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DIARY FOR FEBRUARY.

1. Tuesday.... Chancery Examination Term, Toronto & Cobourg, commences
   Last day for notice of Examination Chatham & Kingston.
2. Wednesday Chancery Examination Term, Goderich commences.
5. Saturday - Chancery Exam ation Term, Cobourg and Goderich, ends.
6. SUNDAY... *5th Sunday aft · Epiphany.*
7. Monday ... HILARY TERM begins.
8. Tuesday ... Chancery Ex Term, London & Belleville com. Last day for
   notice of Examination, Niagara and Brockville.
11. Friday ..... Paper Day, Q. B.
12. Saturday... Last day for service of Writ County Court. Paper Day, C. P.
13. SUNDAY... *6th Sunday after Epiphany.*
14. Monday ... Paper Day, Q. B.
15. Tuesday ... Chancery Examination Term, Chatham & Kingston, commences.
16. Wednesday Paper Day, Q. B.
17. Thursday.. Paper Day, C. P.
19 Saturday... HILARY Term ends. Chancery Ex. Term, Chatham & Kingston ends
20. SUNDAY... *Septuagesima.*
22. Tuesday ... Chancery Ex. Term, Niagara & Brockville, com. Last day for no-
   tice of Ex. Barrie & Cornwall. Last d. for decl. for Co. Court
26. Saturday... Chancery Examination Term, Niagara and Brockville, ends.
27. SUNDAY... *Sexagesima.*

"TO CORRESPONDENTS."—*See Last Page.*

IMPORTANT BUSINESS NOTICE.

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

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

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

The Upper Canada Law Journal.

FEBRUARY, 1859.

THE LAW JOURNAL AND THE PROFESSION.

It is with unfeigned pleasure we announce the fact that day by day the *Law Journal* is more and more acquiring the confidence and support of the legal profession.

When first the *Journal* was commenced in Barrie, it was looked upon by the profession as an organ for the local Courts, and nothing more. The place of publication rather favored the idea than otherwise, and this, added to the prominence then given to Division Court matter, no doubt was the origin of the prejudice.

When in 1857 the place of publication was changed from Barrie to Toronto, and an increase made in the Editorial staff, we explained to the profession that we were as much their organ, as that of any other body of men engaged in the administration of justice in Upper Canada; we offered them, as a guarantee in confirmation of our statement, the name of a gentleman who had even then made himself known far and wide as an able and industrious law writer. We, in addition, considerably enlarged the size of the paper, and carried into effect a new arrangement of its contents, so as to display to the best advantage the varied subjects from time to time appearing in its columns.

All this we did without curtailing the privileges of any one class of subscribers. We explained that from Clerks and Bailiffs of Division Courts we received a large support; that without their support we could not successfully conduct the *Journal*; and that to hold that support, there must be as before, a fair proportion of matter of interest to them. So from Municipal Councils we derived support of a gradually increasing description, which it was our interest to encourage, and which, with some effect, we are glad to acknowledge we have encouraged. So from Magistrates and Coroners we expected a certain support, in which we have not altogether been unsuccessful. To furnish information of a practical kind for all these different classes of readers, has ever been, and in all probability shall ever be a leading object in the management of the paper.

But while doing so, we never have lost sight of the fact (and do not intend to do so) that a general support from the legal profession is much to be desired, and that to acquire their support, the *Law Journal* must be made worthy of their patronage. The more we considered the prejudice against the *Journal* borne by many of that class of its readers, the more we strove to undeceive them, and at length our labors have in this, as in other directions, produced good fruit.

Since Mr. Harrison became connected with the *Law Journal* as an Editor, it has, we know, risen much in the esteem of the profession; and the letters which we have from time to time received in t· imony of this belief, have been very gratifying to us.

PROFESSIONAL DISTINCTIONS.

In our January number appeared the names of four new Queen's Counsel. We do not notice the fact to animadvert upon it in terms of dispraise (for we believe each of the gentlemen appointed deserves the distinction), but to make it the occasion of some remarks on the dignity conferred. It is in our opinion only proper that in the profession of the law there should be distinctions for men of mark. The effect of such is to encourage a laudable spirit of emulation, and proportionably to elevate the standard of the profession.

From the earliest times, distinctions of some kind have in England prevailed among counsel in the several courts. The distinctions, to be at all prized, must be given only to worthy objects, and confined within reasonable bounds; and when they carry with them privileges of pre-audience, or such like, they should not be so frequently conferred as to prejudice the rights of suitors.

In England, the greatest distinction which could be conferred upon a barrister, was that of the coif, or of being made a serjeant. Barristers were styled *apprenticii ad legem*, or *mere learners;* whereas serjeants, or barristers of sixteen years' standing, were called *servientes ad legem.*

Coke, in his usual quaint style, says that counsel were called because of their good service to the commonwealth, and of their sound advice in law; and as in ancient times they that preserved and kept the peace were called *servientes pacis* or *ad pacem*, so these men are called *servientes legis* or *ad legem*, &c.

Serjeants were created by writ from the monarch, the fountain of honor, and were called to the degree with great solemnity. There were, as Coke says, "the hood, robes, coif, and other significant ornaments; the great and sumptuous feast they made; the rings of gold they gave, their attendants and other great and honorable ceremonies." So high was the honor, and so great the dignity, that the Judges of the courts of Westminster were always admitted into the order before being advanced to the bench. In the Reports we often read that Mr. A. B. succeeded the late Mr. Justice C. D., and was called to the degree of the coif, and gave rings with the motto, "*Tutela legum*," or some such motto, and shortly afterwards received the honor of knighthood, &c.

Serjeants had their court, in which they enjoyed a monopoly of business, and that court was the Common Pleas. So had King's Counsel great privileges in the King's Bench; so had fiscal advocates in the Exchequer. But of these reliques of the past, little more now remains than the names. The utilitarian system of modern days has levelled many of the honors and dignities of the legal profession, as well as mere titles of distinction in other professions.

As early as 1829, an agitation was commenced to throw open the Court of Common Pleas to the bar generally. It was continued with little intermission for five years. At length the monarch yielded, and issued a warrant for the purpose of accomplishing the object of the agitation. The warrant, which was under the hand of the King (Wm. IV.), recited that it had been represented to him that it would tend to the general despatch of business then pending in the courts of common law at Westminster, if the right of counsel to practise, plead and be heard was extended equally to all the Courts, but that such object could not be attained so long as the serjeants-at-law had the exclusive privilege of practising, pleading, and audience, during term time. It then proceeded to direct that the right so to do should, from a day named, cease to be exercised exclusively by the serjeants-at-law, and that upon and from that day counsel learned in the law and all other barristers-at-law might, according to their respective rank and seniority, have and exercise equal right and privilege of practising, pleading and audience in the Court of Common Pleas with serjeants-at-law. The warrant is published at length in 10 Bing. 571, and may be there more fully consulted by the curious.

Of course the serjeants were not thus to be vanquished. They determined that if they were to die, they should die fighting in defence of their ancient privilege. The first thing they did was to petition the Queen in Privy Council against the act of Lord Brougham, for he was without doubt the adviser of the whole proceeding. They alleged that the warrant was illegal, for several reasons, among others that it bore only the sign manual of the Sovereign, sealed with no seal or signet, and countersigned by no public officer. They also contended that the warrant was illegal inasmuch as it purported to alter the constitution and practice of one of the superior courts of justice by the authority of the Crown alone, and that the prescriptive privileges of the serjeants-at-law could not be abrogated by any authority except that of an act of Parliament.

Counsel were heard in support of the petition, and upon the argument it was suggested by Chief Justice Tindal, then a member of the Privy Council, that as the Judges of the different courts had a discretion to hear whom they pleased, the Judges of the Common Pleas might throw open that court to the bar in general, without an order from the Crown.

No decision having been pronounced by the Privy Council, the serjeants, in 1840, moved the Court of Common Pleas to be restored to their exclusive right to practise. The court held that from time immemorial serjeants enjoyed the exclusive privilege of practising, pleading and audience in the court; that immemorial enjoyment is the most solid of all titles; that a warrant of the Crown could no more deprive the serjeant who holds an immemorial office of the benefits and privileges which belong to it, than it could alter the administration of the law within the court itself; and therefore, in conclusion, held that the right of the serjeants to the sole and exclusive privilege claimed by them was still in existence, notwithstanding the King's warrant; and added, that in the due course of administering justice, they (the court) felt themselves bound to allow the right still to be exercised. The judgment is reported at length in 6 Bing. N. C. 235, and will to the curious repay a perusal.

The decision was received with anything but satisfaction by the profession not of the degree of the coif. During the delivery of the judgment a furious tempest prevailed. It shook the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas. This is faithfully recorded by Bingham, in a note to the case, and was looked upon by many of the profession as a warning which might well appal the stoutest members of the court. For five years more the agitation was continued, and at length ended in an act of Parliament, which granted

all the privileges that the profession so strenuously demanded, and the serjeants so stoutly denied.

On the 18th August, 1846, an act was passed, intituled, "An Act to extend to all Barristers practising in the Superior Courts at Westminster, the privileges of Serjeants-at-Law in the Court of Common Pleas." It recites that it would tend to the more equal distribution and to the consequent despatch of business in the superior courts of common law at Westminster, and would at the same time be greatly for the benefit of the public to have the right of barristers at law to practise, plead, and to be heard, extended equally to all the courts; and enacted, as in the warrant, that after the passing of the act, all barristers at law, according to their respective rank and seniority, might have and exercise equal rights and privileges of practising, pleading and audience in the Court of Common Pleas at Westminster, with serjeants-at-law. (9 & 10 Vic. cap. 54.)

The title of serjeant-at-law as a title of distinction, though shorn of some of its privileges, still exists. It has never been introduced into this province. The well understood rule of sixteen years' standing at the bar as a qualification may at first have operated against its being conferred in a new country like Canada, wherein at one time barristers were made barristers by license of the Governor, and without any previous study. Whether this was the reason or not, of course, is only matter of surmise. Whatever the reason was, it is certain that it did not operate against the creation of King's Counsel. The creation of a Court of King's Bench was in time followed by the creation of King's Counsel, an honor which has been conferred both before and since the union of the provinces.

At one time, in England, the power to create Queen's Counsel was greatly abused. It was said, in 1842, with allusion to the great increase of the peerage, that it was no longer gentlemanly to be a Peer, and that upon the same principle it was no longer a distinction to be a Queen's Counsel, for they were made in batches, less for what they had done than for what they were expected to do. Lord Abinger, as able an advocate as ever addressed a jury, did not receive a silk gown until he was of twenty-five years standing. In his time, the appointment was given as an honor and accepted as such. But with multiplication came deterioration; and finally *Punch* interfered, and represented the Lord Chancellor caricatured as baking Queen's Counsel, as Napoleon had been previously caricatured, by Gilray, baking kings and queens—of ginger bread.

In Upper Canada, in 1841, when Mr. Draper was Attorney General, two Queen's Counsel were created. In the year following, he still being Attorney General, five more were created. In 1845, one was created; and, in 1846, no less than five additional. All these, thirteen in number, we believe owe their parentage to Mr. Draper. Next, the late Mr. Baldwin tried his hand. In 1848, he created one. In 1849, one; and, in 1850, no less than nine; making for him no less than eleven. In 1851, he retired from power and was succeeded by Mr. Richards, who appears to have been content without the achievement of success in this line. Next we had Mr. Ross, who commenced his career by the appointment of three, which having done he ceased. And last we have Mr. Macdonald, who, in 1855, created one; in 1856, twelve; and, in 1858, four more; making in all seventeen.

We must do Mr. Macdonald justice, and say that his appointments have ever been for merit regardless of politics. In his first batch, he with the greatest magnanimity appointed two gentlemen who at the time were his violent opponents in the Legislative Assembly, but who were by standing and ability in the profession deservedly entitled to the honor.

We trust that the day will never come when a member of the profession, to attain this or any other distinction, must either be a political partizan or a cringing parasite. If the day should come, then that which is now an honor will be a disgrace, worthy of the acceptance only of bad men.

The Queen's Counsel has his privilege and his disability. The privilege is that of pre-audience in the courts; and the disability is that of being unable to accept a retainer in any cause, civil or criminal, against the Crown, without special license—a license which is never refused. It is said by some, that as the Judges take judicial notice of the standing of a barrister who is a Queen's Counsel, they should at the same time take judicial notice of the fact whenever a Queen's Counsel appears against the Crown, and ask for his license so to do. Be this as it may, Queen's Counsel have in our courts appeared against the Crown, without having a license and without being asked for one. The Judges of course know best what is proper and necessary to be done on such occasions.

CONVEYANCING FEES.

There are men, both in and out of the legal profession, who argue that a lawyer should be free to charge as much or as little as he pleases for his services.

Persons of this opinion assert that the law of competition would work as well in the case of the legal as the medical or any other profession or trade, and that the man who would do his work best and charge least would be sure to succeed.

We confess we have not been able to bring ourselves to this opinion. Lawyers now can charge as little as they

please, but are restrained when they attempt to charge more than at which the law has fixed as a fair compensation for their professional skill and services. Of this the public at least have no right to complain. A complaint, if from any quarter, ought to come from the profession; and we believe we know the profession sufficiently to state that a complaint from them is not likely to come.

If lawyers are in any respect to be compared, in the great machinery of life, to tradesmen, they will on the score of liberality stand the comparison. We have known barristers time and again to give advice gratuitously, and seldom have known a tailor to give a coat for nothing, or even a grocer, a pound of sugar. Cavilers will answer that the analogy is not complete, for that the advice of the lawyer costs him nothing, whereas the tailor buys his cloth and the grocer his hogshead of sugar.

But is it so? Does it cost a man nothing to make himself competent to give sound legal advice? Does it cost nothing to devote oneself for years, without fee or reward, to the study of the law, in the acquisition of a knowledge of the laws? Does it cost nothing to procure an expensive library, without which, in the present state of legal science, it is impossible for a man to advise according to law? Here is the fallacy. The lawyer's knowledge is his stock in trade, quite as much as the cloth and the silk of the tailor and the tea and the sugar of the grocer. It is a stock in trade which costs more than any commodity of an ordinary tradesman, and must therefore be sold at what appears to be a higher price.

Those who know little or nothing of the labor undergone by a man to make himself a good lawyer think that because his advice is given, as it may be, off hand and in few words, it ought to cost little or nothing. Such persons would pay for opinions by the folio and for oral advice by the hour.

The tradesman, who shuts up his store, goes to his fireside relieved of the cares of the day and free till another day begins. The lawyer in good practice leaves his office and goes home to work—to work, if anything, more assiduously than in his office. For the real lawyer there is scarce any relaxation; but because the public do not see him toiling by his midnight lamp while others carouse and enjoy themselves, the lawyer's life is said to be an easy one and his profession is envied.

His life is, without exaggeration, a life of toil—of patient industry. He from day to day acquires knowledge, as the bee does honey, by unflagging industry. The older he grows, if faithful to his profession, the more are his services or his advice in value. To knowledge he adds experience, both of which increase, as does his library, at a heavy outlay.

