessing a judgment on which the real estate of the deceased was sold, and applied to the payment of debts which were posterior in order to those which would have been paid had the property been brought into a course of administration (*Ib*).

The statute now regulating the granting of letters of administration, is Consolidated Statute of Upper Canada, cap 16. It is a re-enactment of the former act 22 Vic, cap. 93, and the remarks that we made upon the last mentioned act, will equally apply to the existing law.

THE PITTSBURGH LEGAL JOURNAL.

We notice that the proprietors of the *Pittsburgh Legal Journal* have made arrangements with the State Reporter, Mr. R. E. Wright, under which there will be published officially in that Journal, abstracts of all cases that are intended to be reported in the forth-coming volumes of the Pennsylvania State Reports.

UPPER CANADA REPORTS.

The attention of the Profession is directed to an advertisement of Maclear & Co., in this number of the *Law Journal*, offering a complete set of the Upper Canada Reports for sale. The chance is a rare one, and we are informed that the selling price is much less than cost.

LAW SOCIETY, UPPER CANADA.

HILARY TERM, 1860.

ARTICLED CLERKS' EXAMINATION

SMITH'S MERCANTILE LAW.

1. What is an indorsement in full, or in blank respectively, of a bill or note; and what bills or notes can be transferred by mere delivery?

2. State the requisites of a valid tender?

3. What is a nominal, and what a dormant partner, and upon what principles respectively does their liability to third persons depend?

4. In what cases will a master be held liable for goods bought on his credit by a servant?

BLACKSTONE'S COMMENTARIES, VOL. 1.

1. What is the common law of England?

2. What is the meaning of the maxim, The King can do no wrong?

3. What is the distinction between absolute and relative rights?

STORY'S EQUITY JURISPRUDENCE

1. In what cases has a vendor of real estate a lien for the purchase money?

2. Under what circumstances will a court of equity decree specific performance of a parol contract for the sale of land?

3. When will a court of equity relieve against penalties and forfeitures?

4. What is the nature of the relief given by a court of equity on a bill filed to establish a will?

WILLIAMS ON REAL PROPERTY

1. Give a definition of a vested remainder? Mention an example

2. What is requisite to the validity of a deed of bargain and sale?

3. Give an instance of tenancy by sufferance.

4. What is the difference between an indenture and a deed poll?

5. Can a valid lease of lands be made by parol, in any and what cases?

STATUTES AND PLEADING OF THE COURTS

1. In what cases can replevin be brought in this province?

2. What is the effect of suing the several parties to a bill or note in separate actions?

3. If the defendant in an action of ejectment does not appear at the trial, what is necessary to entitle the plaintiff to a verdict?

4. What is the rule, under the Common Law Procedure Act, for pleading and traversing the performance of conditions precedent?

5. How must an infant sue in equity?

6. What is the proper proceeding to enforce obedience to the decrees or orders of the Court of Chancery?

7. What is the next proceeding in a cause in Chancery, after a demurrer to the Bill has been overruled?

EXAMINATION FOR CALL.

SMITH'S MERCANTILE LAW.

1. To what limitations is an undisclosed principal's right to sue in his own name subject?

2. What is an actual and what a constructive total loss; in what cases is the insured entitled to abandon, and what is the effect of abandonment?

3. State the rules with regard to appropriation of payment?

4. How may a right of lien once acquired be lost?

BYLES ON BILLS.

1. Will an indorser be entitled to notice of dishonour, where it can be shewn that he knew the bill would be dishonoured, and what information must a notice of dishonour contain?

2. Is there any and what distinction between the liability of the drawee of a bill of exchange and a banker on whom a cheque is drawn?

3. If a bill obtained by fraud be indorsed by A to B., B. having notice of the fraud, but A. being an innocent holder, can B. recover on the note? Give your reasons.

TAYLOR ON EVIDENCE.

1. Has the party on whom the *onus probandi* lies in all cases the right to begin?—if not, state any exceptions.

2. State any exceptions to the rule that hearsay evidence is inadmissible.

3. What is the limitation as to the right of calling evidence to contradict a witness who denies that he has made a particular statement at another time?

4. Is a declaration by a person not a party to the record accompanying an act in any cases admissible in evidence? Give your reasons.

STORY'S EQUITY JURISPRUDENCE

1 What is a bill of discovery? Mention some of the cases in which such a bill will lie

2 What is a constructive trust? Give some examples

3 Can a suit for specific performance be maintained by a purchaser of land against the vendor where the contract is signed by the vendor only?

4 Can an infant purchaser of lands maintain a bill for specific performance of his agreement to purchase? Give a reason for your answer

5 Is an executor liable in equity for a debt due by him to his testator's estate?

6 When will the widow of a testator be bound to elect between her dower, and a legacy given her by the will?

7 In what manner can a mortgagee of personalty enforce his security?

WILLIAMS ON REAL PROPERTY

1 What are the distinguishing features of a joint tenancy?

2 What are "springing uses," and "shifting uses" respectively? Give examples of each class, and shew in what way they do not conform to the common law.

3 What powers may and what may not be released or extinguished by the donee?

4 Is a conveyance of an estate of freehold, to commence at a future day, valid at common law?

5 What is essential to the due execution of a dower?

6. In what manner can an estate tail in possession be barred? What is the proper mode of conveyance for a tenant in tail to adopt to convert his estate tail in possession into an estate in fee in himself?

ADDISON ON CONTRACTS.

1 What is the rule with regard to proof of consideration for simple contracts, contracts under seal, and negotiable instruments respectively?

2 Does a promise by A. to pay the debt of B, who has been taken under a *Ca Sa* in consideration that B's creditor will discharge him from the *Ca. Sa*, require to be in writing? Give your reasons

3 What is the effect of the consideration for a contract being partly legal and partly illegal?

4 In what cases will a request be *implied* where the consideration for a promise is *executed*?

PRACTICE AND STATUTES.

1 When will a devise of lands by a tenant in fee simple, without words of inheritance carry the fee?

2. How must a will of lands be attested?

3. Under a conveyance to two or more persons, without words indicating whether they are to take as joint tenants, or tenants in common, how will they take? Are there any and what classes of persons to whom the rule does not apply?

4. How do relatives of the half-blood take by descent?

5. An answer to a bill having been filed, and no subsequent proceedings having been taken by the plaintiff within the time limited for that purpose, what courses of proceeding are open to the defendant?

6. What is meant by the expression that a suit is abated? In what manner is an abatement rendered?

7. To a suit by a *cestui que trust* to carry into execution the trusts of a deed of assignment for the benefit of creditors, who are the necessary parties?

8. What is the effect upon a future suit between the same parties, in respect of the same matter, of a plaintiff taking an order to dismiss his own bill after the cause is set down for hearing?

9 In an action of trespass, where the plaintiff recovers less than forty shillings, how many certificates are necessary to entitle him to full costs, and what must such certificates contain?

10 Is a plea of accord without satisfaction, or satisfaction without accord, or either of them, a good plea?

11 Mention some causes of action in which money cannot be paid into courts

12 Where the time for making an award is enlarged by Judge's order, and no time specified in such order, for how long a time is the enlargement?

EXAMINATION FOR CALL WITH HONORS

JUSTINIAN'S INSTITUTES.

1 Give a definition of the legal term "obligation," as used in the civil law.

2 How were obligations arising from contracts divided, in the civil law, with reference to the manner of their creation?

3. Give an instance of a contract created "*verbis*"

4 Give definitions of the contracts of "*mutuum*" and "*commodatum*," and explain the distinction between them

5 What was essential to make the contract of sale complete in the civil law?

6 Give a definition of "*novatio*," and explain the mode in which an obligation was dissolved by it.

COOTE ON MORTGAGES

1 If leaseholds are mortgaged, and before the mortgage is paid off the term expires, and the mortgagee then takes a new lease in his own name, what are his rights in respect of such new lease?

2 If a surety for a mortgagor purchases the mortgage for a less sum than the mortgage debt, what are his rights against the mortgagor?

3. What is the proper remedy of an equitable mortgagee who desires to apply the rents and profits of the estate, in reduction of his debt?

4 Is a mortgagee who assigns the mortgage in any case liable to the mortgagor for rents and profits received after the assignment by his assignees? Give reasons for your answer

5 Will a mortgage given by a client to his solicitor for costs due and to become due be to any and what extent a valid security?

6 Can the mortgagee compel the mortgagor to account for rents and profits received by the latter while in possession?

DART'S VENDORS AND PURCHASERS.

1 Is a conveyance upon a sale by an infant void or voidable only?

2 If an infant vendor commit a fraud upon the purchaser by falsely representing himself as of age, will a court of equity give the purchaser any and what relief, if the vendor attempts to recover the land in ejectment?

3. What are the requisites to a confirmation by a *cestui que trust* of a voidable purchase of the trust estate by his trustee?

4. What false statement by the vendor will avoid the contract?

5 What are the essential requisites to the validity of an agreement for the sale of lands?

6. What is constructive notice? Give a definition.

7 How must a vendor, relying on a waiver by the purchaser of his right to an investigation of the title, charge such waiver in his bill for specific performance?

8. What covenants for title has a purchaser a right to, from a vendor who has acquired the estate sold by inheritance?

JARMAN ON WILLS.

1. In what cases is parol evidence admissible to shew the intention of a testator? Give instances.

2 Give some instances of estates arising by implication under a will

3 In what cases will cross remainders be implied in a will? Give examples Is there any difference between the construction of wills and deeds as to the implication of cross remainders?

4 Explain the doctrine of "election" as applicable to wills Give an example.

5 When will lands held in trust pass under a general devise of all the testator's lands?

6. Under devise to A and his children, A having no children at the date of the testator's death, what estate will A take? What estate would such a devise have conferred if A had had children at the testator's death?

WATKINS ON CONVEYANCING.

1. Can an estate for years be in any mode and how so limited to A for life with remainder over to B and the heirs of his body that the first taker cannot defeat the remainder? If an estate to C and his heirs were limited after the limitation to B and the heirs of his body, what estate would C. take?

2 If there is a conveyance by deed of bargain and sale to A and his heirs, to such uses as A shall appoint, and in default of appointment to the use of A. and his heirs, and A. executes an appointment to B. and his heirs, does B take any and what estate at law? Give reasons for your answers.

3. What estate will pass under a conveyance by bargain and sale to A and his heirs by tenant in tail in remainder, without the consent of the protector of the settlement?

4 What are the distinctions (five in number) between an executory devise and a contingent remainder?

5. What estates may be successively limited by way of executory devise? Within what period must an executory devise be limited to take effect in possession, so as to avoid the rule of law against perpetuities?

6. When does a tenancy by entireties arise? Give an example.

7 What liability does the mortgagee of leasehold incur in respect of the covenant on the part of the mortgagor contained in the lease? Does this liability arise from privity of estate or privity of contract?

STORY'S CONFLICT OF LAWS.

1 If a debt contracted in England be there barred by the Statute of Limitations, can the creditor recover it in this country? Give your reasons

2 If one enter into a contract in a foreign country to pay money, or do any other act in this, which contract is void by the law of the foreign country but valid here, by which law is its validity to be determined by our courts?

3. Can an action be maintained here on a contract void under the Statute of Frauds, but made and to be performed in a foreign country, by the law of which it is valid? Give reasons for your answer.

4. By what law is the succession to the moveable estate of an intestate to be regulated, where the intestate's domicil is in one country, and the moveable property in another? Give reasons for the answer

5 If a testator domiciled in Scotland, but seized of real estate in this country, make a will in Scotland disposing of his lands here, upon what law would the construction of the will depend? Give reasons for the answer.

STORY ON PARTNERSHIP.

1 To what extent can the sheriff seize partnership property upon a judgment against an individual partner for his separate debt? And what is the position of a purchaser from the sheriff in such a case?

2 Is the rule that a release by one partner of a debt due to the firm an exception to the doctrine that one partner has no authority to bind his co-partners by deed? If not, upon what principle does the effect of such release depend?

3 Is there any, and if so, what cases in which a retiring partner, after notice, will be held liable for the new debts of the new firm?

4 What is the effect of the death of one partner, and what is the position as regards the partnership property of his personal representatives?

5 What is the presumption, in the absence of precise stipulation, as to the proportion in which each partner is to share in the profits, and does the amount which each has contributed effect this presumption?

RUSSELL ON CRIMES.

1 Does the crime of larceny necessarily involve a trespass? Does it differ in this respect from embezzlement, and obtaining money by false pretences, and if so, how?

2 What is the *Common Law* offence of arson?

3 Can a woman be accessory after the fact to a felony committed by her husband, and does this rule apply to treason? Give your reasons

4 What is the definition of burglary, and what is considered night for this purpose?

5. Are there any crimes for which a woman will be answerable if committed under the control of her husband? If so, mention them.

THE ART OF PLEADING.

(From the Solicitors Journal.)

At the last meeting of the Glasgow Legal and Speculative Society, in the Faculty Hall, the President having introduced the Lord-Advocate, his lordship, after some preliminary observations said—The subject that I have chosen is the art of pleading as distinguished from the other branches of legal education: and as I understand that all the members of this society are intended for the practice of the profession of law, it probably may not be amiss to direct a few observations to that very important, and, as an artistic branch of the profession, rather neglected study. For, while the study of the law itself embraces and engrosses the attention of the student, I think there is too little attention paid to the rules by which the art of pleading should be conducted, and yet that, in order to success in the profession as the law now stands, is essential—not merely written pleading, as it used to be, but oral pleading, which, I am happy to say, is the principal vehicle by which the cases are now discussed; and therefore, as the importance of the legal tribunal increases—and it has greatly increased—it is the more necessary to understand the philosophical and practical rules upon which cases should be argued as well as decided. The objects and principles of pleading, in the vulgar sense, are much misunderstood. We often see and hear it represented as if the business of the lawyer were to make the worse appear the better reason—as if, at all events, that was part of his profession—that the main object of a pleader was to gloss over the truth, or to be able to do so, and to be able to present that which is not true in unreal and false colours. Now I deny altogether, not merely the general truth of this, but I deny that there is anything in the practice of the legal profession which in the slightest degree warrants or vindicates the assertion. It is quite the reverse. In order to excellence or effect in pleading precise and strict accuracy is absolutely essential, and no man can be a great pleader without it. The truth is, the mistake arises from ignorance of what the art of pleading is—from imagining that there is something precise and definite in legal right. It is not so, and it never can be so, because the law is in one sense unjust. It is an average justice that a legal system must aim at, and the art of pleading is the art of bringing the circumstances to which the pleading is applied within the favourable category of the law. In the great

majority of cases that is a question of dialectics, not a question of fact, fairly admitting of a difference of opinion and of discussion on both sides. Plainly then, in the just exercise of the art, the elements of truth and falsehood, in their absolute sense, do not arise. That is the better reason which the judge confirms, the worst is that which he rejects: and, therefore, in a strict logical sense the result of making the worse appear the better reason cannot by possibility arise. In the noble profession of the law, about the highest intellectual exercise in which a man can be engaged, there is nothing whatever that approaches to the maintenance of falsehood instead of truth in the dialectics that are necessary for the due argument of the general legal question. On the contrary, if a man has a bad case, the argument which must maintain it is an argument that cannot be maintained. You may think so; but he is a suitor in the court, and he is entitled to have his case stated, and he is entitled to have his argument as favourably put for him as the facts will admit; and it is in vain to say, therefore, that the man who only discharges a great public duty by so stating it is liable to the slightest imputation of endeavouring to make the worse appear the better. Now then, the first question is the preparation for the position of a pleader. Of course, knowledge of law lies at the foundation of it; and if I may take the liberty of saying so to you, who have shown your zeal and desire to profit by the study of the law by joining the asssociation which I am now addressing, and if I may judge by the case-book which has been put into my hand, exercising yourselves in the meetings of this society with great intelligence and great appreciation of legal difficulties and legal distinctions—I need not say to you that knowledge of the law is important, but I may take the liberty of saying to you that every hour you spend in the study of the law now will save you many hours in after life. But there is another department on which I will say a word. I see that your society is legal and speculative, and embraces not merely discussions on legal topics, but also on speculative or general topics. It is impossible to overrate the importance of that combination. When a man begins active practice there are two snares into which he is apt to fall. One is of imagining that he is now going to be a practical lawyer, anything but law is unworthy of his consideration—that he is to forget all his previous studies, and devote himself to being a real business man—and that if he indulges in the lighter avocations in which, perhaps, he once took pleasure, he is likely to lose his reputation as well as his time. Now, there is no greater mistake than that, because the early studies in which a man of intellectual tendencies engages have the most important influence on his future professional life. It enlarges the mind—it gives variety and versatility to the tone—it enables a person to indulge with safety in larger and more general views of illustration; but in addition to that, it gives the power of composition, it gives a knowledge of the language, without which no man can be a good pleader. It is important, therefore, to study general literature, with a view to the active exercise of the profession, in order that you may know what to discard in the way of expression as well as what to keep. The power of precise expression is only to be learned by knowledge of the language, and that is only to be gained by studying its best models; and the power of precise expression is one of the greatest weapons which a pleader can use. But there are two remarks to be made here. In the first place, it is necessary to learn with accuracy the scientific vocabulary and nomenclature of your art. Now this is very apt to be a stumbling-block to the young practitioner. I know myself I cannot express the disgust with which, fresh from moral philosophy and the speculative society, I first began to study law. The terms were hateful to me; I could not reconcile them to any model of composition with which I was accustomed, and they appeared to me to be both barbarous and absurd. But that was a very crude and foolish imagination, because the use of technical terms is essential to any science whatever; and so from the use of popular terms in the science of law indicating elegance, it indicates nothing but ignorance, because an adept in any science is at once discerned by the accurate and skilful use of its nomenclature—a nomenclature invented simply because it imports something different from ordinary language. The proper meaning and use of technical words is one of the most important parts of the law student, for it enables him to express with precision neither more nor less than the technical term imports. These technical terms do not admit of equivalent, because for the most part they have a scientific meaning, and, if you once begin to introduce popular instead of technical terms, you fail to express with the accuracy essential to good pleading the precise idea which you intend to convey. After some remarks on the advantage of all studies in this profession, especially that of literature, his lordship pointed out the necessity of a very careful preparation of the causes they might be engaged in for judicial decision. The system of pleading in the sheriff courts, he said, is, I believe, as simple, as good, and as nearly a model for the statement of facts, as any system that at this moment exists. It was an experiment which we tried in the Bill of 1853, to see whether without an elaborate statement of facts, in ordinary and simple cases, an issue could not be joined much more expeditiously and less expensively than formerly was the case; and I understand that the short answer given in after the serving of the summons—the general defence—has, on the whole, worked well. I know that certain remarks have been made on the bench in the Court of Session, upon cases of that kind coming up, where the record was rather barren of fact; but I might own for myself that, in the cases in which I have heard the remarks made, I am far indeed from concurring in them. I believe it is far better, if the facts are simple, to let them be stated generally and go to proof, than to have long papers, expensively prepared, at great sacrifice of time, for the purpose of stating facts in detail, which might be perfectly well stated generally at once, upon the first hearing of the case; but of course there are many cases where this cannot be done. There are a great many cases of most important mercantile questions that arise to which it is impossible to apply that general rule; and accordingly, the mode of stating facts on the record is a matter which the practitioner ought to study, and that also is a thing to be done according to rule, because in no part of this proceeding is a man merely to trust to the hazard of the moment. The whole process from beginning to end ought to be an artistic process; and as to the mode of stating facts, according to our system of pleading, the general rule for the practitioner should be that he should state nothing but facts, and that all quotations, and all extracts, correspondence, deeds and settlements, should be simply referred to, and never be quoted at all. Having therefore, the materials, the question is, on what general rules, oral or written, pleading should be conducted? Now this is, perhaps, more an art than a science, having more relation to mechanical adaption than to theoretical abstraction. You should never lose sight of this, that the real end we have in view is to convince a man, or two or three men. The materials are facts and legal principles, and the art is logic—the systematic and skilful combination of the facts and the legal principles. Of course, in the practice of this art a great deal depends upon intellectual qualities, without a certain measure of which success is difficult; but still there are some general rules which it is useful to observe, and these general rules that I am now going to speak to are not the rules of the schools as you will find in Cotillon, but are certain practical rules, which by my intercourse with older lawyers, or in my experience, seem to me to be well worthy of observation. In the first place, the statement of facts, as the foundation of the logical structure, demands careful attention. It should be without prolixity, full and exhaustive. There is nothing which young pleaders, full of the coming argument, are more apt to treat with carelessness; and yet an argument without facts is a house built on sand, which al-