Then why not allow him to charge as he pleases? Because the profession is *more* than a trade. A tariff of fees, while it protects the public from the exactions of unscrupulous lawyers, also protects the profession from the misconduct of the same class of persons—it prevents the low and the cunning outbidding the learned and the respectable—it prevents the necessity for a resort to sham advertising and the many tricks of a trade.

A tariff too is a scale of charges fixed by the Judges—by men who have gone through the wear and tear of the profession, and who know therefore the value of the commodity which by tariff they regulate. This in itself is a great protection to the public, as well as a safeguard of professional etiquette.

Upon the whole, we are now as much as ever in favor of a tariff of fees for professional services We think the rule a good one and one that ought to be and will be preserved. And more, we think it a rule to which there ought to be no exception, unless for strong reasons. Is there an exception? There is, and it is conveyancing.

An idea prevails, more or less general, that any man who can write can draw a deed; and that any man, whether he can prepare a deed or not, can draw a will. The idea, when put into practice, produces an endless variety of litigation, the object of which is to make certain that which ignorance of the plainest rules of law made uncertain. This is free trade in conveyancing.

Why should any one pay for a deed one pound to Mr. A. B., the eminent barrister, when Mr. C. D., the well known land agent, will prepare one for ten shillings? Why should farmer E. F. pay two pounds to Mr. A. B., the barrister, to prepare his will, and so reduce his assets by that large amount, when the land agent, C. D., will prepare his will for ten shillings? The thing would be folly. Therefore it is not done; but in some manner or other, when E. F. dies, it is found that his will is ambiguous or his deed defective. Then people exclaim that he was mad to employ an ignoramus of a land agent, instead of having the work done by a professional man, who could not only have done the business correctly, but be responsible for errors and mistakes.

Suppose, however, that the man who wants his deed or his will prepared has no confidence in any but professional men, he of course goes to one who charges least. There is A. B., the well known barrister, who charges one pound five shillings for a deed, when C. D., the embryo barrister, whom nobody seems to employ, is willing to do the work for half the money. Hence Mr. C. D. is employed. We shall not say that C. D. cannot do the work as well as A. B., but the presumption is strongly against him. The lawyer of standing, with a large practice, is more likely to be *cu fait* than his junior, who has just opened an office; and the latter is less likely to be responsible than the law

yer, who with experience and a reputation, has acquired wealth. But as between lawyers, for the reasons already mentioned, there should be a tariff of charges applicable to all and for the governance of all. There is quite as much reason for the tariff, as applied to conveyancing, as to the conduct of a suit. The one is as much a branch of professional business as the other, and it is the fault of the profession that it is not exclusively so.

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

(Continued from p. 10.)

Superior Court—Courts of Assize—District Courts—Courts of Request—Jurisdiction of each—Execution of Process—Tenures of Land—Disputes as to English and French Law—Results.

By an ordinance of 17th September, 1776, General Murray, with the advice of his Council, no Assembly having been as yet summoned, constituted courts of justice.

First.—A superior court of judicature, which was named King's Bench, to hold sittings in the town of Quebec twice every year, viz., one to begin on 21st January, called Hilary Term, and the other on 20th June, called Trinity Term. In this court a Chief Justice presided, with power to hear and determine all criminal and civil cases, agreeable to the laws of England and the ordinances of the province. From it an appeal lay to the Governor and Council, wherever the matter in dispute was above the value of three hundred pounds sterling. Wherever the value was five hundred pounds or upwards, an appeal lay from the Governor in Council to the King in Council. In all trials in this court all his Majesty's subjects were admitted on juries, without distinction. In all civil proceedings, the forms of action, the pleadings, the method of trial and the rules of evidence, were those prescribed by the English law.

Second.—The Chief Justice, once in every year, was authorized to hold a Court of Assize and General Gaol Delivery, soon after Hilary Term, at the towns of Montreal and Three Rivers, for the more easy and convenient distribution of justice in those parts of the province.

Third.—An inferior court of judicature, known as the Common Pleas, was also established. It sat at Quebec twice every year, at the same time as the Superior Court. A similar court was afterwards established in and for the district of Montreal. The courts of Common Pleas had authority to determine all demands above the value of ten pounds, with a liberty of appeal to the King's Bench whenever the matter in contest was of the value of twenty pounds or upwards. Where it exceeded three hundred pounds, there lay an immediate appeal to the Governor in Council; and from the Governor in Council, where the matter in contest exceeded the value of five hundred pounds, an appeal lay to the King in Council. This court was empowered to determine disputes agreeable to equity, having regard nevertheless to the laws of England, so far as the then circumstances of the province would admit and until such time as proper ordinances for the information of the people could be established by the Governor and Council agreeable to the laws of England. The French laws and customs were allowed and admitted in all causes in these courts between the natives of the province, where the cause of action arose before 1st October, 1764. The first process was an attachment against the body, and execution might be had against the body, goods and lands of the defendant. The proceedings were drawn up in any form that the parties thought proper, sometimes in French, sometimes in English, as the attorney who prepared them happened to be French or English.

Fourth.—Courts for the trial of small demands in a summary way were also established. Power was given to any one Justice of the Peace within his district to hear and determine all causes or matters of property, not exceeding the sum of five pounds. A like power was given to any two Justices within their district, with jurisdiction not exceeding ten pounds. From the decision of the court, whether consisting of one Justice or of two, there was no appeal. Power was also given to any three Justices to be a quorum to hold Quarter Sessions in their respective districts, every three months, with a jurisdiction in civil cases for claims above ten and not exceeding thirty pounds. From this court an appeal lay by either party to the court of Queen's Bench.

Though a Provost Marshall or High Sheriff had been appointed two years previously, he does not appear at this time (1764) to have arrived in the province or to have appointed any deputies or other inferior officers. In his absence, warrants and other process were directed to officers of the Militia or to special Bailiffs. All subjects were, however, commanded to aid the Justices and officers of Militia in the due execution of their duty.

It was by an ordinance of 6th November, 1764, declared that until 10th August, 1765, the tenures of land with respect to such grants as were prior to the session of Canada by the definitive treaty of February, 1763, and the rights of inheritance prevailing before that period in such lands, should remain to all intents and purposes the same, unless altered by some positive law. It was provided that nothing in the ordinance contained should extend to the prejudice of the rights of the Crown, or to debar his Majesty, his heirs or successors, from obtaining by due course of law, according to the laws of Great Britain, any lands or tenements which at any time thereafter should be

found to be vested in his Majesty, his heirs or successors.

In view of this ordinance, it was contended by a very respectable portion of the people that all lands of which the owners died after 10th August, 1765, became subject to the English law of inheritance and the English law of dower, and to the English rules of forfeiture for high treason, and to all other rules of the English law relating to lands, even though the lands had been originally granted before the signing of the definitive treaty of peace; and that all lands granted subsequently to that treaty were at the time of the making of the ordinance of 1764 subject to the English laws, and were so to continue. An equally respectable portion of the community was of a different opinion.

The fact was, that neither the proclamation of 1763, nor the commission granted to General Murray the year following, was ever published in French. This was a grave neglect, when it is remembered that the majority of the inhabitants were then wholly ignorant of the English language, and of course wholly ignorant of the extent of the introduction of English laws. The consequence was that the habitant continued to divide his land upon an inheritance in the same manner as before the conquest. His widow was entitled to the same share as before, without any regard to the English rule of dower, which differs widely from the French law. His personal estate, if he died intestate, was distributed according to the rules of the French law, which differ from the English statute of distributions. His personal estate was distributed without the issue of any letters of administration, though the Governor under his royal instructions had power to do so. On the other hand, upon the death of an Anglo-Canadian, his relatives regularly took out letters of administration, and as regularly followed the English law of distribution.

This diversity of opinion, as may well be supposed, caused much uneasiness and confusion. Not only as to the rules of law attending realty, but as regards the mode of conveyancing, did the diversity exist. The Anglo-Canadian bought and sold lands by instruments, drawn up according to the English mode of conveyancing. The French Canadian employed a Notary or a Scrivener for the same purpose, who followed the French forms of conveyancing made use of before the conquest. It often happened that the same land was sold and bought and mortgaged by both French or English conveyancers, as it passed into the hands of Franco or Anglo-Canadian proprietors. This also was productive of much confusion. Leases, however, for twenty-one years, of lands near Quebec, though void by the French law, were made by the Society of Jesuits. Other privileges in regard to the leasing and sale of realty allowable by the laws of England, though contrary to the laws of France, were often used by Franco-Canadians.

LAW SOCIETY OF UPPER CANADA.

Through the kindness of the Secretary of the Law Society of Upper Canada, we are enabled to publish the examination paper as to call to the bar for Easter Term last. We expect to continue the papers from Term to Term, in the hope that students and others will be benefited thereby.

STORY'S EQUITY JURISPRUDENCE.

1. In what cases will a court of equity relieve against penalties and forfeitures?
2. When will a legacy be deemed a satisfaction of a debt due by the testator to the legatee?
3. What debts may a mortgagee of personal property tack to his original debt.
4. Upon what grounds will a court of equity decree the dissolution of a partnership before the expiration of the time limited for its continuance?
5. Can a husband assign his wife's revisionary interest in a chose in an action so as to defeat the wife's right of survivorship? Give a reason for your answer.
6. What constitutes constructive notice?
7. Can an infant purchaser of lands maintain a bill for the specific performance of his agreement to purchase? Give a reason for your answer.
8. Will the Court of Chancery in Upper Canada enforce the specific performance of a contract entered into by persons both domiciled in Upper Canada, for the sale and purchase of lands in Lower Canada?
9. Is an executor liable in equity for a debt due by him to his testator's estate?
10. Where a man purchases land, and pays the purchase money, but takes the conveyance to a third person, who will in equity be deemed the owner? Are there any and what exceptions to the general rule in such a case?

WILLIAMS ON REAL PROPERTY.

1. A., tenant for life, with remainder to B. in tail, with remainder over to C. in fee, can B. in any and what manner bar his own issue and the remainder in fee, so as to convert his estate tail into an absolute estate in fee? Can he bar his issue without barring the remainder?
2. Give a definition of an easement?
3. When was the Statute of Wards and Liveries passed, and what important effect had it on the tenures of land?
4. What covenants has a purchaser of lands a right to require from his vendor?
5. Is a woman entitled in any and in what case to dower out of her husband's equitable estates?
6. Upon the death intestate of a tenant *pur autre vie* living *cestue qui vie*, and there being no special occupant named in the deed creating the estate, who is entitled to the estate? Is the law on this subject determined by any and what statutes?

BLACKSTONE'S COMMENTARIES.—VOL. I.

1. When was the Habeas Corpus Act passed? What rights does it give the subject?
2. Can a guardian be appointed by the will of any and what person; and is the right so to appoint a guardian given by common law or by statute?
3. How must a corporation be created?
4. What is treasure trove, and to whom does it belong?
5. What is the meaning of "The King can do no wrong?"
6. What is the law of England with regard to the guardianship of lunatics?

REDDIE'S INQUIRIES.

1. State some of the advantages and disadvantages of codification.
2. Give definitions of international law, of public national law, and private law.

3. What are the sources and general component parts of the private law of a state?

TAYLOR ON EVIDENCE.

1. What is meant by impeaching a witness by general and particular evidence; and which is permitted in the case of a party seeking to impeach his own witness? What is the reason for the distinction?
2. After how long a period is a deed considered as proving itself? What is meant by proper custody?
3. What effect as an admission has the payment of money into court in an action of tort?
4. Can the admission of a party to the record as to the contents of a written instrument in any case dispense with its production at the trial?
5. Is an entry made by a deceased person in the ordinary course of business evidence of everything contained in such entry?
6. Are any persons except parties to the record incompetent witnesses; if so, who are they?
7. To what extent is hearsay of declarations by members of the family admissable in questions of pedigree? Does the remoteness of the relationship affect the admissibility of the evidence, and does the rule apply to relations by marriage?

SMITH'S MERCANTILE LAW.

1. Is there any and what distinction between the liability to third persons of an agent remunerated out of the profits, and that of one remunerated by a sum proportioned to the profits?
2. Where a contract has been made by a broker what is the written contract to satisfy the statute of frauds?
3. What facts is the insured bound to communicate to the insurer? Is there any and what distinction in this respect between misrepresentation and concealment?
4. How many contracts of affreightment are there? What is meant by a general ship?
5. Can there be such an acceptance of goods as will satisfy the Statute of Frauds without precluding the purchaser from afterwards objecting to the quantity or quality?

ADDISON ON CONTRACTS.

1. Is there any and what distinction between the liability of a corporation on an executed and executory contract not under seal?
2. What consideration is necessary to support a promise? Must it necessarily be an advantage to the person promising?
3. Upon what principle does the right of a wife to pledge her husband's credit for goods depend?
4. Has an innkeeper a right of lien on all the goods of his guest? If not, to what goods does the right extend?
5. What is the liability of a gratuitous bailee with regard to the goods entrusted to him?

BYLES ON BILLS.

1. Can a note be made payable in instalments? If so, how far will the failure to give notice of dishonour to an indorser in the case of one instalment discharge him?
2. What is the effect of indorsing a bill *sans recours?*
3. Does payment of a bill at maturity by any person except the acceptor destroy its negotiability?
4. What is acceptance for honour?
5. What is the effect of the consideration of a bill being partly legal and partly illegal?
6. What bills or notes are transferable by endorsement and what by delivery?
7. When does the Statute of Limitations commence to run on a note payable on demand?

PRACTICE AND STATUTES.

1. How many years' arrears of dower are recoverable in Upper Canada?
2. Are there any and what statutory provisions in Upper Canada affecting the equitable doctrine of tacking?
3. What is the effect of registering a judgment in Upper Canada upon the lands of the judgment debtor?
4. What is the writ of *Ne Exeat Provincia*, how and in what cases will it be granted?
5. Into how many parts is a bill in equity now divided?
6. Is a mortgagee after a sale under a decree producing a sum insufficient to pay the mortgage debt entitled to any personal remedy in equity against the mortgagor for the unpaid residue of the debt?
7. Within what time must a new trial be moved for in criminal cases?
8. What is the rule with regard to counsels' speeches at nisi prius?
9. When distinct parties to a note or bill are sued in the same action, are they competent witnesses for each other?
10. Is probate out of Upper Canada good evidence in the case of a will of realty, if so, are any and what steps to be taken before using it in evidence?
11. What is necessary to be stated in the rule nisi for a new trial?
12. If a new trial is granted as contrary to evidence, what is the rule with regard to costs?

THE CANADA DIRECTORY.

It is with regret we find that Mr. Lovell has for the present relinquished the idea of issuing a new edition of this most useful work.

Notwithstanding his offer to do so upon receiving anything like encouragement, either from apathy or from the scarcity of money, probably the latter, no encouragement has been given. He tells us, that the result of a careful canvass of all the principal towns and cities from Toronto eastward, is such "as to render the prospect of another edition utterly hopeless." He then shows that upon the last edition he has sustained a loss of $16,037·64.

These facts are very desponding, but such as we are sure will not deter Mr. Lovell whenever he can see his way to issue a new edition of the Directory with any probability of success.

Few, if any publishers in Canada are able to compete with Mr. Lovell in large enterprises, and none are more willing to incur risks in the hope of ultimate success.