though constructed with all the ingenuity in the world, will tumble down beneath some little circumstance overlooked or forgotten. The first reputation which a pleader should set himself to acquire is a reputation for stating his facts with unscrupulous accuracy. I need say nothing of intentional misstatements, because no member of an honourable body would be guilty of that. But there is great temptation, especially at the commencement of a professional career, to colour facts in the mode of statement so as to admit those which are adverse, and unduly exaggerate those which are favourable; but no man who indulges in this habit in the slightest degree ever can become a great pleader. It has two great disadvantages—in the first place, it is necessarily inconsistent with high art, because exactly in proportion to the exaggeration or distortion of the fact, is the argument false and powerless. It is like the tricks of painting, which, while they produce effects startling to the vulgar, the educated eye detects and disdains. Nothing has a greater tendency to corrupt and deteriorate the logical perception than the habit of looking for aid in false premises to assist a difficult or desperate process of reasoning. A second and necessary effect is distrust in the mind of the judge. A logical fallacy may be difficult to discern, but imperfect statement of fact is short-sighted as well as injurious, and a very few instances will produce in your accustomed tribunal a distrust far more easy to create than to dispel. I am the more anxious to impress this upon you, that it is a snare difficult at starting to avoid, and there is no cause which operates so powerfully in producing slovenly and imperfect pleading. But you are not to suppose that much legitimate art may not be expended simply on the statement of facts. It is one great department of skilful pleading. In the hands of a master the statement of fact suggests so much that when it is finished the battle is half over. The circumstances have all fallen into their proper order with so much coherence—they hold such a clear and logical relation to each other—that the desired result starts up before you before any words have even framed it. I have known pleaders who possessed this faculty in great perfection, and who, while apparently stating in the most natural order, and in the simplest language, an unvarnished series of circumstances, had so arranged them, with reference to logical order, that the argument was begun, conducted, and riveted before the tale of facts was ended. This, which is one of the highest acquirements of the art, is not only not to be confounded with inaccurate statement, but is quite inconsistent with it. It consists in so adjusting the order and manner of the narrative, as that it shall bear its proper relation to the legal principles which you are anxious to deduce from or apply to them, and the habit of endeavouring to excel in this branch of pleading is the surest safeguard against being betrayed into the error I have endeavoured to warn you against. There is also another great advantage in oral pleading especially in performing the part of the duty with deliberation and care. It gives ease and confidence to the reasoning which is to follow. The pleader, as he feels that step by step he is building his edifice on a sure foundation, takes courage, and when his coping stone is fairly placed, he plants his foot firmly on it, and commences his reasoning, with the certainty that he has all his materials before him. It is plain also, that in order to bring this statement to the desired result, it must be framed with a full knowledge and appreciation of the legal principles to be applied—in other words, no man need attempt it who is not thoroughly master of his case. He must have weighed and pondered over it, and scrupulously estimated the precise effect which the facts have on the law to be maintained; and whether the case be important or unimportant, the practitioner should never hold his duty discharged until he has constructed his argument with as much coherence and solidity as it admits of. Every case should be regarded as an exercise in his profession, to be performed as perfectly as possible, and the pleasure which the artistic labour confers will reward him amply, however insignificant the stake may be. The facts, however, stated, the next question is, on what rules should reasoning be conducted? I assume, of course, at present that the pleader has mastered the law applicable to his case. The question is how he is to apply it. Now, one great rule I shall suggest, as it was to me by the greatest pleader of his time—the late Lord Rutherford, who said to me—"Never think what you can say about the legal argument; consider how you are to gain your case." There is no error which a young pleader is so apt to run into as exhausting his ingenuity in maintaining legal sophisms or subtle refinements which he has charmed himself into admiring. There is no trick of fancy so strong as that which makes a lawyer enamoured of an argument he has himself invented; especially if his practice is not great and his mind has had time dwell on the process, it is wonderful how clear and conclusive a fallacy will become to his own mind, when any other mind will at once detect it. But even if the subtlety have some legal truth to recommend it, he must remember that he has to adress himself to a judge who has had other things to do then to split intellectual hairs for the last fortnight—and that the attempt, in the course of a single address, to educate the judge to his own pitch of refinement, must necessarily be hopeless. There is no cure for this state of mind so effectual, no means so potent of dispelling the day-dreams of an inventor of fallacies, as the prosaic question, will it gain the case? It may display acuteness, indicate great power of analysis; be really a creditable specimen of metaphysical analysis; but all is useless if it will not gain the case. The true process is, when the facts and the legal principles are mastered, to sit down quietly to consider how the battle is to be gained and the citadel stormed. This also is a task which presupposes and insures thorough knowledge of the case. The temptation is often great to be satisfied with saying something smart and plausible upon it; but when the line of argument is fairly canvassed and considered, and the points in which victory is probably determined, throw away all the rest. If they won't gain the case they are worse than worthless, whatever their merits in points of ingenuity; for nothing so much injuries the effect of a sound and strong argument as to find it alongside a weak one. In the next place go straight to your adversary's arguments. It was told to me of the great John Clark, who was in his time probably the acutest and most powerful man at the bar, that he despised greatly some of his contemporaries, who went round about and round about their adversary, and never fairly met him, but endeavoured to draw away the attention of the Court from his argument. Again never misstate your adversary's argument, but rather the reverse; and here I may quote without offence, the practice of a great living pleader, now on the bench—I mean the present Lord Justice-Clerk—who, in legal dialectics, was probably as accomplished a man as the bar of Scotland ever produced. He never misstated his adversary's argument—he even stated it more strongly than his adversary had done, just in order that his triumph might be greater, when, after having strengthened the argument in that way, he was enable to crumble it into atoms. There is, however, a suggestion which I also learned from some of the luminaries of former days, who studied this art of pleading, probably with greater accuracy than we do, because, as their oral pleadings were not so frequent, they were able to give them more care and consideration. But I remember my father stating to me as a rule that he had often practised with success when hard pressed by the difficulties, and intricacies, and power of the opposite argument—and I think I may say of him that he was, perhaps, the fairest pleader of his time—"It is," he said, "a perfectly legitimate proceeding, if you find that your adversary's plan of reasoning looks so coherent and compact that you cannot break it, and that the judges or the audience are impressed with it, to begin at the other end of the chain. If the opposing argument proceeds by induction, do you proceed by analysis; if it commences with the statement of fact, you may begin with the

statement of the law; and in that way you get the mind of the judges fresh to attend to your argument, and you have not to labour to show where the weak link is in a chain so artificially and scientifically constructed as that of your adversary." After some observations on the style, his lordship expressed his disapprobation of the manner in which witnesses were very frequently examined; the questions put to them should be really questions, and the witnesses should be left to tell their own story in their own way. He likewise stated his disapproval of the custom which some had of brow-beating witnesses in cross-examination. His lordship concluded by observing that he had thrown out some hints, and given them a few disjointed materials, their reflection on which might not altogether be misapplied. If he had done anything whatever to encourage the young student in that profession in which he (the Lord Advocate) had spent his life, and to which he was ardently attached—it is one of the noblest exercises of the intellect, and one of the most useful avocations in which a citizen of a free country could engage—he would be amply repaid for having availed himself of the kind opportunity which they had afforded him of meeting them.

COURTS OF APPEAL—CONFLICTS OF DECISIONS.

From the Solicitors Journal.

The most important branch of the judicature of a country would seem to be its courts of appeal. They exercise the function of finally deciding all questions arising as to the substance or construction of the law—a function which in countries of unwritten laws borders closely on the legislative; and the decisions of these tribunals constitue the standard of the law to which all inferior courts must conform. It might be expected, therefore, that the appellate courts would be the chief care in the constitution of a judicial establishment; that their maintenance and efficiency would be a constant object of attention and supervision, and that their decisions would be received with greater respect, and studied with more diligence by the lawyer than those of any other courts. In this country, however, the courts of appeal appear in a very different position. Their constitution in their present form can be traced only to chance and casual expediency. Public attention is seldom called to their action or efficiency; and any question made concerning the amendment of the Supreme Court of Appeal commonly turns upon considerations of a political rather than a juridical character, and foreign to its immediate purpose as a branch of the judicature of the country. Even the judgments of these courts, though final and conclusive as to the questions of law which come before them, are not found of equal practical utility with those of the inferior courts; and the library of a lawyer in ordinary is not deemed incomplete although it does not contain the volumes of the Reports of the House of Lords.

The time seems now to have arrived when our courts of appeal should be subjected to the same process of criticism and amendment which has been exercised so freely and with such beneficial effect over other branches of our judicature, in comparison with which the branch in question at present remains in a very inferior degree of efficiency. The operation of our courts of appeal as at present constituted is far from satisfactory. The multiplicity and complexity of these courts presents an unnecessary obstacle, and causes useless delay in obtaining a final decision; and these evils are augmented by the irregularity, slowness, and uncertainty, of each stage in the process. The final judgment, when obtained, is found to depend in a great measure on the casual mode of constructing the courts, and on other accidental causes, rather than on the real weight of judicial authority. The value of the final judgment as a delaration of law is thus depreciated, so that it even becomes a question whether it would not be expedient for the House of Lords to exercise the liberty of reviewing its own decisions, in order to avoid the alternative of persisting in some erroneous doctrine in which it may have become implicated, through the peculiar views entertained by two or three of its learned members. From a discussion which recently appeared in the columns of this journal, it seems that some difference of opinion actually exists even amongst the lords themselves as to the existence of this power. It is certainly a remarkable instance of the unsettled state of the principles of our courts of appeal, that any question should exist as to a power so contradictory in its nature to the fundamental notion of a court of final appeal, and to all ideas of certainty in the law.

We have collected the few following cases as examples, for the purpose of showing the peculiar action of our courts of appeal, and the remarkable results occasionally produced by them, where there is much conflict of judicial opinion. These cases, it may be said, are exceptional. But they are not so in fact. They have been selected from the most recent publications of reports in which many other cases may be found containing the same peculiarities in a less prominent degree; and the very same elements of uncertainty and inconsistency pervade all cases of appeal, although they do not produce the same strikingly anomalous results in the majority of instances.

In the case of *Hickman* v. *Cox* (8 W. R. 754) the question was, whether creditors signing a deed of arrangement, by which the debtor assigned his business to trustees upon trust to carry it on for the benefit of the creditors, became liable as partners for debts contracted by the trustees in carrying on the business. In 1856 the Court of Common Pleas, consisting of Jervis, C. J., Williams, J., and Willes, J., decided this question in the affirmative. In 1857 the case came before the Court of Exchequer Chamber, and the judges were equally divided. Coleridge, J., Erle, J., and Crompton, J., held the affirmative; Martin, B., Bramwell, B., and Watson, B., the negative. In 1860 the case came before the House of Lords; Blackburn, J., Crompton, J., Williams, J., Pollock, C. B., held the affirmative opinion; Channell B., Wightman, J., the negative. The law lords, comprising the Lord Chancellor, Lords Brougham, Cranworth, Wensleydale, and Chelmsford, decided unanimously in the negative. The opinions of the judges and of the law lords on this question are accordingly thus balanced:—

Aff.	*Neg.*
Jervis, C. J.	Martin, B.
Williams, J.	Bramwell, B.
Willes, J.	Watson, B.
Coleridge, J.	Channell, B.
Erle, J.	Wightman, J.
Crompton, J.	The Lord Chancellor.
Blackburn, J.	Lord Brougham.
Pollock, C. B.	Lord Wensleydale.
	Lord Cranworth.
	Lord Chelmsford.

The judges of the superior courts thus stand in a majority of nine to five against the final judgment of the House of Lords. The law lords, assembled in an unusual number, turned the scale by a majority of two.

The recent case of *Jeffries* v. *Alexander* also presents a remarkable conflict of judicial opinions. The question in dispute was, whether an indenture, containing a covenant with trustees that the executors of the covenantor should within twelve months after his death invest £60,000 in Government funds in the names of the trustess upon trusts for charitable purposes, —where the assets of the covenantor after his death consisted of charges upon real estate,—was within the statute of Mortmain. The Master of the Rolls thought that it was, and ordered an action at law. On appeal, the Lords Justices, assisted by Wightman and Erle, JJ., declared the indenture valid, and that the sum was payable. Before the House of Lords, on the first hearing, the law lords were equally divided. On the second hearing, six common law judges attended to assist the

House, and were equally divided: Wilde, B., Byles, J., and Pollock, C.B., being of the negative opinion, and Blackburn, J., Willes, J., and Williams, J., of the affirmative. Finally, the Lord Chancellor, Lord St. Leonards, and Lord Kingsdown, decided the question in the affirmative against the judgments of Lord Cranworth and Lord Wensleydale. The judges who had delivered opinions in this case then stood as follows:—

Aff.	*Neg.*
LORD CHANCELLOR.	LORD CRANWORTH.
LORD ST. LEONARDS.	LORD WENSLEYDALE,
LORD KINGSDOWN.	WILDE, B.
BLACKBURN, J.	BYLES, J.
WILLES, J.	POLLOCK, C.B
WILLIAMS, J.	KNIGHT BRUCE, L.J.
THE MASTER OF THE ROLLS.	TURNER, L.J.
	WIGHTMAN, J.
	ERLE, J.

And the case was ulimately decided against the opinions of the majority.

The case of *Boosey* v. *Jeffries*, (20 L. J. Ex. 354; 24 L. J. Ex. 81,) raised the important question whether a foreign author while resident abroad can acquire a copyright in England. Rolfe, B., ruled at Nisi Prius in the negative, to which ruling a bill of exceptions was tendered; and in 1851, the Court of Exchequer Chamber, composed of Lord Campbell, C. J., Patteson, J., Maule J., Wightman, J., Cresswell, J., Erle, J., and Williams J., decided unanimously against the ruling and in the affirmative of the question. On appeal to the House of Lords in 1854, the judges called in to assist were divided in opinion; Crompton, J., Williams, J., Erle, J., Wightman, J., Maule, J., Coleridge, J., held the affirmative; while Alderson, B., Parke, B., Pollock, C. B., Jervis, C. J., held the negative. The law lords, comprising the Lord Chancellor, who had originally ruled the question at Nisi Prius as Baron Rolfe, Lord Brougham, and Lord St. Leonards, finally decided the question in the negative.

Judicial authority in this case then stood as follows:—

Aff.	*Neg.*
LORD CAMPBELL, C. J.	ALDERSON, B.
PATTESON, J.	PARKE, B.
MAULE, J.	POLLOCK, C.B.
WIGHTMAN, J.	JERVIS, C. J.
CRESSWELL, J.	LORD CRANWORTH.
ERLE, J.	LORD BROUGHAM.
WILLIAMS, J.	LORD ST. LEONARDS.
CROMPTON, J.	
COLERIDGE, J.	

The case was thus decided against a majority of two. Three law lords overruled an unanimous decision of the Court of Exchequer Chamber, constituted of seven judges, one of whom was also a peer and might have supported his own decision in the House of Lords.

The case of *Cooper* v. *Slade* (7 W. R. 63), was an action for penalties under the Corrupt Practices Prevention Act, 1854, and turned on the question whether the payment of the travelling expenses of an elector was prohibited by the statute: Parke, B., at Nisi Prius ruled that it was. In 1856, on a bill of exceptions, the Court of Exchequer Chamber decided that it was not; Alderson, B., Cresswell, J., Martin, B., Crowder, B., and Bramwell, B., being of that opinion, while Williams, J., maintained the contrary. In 1858, the House of Lords, consisting of the Lord Chancellor Cranworth, and Lord Wensleydale, reversed this judgment; Channell, J., Watson, B., Willes, J., Crompton, J., Williams, J., Wightman, J., Coleridge, J., advising for the reversal, and Bramwell, B., advising against it. The question in dispute in this case, though not of legal, was of great practical and political importance; and yet only two law lords were found in attendance to decide finally upon it. These two lords, one of whom had originally delivered the ruling on which they sat in judgment, reversed the judgment of the Court of Exchequer Chamber, composed of six judges, of whom one only was dissentient.

The above examples are sufficient to call attention at once to some of the more obvious incongruities in the operation of our courts of appeal. They are also highly suggestive of further reflections on the construction and action of those courts, which we have not space to enter upon at present, but which may furnish appropriate matter for observation on a future occasion.

DIVISION COURTS.

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

CHAPTER I.

Of the Small Debt Court System, from its origin to the establishment of Division Courts—A. D. 1792 to 1841.

In treating of the Upper Canada Division Courts, a brief reference to the institution and progress of the small debt court system in this part of the Province seems a fitting introduction.

In the year 1791 the Province of Quebec, which then included Upper Canada, was divided into two provinces, and by the Imperial Act 31 Geo. III., cap. 31, a distinct legislature was given to each. The western or upper division was called the Province of Upper Canada; the eastern or lower, the Province of Lower Canada.

Upper Canada was subsequently divided into Counties, for the purposes of representation, and commenced to legislate as a separate province under the constitution created by the Imperial Act.