We hope the time is near at hand when the efforts of such a man to serve the public will be pretty well sustained. He is not a selfish but a very enterprising man. His recent efforts to encourage everything in the shape of colonial literature deserve much praise.

INDEX TO VOL. IV.

The Index to Vol. IV. of the *Law Journal* is now in the hands of our publishers, and will, we expect, be issued with our number for March.

Our thanks are due to C. Robinson, Esq., Reporter of the Queen's Bench, for Queen's Bench cases; and to Thomas Hodgins, Esq., LL.B., for reports of cases in Chancery. The latter, we believe, complains that Mr. Grant copies his cases in the Chancery Reports, without acknowledgment.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

OWEN SOUND, January 15th, 1859.

GENTLEMEN,—As the Parliamentary Session is about to commence, and as experience has shewn that petitioning for an increase of Bailiffs' fees [illegible] most unprofitable business, I have concluded to inquire if you [illegible]thing that an application to the Legislature to be heard, either by counsel or one of own number, could be considered as any more promising in ultimate effect, or if your knowledge and ingenuit[illegible] can suggest anything that we can do to propitiate a measure of justice on behalf of bailiffs?

I shall receive most gratefully from yourselves, or any other or others, any information touching the manner in which the First Division Courts in other Counties are dealt with. I have been told that in some Counties, not only are the sittings of of the Court uniformly held in the County Court room without demur, but that the Clerk is provided with an office in the Court House. Here, sometimes on one pretext sometimes on another, the sittings are held sometimes in a vacant store, at others in a room so small that the Judge and his officers are crowded together most unseemly in a corner, leaving scarce space enough for the litigants in a single case, the rest having to stand outside, furnishing a stranger with a very strange idea of an "open Court;" sometimes in a dilapidated and deserted log school house, with holes in its sides large enough to pull a sleigh through, and through which holes the pigs intrude; at this instant I am under orders to prepare a garret for the ensuing sittings, and that too for a Division which, in 1857, had 3000 suits, and last year had approaching 2000. Our office, too, is kept in an inflammable frame building. I think I am not a nervous man, but I must confess to a very sensible increase of the "circulation," whenever I think of the "books," and the thousands of promissory notes and other important papers in that combustible little shell, while a suitable office in the Court House (not used by the officer for whom it was provided) is occupied by a private person. We are continually reminded that Division Courts are *County* Courts by the various forms and proceedings of the first (or as the case may be) Division Court for the *County* of, &c.; and "*the Journal*" intimates that the Division Courts are modelled after the *County* Courts of England. Indeed it is plain that the Division Courts are *County* Courts, but that the sittings are held at various places for the convenience of suitors.

I am sincere in my desire to do up my business in an orthodox way, and consequently was much puzzled by noticing that Mr. Klotz's Bailiff (and under Mr. Klotz I would expect everything to be done notably) had paid in the whole of the proceeds of a sale under several executions to the Clerk, thus burthening him with the labour as well as the responsibility of applying the money. The mode of applying that you direct has been my practice, and I have always done it myself, never perceiving that it was anybody else's business to do it. I have searched, enquired, and cogitated on the matter without being able to connect the practice in Mr. Klotz's office with any authority either positive or inferential, and shall consider myself under the pressure of a favor in receiving in any way anything elucidatory.

On page 13 of the *Journal* for this year I notice a form of Bailiff's return, &c., "*pursuant to the 11th Rule.*" It appears that "this *method* has saved" Mr. Klotz "considerable labour," and *you* say the practice is attended "with much *convenience* and *satisfaction* to *all* concerned." Hereupon I beg to say, first, that the "Form" (for such an one) is manifestly incomplete without a column shewing *when* the summons was *received* by the Bailiff: second, that I shall feel suitable grateful to the compiler of that form if he will exhibit the method by means of which he eliminated the heading, sub-headings, or any part of the said form out of "*the 11th Rule:*" thirdly that I make no doubt but that such a return would *save* any Division Court Clerk "considerable labour," but at whose cost? why the Bailiff, who already makes one sheet return gratuitously, and the *Law Journal* seems to promise him the felicity of having to make another at (as I suppose) a like liberal rate: and lastly, that I can conceive of the *convenience* the returns would be to the Clerk and the suitors, for what would save him labour would save them time, and they must be very strange people indeed if they did not derive satisfaction therefrom. But having got my copy of the *Journal* only to-day I have not had time as yet to discover where the Bailiff's share of the *convenience* is to be found. As for his quota of the *satisfaction* I must suppose that to consist in the gratification that he in common with all good men naturally feel in the knowledge of having done a kind action. It has not been the practice in our Cou.t to make such returns, but I will mention that after Cour , when the work is done, and time and opportunity serve, I present my account with the Clerk; I make it columnar as thus, number, style, miles, amount, with such remarks as each case may require, such as, subpœna, paid witnesses, attachment, charges, &c., &c. The date of service I do not mention, that is on the summons and is not necessary to the account which is not sworn to, as the bulk of what is paid for is sworn to before. With my best wishes for the *Journal*, I am, Gentlemen,

Your obedient Servant,

PAUL DUNN.

[On the subject of Bailiffs' fees we can add nothing to the suggestions before offered in the pages of this Journal. The subject must be kept alive, and members of the Legislature reminded from time to time of the grievance complained of. Perseverance in a good cause is everything; and Bailiffs should not despair if justice to them be deferred.

As to permission to be heard at the Bar of the House, it would be idle to think of it. The proposition would not be listened to for a moment. But let the voices of the members be heard *within the bar*, exposing the evil and urging a remedy, and the object will before long be attained.

We had no idea till informed by our correspondent's letter that the use of the Court House for holding the Division Court is denied in any County in Upper Canada. We incline to think that Grey must be the only County wherein "The Peoples' Court" is excluded from the building erected by the peoples' money for public accommodation. True the Courts of Record, Nisi Prius, County Court, Surrogate Court and Quarter Sessions may not be interfered with, and the Division Court appointments if clashing with these Courts must give way. But when not doing so we are at a loss to understand on what principle they are excluded from the use of the Court House. The County Councils are *bound* to provide accommodation for the Courts of Record only, but that accommodation when not required for those Courts, ought surely to be available for other Courts of Justice. The evil in the County of Grey must be cured in the locality, and if the subject be properly laid before the authorities or the public, we have no doubt of the result. In the City of Toronto the Division Court Clerk is provided with an office, and has the use of a fire-proof vault in the Court House.

With respect to our correspondent's remarks on the subject of Bailiff's returns we deem it unnecessary to say anything.—EDS. L. J.]

To the Editors of the Law Journal.

PRESTON, 17th January, 1859.

GENTLEMEN,—Another question with reference to executions in relation to attachments presents itself in the 2d proviso of the 64th sec. of the D. C.'s Act of 1850. "*Provided always*, that proceedings may be conducted to judgment and execution in any case commenced by attachment under the provisions of this section in the Division Court of the Division within which the warrant of attachment shall issue, and that when proceedings shall be commenced in any case before the issuing of an attachment under the provisions of this section, such proceedings may be continued to judgment and execution in the Division Court in which such proceedings may have been commenced, and the property seized upon any such attachment shall be liable to seizure and sale under the execution to be issued upon such judgment," &c.

If, now, A. sues B., and B., after service, and shortly before Court absconds; if C., another creditor of B., takes out an attachment upon which B.'s goods are delivered to the Clerk; if A. proceeds to judgment and execution at the next Court—C., however, only having had the goods of B. attached about a week before that Court, being obliged to wait for his judgment against B. until the next sitting of the Court, the question arising is: Are the goods of B. that are in the custody of the Clerk by virtue of an attachment warrant in the suit of C. v. B. liable to seizure and sale under the execution in suit A. v. B.?

It is held by some that they are not liable to such seizure and sale; and they base their argument on the connection which the word "*judgment*" in that proviso has to the whole section, which particularly refers to attachment cases, and that only judgments obtained on attachment suits are to be understood; while others assert that the words '*in any case*" embody both attachment suits as well as others; that the execution in suit A. v. B. has priority over the attachment suit C. v. B., since in the former judgment has been already obtained, while in the latter judgment is still pending, and a possibility existing that C. may be non-suited, or the attachment be otherwise declared void.

Since this question has lately created some excitement, and is one of general importance, your opinion on the same will be very thankfully received.

I remain, Gentlemen,
Respectfully yours,
OTTO KLOTZ.

[The question is a doubtful one. We have heard of no decision in point. Our own impression is that "judgments" refer to judgments in favour of *attaching* creditors.—EDS. L. J.]

To the Editors of the Law Journal.

SOUTHAMPTON, January 13th, 1859.

GENTLEMEN,—You will greatly oblige me by giving me your views with reference to the following case at a sittings of the first Division Court, County of Grey.

A. obtained a judgment against B., who resides in the County of Bruce. The Clerk of the Division Court in Grey sent a transcript to the Clerk of a Division Court in Bruce, upon which an execution is issued against the goods and chattels of B. A levy is made on *part* of B.'s goods and chattels, who gives a bond for their production when required. A. directs the Bailiff not to sell for some time. In the meantime the tax Collector seizes the same goods and chattels.

The question now arises, which of the officers has the right to the goods? In answering the question, please state whether the bailiff, having levied on *all* B.'s goods and chattels, would have made any difference, as I am anxious to know whether a tax Collector can seize goods under levy or not. In the case above cited, I think he had no right to seize, seeing that A. had *other* goods on *which he might have seized.*

The Bailiff has interpleaded, which has given rise to another question. Rule 53 says that the claimant shall be deemed the plaintiff. Form 28 in the book of Rules and Forms, ends by saying "To ———, the above named *plaintiff.*" This must be a mistake, as the form evidently refers to the *defendant.* Again, Forms 28 and 29 both give this expression, "Issued out of this Court in *this action.*" In the case above referred to this could not be the case, as the interpleader suit is between the tax Collector and A., and the action out of which the execution was issued was between A. and B., in addition to which the original suit was in Grey, and the execution issued out of a Court in Bruce.

Yours, &c., BAILIFF.

P.S.—Since writing the foregoing, I have given the subject a careful study; and in respect to the second question come to the conclusion that the Form No. 28 requires to be headed and the suit styled the same as the original suit on which the execution was issued, in which case "the above named plaintiff" would be right.

[It may be questioned whether the Collector may not treat the withdrawal and taking bond of forthcoming as an abandonment of the levy. We think under the facts as given that the seizure by the collector will be sustained. Only part of the goods being seized does not affect the question.—EDS. L.J.]

To the Editors of the Law Journal.

MILTON, 21st January, 1859.

GENTLEMEN:—I beg to submit a question to you on the subject of a Fee which appears in the Division Court Tariff of Bailiffs' Fees. I do not recollect having seen any opinion expressed thereon in your excellent Journal, and I know a difference of opinion does exist on the point. It is this—"for drawing and attending to swear to every affidavit of service—when served out of the Division."

Now, on reading it, it looks like allowing 5s. (over and above mileage and service) for attending at the Clerk's office to make the affidavit, merely because the defendant in the suit resides outside the Bailiff's Division. But, surely the framers of the Tariff must have contemplated the performance of some *extra* duty for that *extra* fee! and I do not see what *extra* duty is performed in *this instance, as one attend*ance at the Clerk's office would suffice for making the affidavit to this outside service in common, or at the same attendance with twenty, served within the Division, thereby requiring no imperative or absolute attendance *exclusively* for filling in this outside service. I conclude, therefore, that no *extra* duty is thereby required or performed.

Again, some Divisions are so situated (this one for instance) that by travelling *less* than *two* miles either north or west from the Clerk's office, the Bailiff is in another township on either quarter,—therefore, outside the Division; in which case, where the extra 1s. 3d. charged to each defendant, it strikes me that a large amount of costs would be made without any equivalent being shewn therefor.

I do not, gentlemen, raise this seeming objection, from any desire to reduce the fees of Bailiffs, for I consider them to be a class of officers who in many particulars are not sufficiently remunerated, and who deserve every fraction the tariff allows; but, my object is, to elicit opinions on the point.

I would submit the following as the legitimate application of the fee; that the Bailiff be allowed 1s. for attending to make affidavit of service when the summoning emanates—or, is issued from another Division or County than his own: by which interpretation I can see the application to be very reasonable, as, in that case, a *special* attendance to make affi-

davit is necessary, in order that the Clerk may make a return thereof to the foreign Division, and in that attendance I see an equivalent for the extra shilling.

Knowing your willingnsss to give information on these matters, and being persuaded that your opinion thereon is "*ex cathedra*," and will finally settle the point, I submit it for your interpretation, and remain, Gentlemen,

Most respectfully yours,
J. H.

[We agree with our correspondent in the reasonable construction he puts on the item referred to in the Tariff, and the practice so far as we are informed is in accordance with his views. However, we shall be happy to hear any communication on the other view which the above question elicits.
EDS. L. J.]

To the Editors of the Law Journal.

LONDON, January 21st, 1859.

GENTLEMEN,—Your opinion on the following in your Journal would much oblige.

Does the cause of action arise where a note falls due and is made payable, although it may have been given in another division? Your obedient Servant,

JOSEPH JEFFERY,
Bailiff 1st D. C., Middlesex.

[We believe there is a diversity of opinion on this point, but we incline to think that the cause of action arose where the note was given.

A note is the evidence of a debt due by the maker, which debt must have been in existence before the note was given; and it is but reasonable to suppose that this written acknowledgment of it was given where it was contracted.

The question has been asked us before, as our correspondent will see by referring to Vol. 4, page 157, where a number of cases bearing on the point are referred to.—EDS. L. J.]

THE MAGISTRATES' MANUAL.

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

Continued from page 14, VOL. V.

SUPPLEMENT—SUMMARY TRIALS.

Power of Recorders to try certain offences summarily.—If any person be charged before the Recorder of any City:

1. With having committed simple larceny, and the value of the whole property alleged to have been stolen does not in the judgment of the Recorder exceed five shillings.

2. With having attempted to commit larceny from the person, or simple larceny.

3. With having committed an aggravated assault by unlawfully and maliciously inflicting upon any person, with or without any weapon or instrument, any grievous bodily harm; or by unlawfully or maliciously cutting, stabbing or wounding any person.

4. With having committed an assault upon any female whatever, or upon any male child, whose age does not in the opinion of the Recorder exceed 14 years, such assault being of a nature which cannot, in the opinion of the Recorder be sufficiently punished before him under any other act, and not amounting, in his opinion, to an assault with intent to commit a rape, if the assault have been on a female.

5. With having assaulted any magistrate, bailiff, constable, or other officer in the lawful performance of his duty, or with intent to prevent the performance thereof.

6. With keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame, or bawdy house.

In any such case the Recorder may hear and determine the charge in a summarily way.*

Police Magistrates.—The Police Magistrate of any City in Upper Canada, sitting in open Court, is authorized in the case of persons charged before him, to exercise with regard to the above offences, the same powers as a Recorder.†

Duty of Justices of the Peace in such cases.—If any person be charged before any Justice of the Peace with any of the above mentioned offences, and in the opinion of the Justice the case is proper to be disposed of by a Recorder or Police Magistrate in Upper Canada, the Justice may, if he see fit, remand such person for further examination before the Recorder or nearest Police Magistrate. But the remand must not be made by a Justice of the Peace for Upper Canada before a Recorder or Police Magistrate of Lower Canada, or *vice versa*. A person remanded before the Police Magistrate of any City, may be examined and dealt with by the Recorder of the same City, and so *vice versa* where the remand is before a Recorder.‡

Proceedings if party remanded fail to appear.—If any person suffered to go at large upon entering into such recognizance as the Justice of the Peace is authorized to take on the remand of a party accused, conditioned for his appearance before a Recorder or Police Magistrate, do not afterwards appear pursuant to the recognizance, then it is the duty of the Recorder or Police Magistrate before whom he ought to have appeared, to certify (under his hand) on the back of the recognizance to the Clerk of the Peace for the County or Union of Counties in Upper Canada the fact of such non-appearance, and the recognizance may then be proceeded upon in like manner as other recognizances, and the certificate is to be deemed sufficient *prima facie* evidence of the non-appearance.§

Preliminary duty of Recorder, &c.—Whenever the Recorder or Police Magistrate proposes to dispose of the case summarily, after ascertaining the nature and extent of the charge, but before the formal examination of witnesses for the prosecution, and before calling on the party charged for any statement he may wish to make, it is the duty of the Recorder or Police Magistrate to state to such person the substance of the charge against him, and to say to him these words, or words to the like effect: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by jury at the (*naming the Court at which it could so next be tried*)."‖

Hearing of the charge.—If the person accused consent to the charge being summarily tried and determined, it is next the duty of the Recorder or Police Magistrate to reduce the charge into writing and read the same to the ac-

* 20 Vic. cap. 27 sec. 1; and 22 Vic. cap. 27, sec. 1.
† 20 Vic. cap. 27 sec. 14. ‡ 20 Vic. cap. 27 sec. 5.
§ 20 Vic. cap. 27. sec. 6. ‖ 22 Vic. cap. 27 sec. 3.

cused, and then ask him whether he is guilty or not guilty of the charge. If the accused say "guilty," the Recorder or Police Magistrate is next to proceed to pass such sentence upon him as may by law be passed; but if the accused say "not guilty," it is then the duty of the Recorder or Police Magistrate to examine witnesses for the prosecution, and when the examination is completed to inquire of the accused whether he has any defence to make to the charge. If he state that he has a defence it is the duty of the Recorder or Police Magistrate to hear the defence, and then proceed to dispose of the case summarily.*

Power to compel attendance of witnesses.—Any Recorder or Police Magistrate before whom any person is charged as above, is empowered by summons to require the attendance of any person as a witness upon the hearing of the case at a time and place to be named in the summons. So the Recorder or Police Magistrate may bind by recognizance all persons whom he may consider necessary to examine touching the matter of the charge, to attend at the time and place to be appointed by him, and then and there to give evidence upon the hearing of the charge. In case any person so summoned or bound by recognizance neglect or refuse to attend in pursuance of the summons or recognizance, upon proof being made of such person having been summoned or bound by recognizance, the Recorder or Police Magistrate before whom such person ought to have attended is empowered to issue a warrant to compel his appearance as a witness.†

How witnesses summoned.—The summons may be served by delivering a copy of it to the party summoned, or by delivering the copy to some inmate of the party's usual place of abode. So every person required by any writing under the hand of the Recorder or Police Magistrate to attend and give evidence is deemed to have been duly summoned.‡

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C. Robinson, Esq., *Barrister-at-Law.*

TRINITY TERM, 1858.

Pratt et al. v. Drake.

Promissory note—Indorser's name signed by the maker—Proof of authority—Asking for time—Estoppel.

In an action against the indorser of a note, it appeared that his name had been written by the maker, his nephew, and there was no evidence of express authority, but it was proved that defendant had before and afterwards indorsed for his nephew on purchases by him from these plaintiffs, and that when payment of this note was demanded from him he had asked for time, and had not denied his indorsement until some months afterwards when the maker had absconded. His excuse was that he kept no memorandum of his indorsements and supposed it was right.

Held, that defendant had precluded himself by his conduct from disputing his liability; and the jury having found in his favor, a new trial was granted without costs.

Action on a promissory note of Thomas Drake, made on the 27th of October, 1856, payable to defendant Benjamin Drake, or order, for $274.7 in four months, indorsed by defendant; with a common money count.

Pleas:—1st. Denying that defendant indorsed the note. 2nd. *Nunquam indebitatus* to the common count.

At the trial, at St. Thomas, before *Robinson*, C. J., it appeared that the claim was only for a balance of £30 still unpaid on the note, payments having been made on account of it by Thomas Drake, the maker.

It seemed clear that the defendant's name indorsed on the note was not in fact written by the defendant, but by Thomas Drake, his nephew, the maker of the note, who gave it thus indorsed to the plaintiffs, merchants in Buffalo, from whom he bought goods.

Thomas Drake had before dealt with the plaintiffs, and in the autumn of 1856 he wanted more goods from them but they declined letting him have more, unless he would cover the amount by his note indorsed by some person whom their attorney, Mr. Warren, living at St. Thomas, would accept as sufficient. Mr. Warren told Thomas Drake, that he would accept a note indorsed by the defendant, and such a note was accordingly brought to him, and Thomas Drake obtained the goods he required. The defendant had before that indorsed a note for his nephew Thomas in favour of the plaintiffs for other goods, which had been paid.

It was proved that soon after this note became due, in March, 1857, payment was demanded by Mr. Warren from the defendant, who begged him not to press it, as it would injure him. On that occasion the defendant did not see the note, but he stated that his nephew, had indorsed his name on other notes, and that he, the defendant, had paid them.

The defendant, it was sworn, frequently gave his name as indorser, but kept no bill book.

In March or April, 1857, the plaintiff's clerk was sent over to collect this note. Defendant told him he did not wish it pressed, as it would injure Thomas, his nephew, and the clerk in consequence told his attorney to let it lie for a time. Thomas after that absconded, and it was not until December following (1857) that the defendant denied his indorsement, and refused on that account to pay it. It was sworn that payment could have been enforced from Thomas Drake while he remained here, if the plaintiffs had been aware that the indorsement was disputed, and that they had no recourse but against him.

In the meantime the nephew had got a further credit from the plaintiffs, upon a note, which the defendant indorsed.

The learned Chief Justice told the jury that, as the name of the defendant was indorsed, not by himself, but by Thomas Drake, they should be satisfied, before they could hold the defendant liable, either that Thomas Drake had express authority to indorse this particular note in defendant's name, or to indorse notes generally for him as Thomas might have occasion, or at least that there had been such a practice on the part of Thomas of using the defendant's name as an indorser, recognised and sanctioned by defendant, as would fairly support the inference of an implied general authority given by the defendant to Thomas to indorse notes in his name for Thomas's accommodation. But that the evidence on that point should be clear and convincing, for that it would by no means follow that a special authority given to indorse one or more notes, would render a party liable upon other notes indorsed in the same manner without his knowledge.

But the jury were told, on the other hand, that when the defendant was applied to for payment in March, 1857, if he had any idea that this note was not indorsed by him, or with his sanction, and meant to deny his liability, he should have done so promptly, and not asked for delay, and left the plaintiffs to believe from March to December that all was right, and then first deny his indorsement after his nephew had absconded: that the defendant's excuse was that he kept no memorandum of his indorsements, and supposed it might be all right, and so asked for time; but admitting that to be true, as it was proved that the defendant had on other occasions paid notes which his nephew had indorsed in his name, it was fair that this note should be treated as having been indorsed by his authority, after what had occured, rather than throw the loss upon the plaintiffs, especially as the plaintiffs had every reason to suppose the indorsement was genuine, from the defendant's conduct, not only in relation to this note, but in afterwards indorsing another note for his nephew, on which he got a further credit from these same plaintiffs.

The jury gave their verdict for the defendant.

Becher, Q. C., obtained a rule *nisi* for a new trial on the evidence, to which

D. B. Read shewed cause

* 22 Vic. cap. 27 sec. 3. † 22 Vic. cap. 27 sec. 4, ‡ *Ib.* sec. 5.

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

My brothers have considered this case, and we are all of opinion that the defendant had precluded himself, by his conduct after payment was demanded, from disputing that he was liable upon the note, although he could no doubt say truly that his name was not written on the note by himself.

If he meant to deny that his nephew had indorsed his name on the note by his authority, he should not have asked for delay, and conducted himself in other respects in so inconsistent and undecided a manner. We think there should be a new trial without costs.

Rule absolute.

MAULSON ET AL. v. THE COMMERCIAL BANK.

Assignment in trust for creditors—Nature of the change of possession required—20 Vic., ch. 3.

In considering whether a sufficient change of possession has taken place to satisfy the statute, regard must be had to the nature and purposes of the assignment, and the circumstances of the case, and when made by a merchant for the benefit of his creditors, it is not to be expected that the assignees should remove the goods, or take exclusive possession, as in the case of an ordinary sale of goods.

The assignor may continue upon the premises, and assist in disposing of the goods, without vitiating the assignment in law, but it is a fact to be left to the jury, as evidence to shew that the transfer was colourable.

Held, that upon the evidence to shew that the jury were warranted in finding an actual and continued change of possession.

This was an interpleader issue, to try whether goods seized by the sheriff of York and Peel under a *fi. fa.* from this court tested 19th November, 1859, and delivered on that day to the sheriff, upon a judgment of these defendants against Bostwick and McDonell, were at that time the property of the plaintiffs, to whom they had been assigned by Bostwick and McDonell to be sold for the benefit of their creditors.

The assignment was not registered, and at the trial, which took place at Toronto, before *Richards*, J., the only question was whether there had been a sufficient change of possession. The case was left to the jury, and they found for the plaintiffs.

Christopher Robinson obtained a rule *nisi* for a new trial on the law and evidence. He contended that an actual and continued possession of the goods assigned to the plaintiffs was not proved at the trial.

Boomer shewed cause.

The evidence is fully stated in the judgment.

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

We think we cannot say that the verdict was wrong upon the evidence, on the only point on which it is questioned by the rule. The evidence shewed that, although the goods were not removed to another building after the assignment, they were actually taken possession of by the assignees, who exercised a continual control over them, putting persons of their own in charge, though the former owners of the goods continued to assist in disposing of them. It was sworn that one of the trustees attended daily in the store, and received the money that had been taken in: that new books were opened, every thing done in the name of the trustees and that, besides their having given notice to the defendants in particular of the assignment, they made it public in an open manner, by distributing hand-bills. Of course nothing that the trustees could do by way of giving notice could avail, if the assignment came clearly under the Chattel Mortgage Act, and required registry, and was not registered, for then there would be one enquiry to make, namely, whether there had been an actual and continued change of possession. We think there was in this case sufficient evidence to warrant the jury in finding that there had been such a change of possession, although the goods were not removed, for there is no case in which a removal of the goods has been held to be indispensable, although there should be more pains taken than are generally taken, even when all was fair and honestly meant (as we have no doubt was the case here) to make the change of possession palpable, so as to leave no pretence for questioning the validity of the assignment on the ground on which it has been questioned here.

These assignments to trustees for the benefit of creditors, with a view to a ratable distribution, are expressly excepted from the operation of the English Chattel Mortgage Act, but there is no such exception in our act, though it seems reasonable and convenient that they should be excepted, or if not, that the oath of *bona fides* on which they may be registered should be modified so as to suit the case.

I have intimated in other cases that I have doubted whether such assignments come within the act—that is, whether they can properly be called sales of the goods so assigned in trust. But admitting that they must be held, as they have been, to come within the statute, then the question is, whether what has been shewn to have taken place in this case can be held to have been such a "delivery" and such an "actual and continued change of possession of the goods" (which are the words of the statute 20 Vic., ch. 3, sec. 2), as to dispense with the necessity of resigtering the assignment.

We think that to give a reasonable construction to the act, we must have regard to circumstances—that is, in this case, to the object and purposes of the assignment. When one man buys goods of another, we must suppose that he buys them because he wants them, and we expect him to take possession of them, and to use and enjoy them. And when, instead of that, we find that, although he has paid for the goods, or contracted to pay for them, yet he abstains from taking them into his possession, and leaves them still in the hands of the seller to be used and enjoyed by him, we naturally entertain a suspicion that all is not right—that there has been only a pretended sale of the goods, and that the transaction is a sham, by which it is hoped to deceive the public into the belief that the goods, though still in the possession of the same person, belong in fact to another, and cannot therefore be seized to satisfy the debts of the former owner. The inconsistency between the conduct of the parties and the assertion of a sale, gives rise to the suspicion, seldom unjust, that there must be a secret and fraudulent understanding between them to defraud creditors.

But in the case of an assignment like this, to trustees for the benefit of creditors, the case is altogether different. The assignee in cases of that kind is often a person not in mercantile business, having no warehouse in his possession in which to keep goods, nor any shop in which to expose them to sale; or he is often a retired merchant no longer in possession of such conveniences; or, if a merchant in actual business, his warehouse or shop may be supposed in general to be occupied by his own goods. He is therefore not expected, and it is not usual course of such transactions, that assignees should actually remove the goods of the insolvent person from their former situation to his own premises, or to premises hired by him for that purpose. What ordinarily takes place is, that the shop in which the goods were on sale before the assignment, whether owned by the insolvent in fee or held on lease, is part of the property assigned, and the goods remain there till they are disposed of, either by retail or otherwise.

Then admitting that to such cases of assignment as well as to others the statute 20 Vic., ch. 3, applies, the question is whether upon what was proved in this case the jury could rightly hold that there had been an immediate delivery of the goods, and such actual and continued change of possession as complied with the attention of the statute, regard being had to the circumstances of the case. There certainly was an immediate delivery of the goods into the possession of the assignees, who exercised all the control over them, actually, and openly, and continually, that an assignee for such a purpose could be expected to do. But it is true that though the assignees thus held the goods, and were in possession of them all the time by their clerks and servants, yet the former owners continued to assist in disposing of them. That no doubt subjected the case to suspicion, and made it necessary to submit to the jury whether the change of possession was real, or only apparent, and whether it could be said that there had in truth been a change of possession from the former owner to the assignees. The jury thought that there was no deceitful appearance, and that possession had in fact been changed, though for the benefit of all parties interested, the former owners gave their attendance and assistance upon the premises in disposing of the goods.

We think that finding was not inconsistent with the evidence. And we do not consider that what Lord Ellenborough said in *Wordall* v. *Smith* (1 Camp. 333) can be reasonably applied in the present case. Then what was asserted was, that before the sheriff came with his execution the goods had been sold to another cred-

itor; but it was proved that, though a servant of such alleged vendee was immediately put into the house, yet the former owner and his wife continued to carry on the business of publican as usual, with the stock-in-trade that had been so assigned, during which time the servant was employed to keep possession, when he sold beer, put the money into the till, to which they had access. Lord Ellenborough held that there was in that case no *bona fide* substantial change of possession: that a concurrent possession with the assignee was colourable, and was fraudulent and void; and that the merely putting another in possession with the former owner of the goods was a mere mockery.