The first Parliament of Upper Canada was constituted and assembled in the year 1792, and the first act of the Provincial Legislature was to adopt the laws of England as the rule of decision in all matters of controversy relative to property and civil rights;* but "the forms of proceedings in civil actions and the jurisdiction of the courts already established," were not interfered with (32 Geo. III., cap. 1). This was followed by an act requiring all issues of fact joined in any action in any of His Majesty's Courts of Justice within the Province, to be tried by a jury summoned and taken conformable to the laws of England (32 Geo. III., cap. 2); and, by another act, causes exceeding

* The laws and customs of Canada established in the year 1774 for the Province of Quebec, not many years before then a French Colony with the laws and customs of the parent country, remained in force when Upper Canada was erected into a separate province. Unsuited to the inhabitants of Upper Canada, the great majority of whom were "British born subjects educated in countries where the English laws were established, and unaccustomed to the laws of Canada," they were at once abolished by the Parliament of Upper Canada, and the English system established in their place, at the same time, existing rights were saved and properly guarded in express terms by the enactment. The English "poor laws," and the laws respecting bankrupts, were not introduced, being specially excepted (32 Geo. III., cap. 1, sec. 6).

forty shillings in value were no longer to be disposed of summarily without a jury (32 Geo. III., cap. 4)

"To contribute to the conveniency of the inhabitants of the Province an easy and speedy method of recovering small debts," was deemed necessary, and an act with this declared object passed in the same session of the legislature (32 Geo III, cap 6). It provided for the establishment of courts, two or more justices of the peace acting in each, with power to hear and determine matters of debt to forty shillings, and to "decree as to them should seem just in law and equity" Each of these tribunals exercised jurisdiction for a certain locality or division. The several divisions being "ascertained and limited by the Justices' assembled in General Quarter Sessions

The *place* of holding a court was fixed by the justices acting for the particular division; the *times* for holding the several courts were on certain days prescribed by the statute itself.

The tribunals thus created under the name of "*Courts of Request*," although defective in power and without any settled procedure, were probably adequate to the wants of the inhabitants of Upper Canada, at that time few in number; and any question that could arise in the exercise of the limited jurisdiction given must have been, from the circumstances of the country, of the simplest and most ordinary character. We may at least conclude that they were found useful and were acceptable to the people, for after a trial of nearly a quarter of a century their jurisdiction was more than doubled.

"It was the wise constitution of the Common Law of England to bring justice to every man's door," and in England a multitude of inferior courts were from time to time established to bring justice home to the people. From their great diversity, however, in constitution, jurisdiction and procedure, they failed to accomplish the object of their creation, and were swept away, to be replaced by the general system of County Courts now existing *

However defective in other respects, our local courts were from the first uniform in constitution and jurisdiction, and, without any radical change in the general plan of organization have been gradually matured into the present system of local judicatories throughout Upper Canada. As it was in 1792 so it is in 1861, tribunals are established over the country upon the same plan, the jurisdiction alike in all, each court has its local limits, which are fixed by the justices acting in Quarter Sessions

Although the original design has been kept in view and the general features of the system retained, yet, as will be seen, the character of these courts has been greatly changed, —in constitution, jurisdiction, and procedure. They are no longer "small debt" courts, but embrace a very large share of the law business of the country *

Proceeding to notice the legislation affecting the Courts of Request established in 1792, we find no change worthy of particular notice till the year 1816

In the year 1797 certainly there was a provision empowering the justices of Assize and nisi prius to act as visitors of the District Courts (then presided over by laymen) and of Courts of Requests in their Circuits (37 Geo. III. cap. 6, sec. 7). But it is difficult, at least at the present day, to say what practical advantage could be attained by this enactment. The same act prohibited any charge for mileage, but this strange provision was repealed the next session (38 Geo. III).

On the statute book of 1816 is a legislative declaration, that "it will contribute to the conveniency of the inhabitants of this Province to extend the jurisdiction of the Courts of Request" It is in the preamble to the Act 56 Geo. III, cap. 5, by which the jurisdiction was increased to five pounds in matters of debt. This act also better defined the authority of justices of the peace as judges of these courts; and laid down a simple procedure. There were certain restrictions however, for an acknowledgment of the debt in writing, or other proof than that of the oath of the plaintiff, was made necessary to ground a judgment, unless the demand did not exceed forty shillings. A defendant could not be summoned out of the court division in which he was a resident, and no writ of execution could issue on a judgment under the enlarged jurisdiction until forty days after the judgment had passed. And it is observable that at this early date it was deemed proper to exclude from the jurisdiction of the courts "debts contracted at a tavern for spirituous liquors, or for any gambling debt whatever."

A difficulty seems to have been felt respecting the power of the Courts of Request to deal with cross demands, and it would seem that a defendant having a debt against a plain-

* In Mr Harrison's work on the C L P Act, the subject is thus referred to. "As early as 1517 a court for the recovery of small debts, known as a Court of Conscience or Court of Requests, was by act of the Common Council established in London In 1605 the same court was fully confirmed by act of the legislature (3 Jac I cap 15 This court having been found very beneficial in London, courts of a similar nature were established by numerous acts of the legislature in different parts of the kingdom The accumulation of inferior courts throughout England exhibited the jumble before for the local administration of justice By reason of the diversity of these courts and the defects in their constitution, and in order that "one rule and manner of proceeding for the recovery of small debts and demands should prevail throughout England," all small courts were abolished and a system of County Courts fully established (9 & 10 Vic. cap. 95)

* For the 18 months ending 30th September, 1859, there were 215,883 cases entered in all the Division Courts in Upper Canada, for claims varying from $1 to $100 The probable average at least $24 to each case, and the total amount for which suits entered in that period would exceed five millions of dollars.

In the Courts of Request, 39,203 cases were entered in the year 1538, for sums under $40 in each case

tiff was driven to his action for the same if he sought to recover any balance against him.

By 11 Geo IV, cap. 5 (A D. 1830), the law of set-off was extended to the Courts of Request, and they were allowed to deal with such cases and to *give judgment for* the defendant for any balance found to be due to him from the plaintiff; but if the nature or amount of the defendant's demand, or set off, was such as not to come within the general jurisdiction, it could not be entertained, and the defendant was without remedy in the Court of Request

This is the last enactment respecting the local courts during the first forty years of their existence in Upper Canada, for until the year 1833 no other change was made They stood from 1792 to 1833 upon their original footing. The court boundaries traced out by the Court of Quarter Sessions, the courts presided over by justices of the peace. It was then that the first marked change was made in the constitution of the Courts of Request, under the statute 3 Wm. IV, cap 1.

By this act a re-arrangement of the court divisions was directed in each district, and the divisions when declared in Quarter Sessions were to be numbered and described, and a list thereof transmitted to the Governor's office.

The judicial power was transferred from justices of the peace to commissioners appointed by and holding office during the pleasure of the Crown, and to qualify for office each commissioner was required to take an oath "faithfully, impartially, and honestly, according to the best of his judgment, to hear and determine," &c., the matters brought before him a- a commissioner.

A clerk and bailiff were to be appointed to each court by the commissioners thereof An oath of office was prescribed for the clerk, and both clerk and bailiff were required each to give security for the due performance of his official duties.

The commissioner, clerk and bailiff were all paid by fees upon the proceedings, according to a table of fees contained in the statute.

The jurisdiction of the courts was extended "to matters of debt and contract," where the demand did not exceed *ten pounds*, and the defendant resided in the division; and enlarged powers necessary for carrying this jurisdiction into effect were conferred upon the commissioners. The privilege of Barristers and Attornies to object to the jurisdiction was taken away, and they were in effect debarred from bringing actions in the Superior Courts upon a subject matter cognizable in a Court of Requests. Witnesses living out of the division might be summoned from any part of the district. Writs of execution could be executed in any part of the County. The commissioners were empowered to fine and imprison for contempts in the face of the courts, and the practice was remodelled and traced out more in detail. In fact, procedure in these courts was then put much on the footing that it afterwards stood in the first Division Court Act

As in the previous Act so in the statute, claims for gambling debts and for spirituous liquors drunk at a tavern were excluded from the jurisdiction, as were also "causes involving the rights or title to real estate."

The jurisdiction of our Courts of Requests was at no time exclusive, yet their existence pointed to the propriety of withdrawing from the superior courts cases of a trifling nature, and the Act sufficiently enforced this by providing that the costs of actions brought in the Superior Courts, which might be tried in the court of requests, should be limited to Court of Requests costs, unless it was shown to the court or a judge, that from the nature of the plaintiffs evidence, or the situation of his witnesses, he could not have proved his case in the Inferior Court, or unless the action was commenced by bailable process against the defendant.*

The act was made to extend to all districts thereafter to be created; and the justices of the peace were required at their first quarter sessions, if a new district, to set off the same into court divisions. It had not long been in force when it was found necessary to make some alterations and amendments in it, and in 1837 a statute was passed

* In those days, and indeed until the year 1845, a person could be arrested for a debt as low as two pounds, under process from District Courts — under process from the Court of Queen's Bench if the claim exceeded five pounds And to facilitate arrests Commissioners of the Court of Queen's Bench were supplied with, and authorized by statute to issue writs. These writs were, in all cases, obtainable on the affidavit of the plaintiff, or his agent of the debt, that deponent "was *apprehensive* that the defendant would leave the Province without satisfying the same," and that process was not sued out from vexatious or malicious motives, This power of arrest was fearfully abused, and a vast amount of perjury and injustice committed under cloak of law

Though commissioners were not then numerous — probably not more than an average of fifteen in each district, and were for the most part professional men — yet still the facilities for obtaining a writ on the instant at a trifling cost, greatly increased the evil What would it be in the present day under such a law, when commissioners are as thick as blackberries through the country — men of every grade in life, and most of them out of the profession?

An incalculable amount of loss, hardship and misery was wrought to thousands of persons throughout Upper Canada under that abominable law The country was infested by a plague of "clock-peddlers" in particular, and farmers were induced to purchase their wares "on one or two years credit" on promissory notes commonly with a stipulation to take payment of the note in farm stuff These notes were "traded" from one to another of the vermin and scarcely were they, due when a "*capias* was sworn out, and fortunate was the defendant who escaped with loss in costs, and expenses equal to double the amount of the claim against him, for under the above exception the plaintiff was entitled to superior court costs Well-to-do farmers — men owning cleared farms, and who had not the slightest idea of leaving the country, were arrested for a debt of a few pounds, and many emigrants, just settled in the bush, were taken from their homes at seeding time or harvest, dragged to gaol, and often lost their all for a paltry "clock debt." In fact few escaped loss or annoyance however good their means and standing who fell into the hands of these ruthless wretches. Hundreds of writs in one county alone have been "sworn out" in a week, in very many cases by men who had no personal knowledge of the defendants To this day the old settlers remember these doings with a bitter feeling, and speak of the wide spread injury they occasioned

for the purpose. (7 Wm. IV., cap 12.) This statute was brief, and dealt with four subjects.

First—As to the organization of the courts.

It would appear that doubts arose, and reasonably enough, whether the magistrates acting in quarter sessions having once exercised the power conferred by the act of 1853 to "ascertain and declare" the court divisions in their several districts, could afterwards vary or change these divisions. To settle this doubt, it was enacted that it should be lawful for the magistrates to vary the divisions of the courts of requests *from time to time* as to them might seem necessary.

Second—The naked power of summoning witnesses, given by the act of 1833, could hardly have been of much value without the authority to punish for non-attendance. This also was remedied by one of the clauses, enabling the commissioners to impose a fine of forty shillings upon any person disobeying a subpœna from the court.

Third—As to jurisdiction, it was provided that a debtor might be summoned from any division within the particular district to the division where the debt was contracted; and a mode was prescribed of transmitting process for service in an out division, making proof thereof, and obtaining return—much the same as that now in force in the division courts; and lastly, personal service of summons on a defendant was dispensed with in cases not exceeding five pounds, where it was made to appear that the defendant "absented himself for the purpose of avoiding the service."

Under the act of 1833, as amended by that of 1837, the power of appointing court divisions was exercised by the magistrates in quarter sessions, and every district in Upper Canada separated into divisions. A court of request was organized in each division, provided with proper officers—commissioners, clerks and bailiffs.

(*To be continued.*)

U. C. REPORTS.

QUEEN'S BENCH.

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

SHAW AND NEAL AND THE CORPORATION OF THE TOWNSHIP OF MANVERS

School section—Alteration—Notice—By-laws

On the 19th of December, 1857, a township council passed a by-law creating a new school section called No. 9 out of sections 13 and 8, and defining what should thereafter constitute section 13. Notice was given of the intention to pass this by-law, but it was not done at the request of the freeholders and householders express. I at a public meeting, on the contrary the change made appeared to be opposed to the wishes of a majority of the inhabitants. On the 8th of May, 1858, a by-law repealing it was passed, of which no notice had been given to the parties interested thus restoring the sections to their former position, and on the 10th of September, 1859, another by-law was passed assessing the section 13 as it originally stood, for the expenses of building a school house, &c.

Held, that the by law of May, 1858, must be quashed, for the previous by law was legal and a by law repealing it which would in effect make an alteration of school sections, could not be passed without notice to those interested; and that the by law levying a rate on section 13, as it stood before 1857 must necessarily be quashed also, for that would include part of what was section 9.

Hodgins obtained a rule *nisi* to quash two by-laws under the following circumstances:

On the 19th of December, 1857, the township council of Manvers passed a by-law altering some of the school sections of the township. The first clause created a new school section to be carved out of sections numbers 13 and 8, and the new section was called section number 9, and it was defined by boundaries.

The second clause defined the portion of the township which should thereafter compose section number 13.

When this by-law was passed the relator, Shaw, was a member of the township council. It seemed that the change was opposed by various inhabitants of the then section, but Shaw proposed the by-law in council, and one other of the councillors voted with him, one voted against it, the reeve did not vote, and the fifth councillor was not present. Notice was given of the intention to propose this by-law. The by-law came into operation on the 25th of December, 1857.

On the 8th of May, 1858, the township council repealed this by-law, the effect of which, if legally done, was to restore matters to the former footing.

At the annual school election of trustees in 1858, it seemed the majority of the electors considered that the by-law of 1857 did not legally constitute the section number 13, and as Shaw's term of office as trustee expired by effluxion of time, the majority elected a person of the name of Sanderson in his place. The local superintendent attended that meeting. When the election was held for 1859 the other relator Neal, joined with Scott, another of the trustees in calling the meeting to elect a new trustee in the place of Neil, whose term of office expired, and on that occasion one McQuaid was elected in Neal's place. The parties, that is, the majority, were then treating the school section as upon the footing upon which it had stood previous to the by-law of 1857.

It appeared that a school-house had been built since the repeal of the by-law altering the section, and on the 10th of September, 1859, the township council passed a by-law assessing the section in $365, to pay the expenses of building the school house, and for paying the teacher's salary.

The present application was made on the part of the relators, Shaw and Neal, to quash these two by-laws of the 8th of May, 1858, and the 10th of September, 1859, in order that the by-law of the 19th of December, 1857, altering the sections, might remain in force. The grounds upon which the application was made were as follows:

With regard to the first of the by-laws—1. That the by-law was passed without notice to the trustees of school sections 8 and 13, and other parties affected thereby, and without the request of a majority of the freeholders and householders of the school sections to be affected by it.

2. That the by-law does not set out or recite any such notice or request as the condition precedent for the passing thereof by said council.

3. That no notice of the passing of the by-law was given by the said council to the trustees of the school sections affected thereby, nor to the local superintendent of common schools, either immediately after the passing thereof or on or before the 25th of December, 1858.

Then, with regard to the second of the by-laws complained of, the objections were:

1. That the school section on which the rate was levied was not legally formed.

2. That the by-law was passed without notice to the trustees, and freeholders and householders of the school section concerned.

3. That the by-law was passed without the previous request of the majority of freeholders and householders of said school section, as expressed at a lawful annual or special meeting thereof duly called by the trustees for considering the levying of the rate mentioned in the by-law and the application thereof.

4. That the by-law was passed without the previous request of the lawful trustees of said school section, duly made to the council on behalf of a majority of the freeholders and householders expressed at a public meeting for the purpose of authorising said rate and application therefor.

5. That the by-law does not set out or recite that it was passed at the request of the trustees of the section, duly made to such

council on behalf of a majority of the freeholders and householders therein, expressed at a public meeting called by the said trustees for the purpose of authorising said rate.

6 That the by-law was not applied for by the lawful trustees of said section, at or before the meeting of the council held in August, 1859.

7. That the by-law levies a rate on behalf of an illegal contract for building the school house mentioned therein, said contract having been previously made with a member of the corporation of trustees, and also levies a rate for law costs, for which the trustee corporation is not responsible.

The application was supported by the affidavits of the relators and others. The relators swore that they as trustees, which they claimed to be as legally representing the altered school section, received no notice whatever of the consideration or passing of the by-law of the 8th of May, 1858, and that they were informed, and believed, that none of the parties affected by or interested in the effect of that repealing by-law were informed of the intention or the proceedings of the council in passing it, nor did the council enquire or satisfy itself whether any notice had been given to the parties concerned, but that the council did it of their own accord They further said, that the clerk of the council did not notify the trustees of it, or the local superintendent, and it was only lately he inhabitants of the section knew that such a by-law was passed.

The by-law of the 10th of September, 1859 was requested to be passed by Sanderson and McQuaid, trustees of school section number 13, which they contended they represented. With respect to this by-law the relators swore that those persons who asked the council to pass the by-law had no authority to do so, because they were wrongfully elected, and had not the true seal of the corporation, which the relators contended remained in their hands They said they were not aware of any meeting having been called to consider the levying of a rate, and they believed none was called; that treating the relators as the lawful corporation of trustees, the council had full notice that they had not requested a rate to be levied, and they denied that they had requested the council to pass the latter by-law The relators then further stated, that Sanderson was the party who held the contract for the building of the school house mentioned in the by-law, and for which the rate was levied, and further, that they were informed and believed that the costs of a division court suit, paid by one Scott, were included in the rate.

The relators were supported by the affidavits of three other persons, inhabitants of the section, with regard to what they had stated.

M. R. Vankoughnet shewed cause.

The application was opposed upon affidavit of Scott, who was the reeve for the year, 1859, and who stated that he was a councillor for both the years 1858 and 1859, and was one of the school trustees in 1857, at the time the then council made the alteration. He said that there never was any public meeting of the freeholders and householders for the purpose of petitioning the council to make an alteration in the sections. A notice was given, however, that the council would be asked to make the alteration, and in consequence of that he appeared at the meeting of the 19th of December, 1857, to oppose the alteration, and he produced the petition of twenty-six of the inhabitants opposing the alteration. Neal, one of the trustees, a relator now, appeared and produced a petition of thirteen of the inhabitants in favour of the alteration. At that time the other relator, Shaw, was both a trustee and councillor, and he supported the alteration Scott further stated that it was found the alteration worked injuriously, and broke up the school, and upon taking legal advice he was informed that the by-law altering the sections was itself illegal, and unless it were repealed steps might be taken to quash it. This was communicated to the council, and the members of the council then had an interview with Shaw, and Shaw was informed that if he would give security against the costs the council would allow the by-law of the 19th December, 1857, to be tested, but this Shaw refused to do, whereupon, to avoid trouble and expense to the township, the council, as Scott stated, on the 8th of May, 1858, repealed the by-law of December, 1857.

The affidavit of Scott was supported by affidavits of six other persons, inhabitants of the section 13, all denying that any meeting was ever called or held for the purpose of considering the expediency of any alteration All these persons said that they were opposed to it, and that the majority of inhabitants were opposed to it: that the effect of the alteration was to destroy the section, and that it would be impossible to maintain a school in it.

BURNS, J., delivered the judgment of the court.

With respect to the ground upon which the defendants attack the by-law of 1857, as a reason why it might be repealed by the township council—namely, that no public meeting was held of the freeholders and householders of the inhabitants, or any request made to the council expressed at any meeting for the purpose, to make an alteration in the sections, this court has already decided in *Ness* and *The Municipality of Saltfleet*, and *Ley* and *The Municipality of Clarke*, (13 U. C. R. 408 & 434,) that it is not necessary to confer power upon the council to alter school sections that it should first be asked to do so by that mode of request All that is necessary, in case of an alteration being asked for, is that all parties affected by the alteration shall have been duly notified of the intended step or alteration Notice was given, and both sides, those favourable to the alteration and those opposed to it, were present and were heard, but the council notwithstanding passed the by-law making the alteration Why then it should be supposed in May, 1858, that the by-law was illegal, it is difficult to conceive, unless it be that the parties thought the council had no power to pass it against the wish of the majority o. the inhabitants of the school section? According to the affidavits and petitions *pro* and *con*, there seems to be little doubt the by-law was passed contrary to the wishes of a majority of the inhabitants Nevertheless it was a legal by-law, and it could only be got rid of again upon legal grounds

This latter point is involved in the attack made by the relators upon the by-law of the 8th of May, 1858, and the question is whether that by-law has been legally passed without notice. It is not pretended that the ratepayers or inhabitants generally of the section 13, or the new section created by the by-law of 1857, were notified or had any notice of an intention to pass such a measure. It seems that Shaw, one of the relators, was aware on the 7th of May that such a measure was before the council, for he was then asked to give the council a guarantee against costs, and they would allow the by-law to stand which was then still in force; but this he refused to do. It appears there was a division among the inhabitants immediately after the passing of the by-law of 1857, and each division elected its own set of trustees. or rather another trustee to fill up a vacancy. There seems to be little doubt, that in the contest going on between the two parties, the one favorable to no change being made in the section was the most numerous

The question, however, is not which was the most numerous party electing the trustee in 1858, or which of them had most friends in the council in May, 1858, but the question, is whether the council had any power to repeal the previous by-law without the parties interested in it being notified of the alteration the repeal would effect?

The repealing of the previous by-law undoubtedly was another alteration in the section, and that could not go into operation until the 25th of December, 1858. The 4th sub-section of section 18 of the school act of 1850, enacts that no application for an alteration shall be entertained unless it shall clearly appear that all parties affected by such alteration have been duly notified of the intended application. The giving of notice is a condition precedent to the council entertaining the application, and this provision must apply as well to the repeal of a law, which would itself constitute an alteration, as of a notice in the first case of making a change

For this reason the by-law of the 8th of May, 1858, must be quashed

Then comes the next by law, levying the rate. If the by-law upon that which is founded be quashed, it is impossible this can stand. The by-law of the 8th of May, 1858, being removed out of the way, then that of December, 1857, remains in force, and by that a new section, number 9, was created out of sections 13 and 8 The by-law for levying the rate, however is for section 13 as it formerly stood, and under that those who would be in the new section 9 are called on to pay, which cannot be right so long as number 9 remains

Without entering into the points raised against the last by-law which have been taken, it is sufficient to say that in removing the by-law of the 8th of May, 1858, the other must go with it.

The rule should therefore be made absolute with costs

Rule absolute.

McCARTHY v. THE CORPORATION OF THE VILLAGE OF OSHAWA.

Village corporations—Duty to maintain crossings

The plaintiff, living in an incorporated village, laid a plank from his door across the ditch to the street, by which he was in the habit of crossing, although the ditch was deep there, and he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by this plank at night he fell off and broke his leg, and he thereupon sued the corporation, alleging that it was their duty to have maintained a proper crossing from his house to the street

Held, that there was no such duty incumbent on the defendants, and that the action could not be maintained.

The declaration stated that the plaintiff owned a lot in the village of Oshawa, at the head of a street called Mechanic street: that between his land and the street there was a ditch for draining the street: that it was the duty of the defendants to keep that ditch in proper repair, and to make and maintain a sufficient bridge or crossing over the ditch from the street to the plaintiff's land and dwelling house: that they neglected to do so: that the crossing there was insufficient, and the plaintiff, in crossing from the street to his dwelling house, fell into the ditch, and broke his leg

Defendants pleaded,—1. Not guilty. 2. The same plea by statute. 3. That they were not possessed of the street, as the declaration alleged. 4 That the plaintiff was injured by his own carelessness, default and neglect. 5. That the plaintiff's cause of action did not arise within three months of the action brought. 6 That the street was not a highway as alleged

At the trial, at Whitby, before Hagarty, J., an amendment was allowed to be made in the declaration, averring that it was the defendants' duty to make and maintain a bridge or crossing over the ditch to the plaintiff's land and house, and that they did not do so. Before the amendment, the statement was that the defendants did not keep the ditch in repair, and the injury was ascribed to their default in not doing that. The defendant objected to the amendment.

The evidence shewed that the ditch spoken of was an ordinary ditch on the edge of the street, intended as usual to be open, like the other side ditches in the village. The soil being loose, the ditch had become wider and deeper; and was at the time of the accident, about six feet wide at the top and about three feet deep.

The plaintiff could, by going a short distance along the sidewalk, have avoided the part where this deep ditch was, but in order to cross more directly from the street to his house, he had himself laid a single plank over the ditch, by which he was in the habit of crossing. This plank was narrow at one end, and so was unsteady, and coming home one night he fell off the plank and broke his thigh He had never applied to the defendants to make a crossing from the street to his premises, and it was proved that the inhabitants in the village provided such crossings for themselves, none being provided by the corporation, except at the intersections of streets.

It was objected by the defendants' counsel that the defendants were entitled to notice of action: that the action should have been brought within three months; and that it was the plaintiff's own negligence to place there an insufficient plank.

Leave was reserved to move to enter a nonsuit or a verdict for the defendants on these objections.

Bell, (of Toronto,) obtained a rule *nisi* accordingly He cited *Mackinnon* v. *Penson*, 18 Eng. Rep. 509; 22 Vic, ch. 99, secs. 322, 323; 13 & 14 Vic., ch 15, sec 1

Cameron, Q C., shewed cause, and cited *Mayor &c., of Lime Regis* v. *Henley*, 2 Cl. & Fin 354; *Whitehouse* v. *Birmingham Canal Co*, 27 J. J Ex 25; *Gibbs* v. *Trustees of the Liverpool Docks*, Ib. 321; *Ruck* v. *Williams*, 3 H. & N. 308; Grant on Corp. 501-2.

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

The statute 13 & 14 Vic, ch. 15, sec. 1, which was cited in this case does not apply to incorporated villages, but only to cities and towns, and anything, therefore, that might turn upon provisions in that statute cannot affect the question before us. But the Municipal Act, 22 Vic, ch 99, secs 322, 323, extends the provisions of that statute to incorporated villages If the street from which the plank was laid to the plaintiff's premises by himself was a public street, which we assume, then by the clauses of the Municipal Corporations Act just referred to, it was the duty of the corporation of the village to keep it in repair, and a right of action is given to any individual who may sustain damage from the neglect to do so But then, any action on that ground must be brought within three months of the damage being suffered, as the statute requires, which this action was not; and we do not see proof that the street was out of repair

Then, as to the other ground of action introduced by the amendment—namely, the neglect of the defendants of an alleged duty to provide a bridge or crossing from the street to the plaintiff's land and house—no authority has been shewn for asserting that to be a duty imcumbent on the corporation, and we do not think it is.

The public crossings or bridges over the side ditch at the intersection of streets is all that we see the corporations of cities, towns, and villages do in fact provide: it is all, so far as we have observed, that the inhabitants of towns expect them to provide, and we do not think that the duty could reasonably be extended further. If the plaintiff in this case had walked a few yards further along the street, he would have had the advantage of the public crossing over the ditch into the other street which intersected it, and thence could have got conveniently upon his own land.

The plaintiff, like others, seems to have desired the convenience of crossing from the street directly opposite to his own door, and he seems also to have taken upon himself to provide a crossing, but only by a single plank, which in the night time he should have considered it is not always safe to trust to, for the plank may easily have been shifted in its position so as not to rest firmly, or a false step may easily produce an accident.

We should be making a decision which would take all municipalities, both in town and country, by surprise, if we held that the defendants were chargeable with the accident which the plaintiff in this case unfortunately met with. The verdict must, we think, be set aside, and a verdict entered for the defendants on the leave reserved at the trial.

Rule absolute

MICHAELMAS TERM, 1860.

THE SCHOOL TRUSTEES OF THE CITY OF TORONTO v. THE MUNICIPAL CORPORATION OF THE CITY OF TORONTO

Con Stat U C cap 64, sec 79, sub-sec 11—Estimate of School Trustees—Duty of City Council

Where the Board of School Trustees of a city prepare and lay before the Municipal Council of the city an estimate of sums deemed requisite by the School Trustees it is the duty of the City Council to provide such sums in the manner desired by the Board of School Trustees

If the City Council refuse so to do a mandamus may be issued to compel them to do so at the instance of the School Trustees

Cameron, Q.C, obtained a rule in this term on the Municipal Council of the Corporation of Toronto to shew cause why a peremptory mandamus should not issue, commanding them to assess and levy $30,000 ordered by the Board of School Trustees of the city to meet the expenditure of the Common Schools of the city for 1860, according to the estimate furnished by the Board to the Municipal Corporation, by levying such a rate upon the rateable property in the said city as shall be sufficient to raise the said sum of $30,000

This rule was obtained upon an affidavit made by one of the School Trustees that the annual value of the whole ratable property in the city for the current year (1860), as finally settled by the Court of Revision, is $1 643,888. That the School Trustees adopted the sum of $30,000 as the expenditure required for the Common Schools for 1860. That an estimate was accordingly furnished by the Trustees to the Corporation of the city, and that the City Council passed a by-law to assess and levy 1 cent and 6 mills in the dollar on the above-named value for such Common School expenditure, and no more; but that such rate is not sufficient to raise $30,000—that it will require a rate of two cents in the dollar to do so.

The City Council did pass a by-law which would have imposed a larger rate for school purposes, the particulars of which by-

law was not shown to the court, but afterwards, on the 24th October, 1860, repealed that by-law, which had fixed the rate for the year, and which appropriated the proceeds of it to various purposes, including school purposes, and they passed another by-law as a substitute for the first, and in this latter by-law they provided that of the proceeds of a rate of 15 cents in the dollar, imposed for all purposes mentioned in the by-law, the proportion of 1 cent and six mills shall be applied to "defray part of the expenses of Common School Education"

No affidavits were filed in answer to the rule.

It was sworn that the City Council having been called upon by the School Trustees to impose the necessary rate of two cents in the dollar upon the whole value of ratable property, declined to do so.

A Wilson, Q.C., in showing cause against the issuing of a peremptory mandamus contended that the School Trustees have no right to insist that the city shall impose a rate for school purposes, because they may have the means in their hands of defraying the expense, or part of it, without such rate, or they may choose to raise the sum by a loan

He objected also that, as the School Act enabled the School Trustees to raise the money themselves by rate, they are not in want of the extraordinary remedy by mandamus, and on legal principles have therefore no right to it.

Cameron, Q.C., cited Consolidated Statutes, U.C., cap 64, sec. 79, sub-sec. 21, p 747, *Brockville School Trustees* v. *The Town Council of Brockville*, 4 U. C. Q B 302, *School Trustees of Port Hope* v. *The Town Council of Port Hope*, 4 U. C. C. P. 418; *School Trustees of Galt* v. *The Municipality of Galt*, 13 U. C. Q B 511.

A Wilson, contra, cited *The King* v. *The Severn and Wye Railroad Co*, 2 B & Al 646; *The King* v. *The Bristol Dock Company*, 6 B & C. 181.

ROBINSON, C. J.—In the case cited of the *The Brockville School Trustees* v *The Town Council of Brockville*, 4 U. C, Q B 302, this Court had granted a mandamus nisi to which a return was made, and that return brought up a particular question, whether they had or had not proceeded irregularly in an important step which they had taken in substituting one general School for four local schools, and incurring without reference to the ratepayers a large expense in erecting the new school The Town Council rested their opposition to raising the money by rate on the ground that that measure of the trustees was illegal.

This was an important question, which both parties desired should be determined by the Court, and it was raised in that formal manner on the return to the mandamus. The Court were bound to give judgment on the sufficiency of the return made by the Town Council, and finding it to be insufficient they decided accordingly, and the writ was ordered

The ground taken here, that the School Trustees had power by law to raise the rate themselves, and therefore could not call upon the Court to command the Council, does not seem to have been taken, and it is not likely that it would be, because the objection went to the right to raise the rate either by their own means or the other, on account of the alleged illegality of the expenditure in putting up the new school house.

That case, therefore, cannot be relied on, as an authority for maintaining that the trustees can, as a matter of right, insist in all cases, on the Municipality raising the money by rate.

Then, looking at the other case of the *School Trustees of Port Hope* v. *The Town Council of Port Hope*, 4 U. C C. P. 418, and *School Trustees of Galt* v. *The Municipality of Galt*, 13 U. C Q. B. 511, and looking at the existing School Act, cap. 64, (Consolidated Statutes, Upper Canada,) I think it results from the whole that the Court may, if it shall seem to them to be manifestly proper in any case on the facts before them, order the Municipality of a city to raise a rate, notwithstanding the School Trustees might, under the the Act, impose and collect the necessary rate themselves.

I take this case to come expressly under the 79th sec. of cap 64 Here the School Trustees have laid before the Council their estimate of the sum required for the year for school purposes, whereupon the statute says, p. 747, sub-sec. 11 (f.), "And the Council of the city, town or village, *shall* provide such sums *in the manner* desired by the said Board of School Trustees"

I am not sure what may be meant by the words "*in the manner desired*" It can hardly mean that they are to determine for the Council whether the money shall be paid out of city funds that may be had, or borrowed on debentures, or raised by rate, and if by rate, the manner of levying it. It means rather, I suppose, that the City Council are to take care and provide at such periods and in such sums as it may be called for.

The sub section 12 of this clause is all that I find in the existing School Act which gives power to the Board of School Trustees in a city to levy school rates, and that seems to be a mere discretionary power that may be exercised in aid of the power of the city to collect school moneys, and when the trustees levy money under that provision, it would not be on ratepayers generally, but on the parents or guardians of the children attending any school under their charge. These at least are not co-extensive powers.

It is very reasonable for the City Council to say that the trustees cannot dictate to them, neither should the Court order, by what means they are to provide money, whether by rate or loan, and the case from Port Hope, 13 U. C. Q B. 511, that objection was said by the Court to have much force.

But in all that is before us in this case we see—

1st. That the City Council have received the usual estimate for the year, and have objected to it.

2nd. That they proceeded to provide by by-law for raising the whole sum by rate.

3rd. That they afterwards in effect cancelled what they had done, so far that they have provided a less rate, which will only produce a part of the sum, and will leave the rest unprovided for.

4th. That having every opportunity of showing their reason for doing this, they have given no reason, but leave to their full force the grounds of complaint which the Trustees have laid before us If they substituted a rate of one cent and six mills for a rate of two cents, because that would produce the sum required, or because they have paid, or are ready to pay, or mean to provide the residue by law, or from their current general purpose funds, or for any other good reason, we may take it for granted they would have laid the reason before us by affidavits.

Not having done so, we are bound, I think, to proceed upon the assumption that they have no good reason to offer.

The interests of the Common Schools are too important in a large city to admit of a sudden suspension of their proceedings, from any dispute of this kind between the two authorities, if it can possibly be avoided It would produce the utmost inconvenience.

I think we must make the rule absolute, for the obligation upon the City Council under the stat . is express in its terms, and no good reason has been shown why, since it has been executed in part, it has not been executed to the full extent.

The cases cited from 2 B. & Al. 646, and 6 B. & C. 281, are satisfactory authorities for the purpose for which they are cited, but do not apply under the circumstances of this case to restrain us from doing what we can to prevent what, for all that appears, might come to be a great public evil. If the City Corporation shall hereafter show that they have rendered it unnecessary to levy a rate as required by providing the money without delay, either wholly or in part, from other sources, they may be assured that no fault will be found with such a course.

It is but just towards the city to suppose that if they were prepared to meet the estimate without levying a rate, they would not have left them to this time unpaid, or at least such amounts on account as were from time to time required.

Rule absolute.

CHAMBERS.

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

HAMILTON AND DAVIS v HOLCOMB, MCPHERSON, AND CRANE

Several Defendants—Ca. Sa.—Arrest of one—Satisfaction of Judgment.

Held, that the arrest of one of several defendants under a *ca. sa.*, and his subsequent discharge with the consent of plaintiff operates as a satisfaction of the judgment by all the defendants, and this, although plaintiff at the time of the discharge expressly stipulated that his other remedies on the judgment were not to be impaired by the discharge (January 7, 1861)

This was a summons to set aside a writ of *fi. fa.*, issued 5th

July, 1860, against the goods of the defendants, and all proceedings thereon, and for entering satisfaction on the judgment roll under the following circumstances.

The plaintiffs obtained judgment against the defendants, in January, 1858, upon a bill of exchange, drawn by Messrs Holcomb & Henderson, upon and accepted by the defendants, McPherson & Crane.

McPherson & Crane made an assignment for the benefit of creditors, on the 2nd Jan., 1858. In June, 1858, the defendants sued out a *ca. sa.* upon the judgment, against all the defendants, and thereupon the defendant, McPherson, was arrested and charged in execution; and on the 3rd July, 1858 the plaintiff's solicitor authorised the sheriff to discharge him by a memorandum in writing, as follows: "Mr. Sheriff you will please discharge the defendant, John McPherson, from custody, under the *ca. sa.* in this cause, upon payment of your fees."

The defendant was discharged, and the plaintiffs signed the deed of assignment, made by McPherson & Crane, on or about the 20th July. The plaintiffs, on 5th July, 1860, sued out a *fi fa* against the goods of the defendants, and under it the sheriff seized goods in the possession of the defendant Holcomb.

It was sworn on the part of the plaintiffs, that the understanding when McPherson was discharged, was that the plaintiffs were not to be affected by the discharge, but were to be at liberty to enforce the judgment by any other remedy.

Galt, Q. C. for the summons submitted, 1. That satisfaction of a judgment by one of several defendants is, as against the judgment creditor, satisfaction by all. 2. That the arrest of one defendant in the cause under a *ca. sa.*, and his subsequent discharge from custody by the order of the plaintiff's attorney, operates as a satisfaction of the judgment by the defendant arrested. He referred to *Vigers* v. *Aldrich*, 4 Burr., 2482; *Jaques* v. *Whithy*, 1 T. R., 557; *Clarke* v. *Clement, et al.*, 6 T. R., 525; *Catlen* v. *Arnott*, 3 C. B., N. S., 796.

Harrison, Q. A., contra, contended, 1. That the arrest under a *ca. sa.* was not *per se* a satisfaction of the debt. 2. That this followed by the discharge from custody by the order of the plaintiff's attorney, was not sufficient to work satisfaction. 3. That the consent of plaintiff to the discharge, must be shown to have been express and absolute. 4. That when plaintiff consented to the discharge in this cause, it was upon the express reservation of his other remedies of the judgment. 5. That the arrest and subsequent discharge of a single defendant, would not operate as an absolute satisfaction of the debt, but only to bar the plaintiff's remedy by *ca. sa.* as against the particular defendant. 6. That, if a satisfaction, the liability of defendants as drawers of a bill of exchange, is under our statutes several, as if separate actions had been brought, and so satisfaction by arrest and discharge of one would be no bar to proceedings against the others. He referred to Con. Stat., U. C. cap. 22, s. 274, p. 244; *Ib.* cap. 42, s. 23, *et seq.* p. 446; *Denton* v. *Godfrey, et al.*, 11 Jur., 800, *Harris* v. *East India Co.*, 11 Moore, P. C., 39; *Thompson* v. *Parish*, 5 C. B., N. S., 685.