That language was just and reasonable as applied to the case which the learned judge had before him, but we cannot safely take it as a guide for the decision of this case, when the object of the assignment, and what was done under it, were so utterly unlike. If we were to set the verdict aside which has been given in this case in favour of the assignees, when there is no reason to doubt that all was done in good faith, without any secret understanding in favour of the former owner of the goods, we should be holding that the statute means in all cases not merely an actual and continued change of possession, but an *exclusive possession*, in the assignee, and that so peremptorily that a jury must be held to have decided against law, if in a case of this kind they find that there has been a change of possession, when the former owner of the goods is allowed by the assignees to give his attendance and assistance jointly with their clerk or agent, and under their control and direction, in disposing of the goods.

That this was a circumstance in the present case which might fairly be submitted to the jury, and considered by them as raising suspicion of the assignment being colourable, we have no doubt, but it was considered and disposed of by the jury with that view, and the conclusion which they came to in favour of the honesty of the case seems to be consistent with the truth of the case. All therefore turns on the question whether, as a point of law, the statute, as it regards change of possession, should be held not to be complied with in any case where the former owner of the goods is allowed, as he very commonly is in cases of assignments for the benefit of creditors, to remain upon the premises assisting the assignees in carrying out the purposes of the assignment. We think we cannot construe the statute so strictly. Rule discharged.

Cann v. Thomas.

Absconding debtor—Attachment—Execution—C. L. P. A., secs. 53. 55.

The plaintiff obtained execution against A., whose goods were then under seizure upon an attachment issued against him as an absconding debtor. The sheriff under C. L. P. A., sec 53, having sued and obtained payment of a sum due by one of A's debtors,

Held, that such money was not liable to the plaintiff's execution, but must be divided among the attaching creditors.

This was an action brought by the plaintiff against the defendant, as sheriff of the county of Wentworth, on a return of *nulla bona* made to a writ of *fieri facias* placed in his hands on the second day of November last past, against the goods and chattels of one William Dodds, in favour of the said plaintiff; and by consent of parties, and by order of a judge, the following case was stated for the opinion of the court without pleadings:—

On the 10th of October, 1857, the above named plaintiff obtained a judgment in this honourable court against one William Dodds, and on the second day of November following placed a writ of *fieri facias*, against the goods and chattels of the said Dodds, in the hands of the defendant, as sheriff, for the execution thereof.

On or about the eleventh day of October last past the said William Dodds absconded from this province, and proceedings were then taken against him as an absconding or concealed debtor, and on the twelfth day of the same month a writ of attachment against the said William Dodds, as such absconding or concealed debtor, was placed in the hands of the defendant, as such sheriff as aforesaid, at the suit of John Riddle and John McNab, who in due course obtained a judgment, and placed a writ of *fieri facias* thereon, against the goods and chattels of the said William Dodds, in the hands of the defendant, to be executed according to the exigency thereof.

Various other writs of attachment, including one at the suit of one Young against Dodds issued on the thirteenth day of such last mentioned month of October, were sued out against the said William Dodds at or about the time of the issuing of the last mentioned writ of attachment, and were also duly prosecuted to judgment and execution.

On or about the thirteenth day of the same month October, and before the writ of *fieri facias* of the said plaintiff, so by him obtained under his judgment, was issued and placed in the hands of the said defendant, he, the said defendant, as such sheriff aforesaid, did give notice in writing to the Great Western Railway Company, a debtor of the said absconding debtor, as provided by the 52nd section of the Common Law Procedure Act, and the personal and other property of such absconding debtor having proved insufficient to satisfy the said attachments and the executions issued thereon, did, in pursuance of the provisions of the said act, sue for and recover from the Great Western Railway Company the sum of £311 13s. 3d., and the said money now remains in the hands of the said defendant as such sheriff as aforesaid, and was in the possession and custody of the said defendant before and at the time of the return of the writ of *fieri facias* in favour of the plaintiff hereinbefore mentioned.

The said sum is not sufficient to satisfy said attachments.

The question for the opinion of the court is, whether the money so received by the sheriff from the Great Western Railway Company is liable to be seized and taken by the sheriff in satisfaction of the *fieri facias* so issued and placed in his hands by the plaintiff, or whether the same is liable to the several attachments so issued against the absconding debtor.

If the court should be of opinion that the money was or is so liable to seizure under the *fi. fa.*, judgment shall be entered for the plaintiff, if otherwise for defendant.

Start, for the plaintiff. *Burton*, contra.

C. L. P. A., 1856, secs. 53, 55, 57, 58, 194; *Collingridge* v. *Paxton*, 11 C. B. 683, were referred to.

Robinson, C. J.—I think the money obtained by suing the Great Western Railway Company under the 53rd clause of the act must be divided among the plaintiffs in the writs of attachment, and cannot be treated as if it was the proceeds of goods remaining in the hands of the absconding debtor, and so paid over to the judgment creditor, who obtained judgment before the debtor absconded; and cannot therefore be paid over to such judgment creditor, under the 55th clause of the Common Law Procedure Act.

The legislature never could have intended that when an attachment creditor had availed himself of this provision of the statute, giving the security for costs which the act requires, a creditor who had obtained execution upon a judgment against the debtor before he absconded, should step in and sweep away the fruits of the action brought by the sheriff at the instance of the attachment creditor for his benefit.

If the debtor had never absconded, and this were a question between a previous execution creditor and a subsequent one, which should receive the benefit of a garnishee order obtained by the plaintiff in the second writ, there could be no question that when the money was collected by the creditor who obtained the order, he would hold it against the creditor who had the prior execution.

The case cited from 11 C. B. 683, has a material bearing on this case. We are clear that the plaintiff cannot sustain this action.

Burns, J.—I think judgment should be given for the defendant. It is admitted that the judgment debt due from the Great Western Railway Company to the debtor was merely an account, and therefore not liable to seizure by virtue of 22nd sec. of 20 Vic., ch. 57, similar to the English act 1 & 2 Vic., ch. 110, sec. 12, enabling sheriffs to seize upon writs of *fi. fa.*, money, bank notes, cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or securities for money. It is said the plaintiff might have had the remedy by garnishment under the 194th section of the Common Law Procedure Act, after he had obtained his judgment, had it not been for the attachments sued out and notices given under the 52nd section of the act, which would deprive him of that remedy. All we can say to that question is, if it be any hardship upon one creditor more than upon another, which of them is to obtain the fruit of his legal proceedings first, the legislature must apply the remedy. The 55th section preserves to the creditor who sues before the debtor has absconded his legal rights upon his execution to the exclusion of the attaching creditor, and the

remedy by garnishment of the demands due to the debtor is an addition, for he never had it before. It may be the legislature considered it would be justice to allow the creditor who should obtain execution upon a suit commenced before the debtor absconded, to have all goods and effects liable to execution held to satisfy the execution prior to the claim of the attaching creditor, and that the attaching creditor might have all other demands not liable to execution held liable to his claim by reason of the attachment and notice to the debtors of the judgment debtor in priority to the execution, but that is not a point for the court to speculate upon. The question here is whether the money, the proceeds of the demand against the Great Western Railway Company, is to be considered as liable to the execution when that money came into the sheriff's hands, though it be admitted, so long as it remained a debt due by the Railway Company, the execution could not touch it. In the case of *Collingridge* v. *Paxton*, (11 C. B. 683), the court held that bank notes seized by the sheriff could not be treated as liable to seizure on another execution then in his hands against the plaintiff at the suit of another person. Now in this case I apprehend, for the same reason given in that case, the amount of the debt due by the Railway Company, when paid into the hands of the sheriff, could not be said to be money identical in the hands of the sheriff of the judgment debtor. The judgment debtor, or his attaching creditors, would have no claim to the identical bank notes, or gold, or silver, or cheque, or whatever the Great Western Railway Company might have paid the sheriff with. It is in that sense, I think, the legislature meant it, when authority was given to the sheriff to seize money, &c., belonging to the debtor. In this case it appears the sheriff recovered the amount from the Railway Company under the provisions of the 53rd section, and that section says the sheriff shall hold the moneys recovered by him as part of the assets of such absconding debtor, and shall apply them accordingly. The 57th section shews how it shall be distributed.

The goods and effects of the absconding debtor in the hands of the sheriff would be liable to such executions as he might have under the provisions of the 55th section, but I do not think that demands which the execution could not touch can be treated, when the sheriff has obtained payment of them, in the same way. The effect of the several clauses of the act is to constitute the sheriff a trustee for the attaching creditors, and it is in virtue of that capacity cast upon him by the act, that the money due from the debtors of the judgment debtor comes into his hands, and not by virtue of his office of sheriff. The former act provided for the attaching creditor plaintiff collecting the demands from the debtors, and suing them if not paid, and by that means discharging his own demand. If that provision had remained in force, it never could be contended that, as soon as the attaching creditor had obtained payment, the sheriff could take the money out of his hands upon an execution against the debtor in the situation this plaintiff's execution is. It does not appear to me that the effect of substituting the sheriff as the proper person to collect those demands has the effect of altering the law, and saying that when the money has been paid to the sheriff under one authority, it shall be considered the debtor's money so *car-marked* as that it instantly becomes liable to another species of demand, which could never have touched it but for the circumstances of the legislature constituting the sheriff a trustee to sue for debts instead of allowing every creditor to sue for himself, and in some cases, perhaps, sue for part only, that is, so much as would be sufficient to satisfy a particular demand.

McLEAN, J., concurred. Judgment for defendant.

COMMON PLEAS.

TRINITY TERM, 1858

Reported by E. C. JONES, ESQ., *Barrister-at-Law.*

STONEBURGH v. THE MUNICIPALITY OF BRIGHTON.

Contract—Liability of Corporation—Right to Recover.

Held, that where plaintiff performed certain public work under contract not made with the municipality, or any of its known officers, but merely with persons in their individual capacity assuming to act as a duly appointed committee, no action lies against the corporation.

Declaration for work, labour, and materials, done and provided by plaintiff for defendants at their request, and on an account stated. *Plea*, never indebted.

The case was tried before *Draper*, C. J., at Cobourg, in April last.

The plaintiff proved that in the latter part of the year 1856, certain inhabitants of the village of Smithfield, in the Township of Brighton, petitioned the municipality of that Township respecting the necessity of making some improvements on the bridge across the creek in that village, representing that such repairs were absolutely necessary, and hoping the municipality would appoint a committee for the purpose of superintending the work, and further stating that the bridge in question was the only portion of the road the inhabitants were unable to keep in repair. On the 6th December, 1856, it was resolved by the Municipal Council,—"That the prayer of the petition be granted, and that Messrs. Abigail Smith, Henry Vantapel, and William Dravey be appointed a committee to superintend the said work." None of these three were members of the council; no other entry respecting the matter appears on the corporate books; in a by-law imposing all rates and assessments on the Township for the year 1857, this bridge or work was not mentioned, for it imposed a gross sum, composed of items which had been discussed in the Council and approved. The sums required for different purposes were estimated for, and if adopted were put into the gross sum. The Clerk of the Council said he thought £75 had been estimated for, for the bridge, on a loose piece of paper written by one of the Councillors, but he could not swear it was included in the rates imposed; he thought it had been struck out. One of the Township Councillors swore that the matter was talked of in the Council in 1857, but nothing whatsoever was reduced to writing. He said £75 for this work was included in the gross sum imposed by the by-law spoken of, and that the money had been raised, that is, all imposed by the by-law, he thought, but he did not know it positively. In December, 1857, a demand was made on the Council for £82 10s. for this work, and the Council resolved, "That the Reeve be authorised and required to take legal advice on the resolution appointing a committee to construct a bridge at Smithfield, and if this Council is found liable, that he be authorised to draw an order on the Treasurer in favour of Coulter and Bates for the sum of £82 10s., for the construction of said bridge, and said order to be made payable on the 20th January, 1858." There was no other by-law, resolution, or minute of any kind on the subject.

The committee, however, proceeded and got a plan and a specification for building a stone bridge, and grading the road approaching to it for a distance of 25 rods one way, and 30 rods the other, and for making 108 feet of railing on each side, and employed plaintiff to execute it. One of them proved that they got no specific directions from the Council as to the nature of the work, nor was any sum mentioned as the limit of the expense. They did not even receive a copy of the resolution appointing them, but signed the specifications produced in their own names, and the plaintiff signed them also, in which there was no reference to the municipality. No written contract was produced, or any other memorandum in writing except the specifications; but they, the three persons named in the resolution, engaged the plaintiff to do the work according to a plan and these specifications for the sum of $330. It was proved that the work was not yet finished, ten or fifteen days' work remaining to be completed, which they thought it better to defer until the spring. The price was sworn to be reasonable, and the work which was done was good.

On this evidence, the learned judge nonsuited the plaintiff, reserving leave, by consent, to move to enter a verdict for him for £75.

In Easter Term, *Patterson* moved to enter a verdict for plaintiff on the leave reserved.

In Trinity Term, *A. Richards* shewed cause, he cited *Cope* v. *Thames Haven Dock and Railway Company*, 3 Ex. 841; *Randall* v. *Trimen*, 18 C. B. 786; *Australian Steam Navigation Co.* v. *Marzetti*, 11 Ex. 228; *Henderson* v. *The Australian Steam Navigation Co.*, 5 E. & B. 409; *Reuter* v. *The Electric Telegraph Company*, 6 E. & B. 341.

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

On this application we have to determine whether the evidence given by the plaintiff shows him entitled to recover the sum of £75.

If entitled to recover at all there seems no objection to the amount.

The latest decisions in England have established that when a corporation is a trading one, and as I understand especially where it is established for a special purpose, they are bound by a contract made in furtherance of the purposes of the incorporation, though not under the corporate seal.

The same doctrine and fully to the same extent has been established in this Province by the decision of the Court of Appeal in *Marshall* v. *The School Trustees of Kitley*, and *Pym* v. *The Municipal Council of Ontario*. We cannot, therefore, entertain any objection for the mere want of a contract under seal to charge the defendants as a corporation. But there are other difficulties in the way. I am not prepared to admit that the Township Council can, by resolution, delegate to third parties power to bind them by contract for purposes which the Legislature have specially entrusted to the Council, and enabled them to execute by the passing of by-laws: *Rumsay* v. *Western District Council*, 4 U. C. Q. B. 374.

The plaintiff did not contract with any known officer or servant of the Municipal Corporation. He does not appear to have entered into a formal contract with the three persons named in the resolution, though it appears that he and they signed the specifications, they signing as individuals, not as acting under or for the Municipality. The resolution under which alone they could assume to act, for the Municipality is not referred to, was not, for all that appears, communicated to the plaintiff, and it is not shewn that in dealing with him he had any ground to suppose he was contracting with the Corporation: they may have told him so, but it does not appear that he ever enquired how it was.