BURNS, J.—Mr Harrison relies on *Denton* v. *Godfrey*, 11 Jur. 800, *Haines* v. *East India Co.*, 11 Moore, P. C., 39; and *Thompson* v. *Parish*, 5 C. B. N. S., 685, to establish the general principal that a *ca. sa.* executed against the defendant is not a satisfaction of the judgment, and that plaintiff may obtain satisfaction from another defendant, though he has discharged McPherson. He argues also, that the defendant Holcomb is not a joint contractor with McPherson and Crane, and therefore the taking of the person of McPherson is no satisfaction.

For the purpose of determining the question raised in this cause, it does not appear to me we are to go behind the judgment and examine upon what it is founded. Admit it to be that Halcomb was only liable as drawer of the bill, and the other two as acceptors, and that if there had been separate actions, the discharge of the defendants from an arrest in one, would have been no discharge in the other, yet when the bill has passed into judgment in one action against all, there is no longer a several liability in different characters, all are equally liable upon the judgment, and it must be considered as one judgment. The bill is merged in the judgment, and the execution must follow the judgment both as respects the different kinds of execution, and as respects all the defendants, unless there be some legal excuse or reason for it.—Hob. 59, *Raynes* v. *Jones et al.*, 9 M. & W., 104.

Where the plaintiff obtained a verdict in trespass, against two defendants, both of whom were arrested on a joint *capias ad satisfaciendum*, and one was discharged on giving a promissory note to the plaintiff, the Court of Common Pleas held that this operated to discharge the other. See *Ballane* v. *Price & Payne*, 2 Moore, 255.

The true nature of the question in this case is, whether the judgment is to be considered satisfied or not by what the plaintiff has done, for if the judgment has been satisfied as respects McPherson, there can be no question that once being satisfied there is an end of it for any purpose whatever.

I agree with the proposition that the mere taking of the person upon a *capias ad satisfaciendum* is not satisfaction *per se* of the judgment. But here the plaintiffs themselves discharged McPherson, and the question is whether that act did not entitle him to have the judgment treated as satisfied.

It appears to me that the cases of *Vigers* v. *Aldrich*, 4 Burr., 2484; *Jaques* v. *Whithy*, 1 T. R., 557, and *Turner* v. *Hague* 7 T. R., 426, fully support the proposition that the judgment must be considered, as respects McPherson, to be satisfied.

If it is to be considered as satisfied with regard to one defendant, is it not so as to all? The case of *Clarke* v. *Clement*, 6 T. R., 525, and the case already mentioned of *Ballam* v. *Price*, prove clearly to my satisfaction that it is so.

In *Clark* v. *Clement*, the plaintiff first took one of two defendants upon a joint *ca. sa.*, and discharged him. The other defendant then moved to have satisfaction entered, but the court instead of ordering that, made an order protecting the defendant from arrest. The plaintiff then sued out a *ca. sa.* against the defendant alone, who had been arrested, and then that defendant applied to the court to set that writ aside for irregularity, for being against the defendant alone, and to have satisfaction entered upon the roll. The court decided that the plaintiff was wrong upon both points, and made absolute the rule for entering satisfaction.

If the defendant obtains his discharge by operation of law, or in some manner to which the plaintiff is not consenting, then the fact of having been taken in execution is not satisfaction. But if the plaintiff discharge the defendant, then the taking and the discharge complete the satisfaction, and a judgment once satisfied by one defendant must, as respects the plaintiff, be considered so *quoad* all the defendants.

I refer to *Catlin* v. *Kernot* 3 C. B. N. S. 796; *Blackburn* v. *Stupart*, 2 East, 243; *Lambert* v. *Parnell*, 10 Jur. 31; *Wood* v. *Bramhead*, 21 Law J. Ex., 216.

The summons must be made absolute, but without costs.

Summons absolute without costs.

ENGLISH ET AL. v. HENDERSON

In an action on the common counts by a Toronto agent of a country attorney against his principal for alleged agency services, leave was given to defendant on the usual affidavit to plead—1 Never indebted. 2 Payment. 3 Set off. 4 Non-delivery of bill signed by plaintiff one month before action.

(Chambers, Dec., 30, 1860.)

This was an action brought by plaintiffs against defendant, on the common counts for alleged professional services rendered by the plaintiffs attorneys of the court, as Toronto agents for the defendant, another attorney of the court resident and practising in Belleville.

Jackson, upon the usual affidavit, that he had just ground to traverse the several matters proposed to be traversed, and that the several matters sought to be pleaded by way of confession and avoidance were respectively true in substance, and in fact, obtained a summons to plead the following matters.

1. Never indebted. 2. Payment. 3. Set off. 4. Non-delivery of bills signed by plaintiff one month before action.

He cited *Smith* v. *Dimes*, 4 Ex. 32.

English showed cause.

MCLEAN, J., made absolute the summons to plead all the matters proposed to be pleaded.

COURT OF ERROR AND APPEAL.

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

CARRALL (Sheriff), Appellant, vs POTTER, Respondent.

Executions—Attachments—Absconding Debtor's Act—Priority

Held, (affirming the judgment of the C. P.) that a second execution coming into a Sheriff's hands after several attachments, under the Absconding Debtors Act—the debtor's goods having been sold under the first execution—has priority over the attachments (23rd January, 1861.)

Appeal from the Common Pleas. This was an action against a Sheriff for a false return, involving the question of priority between an execution and attachments. The facts of the case *Potter v. Carrall*, are reported in 9 U. C. L. J., 42, and 9 U. C. C. P., 142. see also the case of *Carrall* v. *Potter*, (19 U. C. Q. B., 346).

Freeman, Q. C., and *Baird* for the appeal, *Wood* and *R. A. Harrison* contra.

ROBINSON, C. J., (after stating the facts of the case) It seems to me that the attachments being in the Sheriff's hands before the execution of the respondent are entitled to priority, according to the wording of the statute. From early times it has been held that where a second execution against a person comes into the hands of a Sheriff, where the person is already in his custody, he does not go through the form of a second arrest. In attachments against the person, the words used in the writ are: "Keep and detain the body," and in the form of writ given in the Absconding Debtors' Act the words used are, "attach, seize and safely keep all the real and personal property," &c. It does not appear that this right to seize was merely to compel the appearance of the absconding debtor. The appeal should be sustained.

DRAPER, C. J., C. P.—It does not seem to me that the debtor's goods are seized by the attachment. When taken by the Sheriff one of three things happens.—1. Special bail is put in by the defendant, and then all his property so attached is restored to him; or—2. The plaintiff obtains judgment and issues execution; or—3 If the plaintiff fails, the Sheriff is to restore the property to the defendant. Now, the object of the attachment is to compel the defendant to put in special bail, or retain the goods until the plaintiff's right is determined. The objects of writs of *fieri facias* and of writs of attachment are totally different. The Sheriff has no authority to sell except under executions.—he could not sell under the attachments unless in the cases pointed out in the statute. Either then he sold under the respondent's writ, or under the writs of the attaching creditors, and now retains the money for these executions. The seizure by a writ of execution is a complete and exhaustive act,—not so a seizure by a writ of attachment. On technical grounds the respondent is entitled to priority, and the appeal should be dismissed.

MCLEAN, J., concurred with ROBINSON, C. J., that the appeal should be sustained.

ESTEN, V. C., concurred with DRAPER, C. J. The respondent's writ attached on the goods immediately on its being placed in the Sheriff's hands, and should have priority over the attachments. The appeal should be dismissed.

BURNS, J.—The attachment coming into the Sheriff's hands while the goods were in his custody under a prior execution could not attach, because an execution is a totally different writ, and the goods enure to the class of creditors who have the proper writs in the Sheriff's hands. Appeal should be dismissed.

SPRAGGE, V. C.—The cases in the books do not clearly show what act should be done by the Sheriff to bind the goods. The writ of attachment without some act does not bind the goods in *custodia legis*. In this case, the Sheriff had actually seized the goods under a prior execution, and he held them to answer any legal charge which might come in against them; and a writ of attachment being such legal charge, it must be held that such attachments coming in before the respondent's execution are entitled to priority. The appeal should be sustained.

RICHARDS, J., and HAGARTY, J., affirmed their judgments in the court below, and concurred that the appeal should be dismissed.

Per cur.—Appeal dismissed with costs.

HALL, Appellant, v. CALDWELL, Respondent.

Mortgage—Redemption—Dormant Equities—Statute of Limitations—Infancy

The respondent (plaintiff below) filed his bill to redeem a mortgage made by his father in 1835 payable on the 4th February, 1837. The mortgagor remained in possession until his death in May, 1838, and his heir (then an infant) continued to reside on the property until some time in 1839, (about a year after the death of the mortgagor) when the mortgagee obtained possession. In 1842 the mortgagee sold to one of the appellants. The respondent's bill was filed on the 18th October, 1859.

Held, (affirming the judgment of the Court of Chancery.) 1. That the respondent was entitled to redeem. 2. That the Dormant Equities Act does not apply to cases of mortgage. 3. That disabilities apply to the redemption of mortgages the same as to actions to recover land or rent, and that the statute of limitations was no bar to the relief sought by the respondent.

Appeal from the Court of Chancery. The facts of the case and the judgment of the Court below, are reported 6 U. C. L. J., 141.

A. Crooks for the appellant.

R. A. Harrison and *Thomas Hodgins* for the respondent.

ROBINSON, C. J.—The first part of the preamble to the Dormant Equities Act, 18 Vic. ch. 124, seems to be retained in the Con. Stat. U. C. ch. 12, ss. 57, 60, and is therefore still in force. But it appears to me from the wording of the statute that the Dormant Equities Act does not apply to mortgages where the right to redeem is expressed in the deed, and on this point I concur with the judgment delivered in the court below. Then as to the statute of limitations, as being a bar to the right to redeem. The statute did not begin to run during the lifetime of the mortgagor, he was in possession, and if the mortgagee wished to eject him, he could stay proceedings by paying the money into Court. Assuming that every statement in the bill must be taken against the pleader, and that the phrase "about a year after May, 1838," should mean May, 1839, and the bill not being filed until October, 1859, does the disability of infancy relieve the respondent from the operation of the statute? We think it does, and that he is entitled to claim the benefit of the disabilities clause of that statute. The object of the mortgage clause was to settle the law as to the right of the mortgagor to redeem and not to limit him in any other way, and therefore not to deprive him of the advantage of disabilities which he enjoyed before. There is nothing in this case which brings it within the provisions of the 11th section of the Chancery Act of 1837. The appeal therefore should be dismissed.

ESTEN, V. C.—I had doubts at first as to whether the judgment in the case should not be reversed. But on mature consideration I am satisfied that I was right in the judgment given in the Court below. The Dormant Equities Act cannot apply to this case, for mortgages are not within it. In regard to the 11th section of the Chancery Act of 1837 (Con. Stat. U. C. pp. 57, 875), that section I think cannot apply. In cases arising under it, the plaintiff must state a case to warrant the exercise of the discretion of the Court, and the defendant should not meet it by a demurrer. Then as to the statement in the Bill as to the time when the mortgagee took possession, "about a year after," May, 1838, the case of *Baker* v. *Wetton*, (14 Sim. 426, s. c. 9, Jur. 98,) lays it down that the Court will not on such statement as "shortly after," &c., intended on demurrer that the bill shows any thing from which it can be inferred with certainty at what period the time commenced to run, and as long as that judgment stands we must be governed by it. The clause in the statute of limitations providing for disabilities, must be held to apply to redemption of mortgages, as well as to actions for the recovery of land. Although Sir Edward Sugden in his work on *Real Property Statutes*, remarks, "There is, it should be observed, no saving for disabilities of the mortgagor or his heirs," (p. 114.) Mr. Fisher (in *Law of Mortgages*, p. 95), in referring to this statement, expresses a strong opinion against it, and doubts whether it was ever intended that the Courts of Equity in construing the Act would feel bound to deprive the mortgagor and his heirs of the benefit of disabilities. I think the Legislature did not intend to deprive the mortgagor and his heirs of that benefit, and I must therefore hold this respondent entitled to it, and that he has a right to redeem.

Per. Cur.—Appeal dismissed with costs.

BANK OF TORONTO v ECCLES

Assignment for Creditors—Evidence—Registration—Release

This was an appeal from the C P This case was as to the validity of an assignment for the benefit of creditors and the questions raised on the appeal were (1) as to the admission of evidence of consideration (under the deed) *Held* affirmed here—(2) as to registration *Held* that it did not disturb the conveyance—(3) as to release *Held* that it did not vitiate the assignment, as fraud was not to be presumed against the assignee

Esten and Spragge, V. C., *Dissentientibus.*

Per Curiam—Appeal dismissed with costs.

MUNICIPALITY OF KING v HUGHES.

Appeal from the Q B. The judgment of the Court was delivered by Draper, C J, C P. Appeal dismissed with costs.

COMMERCIAL BANK v. AVERILL.

Appeal dismissed with costs.

GREAT WESTERN RAILWAY CO v. BRAID
" " " v McALEESE.
" " " v. FAWCETT.
" " " v. COOK

Appeals dismissed with costs

McARTHUR v. VANDERBURGH.

In this case Robinson, C J, delivered judgment, affirming the judgment of the Court below. The other members of the Court concurred with so much of the judgment as affirmed the conclusiveness of the line run by the surveyor, Roche. Appeal dismissed with costs.

PORT BRUCE HARBOR CO. v. WEBB.

Appeal dismissed with costs.

JOSEPH v. HEATON.

Stands until next sitting

CHANCERY.

Reported by A GRANT, Esq., *Barrister-at-Law*

HENRY v. BURNESS.

Assessment Act—Sale of Lands for Taxes—Combination to Prevent Competition—Effect on Sale—Relief—Costs

A combination among bidders at an auction sale of lands for taxes under and pursuant to the Assessment Act, is not only contrary to public policy, but contrary to the spirit and intent of the Assessment Act.

A party who purchases a lot of land at a sale where such combination exists, though not a party to the combination, will not be protected in his purchase

The Sheriff is, as it were, a statutory trustee, and it is his duty as such, by every possible means, to discountenance a combination against competition among bidders

A person whose land was sold for taxes at a sale where such a combination was proved to have existed, notwithstanding the lapse of a year allowed by the statute to redeem, was relieved from the sale on the same terms as if he had tendered payment within the year—each party paying his own costs of suit

This bill was filed by the owner of land sold for taxes, under the assessment laws of this Province, in the month of October, 1858.

The sale was impeached on the ground of the improper conduct of the sale by the Sheriff, and of there being a combination among the audience, or a large number of them, to prevent competition at the sale.

The sum due for taxes and for the expenses was ten dollars and forty cents, and to satisfy this 200 acres of land, being Lot 12 in the 2nd Concession of the Township of Moore, was sold, and was purchased by the defendant. Its value was proved to be about $2,000.

The nature of the combination charged, and to some extent established by the evidence, was, that the parties to it should not bid against one another The object of the parties was to get whole lots knocked down to them for the taxes in arrear, and there appeared to have been a sort of rotation agreed upon, or at least understood among them, according to which parties were to get entire lots without opposition

It was not brought home to the defendant that he was a party to such combination, and several bidders at the sale were called by the defendant to prove that they were not parties to any combination, and some expressed the belief that there was no such combination whatever: but the fact of such combination is proved by one of the parties to it, Mr. Yeomans, who says: "I got a whole lot for the taxes. There was an agreement between some purchasers, about a dozen I think, of whom I was one—that we should not bid against one another We were to allow one another to get whole lots If any one bid out of his turn it was said, let him have the lot, it is his turn," speaking of the person bid against. "The arrangement applied to both days." What occurred at the sale is perhaps best described in the witnesses' own words Michael Sullivan says:—"I bid for one lot and got it on the first day.

"There was some competition, and there was a general understanding among those present that they should not bid against one another, but each take a lot in his turn. This understanding continued to the end of the sale. If after a person got a lot he bid for another, it was complained of, and it was openly remarked that he had no right to bid again out of his turn" "At the sale if any persisted in bidding others would bid against him, so as to bring it down to two or three acres; few did persist after being told they were bidding out of their turn; there was an opportunity for others to bid if they liked; some bid on lots in order to perfect their title; I was not present at any arrangement that parties should not bid against one another, but I saw that there was such an understanding; the audience was rather riotous sometimes, and the Sheriff threatened to postpone the sale" Francis Creighton says:—"I tried to get a lot the first day, but could not; on the second day the bidders seemed to get lots apiece, but when I tried they bid against me, and I did not go below fifty acres, but when I bid that they would bid lower; other bidders were bid against in the same way It appeared to me that the townspeople and speculators were combined together."

This was confirmed by the auctioneer himself, who says:—"On the first day a great many lots were cut down to small pieces, which were not taken; I thought that it was to prevent others from getting the lots. On the second day more whole lots were sold than on the first. I thought bidders allowed others to get a lot under the idea that they would be allowed themselves to get one without opposition. There was nothing corrupt or fraudulent about the sale that I know of. Mr. Thornton acted as Sheriff's clerk at the sale; he bought some lots When they were put up he said he would take that lot, and there was no one who would bid against him"

The evidence for the defence did not materially change the character of the proceedings at the sale The witnesses spoke of more competition than the witnesses for the plaintiff; and their evidence tends to exonerate the Sheriff from complicity in any arrangement among purchasers to prevent competition, but even Mr. Talfourd, whose evidence is entitled to implicit confidence, says:—"There was an attempt among bidders certainly to get lots in turn, not opposing one another, but the Sheriff I am satisfied had nothing to do with it. I bid for the sake of investment, rather than for the purpose of purchasing land. There was a good deal of noise part of the time." Other witnesses agreed generally in the evidence of Mr. Talfourd. One of them, McAvoy, says:—"There was a great deal of clamour and noise at the sale"

The Sheriff was also called for the defence. He said he was not aware of any agreement among the audience as to their bidding, but he adds—"I did not, however, like the way in which the audience conducted the sale. The practice of persons saying 'I will take this land,' and others saying, 'let them have it,' was probably repeated a thousand times; such practices occur at all sales for taxes, I believe" He added that a number of young men of the place were scattered through the audience; that the greater part of the land sold the first day was thrown up—that

purchased by persons in the neighborhood principally, that purchased by persons at a distance was returned.

Other witnesses spoke of a combination to prevent what they call speculators from a distance from purchasing, others of purchase by such speculators through the young men of the town

It also appeared from the evidence that whole lots were purchased by persons who professed their object to be to perfect their title; *that lands not likely to be* redeemed were preferred, that the sale was conducted amid much noise and confusion, and that a considerable portion of the audience interfered in the conduct of the sale, not only by a private combination or understanding among themselves, but by openly interfering with bidders to prevent their competition.