If, therefore, there is a liability on the part of the Municipality it must arise from their subsequent adoption of the contract, or a receiving of the work. The evidence was insufficient to establish a liability founded on either of these assumptions. I thought, if in fact there had been an adoption of the contract and the work done, by an appropriation on account of it, after it was so nearly brought to a conclusion, it was a matter capable of easy and direct proof; whereas, though it was proved to have been submitted for consideration to the Council, of the two witnesses who spoke of it, one thought it had been struck out of, and the other was not certain, though he thought it had been included in, the gross sum to appropriate which a by-law was passed. I did not think this sufficient, and I said so, and I was not asked to submit it to the jury, and now the motion is not for a new trial, but to enter a verdict for the plaintiff on the assumption that this evidence was enough to give him a right to recover. I still think it did not go far enough; the case struck me thus, when the resolution was adopted to grant the prayer of the petition, an aid to make some repairs and improvements was contemplated, which would enable the inhabitants of the locality to make the highway good. I do not believe the idea of building a new bridge and of grading the approaches for a considerable distance on each side was even then thought of. When the expense incurred by the committee became known, and it was proposed to make an appropriation for it, the appropriation was refused, because it was thought the expenditure was unauthorised, and that an unfair advantage was sought to be taken of the resolution appointing the committee, and I am confirmed in this view by the resolution which was afterwards adopted directing the Reeve to take legal advice as to the liability of the Municipality, and I conclude, therefore, that unless the committee had legal authority to bind them, and did bind them to this payment on the work being done, the Council had not done anything subsequently to bind them, and I continue of that opinion. As to any acceptance of the work, there was no proof whatever of it, except that it was conceded that the public used the bridge as part of the highway which had theretofore been in use, and this I thought formed nothing on this point for the plaintiff.

I think the rule should be discharged.

DeBlaquiere et al. v. Becker et al.

Agency—Evidence—Misdirection.

Held, that the question of agency is a question of fact for the jury, there being some evidence to go to them of which the judge must decide; and, *Held*, that the entry of a party on the assessment roll as resident, when in fact he is non-resident, did *not* render his assessment nugatory.

Held, also, that a statement and demand of taxes, are not a necessary condition precedent to uphold a distress for taxes in the case of non-residents.

Replevin,—Declaration averring special damage from the taking of plaintiffs' goods.

Plea.—Not guilty, by statutes 16 Vic. cap. 182 (1853), and 14 & 15 Vic. cap. 59 sec. 5 (1851) — the plaintiffs' goods had been seized for taxes due to the Municipality of Walsingham for 1857, defendants justifying as collectors.

At the trial before *Hagarty*, J., at Simcoe, John Leighton was called for the plaintiff, who proved the property seized to be plaintiffs. Plaintiffs had taken it the day before seizure, under a bill of sale given by a debtor of theirs. They were about selling it by auction on the morning it was seized by defendants. Evidence was given to shew special damage, which need not be further noticed here. Plaintiffs had carried on a large lumbering establishment at Port Rowen, in Walsingham, but had broken it up. Till within six months before the trial they had an office in Walsingham. During 1857 plaintiffs lived at Woodstock in another county. DeBlaquiere had lived formerly in Walsingham, and had been Township Reeve. One Beard was plaintiffs' agent at their office till it was closed. Witness had been for ten years in Walsingham, doing business for plaintiffs "off and on." In selling this property, he instructed the auctioneer by instructions from plaintiffs; had taken this property for plaintiffs. Bought and sold logs for plaintiffs; paid taxes for them in adjoining Township of Houghton, and other taxes, such moneys being sent by plaintiffs to him. Bargained with persons for sale of plaintiffs' lands, and sold subject to their approval, and in one case left $5 of purchase money which vendee for defendants claims for taxes. Sometime before seizure defendant Becker spoke to witness about the taxes, and said, "what is to be done about DeBlaquiere's taxes," mentioning the amount, £170 odd. Witness said he was writing to Woodstock, and would let him know. Becker was collector, Smith was Bailiff; witness did not, however, inform plaintiffs: witness was winding up plaintiffs' saw log business, and selling their lands subject to their approval, and kept off trespassers: witness had no office: from a few days after 6th July, 1857, plaintiffs had no office or place of business in Walsingham. It was six miles from plaintiffs' mills, and in Port Rowen where Becker spoke to witness about the taxes.

The auctioneer deposed that he was instructed by Leighton for plaintiff. Plaintiff DeBlaquiere had not lived in Walsingham for the last two years. Beard was plaintiffs' "chief boss:" since July plaintiff had no business there.

Beard deposed that he had been plaintiffs' agent; office closed 4th July; for several years witness had returned plaintiffs' property to the assessors: lands were returned as those of "Residents." In 1857 assessors sent the assessment, and Beard on 18th April, 1857, wrote to them in reply:—

Gentlemen,—Your assessment of our lots in Walsingham is correct, with the exception of lot 17 in 11 concession, which we shall be obliged by your taking out of our assessment, leaving total amount of real property £13,089. Yours, &c.,

FARMER & DEBLAQUIERE.—W. BEARD.

Paid some school taxes for plaintiffs: did not know the rate imposed for 1857: did not know amount till seizure.

On the defence, the Township Clerk proved that Becker was collector under Township seal, produced collectors' roll for 1857, plaintiffs' taxes mentioned there: assessed as residents £175 6s. 2½d. on £13789: roll given to collectors 3rd October, 1857: taxes to be paid by 14th December, time was afterwards extended to 1st May: roll not yet returned: seizure was on the 5th November: knew Leighton twelve or thirteen years: understood him to be plaintiffs' agent: Leighton admitted to witness that the taxes had been demanded of him.

One Brown deposed, that he had bought land from Leighton acting for plaintiffs: had been manager for them a long time, buying grain, hay, &c.

One Forsyth deposed, that in beginning of October, 1857, he saw Becker at plaintiffs' premises, Rowen Mills, where their office had been. Becker said he was collecting taxes: asked was there any one in plaintiffs' office, as he was demanding taxes: witness told him Beard was not at home, but was at Woodstock. He was

there several times, witness supposed for taxes: witness paid his taxes there, having rented part of the premises. Beard had been down occasionally after July, but property, office and all had been purchased by others.

On this the plaintiffs' counsel contended that no demand was proved on plaintiffs fourteen days before seizure; that demand must be personal, not on agent; that in any event Leighton was not an agent for such purpose.

For defendants it was urged that the fourteen days' demand was only directory, and that going to the residence or place of business was sufficient.

The jury were told that the act required in terms, that a demand of fourteen days before seizure must be proved, and they were asked to find if such a demand was made on plaintiffs or their authorised agent after the collector had demanded it at their last known place of business. The plaintiffs' counsel contended that the judge should himself decide that Leighton was not an agent on whom such demand could be made. The judge left the question as to Leighton being such agent to the jury on all the facts.

The jury found for the defendants.

In Easter Term, *Freeman*, Q. C., for plaintiffs, obtained a rule to show cause why there should not be a new trial on the law and evidence, and for a misdirection, in leaving to the jury to decide whether Leighton was plaintiffs' agent, and in ruling that notice to an agent, not at the defendant's place of business, was a legal notice.

In Trinity Term, *M. C. Cameron* shewed cause, and *Freeman* supported the rule, citing 16 Vic. cap. 182, sec. 17.

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

I think the learned judge was bound to leave the question of agency as a fact to be decided by the jury: whether the evidence offered was admissable, and if admissable, whether there was really any proof whatsoever of the fact of agency, it was for the learned judge to decide. If he thought there was evidence, then it was for the jury; for the question of agency, is not, I apprehend, one of those preliminary questions, which a judge must himself decide upon in order to let in evidence to be submitted to the jury. Such as, whether a confession be admissable or no, on account of some alleged promise or threat under the influence of which it was given, or whether a party since dead made the declaration tendered in evidence, at a time when the conviction of his speedy death was present to his mind, or whether secondary evidence of the contents of a deed is admissable under existing circumstances.

Then, it appears to me there was evidence that Leighton was the plaintiffs' agent for the purpose of having this particular demand made upon him, and therefore the objection for misdirection fails upon both grounds.

Then it is objected that the names of the plaintiffs should have been entered on the roll as non-residents. That they were in fact non-residents is not disputed. That their names were entered on the roll with their agent, from which the jury might fairly infer a request on their part, is, I think, sufficiently established by the practice of previous years, and by the letter of the 17th of April, 1857; the lands therefore would not come within the description in section 8 of 16 Vic. cap. 182, nor under sec. 22, and no objection was urged, nor indeed could there be, to the amount at which they were assessed. So that if it amounts to anything, the objection is, that by not describing the plaintiffs as non-residents, the entry of their names, and the assessment of their property became nugatory. I think it sufficient to observe that the object of the proviso, requiring the words "non-resident" to be placed on the roll opposite the name of a freeholder, is chiefly if not exclusively designed to prevent his voting at any municipal election by reason of his name being on the assessors' or collectors' roll. We might as well hold the assessment of the party void because his address was omitted from the roll, as because the words non-resident are omitted. I think neither omission *per se* prevents the collection of taxes.

But it is argued that the 41st section (16 Vic. cap. 182) makes it the duty of the collector to call at least once on the party taxed or at the place of his usual residence, or domicile, or place of business, if within the collector's Township, &c., and to demand payment, and if any person whose name appears on his roll shall not be resident within the Municipality, he shall transmit to him by post a statement and demand of the taxes charged against him in the roll, and that as no such statement and demand were transmitted by post, the distress was illegal.

The letter of the 17th of April may be taken to be an answer to the notice transmitted by the assessors under the 23 section of the act. It would state the actual value at which the real property was assessed. All therefore must turn upon the necessity, as a condition precedent to distress, of making a demand, or transmitting one by post, and if necessary upon the proof given thereof.

The plaintiffs were entered on the roll as residents. It is admitted they were not residents in fact, but I do not think, for the reason already given, that the assessment is void for this mistake of description. The collector's duty, however, differs according to the place of residence or non-residence; the sec. 41 providing that "if any person whose name appears on his roll *shall not be resident within the municipality, he shall transmit by post*," &c.; this was precisely the plaintiffs' case. It depends, not on the description entered on the roll, resident or non-resident, which is material for the purpose of voting, but on the fact of being resident or no.

Then the collector should have transmitted them a statement and demand of the taxes charged against them in the roll. The 43rd section gives the power of distress. If any party neglects or refuses to pay for fourteen days "*after such demand made*" on him, referring in this case to actual residents, the collector may levy, "and *at any time after one month from the delivery of the roll to him*," (which must be done on or before the 1st of October, sec. 39), "the collector may make distress, of any goods and chattels which he may find upon the lands of non-residents on which the taxes inserted against the same on his roll have not been paid, and no claim of property, lien or privilege thereupon or thereto, shall be available to prevent the sale and payment of the taxes and costs out of the proceeds thereof." It is to be observed that this last mentioned provision does not say after demand, or after transmitting a statement or demand, but after one month from the delivery of the roll to the collector. It is true that this particular power relates to distress on the lands in respect of which the taxes were imposed, and this may well have been thought necessary, as the goods on such lands may not have been the property of the party assessed. But this provision taken in connection with section 45, leads to the conclusion, that in case of non-residents, the transmitting a statement and demand is not a condition precedent to the power of distress, though the collector may be liable for any damage resulting from the omission to transmit it. The 45th section enacts that if any party taxed shall not be resident, or shall have removed, &c., or if any party shall neglect or refuse to pay any tax assessed in any Township, &c., within the County in which he shall reside, it shall be lawful for the collector to levy such tax by distress, &c., of the goods of such party in any Township, which for judicial purposes, shall be in the same county, and to which such party shall have so removed, or in which he shall reside, "*or of any goods and chattels in his possession therein.*"

The distress appears to me to be covered by this last provision, and I think the rule should be discharged.

Per Cur.—Rule discharged.

CHANCERY.

(IN BANC.)

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

BATES v. TATHAM.

Practice—Receiver for Partnership property—Master's Report.

When there is a reference to the Master to enquire what lands are partnership property, a motion to appoint a Receiver is informal.

(12th October, 1858.)

In this case, three lots had been bought by the parties who had at the time of purchase, been in partnership. The conveyances were made to Defendant, but the Plaintiff had advanced £100 for the purchase of the first lot, part of the purchase money for the second; and the third was bought by a debt due the partnership by the vendor. A decree had been pronounced referring to the Master to enquire what was partnership property.

E. Fitzgerald now moved for the appointment of a Receiver. The purchase money was advanced on the joint account for the purchase of lands. Since the decree, it was arranged between the parties, that the property should be divided and a special lot reserved to pay the partnership debts and costs of the suit. The Defendant had not carried out this; and now refuses to pay any portion of the rents towards liquidating the debts; and he is not worth anything except this property—the Plaintiff having advanced the capital of the partnership and the greater portion of the purchase money for these lands.

Brough, Q. C., contra. There was nothing to show that these lands were bought for the partnership; the Defendant had bought them for himself, and if they were found to be partnership property, they must be sold and their proceeds divided.

ESTEN, V. C., delivered the judgment of the Court. A Receiver can only be appointed for the rents and profits of lands, and not for any other purpose. I think the Plaintiff should prosecute the decree to determine whether this is partnership property or not; for the Court cannot appoint a Receiver unless it is found so, and this cannot be known until the Master reports. It would be little use to appoint a Receiver, for the decree should particularize who should pay him. When the decree determines the partnership property, it is usual to appoint a Receiver as a matter of course. But in this case, the Defendant has from first to last denied,—and with great pertinacity,—that these are partnership lands. I therefore think that inasmuch as there is a reference to the Master to ascertain what is partnership property, it would be inadvisable to grant a Receiver in the present state of the cause.

ROBERTS v. REES.

Mortgage—Duty of purchaser as to Vendor's Mortgage.

The purchaser of an estate subject to his vendor's Mortgage, is bound to indemnify the vendor against such mortgage debt. (Nov. 9th, 1858.)

In this case the bill was filed to compel a purchaser to pay the amount of a mortgage made by his vendor to the original owners. The plaintiff had purchased certain lots in 1852, and had given a mortgage for the balance of the purchase money; shortly afterwards he sold the lots to the defendant, who was aware of the existence of such mortgage. Default having been made in payment of the mortgage, the mortgagees sued their mortgagor (the plaintiff) at law, for the amount, and obtained judgment. The plaintiff immediately on service of the summons, filed his bill against the defendant (the purchaser) to compel him to indemnify him against the mortgage.

Hodgins moved that a decree be now made, in accordance with the prayer of the bill, on the ground that every purchaser of an estate in mortgage is bound to indemnify the vendor against the mortgage debt (*Waring* v. *Ward*, 7 Ves. 337).

Hurd for defendant.

ESTEN, V. C.—Delivered the judgment of the court. This application is not of frequent occurrence in this country, though more general in England, and according to the law there, the plaintiff is entitled to the decree as asked for. The same rule applies here; and the decree therefore, will be that the defendant do pay the amount of the mortgage, together with the costs at law, and of this application.

VANSICKLER v. PETTIT.

Legal Mortgage—Foreclosure—Registry Laws—Duty of subsequent Mortgagees.

A Mortgagee whose mortgage was made before the Registry laws required registration to insure priority, filed his bill to foreclose. The mortgage had not been registered.

Held, that subsequent mortgagees were bound to redeem him, his application being to fix a time for them to redeem: and that purchase for valuable consideration without notice could not be pleaded against him. (29th January, 1859.)

In this case the bill was filed by a first legal mortgagee to foreclose, under the following circumstances: The Plaintiff, in 1849, conveyed certain property to his son, *Robert Vansickler*, who mortgaged back. In 1857, *Robert* sold to the Defendant *Pettit*, who mortgaged back, and which mortgage *Robert* assigned to one *Paxton*. The mortgage to the Plaintiff was not registered under circumstances which prevented the operation of the Registry laws. The plaintiff now filed his bill to foreclose and the Defendant pleaded purchase *bona fide* for value without notice.