Mowat, Q. C., for plaintiff. *J. H. Cameron*, Q. C., and *G. D. Boulton*, for defendant

SPRAGGE, J. C., delivered the judgment of the Court.

To consider briefly the object of that portion of the audience that acted in combination, the means they took to accomplish it, and its effect upon the sale

The object is palpable and was not disguised. It was to secure to themselves entire parcels of land for the taxes in arrear. The means taken to accomplish that object were by an arrangement not to compete with one another, and by silencing competition in others. So far as in them lay, they endeavored to confine the the biddings (with certain exceptions, of which a purchase alleged to perfect a little was one,) to a certain set Those outside of this set were bid against and the quantities of land run down to such a trifle as to be useless to the purchaser, and these generally not taken if the purchase happened to fall to one of themselves. I do not mean that the evidence shews that this exclusion of others was universal. Mr Talfourd and some others were not interfered with, but still this portion of the audience exercised such an influence upon the sale—it is not too much to say, such a control over it—as practically to exclude whom they would from purchasing. The effect of this upon the sale is evident enough, and we may look not only at the audience to see what did occur, but at what must occur necessarily as a consequence of what was done But the evidence shows much more: some bidders deterred from the apparent hopelessness of being allowed to purchase; others induced to refrain from competition in order that, if they did not oppose others, they would be allowed to purchase a lot themselves.

Mr. Mowat contended, and with much force, that such conduct is against the policy of the law, as the law regards auction sales as a just and open method of selling property for the best price; and also against the policy of the assessment laws of the Province, which appear to have been framed with an anxious desire that when land is necessarily sold for taxes, as small a quantity as possible should be sold, and that such part should be sold as would injure the owner as little as possible; and he also insisted upon the extreme inadequacy of price as a ground for setting aside the sale

Upon the latter point I hardly think that the grounds upon which the contracts upon inadequacy of price are founded apply to such a sale as this. The fraud evidenced by the inadequacy of price is that upon which the Court proceeds; but in a sale which the law makes the duty of a public officer to collect revenue for public purposes, if the sale be duly and properly conducted, fraud on his part as an inference from inadequacy of price would seem to be excluded

But I think that there is a great weight in the other objectio On the one hand bidders at auction sales are protected by the rule against the employment of puffers, and on the other hand if a purchaser obtains his purchase by means which prevent a fair competition, he cannot hold it A decision on the latter point is that of *Fuller* v *Abraham*, B. & B. 116, where upon the sale of a barge, a person who afterwards became the purchaser, stated to the audience that he had a claim against the owner of the barge, by whom he had been ill-used. He made a bid and was not opposed, the auctioneer refused to knock it down to him, when he got a friend to make a small advance upon his bid, and he himself made a small advance upon that. The auctioneer still refused to knock the barge down to him, and the Court sustained him in his refusal. The sum bid was about a fourth of the prime cost of the barge.

The books are, indeed, full of authorities to show that a party who obtains an advantage by unfair dealing cannot be allowed to hold it, and that whether the advantage be in the shape of a purchase or not, and if a purchase whether it be by auction or not, still it is obvious that a sale by auction cannot be that test of fair dealing which it is intended and taken to be, unless it is scrupulously kept free *from undue influence from any* quarter. And in regard to sales of land for the payment of taxes, it may be said to be the avowed policy of the statutes that the least land possible should be sold; and as a consequence that any contrivance that may be practised to procure the whole, or a large portion than necessary of the land to be sold, is in contravention of that policy, and it is admitted that not only is the sale at which it is practised affected by it, but future sales, and at other places as well as at the same; for bidders will be deterred from ever going to such sales when they find that their attempts to purchase may be defeated by combinations or other contrivances.

With regard to combinations, they may certainly be innocent, and instances are given where they may be so One is where the thing sold is of such a nature as to be only within the reach of several combined. Another instance is where each of two parties requires a portion of a piece of land offered for sale, and agrees that one shall bid for the benefit of both of them. But the combination which existed in this case was of a totally different character. It was to obtain land not offered for sale voluntarily by the owner, and where he might exercise some control; but through the process of the law,—without competition And why is competition excluded? Clearly under the apprehension that other bidders would pay the taxes for less land; in other words, that others are prepared to bid more for the land than they are; and in order that they may get it at as great an under value as possible,—at a tenth, a hundredth, or, as in this case, at a two hundredth part of its value I can have no hesitation in saying, that such combination must, in the eye of the law, be looked upon as unconscientious In the words of Mr Justice Story,—"They operate virtually as a fraud upon the sale." (Story, E. J., s. 293)

The language of that eminent jurist, Chancellor Kent, in just reprobation of a combination to prevent competition at a sale of lands in execution, is opposite to this case —"Such an agreement is against the policy of the law, dangerous to the rights of property, and fraudulent in its design" 4 Johns C. C. 254. And he quotes with approbation the language of the Court in *Jones* v. *Carroll*, 3 Johns, C. C. 29:—"The law has regulated sales on execution with a zealous care, and provided a course of proceeding likely to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy It operates as a fraud upon the debtor and his remaining creditors by depriving the former of the opportunity of obtaining a full equivalent for the property, which is devoted to the payment of his debts, and opens a door for oppressive speculation." I desire to add the words of another American Judge as expressing clearly and justly the policy of the law in regard to auction sales by officers of the law, 25 Maine Rep. 143:—"It must be admitted that fairness in whatever is connected with auction sales should be encouraged. Vast amounts of property are and must continue to be disposed of at such sales It is a mode of proceeding necessarily resorted to in the execution of decrees and determinations of courts of justice. The object in all cases is to make the most of property that fairly can be made of it. It is the policy of the law, therefore, to secure such sales from every species of undue influence. To allow bidders to buy of each other, which is but a species of bribing, and so to combine to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be admissible"

I need not say in referring to decisions of American Courts, I do not quote them as authority binding upon our Courts; but the opinions of such men as Judge Story and Chancellor Kent are entitled to great respect; and I have quoted their language as, in my judgment, in accordance with the spirit of English law upon the same subject. There was one feature of the sale in question which I do not find to have existed in the cases referred to. Not only was there a combination among a portion of the audience not to bid against one another, whereby competition was bought off, and that, as it would appear, not among themselves only, but on

the part of others; but the combination extended to driving others from the field of competition by so binding against them as to make a profitable purchase hopeless. This, if successfully carried out, would give to certain parties the entire control of the sale; they would purchase as they pleased, and in effect for such prices as they pleased, and others would purchase only at their sufferance. It is manifest that such a sale would be at variance with the spirit and object of a sale by auction, and of our assessment laws so far as they relate to the selling of land for taxes. It is, in truth, a mere going through the form of an auction sale, but in violation of its spirit. The very essence of an auction sale is fair and free competition; when competition is bought off or silenced, it were a misapplication of terms to call a purchase, under such circumstances, a purchase at auction. It is a principle of this Court to have regard to the substance and reality of things not to the shape which they are made to assume. I should shut my eyes to the real character of the sale in question if I held it sustainable, as in substance and good faith, as in name, a sale by auction. Mr. Cameron did not contend (I think rightly) that the defendant was entitled to be protected in his purchase, because it was not proved that he was a party to the combination to prevent biddings. I do not think that the sale could be set aside as against a party to the combination, and sustained as to the defendant.

It is true that in *Cranstown* v *Johnston*, 3 Ves. 170, a case in which Lord Alvanley took so strong a view against the defendant as to say,—"I never saw a case in which relief sought was more clear; and I must forget the name of the Court in which I sit, if I refuse to grant it," still made this remark,—"It is said what if the sale had been to a third person?" I am glad I have not to determine that—a third person might have a great deal more to say than this defendant can." The purchase there was by an execution creditor, who had brought about the sale by means which the Court held to be oppressive, but Lord Alvanley certainly thought that difficulty might exist in the way of relief against an innocent purchaser. But in the subsequent case of *Huguenin* v *Baseley*, 14 Ves. 273. Lord Eldon felt no such difficulty. He said,—"I should regret that any doubt should be entertained whether it is not competent to a Court of Equity to take away from third persons the benefit which they derived from the fraud, imposition, or undue influence of others." He referred to *Bridyman* v. *Green*, 2 Ves. p. 27, heard first before Lord Hardwicke, and then before the Lords Commissioners and cites the language of Lord Chief Justice Wilmot, which concludes thus.—"Let the hand receiving it be ever so chaste, yet if it comes through a polluted channel, the obligation of restitution will follow it." In both of these cases the property was affected in the hands of volunteers, here the defendant though not standing in that position, is affected with notice. Indeed, he scarcely stands in so favourable a position as a purchaser for value with notice, because assuming that he took no part in the combination or in actively influencing the sale, he took the benefit, with his eyes open of the improper practices of others to prejudice the sale. It cannot be urged that it may be that he would have obtained this whole lot, even if the sale had been fairly and properly conducted, and that it would be hard to fix him with the consequences of the misconduct of others. It is possible, certainly, that he might have obtained the whole lot without such misconduct, but he obtained it for a little over $10, while it was worth $2,000, and obtaining it was a natural fruit of the absence of competition—a permissive purchase by the parties to the combination. The bare possibility for it is a point incapable of ascertainment, that the defendant might have made the purchase, even at a fair sale, would be a very weak reason for allowing him to hold it when made at such a sale.

There is considerable conflict of evidence as to the conduct of the Sheriff at the sale. Some of it points to his being an accomplice with those who combined to prevent competition. If this were made out, his conduct, taking his position into account, would be very gross, much worse than any of his audience. —His duty was to discountenance, by every possible means, any combination among the audience. If in any way he lent himself to such combination, it would, undoubtedly, be a very great dereliction of duty, a very gross perversion of his office. But I think this is not made out. He himself, upon being examined, emphatically denied it, and those about him, who had an opportunity of observing his conduct, discredit it. I think that, in repressing the impertinence of some of the audience, he used language which has been misunderstood. But, in acquitting the Sheriff of complicity *with others with improper practices at the* sale, I cannot hold him wholely blameless in his conduct of the sale—at least, according to my judgment of what he ought to have done under the circumstances. He is the officer appointed by the law to conduct the sale—in other words, a statutory trustee, his duty being to sell land to pay the taxes, and to sell as little as it was necessary to sell for that purpose, thus owing a duty, as such trustee, to the owner of the land as well as to the public. In executing his trust, so far as it affected the owner of the land, he found himself thwarted by a considerable portion of the audience, he was able to execute his trust to the public by realizing the taxes from a sale of the land, but unable to execute his trust to the owner of the land by selling as little as was necessary. I think he erred in continuing the sale amid the clamour, confusion, and combination which prevailed, and which rendered justice to the land-owner impossible. I believe, looking at all the evidence, that he made as little sacrifice of the property offered for sale as he could, while permitting the sale to proceed under the circumstances, but when he saw that the essential element of an auction sale, competition, was virtually put down, so that his duty to the land-owner could no longer be discharged, I think he was wrong in continuing the sale.

It may be said that at an adjourned sale he might be met with a repetition of the same conduct on the part of the audience, and that his duty to levy the taxes would thus be left unfulfilled. He might be so met, or he might not, but the chance, or even the probability of it, is not a good reason for continuing the sale as he did. He would have no right to assume that the improper course of conduct would be repeated: I do not mean to say that the course proper for the Sheriff to take may not be attended with difficulty, but the law has a right to look for the exercise of sound judgment and discretion, as well as firmness in the execution of such duties. Mr. Cameron put it that the Sheriff cannot be taken to know that the value of a whole lot necessarily so greatly exceeds the arrears of taxes that a sale of the whole is improper. This implies that the Sheriff is not bound to acquaint himself with what he is selling; that he may properly remain ignorant of the improvements, the quality of the soil, and of every particular beyond the number of the lot and the assumed quantity. I by no means concede that he can properly be ignorant of these particulars, he has peculiar facilities for becoming acquainted with them, and if he had not, still it is his duty to sell for the best price, as I take it so to be. He cannot discharge that duty if so utterly ignorant of what he is selling as not to know whether it is worth ten dollars or two thousand. Besides, the statute, in making it the duty of the Sheriff to sell not only as little as possible, but that part which is *least* injurious to the landowner, seems to contemplate his making himself acquainted with the land he is selling.

In the case before me, combination, for the two purposes I have stated, has been proved, but I do not mean to say that actual combination is necessary to invalidate such a sale. The prevention of competition by any undue means, I apprehend, would be sufficient, because against public policy and a fraud on the sale. The simple issue raised upon these pleadings is, whether the defendant's purchase made under the circumstances that it was, can be sustained. It is not objected that the plaintiff has not come promptly; and as no ground is suggested for refusing relief if the sale was an improper one, I feel no difficulty in holding that the defendant's purchase cannot be sustained.

As to the terms upon which the plaintiff should be relieved, I think, as to the money payment, it should be the same as if he had tendered payment within the year. As to costs, I think each party should bear his own. The defendant cannot hold his purchase, but I think he did not obtain it through any undue practices on his part. The plaintiff, of course, ought not to pay costs. I have had some doubt whether he ought not to have them against the defendant, but, upon the whole, I think it is more just that each party should pay his own.

ASSESSMENT CASES.

IN THE THIRD DIVISION COURT OF THE COUNTY OF ELGIN.

IN THE MATTER OF THE APPEAL OF HEPBURN AND JOHNSTON FROM THE DECISION OF THE COURT OF REVISION OF THE MUNICIPALITY OF THE VILLAGE OF ST. THOMAS.

Lease of Road—how assessable—where assessable

The gravel road in the County of Elgin forming part of the London and Port Stanley Road, was granted by the Crown to the municipal corporation of the County of Elgin, and by that corporation leased for a term of years to the appellants, who were not residents of the village of St Thomas.

Held, 1. That the interest of the appellants in the road being a chattel interest could only be assessed as personal property. 2. That as the appellants did not reside in the village of St Thomas, they could not be assessed by the Municipal Council of that Village in respect to their interest in the road

(June 4th, 1860.)

The gravel road in the County of Elgin, forming part of the London and Port Stanley Road, formerly a Provincial work, was granted by the Crown to the municipal corporation of the County of Elgin under the statute authorising the transfer of public provincial roads vested in Her Majesty under the control of the commissioners of public works, 13 & 14 Vic., cap. 15, continued by secs. 4 & 5, cap. 85 Con Stat. of Can., p. 937.

The municipal council leased this road to the appellants for a term of years

The municipality of the village of St Thomas—through which village about a mile of this road passes—assessed that portion of it as real property, to Messrs. Hepburn and Johnston the lessees, with a view to make them pay taxes for it as such.

They appealed to the Court of Revision against this assessment as illegal, and failing to get redress there, they appealed to the judge of the county court of Elgin.

It was admitted that there was no toll-gate, or other place of business of the appellants connected with the road situated within the municipality of St Thomas, and that both appellants reside in the township of Yarmouth, and not within the village of St. Thomas.

Becher, Q. C., for the appellants, objected to the assessment: 1. That the gravel road is a "*public road and way*," and as such is specially exempted by the 6 sub. sec., Con Stat. U. C., cap. 55., page 651. 2. That the road, though leased, is "*property belonging to a county*" as exempted in the 7 sub-section. That the leasing of the road is in effect but a leasing of the tolls, which the county receives by way of rent, the property in the road remaining in them, and the tenant being *de jure* their collector. 4. That if it be argued that the road is a highway (see Con. Stat. U. C., p. 612) in the face of the above, then it is vested in the crown, and the council, or Messrs. Hepburn and Johnston have a mere easement in it, and it is exempted in the 1st sub-section; and besides as to them it is not real property. But the first reason given is sufficient without going further; the road is *de facto* and *de jure* a public road, (see the use of that term page 613 Con. Stat. U. C., and in other acts) its transfer to the council does not alter this, nor does its letting by the council

The only legal way that taxation can reach this road is by assessment of the income derived from it by its lessees, and the learned judge to whom the appeal is made will, I doubt not, strike out the assessment as regards real property altogether.

In reply to this the Reeve of St. Thomas put in the following paper, prepared by his counsel, Mr. Hamilton.

In regard to the opinion of Mr. Becher as to the illegality of the assessment declared on the portion of the London and Port Stanley Road passing through St Thomas:

1. The municipality of St. Thomas say, that the said portion of the said London and Port Stanley gravelled road is not "a public road and way," within the meaning of the 6th sub-sec. of sec. 9, Con Stat. U. C., cap. 55, page 651, forasmuch as the same is held by Messrs. Hepburn and Johnston by virtue of an indenture equivalent to a deed, and which said indenture binds the county council of Elgin to make the said parties a clear deed so soon as they have power to do so, if required: and further, that the said road is held by the said Hepburn and Johnston for their own benefit, they receiving payment from the public for the use thereof.

2. In consequence of the said indenture from the said county council to the said Hepburn and Johnston, which the Court of Revision consider equal to a deed, the said portion of the said road is the private property of the said Hepburn and Johnston to all intents and purposes, the said indenture not being a lease of the *tolls* as argued by Mr Becher, and the property in the said road being thereby to all intents and purposes vested in the said Hepburn and Johnston, it cannot be exempted from taxation under the sections quoted

3. In answer to the third objection, the Crown has transferred all interest in said road, as a road, to the County Council of Middlesex, the County of Middlesex to the County of Elgin, the County of Elgin to Mr Hepburn, Mr. Johnston deriving his interest from Mr Hepburn; Messrs. Hepburn and Johnston deriving all gain and profit from travel on the said road, and not being mere collectors of tolls, ought not to be exempt from taxation on the said property, as it is clearly of the nature of real property. Further, the road was disposed of by tender. (See memorandum in possession of clerk of County Council of Elgin.) That notices for the said tenders were published in the *St Thomas' Dispatch* and were for tenders for *purchase*, and not for lease of the said London and Port Stanley gravelled road, and bear date 4th Dec., 1856, and 22nd January, 1857.

HUGHES, Co. J.—I am satisfied, as my impression was at the first day of the hearing in this court, that the appellants' interest in the property assessed is taxable, but I had not then made up my mind in what way it was so, nor that it was assessable in the municipality of St. Thomas

After hearing the parties, and reading the arguments that have been, by consent, mutually placed in writing before me, and considering and comparing the facts and arguments with the law regulating assessments, I find that the property of the appellants in the road in question, is only a chattel interest, being a term of years, and as such assessable only as personal property.

The interest of the appellants cannot be regarded as real estate, inasmuch as the title, or fee simple in the road, is vested in the municipal corporation of the county; and the appellants hold only a chattel interest under that corporation, which might be made subject to seizure and sale under an execution against goods and chattels.

Supposing the county council had no interest in it, it is extremly doubtful to my mind whether the 6th sub-section does not exempt it from taxation, because it is a public road and way within the meaning of the 22nd Vic. chap. 64, sec. 313.

The property of the county is also expressly exempted by the 7th sub-section whether occupied for the purpose thereof or unoccupied; here it is occupied by their tenants, or by persons to whom they have granted an easement in it, and as such road it cannot be legally assessed

The question then comes, would I order the roll to be amended by changing the assessment from real to personal property, and order it to be assessed at the income it yields to the appellants, or otherwise? I am satisfied I should not, because I cannot order the roll to be amended in a manner different from what the assessors ought to have originally made it. By the 19th section, I find that the assessors are required to prepare an assessment roll, in which they are to set down "the names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, and of all non-resident freeholders who have either in person or in writing required the assessors to enter their names and the land owned by them on the roll"

Now according to this provision, a man should be assessed for personal property in the municipality where he lives; and by the 20th section, land is to be assessed in the municipality where it lies, so that the appellants, who reside out of St. Thomas in the township municipality of Yarmouth, should be assessed for their chattel interest in this road in the latter municipality only, and the law does not justify the assessing of parties who reside out of the municipality, upon personal property they may possess within it, as it does upon real property, because the words authorising the assessors to act limits them to taxable persons resident in the municipality, who have taxable property therein

It may be urged that the applicants have *different* places of business, inasmuch as their toll gates are the places whence they derive their income from the road, but it would be useless to pursue any argument founded upon the 59th section, because the appellants have no such place of business or toll gate in the municipality of St. Thomas, and because they are not residents of and have no place of business in this municipality, and for the reasons before named I do not consider them properly assessed, or assessable at all in the municipality of St Thomas, and I order that the clerk of the municipality of St Thomas be notified by the clerk of this court of this my decision, and that the roll be amended according to the same.

And as to the costs in this proceeding, I do order that the same be borne and paid by the respondents.

IN THE MATTER OF THE APPEAL OF EDMUND MONTAGU YARWOOD, AGAINST THE DECISION OF THE COURT OF REVISION ON THE ASSESSMENT ROLL OF THE MUNICIPALTY OF ST. THOMAS

Income—How assessable

Where the appellant, who was manager of a bank in the incorporated village of St. Thomas, ceased to be such in February, 1860, was then paid $170 83 the balance of his salary, had not during the year 1860, derived income from any other source and had not after the commencement of May 1860, been a resident of the village,

Held, that he could not be assessed by the village of St Thomas for an amount greater than $170 83 and as that sum is under $200 the proper amount to enter on the Assessment Roll under sec. 83, would be $100 only.

(7th June, 1860.)

This was an appeal under and pursuant to sec 63 of the Assessment Act

The appellant was assessed upon an income of $1,000 as derived *in the capacity of manager of the St. Thomas Branch of the Bank* of Montreal.

He virtually left the employment of that institution in 1859, having obtained three months leave of absence early in November of that year

He had not been since the beginning of May 1860, a resident of the Town of St. Thomas.

He formally retired from the bank, however, only at the end of his leave and the bank paid up his salary at the rate of $1,600 per annum—that is to say, they paid him up to the 8th February, the sum of $170 83, so that all his income for 1860, from that source was a sum over $100 and not equal to $200, and there was no proof or allegation of his deriving an income from any other source.

E. Horton for the appellant.

HUGHES, Co. J.—*The 16th section of the Consolidated* Assessment Act of Upper Canada specifies that the taxes imposed for the year shall be considered to be so imposed for the current year commencing on the 1st January and ending with the 31st December, unless otherwise expressly provided for by By-law.

I consider in the absence of such a by-law, if the taxes imposed for the year are to rate from 1st January to 31st December, that the property upon which rates and taxes are assessed is to be that which the rated party owns or possesses within the same period and no more, and if he were a resident of the town when the assessment was taken or after the first of January he was properly assessable as a resident—because the assessment relates back to the 1st January in each year

The 34th section cannot apply to cases where the person assessed has either no income or where the whole year's income does not exceed $200, but it is intended to apply to those who have an income whose salary exceed $200 per annum and to those cases where the present yearly income has not been fixed or known when the assessor is going round upon his duties: then in all cases where the 34th section applies, the income should be set down as not less than that of the year next preceding the time when the assessment is made.

This appears to me to be the true reading of the 34th section taken with the whole spirit of the Act, and I therefore, think that the 34th section does not apply to the appellant's case.

Here, when the assessors went round upon their business of assessing, the appellant had ceased to be an employee of the bank, and all the salary he was to receive by reason of the employment was fixed because the employment had ceased, so that all that his taxable income by reason of that employment amounts to, is $170 83;

The 33rd section of the Act provides that if the net value of personal property is equal to any of the sums set down in the first column of the scales given therein, but is not equal to the larger sum set opposite to it in the second column, the owner shall be assessed at the smaller sum *only*, thus, a person whose income is more than $100 and not so much as $200 is to be assessed at $100 only,—and as that is the case in the present instance, and as there is no evidence that the appellant has other personal property assessable, I *order the Clerk of this Court to certify to the* Clerk of the Municipality of St. Thomas this my decision and judgment, and do order that the roll be amended by entering opposite the name of the appellant in the 9th column under the heading "*Amount of taxable income*," the sum of one hundred dollars as the amount of the appellant's taxable income, instead of what has already been entered thereon.

I do also order that the costs of this appeal be paid by the respondents to the Clerk of this Court forthwith.

IN THE MATTER OF APPEAL AGAINST THE DECISION OF THE COURT OF REVISION ON THE ASSESSMENT OF CALDWELL ASHWORTH, ON THE ASSESSMENT ROLL OF THE CORPORATION OF THE VILLAGE OF ST. THOMAS

Assessment—Place of business—Place of residence.

Where it was made to appear that the Appellant, though in the village of St Thomas at the time of assessment, was there only temporarily for the purpose of winding up the business of an agency of the Bank of Montreal at that place, but that his real place of residence was London,

Held that he could not be taxed on his income in the village of St Thomas

(5th June, 1860.)

It was admitted at the hearing of this Appeal that appellant was winding up the business of the Bank of Montreal in St Thomas, as their agent; that he resided in London, had never resided in St Thomas, and had charge of the Woodstock agency of the same bank for a like purpose with their St. Thomas agency

E. Horton for the appellant.

HUGHES, Co. J.—The 19th sec of the Assessment Act for Upper Canada requires the Assessor to set down, in the first column of his roll, according to the best information to be had, the names of all taxable persons *resident* in the municipality; and, in the 9th column, the amount of taxable income.

So far, the person who is to be so set down must be a *resident* of the municipality; but the 38th and 39th sections require that every person having a farm, shop, factory, office, or other place of business, where he carries on a trade, profession or calling, shall be assessed for all personal property where he has such place of business, and if he has two or more such places of business in different municipalities or wards, he shall be assessed at each *for that portion of his personal property connected with the business* carried on thereat; or if this cannot be done, he shall be assessed for part at one and part at another of his places of business, or for all at one such place, at his discretion, but he shall in all such cases produce a certificate at each place of business of the amount of personal property assessed against him elsewhere.

These sections appear to contemplate the principals, not subordinates, carrying on business; for the 40th sec. seems to embrace the classes of persons, such as foremen, salesmen, and persons whose callings are agencies of any kind. For if the person has no place of business, he ought to be assessed at his residence. For instance, an insurance company carrying on business in St Thomas, through an agent should be taxed there, unless they come under the exemption of the act; whilst the agent himself, if he resides out of St. Thomas, should be assessed in the municipality where he resides, because the *personal property connected with the business* carried on and the place of business is that of the company, and not of himself, and because the assessor can only assess *resident* parties for personal property.

I think therefore that the appellant belongs to the class of persons indicated in the 40th section, and should be assessed where he resides, and is not assessable in St. Thomas; and I order that

the clerk of this court do notify the clerk of the municipality of St Thomas of this my decision, and that the roll be amended according to the same.

And as to the costs of this proceeding, I do order that the same be borne and paid by the respondent.

UNITED STATES LAW REPORTS.

SUPREME COURT OF PENNSYLVANIA.

KRAMER AND RHAM'S APPEAL.

When the surety for the payment of a debt, or one standing in the relation of a surety, receives a security for indemnity, the principal creditor is in equity entitled to its full benefit. The principle applies to acceptors and endorsers, in favor of creditors, as well as to cases of surety in form

Where a judgment note is given by the principal debtor to an accommodation acceptor for his security, a trust is created which attaches to the debt, and should go in satisfaction of it in default of payment otherwise, unless divested by a *bona fide* assignment for value, and without notice of its character

Appeal from the Common Pleas of Blair Co (LOWRIE, C J, and WOODWARD, J, dissent) Opinion by

THOMPSON, J —In *Curtis* v. *Taylor and Allen*, 9 Paige, 422, the Chancellor of Walworth asserted, and sustained by many authorities, the equitable principle "that where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security And it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence." *Maure* v *Harrison*, 1 Eq Cases Abridg 1092, is to the same effect So also is *Heath* v. *Hand*, 1 Paige, 329, *Paris* v. *Hulett*, 26 Verm Rep 308; *Ohio Life Insurance Company* v. *Ledyard*, Mat Rep. 866; *Branch Bank of Mobile* v. *Robertson*, 19 Ala 798, *Clarke* v *Ely*, 2 Scandf Rep 166; *Ten Eyck* v *Holmes*, 3 Scandt C R 128 So in Cornwell's Appeal, 7 W. & S 305. Justice Kennedy announced the same rule saying, "it is a well established principle in equity that a creditor is entitled to all the securities taken by the surety of his debtor, either for the purpose of securing the payment of the debt to the creditor, or for the purpose of indemnifying himself" To the same purpose are Erb's Appeal, 2 Penna. Rep 296; *Hines* v *Barnitz*, 8 W. 39, *Carman* v. *Noble*, 9 Barr, 366; Hancock's Appeal, 10 Cassey, 155. The authorities place the principle upon the ground that, as the security is a trust created for the better securing of the debt, it also attaches to it, and hence it is, that it may be made available by the creditor, although unknown to him at the time of the purchase of the security for which it may have been given as an indemnity The effect of such a transaction, is the placing of means in the hands of the surety by the principal debtor to meet liability on account of his contract for suretyship It is consequently a trust for that specific purpose, and equity will control the legal title to it in the hands of the surety so that it may be applied to the object intended, viz, the payment of the debt to the holder

Did King, who, it clearly appears was an accommodation acceptor for Baker, stand in the "situation of a surety," as was said by the Chancellor in *Curtis* v *Taylor & Allen*? As between him and Baker he certainly did so As between them he was not the principal debtor, although by the law merchant he would be so to *bona fide* holders of the acceptance But this would not change his relative position to Baker. In his hands, and in the hands of assignees not *bona fide* and for value, the indemnity afforded by the judgment on the 13th Nov, 1857, would be applicable to the payment of the acceptances. This was the trust on which it was given, as King in his receipt for it of the same date says, "to hold as security for the amount of my account against him." There is no dispute but that the acceptances of Kramer & Rham, F Sellers & Co, and Bryan, Gardner & Co, together with other acceptances taken up by Baker, and some items of commissions and expenses constituted King's account, for which the note stood as security. The indemnity was not to apply in any order of priority to parts of the account; it attached to it all and every part of it alike The acceptance went of course, as they were intended to do, into other hands, and the security pledged by the principal debtor for the payment must go to the extinction of the debts created by them so far as they remained unpaid by Baker, on the principles asserted in the outset of this opinion—that when a surety for the payment of a debt receives a security for his indemnity, the principal creditor is in equity entitled to the full benefit of that security, will be subverted, the security still remaining within the reach of equity as will be seen hereafter There are many cases in the books of the application of this doctrine to the cases of surety strictly so But that it cannot be supposed to be limited and controlled by the mere form of the transaction, is apparent from the remarks of the Chancellor in *Curtis* v *Taylor & Allen*, by the qualified expression of "standing in the situation of a surety" The case of *Heath* v *Hand et al.*, 1 Paige, 329, is a case of the direct application of the principle to a transaction like the present. A judgment had been given to secure for advances and acceptances. The holders of the indemnity assigned it to one of their own personal creditors for anterior responsibilities; suppose for them, but on a bill being filed by the defendant in judgment, the party giving it as a security against acceptances made for his benefit,) the collection of the judgment by the Assignee was restrained, and the proceeds directed to be applied to the payment of the bills accepted by the assignees, the Chancellor declaring that, to that extent, the holders of these notes and drafts accepted and endorsed by Hand and Kenyon have an equitable interest in the judgment; *Bank of Auburn* v. *Throp*, 18 Johns. Rep. 405, which being prior to the assignment to Lightbody, must prevail. So also to the same effect in *Eastman* v *Foster*, 8 Metcalf, 19. These authorities, and many others might be added, show clearly the application of the principle to acceptors and endorsers, in favor of creditors, as well in cases of surety in form. The case of *Heath* v *Hand et al*, is also authority for another point in this case, if authority be needed, that the assignment of the judgment for an antecedent debt or liability did not constitute the assignee a purchaser for value. See also *Clark* v. *Ely et al*, 2 Scandf C R 166, and the citation of authorities therein in the affirmation of the principle, by the Assistant Vice-Chancellor of the 1st Circuit of the State of New York.

These principles established, how stands the case in hand? Baker secured King's account to the extent of the judgment note of $10,500, payable four months after date, to be cancelled on the delivery of pig-metal and blooms to the amount of it, within that time, to the latter at Pittsburg. This metal he never did deliver The judgment note therefore remained as security for King's account. On March, 1858, judgment was entered in favor of King on the judgment note. Previously thereto King had accepted all the bills which constituted the claims of Kramer & Rham, F. Sellers & Co., and Bryan, Gardner & Co., together with other notes not necessary to be mentioned These acceptances, with some items of expenses and commissions, constituted King's account, and it cannot be doubted that if he had paid them himself the judgment would have stood good to him as security from which to reimburse himself. He did not pay any of the bills in the hands of the holders named, but on May 4th, 1858, he assigned to Kramer & Rham $7,513 50, as collateral "security" for the payment of their drafts, and to F. Sellers & Co. $2,501 44, also as collateral security for the payment of theirs. These assignments would amount to their respective claims in full, and leave seven or eight hundred dollars, which King says he agreed should go to Bryan, Gardner & Co Kramer & Kham, and F Sellers & Co, have, at considerable expense, enforced the payment of the judgment by Baker, and the claim that by virtue of this and other assignments from King, they are entitled to receive their whole claim out of the indemnity in exclusion of Bryan, Gardner & Co, excepting as to the balance of the judgment after paying them.

The Auditors and the Court below were of a different opinion, and with the exception of certain modifications, hereinafter to be noticed, we think they were right. As already indicated, the judgment note was given by the principal debtor to his accommodation acceptor, a party standing in the situation of a surety for him, and it was for the purpose of saving him harmless; a trust was thereby created in favor of him, and upon the principle already stated, in favor of the holders of the acceptances; 26 Vermont Rep 308; 8 Metcalf, 20 If a trust was thus created, and to secure the debt, it necessarily attached to the debt, and will go in satisfaction of it in default of payment otherwise, unless divested by a *bona fide* assignment for value, and without notice of its character But this element does not exist in this case The assignment

was not, in the legal sense of the term, *bona fide*. It was merely a "collateral" security for the payment of the drafts for which it was given, or securities parted with, and for this reason it remained subject to the equities of others interested, just as if no assignment had been made; *Clark* v. *Lloyd et al.*, sup., and cases thus cited. Under these circumstances, the assignment had no effect on the relative rights of the parties interested whatever. They stand as they did at the creation of the trust, their right neither impaired nor strengthened by the act of the trustee. Equality is equity, and as the payment was the security of the entire account of King, consisting of accommodation acceptances, made or to be made, we think the holders of the acceptances are entitled to it, and equally to a *pro rata* share of the account raised from the original debtor.

The maxim "*prior in tempore, potior in jure*," is strictly a legal maxim. In a case like the present, it cannot be allowed the effect contended for, because the assignment was not a sale for value, but a pledge with notice, or an opportunity to know by enquiring the true character and purpose of the judgment assigned. It is with the equities of the parties, and not with legal rights, we are dealing. The argument of the appellant, that if metal had been delivered as agreed, it would have extinguished the bond, and King would have been obliged to give it up to Baker, and that the money received from the sale of the metal could then have been disposed of by King as he pleased, in payment of the acceptances in any order he might choose, and that equity could not have compelled a *pro rata* distribution under such circumstances, proves nothing against the principles asserted, even if true; for we deal with a different state of facts; with a security that equity can follow as trust property, and will follow and appropriate in accordance with the trust. The force of the proposition lies in the difficulty assumed of following and identifying the money substituted in lieu of the judgment, and not in the fact that equity would not treat it precisely in the same way as the judgment, if it had come into court for distribution. The argument does not disprove the principle, but only shows the difficulty of its application under a different state of facts.

Again it is contended that Bryan, Gardner & Co. cannot compel this distribution against the claimants under King, until they do equity towards King, who, it is alleged, has a claim for that part of his account, which were expenses and commissions. It is enough to say that King himself claims nothing out of the judgment. He assigned it all as already noticed. His claim on the fund is therefore extinguished, and Kramer & Rham, and F. Sellers & Co. cannot now set it up to embarass Bryan, Gardner & Co. as a shield for themselves.

It was urged that Bryan, Gardner & Co. took King's notes as security for the payment of the bills held by them, and that they were embraced in King's mortgage to Florence Kramer, and secured by it. And also, that the same debt was included in a judgment confessed by Baker to Lloyd for the use of certain creditors. It is not easy to see how these facts, growing out of the vigilance of Bryan, Gardner & Co., should destroy their right to another and independent security. It wants a consideration somewhere to establish the relinquishment of a right, but none such exists here, nor did such vigilance insure the other claimants. There is no pretence that either of these securities was taken in satisfaction of Bryan, Gardner & Co.'s claim. Their equity is not prejudiced, therefore, by these considerations. Nor is there any better reason for holding them postponed by their inaction in the litigation that Kramer & Rham and F. Sellers & Co. sustained. Their entire ignorance of the existence of the security, until the last moment, would not have prejudiced them as we have seen, if it turned out that the judgment was a security for their claim, for they ought, in the distribution, to be required to bear their share of the expenses of the litigation, and as the assets were equitable, to be distributed according to equity. I see no reason why the distribution may be made on the principle of equity in this respect, and upon the principle the Auditor very properly acted partially at least, if not to the full extent.

We do not, however, agree with the Auditors in their treatment of the independent securities held by Bryan, Gardner & Co. They do not find them to be worthless, but propose that in the event of their proving of value, that Kramer & Rham and F. Sellers & Co. may be subrogated to the rights of Bryan, Gardner & Co. in them, after the latter are satisfied. This does not comport with the equitable principle governing the case of a party having only one security, and another, the same and an additional one. There, equity, in a proper case, will require the latter to take his satisfaction out of the security which was not common to the latter, unless it trenched injuriously in some way, upon the vested rights of the latter. We think that rule should be applied in this case, that Bryan, Gardner & Co. should be required to exhaust their independent securities in the first place, before taking any part of the fund out of the court, or satisfy the court that they are worthless. This will enable the court to administer equity fully between the parties. Kramer & Rham and F. Sellers & Co. may in the meantime, be allowed to take out of the court their *pro rata* of the proceeds of judgment, and whether they shall be entitled to more, will afterwards depend upon how much, if anything, may be realized by Bryan, Gardner & Co. upon their securities. If nothing can be realized by them, or not enough to satisfy their claim, they will in the first contingency be entitled to take out their *pro rata* share of the judgment, and in the second, so much only as with what may have been received by them from their independent securities, as will satisfy them in full, provided that does not exceed their *pro rata* share in the judgment. We see no other errors in the decree.