Roaf for Plaintiff.

A. Crooks for Defendant.

THE CHANCELLOR.—The position of a first legal mortgagee is impregnable in both law and equity, and he has a right to call upon subsequent mortgagees to redeem him. He files his bill not for foreclosure, but as an invitation to the subsequent mortgagees to redeem, and comes to the Court to ask that a time may be fixed for them to exercise this right. Where there are several mortgagees without notice of the first legal mortgage, the plea of purchase without notice is not a denial of their duty to redeem.—The case of *Collier v. Fitch* governs the present case. The defence therefore of purchase for valuable consideration is inapplicable.

ESTEN, V. C., concurred.

(CHAMBERS.)

TOWN OF PETERBOROUGH v. CONGER.

Practice—Service of Bill on a Solicitor—Order pro confesso.

The rule requiring notice of motion to take a Bill *pro confesso*, after service on defendant's solicitor, cannot be dispensed with, although such solicitor consents to waive such notice.

This was a motion to take a Bill *pro confesso* against the Defendant. Service had been accepted by his solicitor in the usual way, and a consent added, that if no answer was put in within 28 days, application might be made to take the bill *pro confesso*.

O'Brien now moved in accordance with the above. No further notice had been given to the solicitor.

SPRAGGE, V. C.—The practice is to give notice in all cases where the service is not personal. Where the service is personal no notice is required. But it is a matter of practice, and it is proper that the practice should be uniform. And if this was a case not requiring notice, the order could not go without reference to the other members of the Court.

THOMPSON v. WARD.

Practice—Depositions to be used in the Courts.

The usual practice in applications to allow depositions and evidence taken in this Court, to be used in other Courts, is to send an Officer of the Court there with the papers.

This was an application to allow the depositions and evidence taken in this cause to be sent to the Clerk of Assize at Toronto, to be produced on a trial now pending in the Court of Queen's Bench. An affidavit was put in as to the necessity of having the papers at the trial. No notice of motion had been given, but the defendant's solicitor being in court at the time consented to their being used without prejudice or abatement in any other proceedings.

SPRAGGE, V. C.—The practice in all such cases is so give notice of the motion, but as the defendant's solicitor is present and has consented to the motion, the papers may go. The usual course, and which must be adopted in this case, is to send down an officer of the Court with the papers, who retains possession of them for the Court, but allows them to be used in the suit.

GALBRAITH v. GALBRAITH.

Practice—Notice of Motion—Guardian ad litem.

Where the mother of the infants is Plaintiff and the infants Defendants, notice of motion to appoint a guardian *ad litem*, must also be served upon them if of proper age.

In this case the bill was filed by the mother of certain infants, in which they were made defendants. Notice of motion on behalf of Mrs. *Galbraith*, as Plaintiff, was served upon herself as mother of the infants as required by the orders of Court.

Cattanach now moved in accordance with the notice of motion, and read affidavits of the respective ages of the infants.

SPRAGGE, V. C.—I see the orders have been strictly followed in

this case,—which is peculiar owing to the Plaintiff serving her own motion upon herself. I think, however, that as the children are of sufficient ages (12 and 16) to be consulted, notice of motion should be served upon them, so that we may know whom they would prefer.

ELECTION CASE.

IN THE MATTER OF SAWERS RELATOR v. STEVENSON.

Before His Honour JUDGE BOUCHIER of Peterbourgh.

Election—Mayor—Officer of Corporation.

The Mayor of a Town for the year 1858, is not ineligible as Mayor for 1859.
A Mayor is not an officer of the Municipality, within the meaning of sec. 73 of 22 Vic. cap. 99.
An application may be made to unseat a person elected as Mayor, though he be not sworn into office.

BOUCHIER, Co. J.,—The proceedings in this matter are taken for the purpose of testing the eligibility of James Stevenson, to hold the office of Mayor of the Town of Peterborough during the current municipal year, and the ground taken by the relator, in order to support the view he entertains of the question is, that Mr. Stevenson, having occupied the office of Mayor during the year 1858, is therefore under the provisions of the 22 Victoriæ, cap. 99, disqualified from holding the like office during the year 1859. Two preliminary objections were taken by the Counsel acting for Mr. Stevenson, both of which I overruled at the argument, promising, however, to give the latter objection every consideration possible, before pronouncing any judgment in the matter.

Mr. Stevenson's counsel, in answer to the statement of the relator, put in an affidavit and certificate of the proceedings taken at the election of a Mayor in 1858, and contended that the proceedings of the relator, having been commenced antecedent to Mr. Stevenson having taken the oath of office, and the 22 Vic., having provided that the heads of corporations should remain in office until their successors were sworn in; that the affidavit and certificate shewing at the time the writ was issued Mr. Stevenson was actually holding office under the election of 1858, was a sufficient answer to the statement of the relator, and the learned counsel directed particular attention to the wording of the clause, under which members of the Council of corporations now hold their seats as indicating the intention of the Legislature that his view of the case is the correct one.

Upon reflection, I am still satisfied that I was right in overruling the objection; setting aside any previous decisions on the subject, I find that the Legislature by the 15th subsection of the 128 section have by directing, that no costs should be awarded against any person disclaiming office, unless the Judge is satisfied that such party *consented* to be *nominated as a candidate*, or *accepted the office*, recognize the principle that acceptance of a nomination, and subsequent return, are sufficient grounds, for proceeding by *quo warranto* even before the party elected is sworn into office. It is not pretended that Mr. Stevenson was other than a consenting party to his nomination; if it were, the affidavits put in, in reply to the documents filed on behalf of Mr. Stevenson, shew clearly and conclusively that he did accept such nomination. I therefore have in deciding this matter to do so on the merits of the question raised by the relator, and on the interpretation to be placed upon the several clauses of the statute relied on by him, in order to sustain his position. The Relator appears to me to rely, on the disqualification clause 73 sec. 1 of 22 Vic., cap. 99, which sets out amongst other parties disqualified from holding office "*any officers of a corporation*" and on the 120th section, which defining or assuming to define *what shall be the duties of a Mayor*, sets out, that he shall be "the *head* and *chief* executive officer of the corporation," and the Relator argues that the words "*chief executive officer*" used in the 120th section, is to be construed as making the Mayor an officer of the corporation under the 73rd section, and that therefore Mr. Stevenson is disqualified from holding the office to which he has been elected.

The second ground taken by the learned counsel for the Relator, is, that supposing under the other clauses there is a discrepancy as to the meaning of the 73rd and 120th sections, we must in such case revert to the Municipal law of England in such matters, and he quoted the 9th of Anne, cap. 20th, which enacts, that no person, who has been in annual office during the previous year, shall be *eligible* to a *re-election* for the *succeeding year*, and that any person so elected shall be liable to a penalty of £100. Before it becomes necessary to examine the latter proposition we must look at the first point raised, and if we find we can reconcile the apparent discrepancy of the clauses in 22nd Vic., there will be no occasion to enter upon the latter portion of the Relator's argument.

After a careful consideration of the whole statute, I am unable to come to the same conclusion as the Relator, and to find that the words "*chief executive officer*" of the corporation are to be construed as meaning an *officer* of the corporation within the 73d section. I am of opinion that the word *officers* used in the last named section refers to those designated as officers in the 150th and subsequent sections. These clauses are headed by the words "*officers of corporations*," and name and define the duties thereof. Such officers I find to be the *Clerk*, *Chamberlain*, *Treasurer*, *Auditors*, *Assessors* and *Collectors*, and I understand these to be the officers referred to in the 73d section. It was conceded in the argument by the learned counsel for the Relator, that were the proceedings at present pending brought in the year 1860, Mr. Stevenson having been elected during the year 1859, the Relator would have no ground for complaining of such election as an usurpation of office.

Then looking at the 405th section, and the repealing clauses immediately preceding it, I confess myself unable to say that any material difference exists between what would be the position of the parties in 1860 and the present year.

The repealing clauses enact that the statutes under which Mr. Stevenson held his seat in 1858, should cease to be the law on the first of December last, and the saving and confirming clauses declare, in effect, that thereafter the head and members of the Council then in office shall be deemed "the head and members of the Council" as continued, *under* and *subject* to the *provision* of this Act. This taken in connection with the construction I put on the other clauses, seems to me to place the eligibility for office in 1859 under a similar aspect to which it will bear in 1860.

Knowing that this matter has excited considerable interest, I have given it every consideration in my power, and I can come to no other conclusion but that Mr. Stevenson is eligible under the provision of 22nd Vic., cap. 99, to hold the office of Mayor during the current electoral year, and that he is not a usurper of the same. Consequently my judgment in this case is against the *Relator*.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

GENTELMEN:—May I take the liberty of asking for information on the extent of the jurisdiction of a Magistrate respecting indictable offences committed out of the limits of his Territorial Division.

I observe in the Act 16 Vic., cap. 179, sec. 1, That in all cases of treason, felony, or other indictable misdemeanor or offence, whether the same have been committed within the limits of the jurisdiction of such J. P., or elsewhere out of the jurisdiction of such J. P., if the person is residing, or being, or is suspected to reside or be within the limits of the jurisdiction of such J. P., that then and in every such case a J. P. is authorized to issue his warrant (B) for the apprehension of such person.

Sec. 9. That a J. P. may take cognizance of persons brought before him charged with any indictable offence, whether committed in this Province or upon the high seas, or on land beyond the seas, and to act thereon in his ministerial capacity.

Sec. 12 also mentions the power of a J. P. to hear a case

committed in any Territorial Division in which he has no jurisdiction.

And the Ashburton Treaty Act, 12 Vic., cap. 19, makes special provision for the delivery up to justice by the two governments, of any person charged with murder, or assault with intent to commit murder, piracy, arson, robbery, or forgery, or the utterance of forged paper, in either of the dominions of the high contracting powers.

Would it be correct, from the version of these statutes to to infer that a J. P. has authority to receive information or complaint (A) for an indictable offence committed in the United States of America, other than those offences enumerated in 12 Vic., cap. 19, if the offender be or is suspected to be within the Territorial Division of such J. P., and also to issue his warrant (B) and to proceed with the case ministerially as provided for and pointed out in 16 Vic., cap. 179? Or do the words "*or elsewhere*" in sec. 1, and "*any Territorial Division*" in sec. 12 only refer to Canada and not to the United States of America, or any other foreign country? And the words, "*or lands beyond the seas*" in sec. 9, to British dominions only, and not to lands beyond the lakes, or to any other foreign country?

The above question is one of the many with which Magistrates should be thoroughly acquainted before they can efficiently fill that highly responsible office, and the errors so frequently committed by them, should, in my humble opinion be more generally assigned to their want of knowledge, than to an over officious inclination, in which latter light the press generally treats the acts of magistrates: apparently overlooking that the appointments for the Bench of Magistrates are made from among the laity, the uninitiated, and that no Government bestows knowledge and wisdom with the office.

Should you be pleased to favor me with an answer to the above question, I feel convinced the same will be received with thanks by a large number of Magistrates, who, like myself, are desirous to perform their duties faithfully, but who often are in want to know what these duties are, and the undersigned will feel himself under particular obligations to you. Permit me to sign,

Respectfully yours,
A MAGISTRATE,
For the County of Waterloo.

[We think that the Ashburton Treaty and our Statute 12 Vic., cap. 19, contain the whole law on the subject of the surrender of fugitives from foreign justice, and that notwithstanding the enactments to which our correspondent refers, no magistrate can of himself, without reporting the case to the Executive Government of Canada, under 12 Vic., cap. 19, order the surrender of such a fugitive—no matter how great or how small the crime. We think, moreover, that it is not in the power either of a magistrate or of the Executive Government against the will of a fugitive charged with the commission of a crime, other than those mentioned in the Treaty and Statute, to surrender him to the foreign state. If our correspondent can procure access to, and will refer to the Queen v. *Tubee*, 1st vol. Upper Canada Practice Reports, p. 98, he will find the law upon the point fully expounded in an able judgment of Chief Justice Macaulay.—EDS. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—Will you have the kindness to answer the following questions in your next issue, viz.:—

Has a Township Council power to pass a By-law to put up offices to competition, particularly those of Township Clerk, Assessor, and Collector? and can it *compel* the *Clerk* to give security?

Is a Council bound to charge (not less) than $25 for Tavern Licences, by U. C. Municipal Act, s. 246?

By answering the above you will much oblige

A SUBSCRIBER.

[Three questions are put by our correspondent, each of which we proceed to answer *seriatim*:—

1.—If by "competition" is meant for purchase, we say decidedly not. It is the duty of every Municipal Council, entitled to appoint officers, to appoint thereto only men best fitted to discharge the duties, and not best able to purchase office.

2.—It is not provided by law that a Township Clerk shall give security, though it is in the case of Collectors, &c.; yet as the Clerk, like other officers of the Council, holds office during pleasure a request that he should give security on pain of dismissal, would not, we think, be unreasonable. Every Township Council has a right to regulate its offices and officers.

3.—The sum to be paid for a Tavern License is not to be in any case *less* than $25.—EDS. L. J.]

To the Editors of the Law Journal.

January 9th, 1859.

GENTLEMEN,—Since the Act of last Session abolishing preferential assignments, there has been some doubt felt as to its effect, and various opinions expressed respecting it; some saying that it has rendered chattel mortgages nullities; others contending, that it only refers to cases, where there is actual fraud apparent; will you oblige me with your opinion on the following points:

1. Can a chattel mortgage executed previous to the Act coming in force, but the time for the payment of which expires since, be renewed, so as to secure the chattels mortgaged, to the mortgagee, against the other creditors of the mortgagor?

2. Suppose a man to be indebted to several, but whose property is sufficient, or more than sufficient to satisfy *all*, can he give a chattel mortgage to one of his creditors, so as to secure his debt, despite the claims of the others when there is no fraud intended, and the only intention is to secure a debt lawfully due?

Yours truly,

ENQUIRER.

[The Act for the abolition of imprisonment for debt is not retrospective. It enacts that if any person being, &c., *shall* make, or cause to be made, &c., and we do not think that a re-

newal of a chattel mortgage pursuant to s. 8 of 20 Vic., c. 3, is "*a making*" within the meaning of the late Act. The renewal is the act of the mortgagee and not of the mortgagor.

Whenever a chattel mortgage is given since the passing of the Act, the state of the proposed mortgagor at the time of giving the mortgage, is to be considered:—

1. Was he in insolvent circumstances?
2. Unable to pay his debts in full?
3. Did he know himself to be on the eve of insolvency?

So the intent.

1. Was the mortgage given with intent to defeat or delay creditors? or
2. With the intent of giving one or more creditors a preference over other creditors?

If the position of the mortgagor be either of the foregoing, and his intent be as above mentioned, the mortgage is void. But we do not think that the mere intent to secure to a creditor, his claim is of itself sufficient to vitiate a chattel mortgage. There must be, in addition to the intent, the state of circumstances above described as to the mortgagor. In the case put by our correspondent, we think, the mortgage would be valid. —EDS. L. J.]