And now, to wit: Oct. 3, 1860. It is adjudged and decreed, that there be paid and distributed of the fund in Court, to Kramer & Rham, the sum found by the Auditor, viz., $5,065 20, together with such other sum out of the *pro rata* share of Bryan, Gardner & Co., as the court shall find to be their fair *pro rata* share of expenses and costs to be paid of the litigation to recover the said money, if not already fully accounted for in the Auditor's report, and to F. Sellers & Co. the sum of $1,974 55, the sum found by the Auditor in their favor, together with their fair *pro rata* share of the cost of expenses and collection, to be paid as aforesaid; the costs and expenses to be borne equally, in proportion to the amount of their claims respectively. And that the distribution to Bryan, Gardner & Co. be suspended until they shall have exhausted their other securities, after which distribution be made to them upon the principles of this opinion, if they shall not receive an amount sufficient to pay and satisfy the acceptances of King as shown to be held by them before the Auditor, and in case of full satisfaction by them from said securities, then distribution to be made of the fund in court to Kramer & Rham and F. Sellers & Co., in satisfaction of their claim. Each party to pay the costs of this appeal.

MONTHLY REPERTORY.

CHANCERY.

V. C. S.

CONYBEARE v. THE N. B. AND C. RAILWAY AND LAND COMPANY, LIMITED.

Joint stock company—Purchaser of shares—Representations—Suit to rescind contract—Costs.

The purchaser of shares in a joint stock company who alleges that he has entered into the contract on the faith of statements contained in the reports of the directors or communicated to him by the secretary cannot obtain relief in a court of equity on the ground of misrepresentation unless he can shew that he was induced to make his purchase by a specific misrepresentation of fact.

A bill filed by such a purchaser against the directors of a company formed under the limited liability act was dismissed but without costs, as the court was dissatisfied with the defective balance sheet appended to the reports, and with the ambiguity of the statements therein contained.

V. C. S. SLIM v. CROUCHER. *Feb.* 24.

Mortgage—Advance on faith of an illusory grant—Suit for repayment—Remedy in equity.

A. agreed to advance £700 to B. on the security of a certain property in Middlesex, a lease of which at a pepper corn rent B.

represented was about to be granted to him by C then landlord C also wrote at B's request to A's solicitor to the same effect. Shortly afterwards C knowing as alleged that A was about to advance the money on the said security executed a lease of the property to B and on the faith of the said assurance and letter, and of the lease so granted, A. advanced the money and a mortgage to him by way of underlease was executed by B, A afterwards discovered that C had a few months before executed a lease of the same property to B who had mortgaged it to another person That lease had been registered. A. accordingly filed a bill against B. and C for payment of the money. B was then insolvent, C alleged by his answer that he had forgotten the former lease at the time of his execution of the second and that no part of the £300 came to his hands.

Held, that the case was within the jurisdiction of the court and that A. was entitled to a decree against C. for re-payment of the £300 and interest.

M. R. BENNETT v. WHITEHOUSE. *Feb* 9

Right of inspection—Mines—Inspection of defendant working under plaintiff's land.

Where a plaintiff has a *prima facie* case supported by direct evidence, that a defendant is working a mine under his land from pits in the adjacent land belonging to the defendant and the defendant will not allow him or his agent to inspect the mine the court will on motion grant an order to allow the plaintiff to inspect defendant's mines.

M. R. LLOYD v. COCHER. *Feb.* 20.

Marriage Settlement—Construction—Advancement.

By a marriage settlement the trustees had authority with the consent of the husband and wife or survivor to raise £2,000 for placing the issue of the marriage "to any profession, trade or business, or for their advancement in life"

Held, that "advancement" in the case of a daughter might be taken to mean advancement in life by way of marriage.

V. C. W. EKINS v. MORRIS *Feb* 18

Legatee—Charge of debts—Cross demand.

A testator bequeathed all his personal estate free from debts to A and directed that his debts should be paid out of the real estate At the time of his death the testater owed various sums to his tenants, but the arrears of rent due from these exceeded those sums

Held, that A was only entitled to the balance between the sums due from the testator and the arrears of rent.

V. C. W. KNAPP v. BURNABY *March* 6

Debtor and Creditor—Declaration by creditor—Discharge.

In 1841, £4,500 was advanced by the testator to her son B but no security or acknowledgment was executed by B No interest was directly paid but an allowance covenanted to be paid to B by the testator was set off against the interest which at four per cent came to the same amount. In 1843 the testator made a codicil containing a declaration that the £4,500 was due and owing from B and that his appointment as executor was not to have the effect of cancelling the debt. In 1854, a further codicil was made revoking the appointment of B. as executor, but confirming the will and codicil in all other respects In 1855, the testators wrote to B as follows: "You must know when I give you the money, I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it.

Held, that this letter being written under a mis-apprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties did not discharge the debt thereby created.

L. C. LOSLEY v. HEATH *Feb* 25

Settlement—Marriage contract—Parol agreement—Representation made good—Specific performance.

Upon a treaty for a marriage, H the father of the lady wrote to L the intended husband, what H and his wife were able to promise *their daughter on her marriage* and at their death, and saying that all they possessed would be divided at their decease equally among their children By an indenture of settlement made in contemplation of the marriage reciting that H had on the execution thereof paid £500 as a marriage portion with his daughter, L. settled a policy of assurance for the benefit of his intended wife and the issue of the marriage

Bill to have it declared that L. was entitled upon the death of H as the legal personal representative of L.'s wife (H.'s daughter) to a child, share in the residue of H.'s estate, dismissed.

V. C. S. DILKES v. BROADMEAD *March* 8

Following assets—Residuary legatee—Marriage settlement

A the lessee of certain premises demised the same to B for the residue of the term wanting a few days, B. assigned his lease to C. who after B's death allowed the rent to fall into arrear, and the ground—landlord recovered the same from A. B had bequeathed his residuary personal estate to his daughter, who settled it on her marriage. A filed his bill praying to be refunded out of B's residuary personal estate.

Held, that A could not follow B.'s assets as they had been transferred to trustees, and were protected by consideration of marriage.

V. C. W. GRANT v. MUSSETT *March* 12

Will—Construction—Stock and money in the funds.

Testator bequeathed all his "stock and money in the funds" and all the residue of his estate and effects whatsoever both real and personal, upon trusts after payment of debts, &c, to convert into cash all his residuary estate and effects except the freehold, copyhold, leasehold and stocks.

Held, that certain long annuities of the testator were as "stock and money in the funds" within the exception from the general direction, to convert the residuary estate.

V. C. W. *March* 10.

RE THE MAGDELENA STATE NAVIGATION COMPANY.

Joint Stock Company—Increase of capital—Irregularity

A joint stock company was empowered under the deed of settlement at an extraordinary general meeting, and by resolution of at least two thirds of the subscribed shares to increase the capital and raise money on debentures Money was raised on debentures by a resolution passed at an extraordinary general meeting of the company, but at which two thirds of the shares were not represented The money so raised was applied in payment of debts and liabilities of the company, and interest was paid for more than two years up to the dissolution of the company.

Held, that although the issue of the debentures was irregular and invalid, the shareholders who had obtained the benefit of the money raised, and with full notice had recognized the transaction, were precluded from disputing their liability to the holders of the debentures for the monies thereby secured.

V. C. K. *March* 23.

IN RE THE DUKE OF CLEVELAND'S HARTE ESTATE.

Infant—Guardian ad litem—Railway Company—Trustee—Costs

Where an infant appears upon a petition for the investment of trust funds in which he is interested the special appointment of a guardian *ad litem* is necessary.

Where a petition is presented for the investment of the proceeds of railway purchase money, the produce of trust estates, the trustees being made respondents in such petition are entitled to their costs as against the company.

L. J. WRIGHT v. CHARD. *March* 26.

Mesne rents—Relief at law and in equi'y—Jurisdiction—Trustee—Committee of lunatic—Account.

Where a person who holds under two titles which are inconsistent with each other, takes upon himself to decide under which he will act and decides wrongly, the rights which others would have had if the proper course had been taken are not altered or defeated. A trustee for a married woman who was also committee of the estate of a lunatic by the decision of the Court declared to be tenant in tail of certain estates, had received the rents of the same estates and paid them over to the married woman who was deceived by him to be entitled to them.

Held, that the representatives of the tenant in tail were entitled to recover from the trustee as committee the mesne rents so received and handed over.

Where equitable conduct entitles a person to equitable relief, that relief is not gone because the remedy at law is gone.

V. C. W. WARD v. SHAKESHAFT. *March* 20.

Foreclosure—Disclaimer—Costs.

Where a judgment creditor is made a defendant to a suit and is aware of the fact and disclaims by answer, he is not entitled to his costs. Where a creditor defendant puts in an answer and subsequently by affidavit disclaims he is not entitled to his costs. Where an assignee or the mortgagor is made defendant to a suit and undertakes to appear, but before appearance disclaims but is still continued on the record and puts in his answer, he is entitled to his costs. Where after bill filed but before services of a copy of the bill a defendant undertakes to appear, and disclaims he is entitled to his costs.

COMMON LAW.

C. P. DUNCLIFF ET AL v. MALLOT.
DUNCLIFF ET AL. v. BIRKEN ET AL.

Patent—Distinct part of—Assignment of—Infringement.

If a separate and distinct part of a patent be assigned the assignee may sue in respect of an infringment of such separate and distinct part without joining as plaintiffs persons interested only in the other part of the patent.

Q. B. WRIGHT v. STAVERT. *April* 24.

Statute of frauds—Interest in land—Contract for board and lodging.

The appellant agreed orally to pay to the respondent for the board and lodging of himself and man in the repondent's house, and accommodation for his horse in the respondent's stable, £200 a year from a day specified, a quarter's notice to be given on either side; no particular rooms were assigned to the appellant, and he never commenced to reside in the respondent's house, but gave notice of his intention not to perform the contract.

Held, that this was not an agreement relating to an interest in land within the fourth section of the statute of frauds, and need not therefore be in writing.

Ex. DICKSON v. RIGHT. *Jan.* 19.

Consideration—Marriage settlement—Illegitimate child.

The gift of an estate to an illegitimate child under a marriage settlement, is good against a purchaser under 27 Eliz., ch. 4.

Ex. WISE v. BIRKENSHAW. *April* 28.

Garnishee—Common Law Proceedure Act.

The issuing of a writ under the 64th section of the Common Law Procedure Act against a garnishee who refuses to pay money which has been attached, is matter of discretion for the Judge which he need not exercise without grounds to suspect the conduct of the garnishee.

Ex. PRICE v. TAYLOR ET AL. *April* 23.

Promissory note—Friendly Society—Note binding on trustees who sign.

A promissory note was made on behalf of a benefit building society by the Trustees and Secretary in the following form:

"Midland Counties Building Society No. 3,
"Birmingham, March 12, 1858.

"Two months after demand in witing, we promise to pay Mr. Thomas Price the sum of one hundred pounds, with interest after the rate of six per cent. per annum, for value received.

(Signed) "W. R. HEATH, } *Trustees.*
"JOHN TAYLOR, }
"W. D. FISHER, *Secretary.*"

Held, that the persons signing the note were personally responsible.

C. C. R. REG. v. JOHN DANBERRY HIND. *April* 28.

Evidence—Dying declaration.

A dying declaration is only admissable in evidence where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration.

Upon an indictment for using instruments with intent to procure abortion, the dying declaration of the woman was held inadmissable.

C. C. R. REG. v. CHARLES HALLIDAY. *April* 28.

Evidence—Husband and Wife—Admissibility of a husband's evidence when the crimnality of the wife is involved.

The prisoner was indicted in one count for obtaining money from trustees of a savings bank by pretending that a document produced to the bank by E., the wife of T., had been filled up by his authority; and in another count for a conspiracy between the prisoner and E. to cheat the bank; but E. was not indicted. The evidence of T. having been received in support of the prosecution, the prisoner was acquitted on the count for conspiracy, and convicted on the other.

Held, that the evidence of T. was properly received and the conviction good.

Q. B. GUNNER v. FOWLER. *May* 8.

Arbitration—Special case—Proceedings in error.

A cause was referred by consent to arbitration with a special provision that neither party should take proceedings in error on any matter relating to the arbitration. At the request of the parties, the arbitrator made his award in the form of a special case for the opinion of the Court, and in accordance with this opinion the judgment was to be entered up. The Court gave their opinion in favor of the defendant, whereupon the plaintiff took proceedings in error.

Held, that sec. 32 of the Common Law Procedure Act, 1854, which gave power to bring error on a special case, did not apply to such a case as this, which must be taken to be such a special case as is contemplated by sec. 5 of the same act.

Held, also, the parties were bound by their agreement not to take proceedings in error.

C. P. HOLDER v. SOULBY. *April* 30.

Lodging-house keeper—Liability of in respect of goods stolen from lodgers.

The plaintiff hired apartments in the defendant's house, and while there had some of his goods stolen; and the declaration alleged that the defendant did not take due and proper care of his house, by means of which dishonest persons obtained access to it and took the plaintiff's goods; to which the defendant demurred on the ground that the declaration did not allege the defendant to be a common innkeeper, and therefore did not disclose any duty or liability on the part of the defendant.

Held, that the declaration was bad, and that the defendant as a lodging-house keeper was not liable.

C P *Jan* 26

CROSSLEY AND THE E & A STEAM SHIPPING COMPANY

Arbitration—Appointment of umpire by lot

A submission was made to two arbitrators who were (in the event of their not being able to agree) to appoint a third person as umpire: they could not agree and accordingly met for the purpose of appointing the umpire. Each proposed a person for the duty but only one of the two proposed was known to both the arbitrators, the other being only known to his proposer who said that he possessed the qualifications necessary for the duty. Upon this the two names were put into a hat with the understanding that the one drawn out should be appointed and the name of the one not known to both the arbitrators was drawn and he proceeded with his duties.

Held, that the appointment was bad, having been made by lot and the party so appointed not being known to both the arbitrators.

EX FOLGER V TAYLOR ET AL *Jan* 31

County Courts—Execution—Interpleader summons—Rent—Bill of sale.

Where the goods of a third party are taken in execution under County Court process on the premises of the judgment debtor and the owner claims his goods the landlord is not entitled to be satisfied arrears of rent out of the proceeds of such goods or to insist that his rent shall be paid before their removal.

EX. WHALEY V. LAYING. *April* 18.

Costs—Taxation—Arrest of judgment

If judgment is arrested, the plaintiff is entitled to the costs of issues found in his favour under the 145th sec of the Common Law Procedure Act 1852; and the general rule is not affected by an agreement that certain items of the costs are to abide the event.

REVIEWS.

THE CHRISTIAN EXAMINER for January, published in Boston, is before us. We first meet a review of Alger's History of the Doctrine of a Future Life, in which, while congratulating the author upon the success of his labors, the reviewer enters at length into considerations the most important to mankind, and in a manner becoming the subject of which he writes. The place of 'Modern Painters in Art Literature offers a criticism' upon the writings of John Ruskin, with some observations upon vexed questions in art. The Origin of the Gospels will be read with interest by the biblical student. A paper upon Garibaldi gives a summary of his life and the recent events in the history of his country. The number closes with the usual review of current literature.

MACMILLAN'S MAGAZINE for December contains an interesting article upon the opinion of Mr Darwin regarding the Origin of Species. Very many able papers have lately appeared upon this contested question, but this article is no less interesting because of the varied treatment which its matter has received. Next follows a continuation of Tom Brown at Oxford. A well written article upon the English Evangelical Clergy; and papers upon 'Poetry, Prose, and Mr. Patmore;' English Women at Naples, &c., conclude the number.

THE ECLECTIC MAGAZINE for February is embellished with a portrait of the great Engineer Robert Stephenson, and a plate expressive of a stirring event in French history known as "The morning of the 18th Brumaire." The reading matter is as usual made up of the best articles of the British periodicals; and it is sufficient to say, that the selections from such excellent sources form a volume interesting in narrative and in subjects of a Geographical and Scientific character.

THE MONTHLY LAW REPORTER, for January, has come to hand. It contains, with the Narrative of a Celebrated Trial, Reports of the United States District Court of Massachusetts, and of the Supreme Court of that and other States. Its fine appearance and intrinsic value insures its success.

The number of the UNITED STATES INSURANCE GAZETTE for January, published at New York, affords a large and well digested mass of information regarding insurance matters of all kinds, and is thus worthy of an extended support.

THE ANNUAL REPORT OF THE NORMAL MODEL GRAMMAR AND COMMON SCHOOLS, for the year 1859, is received. The various reports do not form so large a volume as in the preceding year, because of the omission of those of the Local Superintendents of Schools. The statistical tables are in a convenient form, and afford every information relating to the subject.

THE LOWER CANADA REPORTS. Edited by M. Le Lievre; published by Augustin Coté, Quebec.

Number twelve of volume ten of these valuable Reports is received. Besides the ordinary number of reported cases, this number contains the annual index of cases and digest of matters reported. One of the cases reported (*Hynes* v. *McFarlane*) we shall probably give in our next number. It decides that a party setting fire upon his land at an improper time is by that mere fact responsible for the loss thereby of a threshing machine which had been brought on his land for the purpose of threshing his grain. The action was differently decided in the Superior Court in the District of Ottawa, but on appeal was reversed, Duval Justice dissenting.

GODEY'S LADY'S BOOK. Louis A. Godey, Philadelphia.

The number for February is received. The Lady's Book is useful and entertaining as usual. It has taken the lead of all other magazines of a similar description, and is determined to keep it. So far as we can discern any change in successive numbers of Godey, it is for the better. The proprietor is bent on proving himself worthy of the great and wide-spread patronage which his magazine receives. He exchanges with no less than 2,460 cotemporary publications. What therefore must be the circulation among subscribers of his well known and much admired magazine? We have heard it said that the circulation is 300,000, and have no reason to doubt the statement. It is by reason of this enormous circulation that the magazine is furnished to each subscriber at the low price of $3 per annum, though intrinsically worth more than double that amount.

MACMILLAN'S MAGAZINE for January has reached us. We first find three entertaining chapters, forming the commencement of a story, entitled, "*Ravenshoe*," by Henry Kingsley. A letter upon Sheridan and his biographers, by the Hon Mrs. Norton, will be read with pleasure. The author of "John Halifax, Gentleman," offers "A few words about Sorrow," and a poem upon "Fergus Seat." Tom Brown at Oxford has a few more interesting chapters; and papers upon Venetia and Pekin are particularly welcome at the present moment.

APPOINTMENTS TO OFFICE, &c.

PROVINCIAL ARBITRATORS AS TO PUBLIC WORKS

THOMAS KIRKPATRICK, of Kingston Esquire LOUIS A. MORFAU, of Montreal, Esquire, and the Honorable PHILIP VANKOUGHNET of Cornwall, to be Arbitrators and Appraisers for the Province of Canada under the provisions of 8 & 41 of Consol Stat of Canada, cap 28.—(Gazetted 7th January, 1860.)

TO CORRESPONDENTS.

"A SUBSCRIBER, AYL"—Too late for current number

"WILLIAM CLOSEY" will receive attention in our next