To the Editors of the Law Journal.

PETERSBURG, Jan. 14th, 1859.

GENTLEMEN,—Please inform me at your earliest convenience, if a pathmaster appointed in 1858, can take a seat as Councillor, in this Township (Wilmot) for 1859, for there are various opinions expressed on the matter, viz., that he is an Officer of the Municipality, and thus disqualified, on account of having to act if called on as pathmaster until his successor is appointed. By so doing you will confer a favour, and greatly oblige,

Yours truly, JOHN ERNST.
Town Reeve of Wilmot.

[A pathmaster or overseer of highways, as he is now called, is, we think, "an officer of the Municipality" within the meaning of s. 73 of the Municipal Act, and as such, disqualified to be a member of the Council.—EDS. L. J.]

To the Editors of the Law Journal.

BADEN, January 13th, 1859.

GENTLEMEN,—I am under the necessity of troubling you as to your opinion "on section 73 of the Municipal Institutions Act," as to disqualifications, where it says, "no officer of any Municipality," shall be qualified to be a member of the Council of the Corporation; your answer on the words *no officer of any Municipality*, in this section, will be received with much satisfaction to me; as one of our councilmen which have been elected councillor, was a pathmaster last year, and since his return as a member, the objection is raised by the opposition that he cannot act, while as above stated that he was pathmaster. Will you be so kind and inform me on the matter by Saturday evening next, as the council will organize itself on Monday next; so that I may know how to proceed, and if so, that the person alluded to cannot act, will a new election have to take place or not, or will the other person which was defeated take the seat?

I would wish to ask one question more, that is, if a Tavern keeper, can take out a license in the name of his father, who is an old man, and that without a family, and lives with his son the tavern keeper, and the tavern keeper made the application for the license, but the old man paid the money to the Treasurer, and got the receipt in the old man's name, —but the application was made in the young man's name the tavern keeper. Now, can this person be a councillor? please to answer if possible by return of mail on Saturday evening.

I am, and remain, yours truly obedient,
MICHAEL MYERS, *Town Clerk.*

[Always willing to oblige correspondents who are also subscribers, we never hesitate to do anything asked of us, provided the request be reasonable; but it is not reasonable to ask us to give legal opinions by mail, and that gratuitously.

The subscription to the *Law Journal* is only $4 per annum, if paid in advance, and the Journal is, we presume, ample value for the money. If, in addition, we were to constitute ourselves the legal advisers of all who subscribe, and that without further charge, we should not only be unjust to ourselves, but to the profession of which we are members.

All who consult us, or either of us, professionally, that is, as Barristers, and not as Editors of the *Law Journal*, shall receive prompt, and so far as our knowledge enables us, correct advice; but for advice so given we shall of course charge in the same manner as other Barristers.

Having for these reasons declined to advise the Town Clerk of Baden in the manner he requests, viz.,—by mail, we proceed to do so in the manner in which we have always done on similar occasions, viz.,—*through the columns of the Law Journal.*

1. The first question put is in part answered in our reply to the letter from the Town Reeve of Wilmot above published. A person Pathmaster or Overseer of Highways at the time of his election is disqualified to be elected, and so in our opinion his election is void.

2. No Inn-keeper or Saloon-keeper is qualified to be elected a member of a Municipal Council. If such an one take out a license in the name of his father, so as to evade the law, he is as much as ever disqualified.—EDS. L. J.]

To the Editors of the Law Journal.

BEAMSVILLE, 24th January, 1859.

GENTLEMEN,—Allow me to submit a question on behalf of the Municipality of the Township of Clinton, and ask a reply in your next issue. Does the 329th clause of the late Municipal Act authorize a Municipal Council to sell any original road allowance that they may think proper, when no other road is given in lieu thereof? I am, &c.,

R. K.
Township Clerk.

[The section does appear to us to have the effect supposed by our correspondent, and we are inclined to believe that the

Legislature so intended. The checks provided for the protection of the interests of the public are,—1. The publication of notice, &c., under sec. 308 of the Act; and 2. The confirmation of the Township By-law by the County Council under sec. 329 of the Act.—Eds. L. J.]

To the Editors of the Law Journal.

GENTLEMEN,—In 1858, we submitted a By-law to the qualified Electors, for raising the amount of Tavern Licenses to £12 10s., the By-law was carried by a large majority, the Act under which the By-law was passed is repealed by the new Municipal Act—the question now is, can the Council raise or lower the amount without on appeal to the Electors.

Yours respectfully,

JAMES PORTER.
Clerk, Mitchell.

[The Council of every Township, City, Town, and incorporated Village, has power to pass By-laws for granting licenses—for declaring the terms and conditions to be complied with by applicant—for declaring the security to be given by him—fo· limiting the number of Tavern and Shop Licenses, &c., all without an appeal to the Electors. The latter is only required when the by-law is to *prohibit* the sale, by retail, of spirituous liquors, &c. See Harrison's Municipal Manual, p. 127, note *v*.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

M. R. DRAKE v. DRAKE. *July* 13, 14·

Will—Construction—Uncertainty—Evidence.

A testator had a sister-in-law, A., and a wife's niece, B., besides other nieces of himself and wife. His will contained a specific devise to "*my sister A*," for life, with remainder to *my niece B.*" The names of two other persons, C. and D., occurred in the Will, but no other niece was named. The residuary gift was to "the said C. D. my niece, A. and E. equally between them." *Held*, that the residuary gift was void as to one-fourth for uncertainty.

Evidence of the instructions given in the will was rejected.

V. C. S. EYRE v. BARROW. *July* 12.

Practice—Attachment—Solicitor—Privilege—Costs.

A Solicitor was arrested under a writ of attachment, while proceeding to attend an appointment with a person for whom he was acting in his professional capacity.—*Held*, that the arrest was improper, and the prisoner must be discharged with costs.

V. C. W. HORTON v. SMITH. *July* 5, 6.

Tenant in tail—Charge—Presumption—Merger.

Tenant in tail in remainder expectant upon an estate, tail in possession, pays off a charge upon the estate during of the prior estate tail, and takes an assignment to himself of the mortgage term. He afterwards becomes tenant, in tail in possession of the estate and dies without issue.

Held, that the mortgage was a subsisting charge, and to be raised for the benefit of his personal representatives there being no act on his part to show a contrary intention.

L. J. TUCKER v. LOVERIDGE. *June* 12, 26.

Portion—Raising portion before the proper time—Real and personal estate.

The testator some time before his death, executed a settlement, whereby he covenanted with the trustees, that if he should die in the life time of his daughter, who was then an infant and unmarried, his heirs or executors should within six months after his death, pay to the trustees the sum of £10,000, which he charged on his real estates; and he declared the trusts of that sum to be for his daughter during her life, and after her death for her children: but if she should die without leaving a child who should attain the age of 21 years, then the trustees should stand possessed of the trust funds as part of his personal estate. The testator during his life raised £10,000 (part of a larger sum), and paid it to the trustees. They afterwards lent £4,500 to the testator, on Mortgage of part of his real estates, and £5,500 to other persons. The testator by his Will gave his personal estate to the plaintiff, and his real estate to the defendants. His daughter survived him, but died within six months after his death, an infant and unmarried, so that the trust fund never became raisable under the covenant.—*Held*, that the whole of the £10,000 was part of the testators personal estate, and belonged to the plaintiff.

M. R. WHITE v. WAKLEY Re NEWBERRY. *July* 6, 12.

Building on anothers land—Implied Contract—Landlord and tenant Covenant.

A tenant with his landlord's permission, built a house on a piece of waste adjoining his holding, and belonging to the landlord. The house was occupied during the term with the demised lands without any additional rent, no express agreement being proved.—*Held*, that there was an implied contract that the house should be held as part of the original demise, and that the covenants to repair extended to it.

I.. C. CHEALE v. KENWARD. *July* 21, 24.

Demurrer—specific performance—Consideration—Nudum-pactum

Plaintiff agreed to transfer to defendant 10 shares in a railway Company, on which nothing had been paid, and defendant agreed to accept the transfer, and indemnify the plaintiff from future calls. Bill by plaintiff for specific performance. Demurrer by Defendant, allowed by the Master of the Rolls on the ground of no consideration—overruled on appeal.

V. C. K. IN RE CLARKE'S DEVISEES. *July* 23.

Railway Company—Payment out of Court—Costs—Practice

A Railway Company pay purchase money into Court under the Lands Clauses Consolidation Act, and a person absolutely entitled to a portion of the fund under £300 in value, petitions for payment out of such part, and asks costs against the Company, the Company resisting payment of the costs on the ground that the application ought to have been made in Chambers.—*Held*, that the application was rightly made by petition, of which the Company must pay the costs.

V. C. S. GRESLEY v. MOUSLEY. *July* 7, 8, 9, 10.

Solicitor and client—Purchases by person in confidential position—Inadequate Consideration—Evidence of value—Fraud—Onus probandi—Lapse of time—Acquiesence—Costs.

A purchase of real estate by a Solicitor from his client set aside, with costs, after an interval of upwards of 20 years, upon the ground of unfair dealing and suppression of facts which ought to have been disclosed, upon the part of the solicitor.

V. C. K. COOKE v. CHOLMONDELEY. *July* 17, 19.

Will—Repairs—Good repair—Mansion-house—Farm-buildings—Tenant for life and remaindermen.

A testator directs his trustees out of the rents and profits of his estate, to keep the mansion-house and messuages in good repair,

and, if necessary, to rebuild any farm-building from time to time. The buildings being in a delapidated state at the testators death, a question arises between the tenants for life and those in remainder, as to the construction of the Will in this respect.—*Held*, that the mansion-house and messuages must be repaired out of the annual rents and profits. That the rebuilding applies to farm-houses, and them only in case of their being incapable of repair, or in case of the expense of rebuilding being no greater, regard being had more to the nature, age, dimension and structure—than the cost of putting them into good repair.

L. J. TASSEL v. SMITH. *July 13, 14.*

Mortgage—Redemption—Tacking—Two mortgages to different trustees for the same mortgagee—Bankrupt Mortgagor.

R. mortgaged an estate in 1832, to three persons, and in 1836 joined as surety with N. in another security, by which he mortgaged a policy of assurance on his own life to the plaintiffs. The Mortgagees in both securities were the auditors for the time being of the same insurance company, and the monies advanced belonged to the company; of which fact R. had notice. Afterwards R. mortgaged the estate comprised in the first mortgage of 1832 to the defendants, and then became bankrupt. The property comprised in both mortgages was sold, but the property comprised in the mortgage of 1836 was insufficient to pay the debt secured thereby. *Held*, (on a special case for the opinion of the Court), that the plaintiffs, as representing the company, were entitled to be paid the deficiency out of the proceeds of the mortgage of 1832, in priority to the defendants; and that the facts of the two mortgages being made to the Company in the names of two separate sets of trustees, and of the mortgagor having become bankrupt, made no difference.

M. R. DRAKE v. WILLIAMSON. *July 7, 8, 26.*

Trustee—Reimbursement—Lien.

Trustees for building a chapel having expended thereon money borrowed on their own security, with a deposit of the chapel deeds made on their own authority, and having been compelled to repay the amount.—*Held*, to have a lien on the deeds, but not to be entitled to a sale of the property to reinburse their outlay.

V. C. K. FITZWILLIAMS v. LONG. *July 26.*

Will—Construction—Vested interest—Gift to children equally on attaining 21.

When there is a gift of dividends, to one for life, and after his death the whole principal to be paid and divided between and among his children, in equal shares, on their respectively attaining the age of 21 years, those only who attain 21 take.

V. C. W. RE HOOPER'S TRUSTS. *July 30, 31.*

Married woman—Equity to a settlement.

A married woman, whose husband had been insolvent, became entitled to a sum of £200, and to the income of £400, which was devisible after her death amongst her nine children.

The Court settled the whole £200 upon her, without giving any portion of it to her husband's assignee in insolvency.

V. C. K. ROGERS v. WATERHOUSE. *July 28.*

Vendor and purchaser—Specific performance—Doubtful title—Estate.

In a suit for specific performance, when the title depends upon a will, the court will not put a construction upon it, except to decide whether there is or is not any reasonable doubt as to the vendor's title; and will not decree specific performance unless it is satisfied that, on appeal to a higher tribunal, the same view will be taken.

The word "estate" does not of necessity pass the fee simple.

L. J. *April 22, 23, June 6, 7, 8, July 12.*

WHITLEY v. LOWE.

Statute of limitations — Acknowledgment by payment — Agent—Receiver.

A suit for the winding up of a partnership was instituted by the executors of a deceased partner, a receiver was appointed in June 1834, who, by consent of all parties, paid the assets which he got in to the plaintiffs, and the suit was no further prosecuted. In 1857, the same executors filed another bill claiming a further debt from the estate of one of the partners, alleging that the operation of the statute of Limitations was avoided by the payment made by the receiver.

Held, that the payment by the receiver did not take the case out of the statute.

L. J. FREME v. BRADE. *May 4, 5, 7, June 7.*

Policy of assurance—Insurable interest—Post obit bond—Debtor and creditor.

R. J. being entitled, in the event of his surviving his father, to considerable estates, insured his life for £10,000. Being unable to pay the premiums on the policies, R. J. arranged with the defendant that he should pay them, and gave him a post obit bond for £14,000, payable after the death of R. J.'s father in R. J.'s lifetime. The defendant then insured R. J.'s life (whenever he should die) for his own benefit, for £14,000. R. J. died before his father, having bequeathed all his personal estate to the plaintiff. The plaintiff claimed the sum of £14,000 the proceeds of the policy effected by the defendant as part of R. J.'s estate.

Held, (in the absence of express contract) that the defendant was not a trustee for the proceeds of the policy, but was entitled to them for his own benefit.

If a person effects a policy for his own benefit on a life in which he has not an insurable interest, it may be a fraud upon the insurance company; but if the money is paid by the company, it belongs to the person effecting the insurance, and not to the person whose life is insured.

V. C. S. HELLING v. LUMLEY. *July 5, 6.*

Specific performance—Injunction—Opera box—Notice.

W. in 1816, agreed to sell his term and interest in a certain opera house to C., reserving to himself, W., his executors, administrators and assigns, the right to a certain box therein, during the continuance of the said term.

In 1823, all W's interest in the said opera house was assigned to a trustee for sale, in whose place the present plaintiff was afterwards appointed. C. subsequently filed his bill, and obtained a decree for specific performance of the agreement above mentioned, and having become bankrupt, his assignees sold his interest in the premises to defendant L., subject to certain covenants, which as L. alleged had, in the event, rendered it impossible for him to continue to W., or his representatives the enjoyment of the aforesaid box.

The plaintiff, as such trustee as aforesaid, claimed to be entitled to the said box, or an equivalent in money for its loss.

Held, that the said defendant, and all persons claiming under him, were bound by the reservation above mentioned. An injunction was granted to restrain the defendant, &c., from preventing the plaintiff from enjoying the said box, without prejudice to the right of the plaintiff to compensation, in case it should appear that his right to enjoyment of the box had been actually lost through the act of the defendant.

M. R. HUGHES v. JONES. *July 8.*

Rehearing—Specific performance—Title.

An order had been made on a claim on affidavit of service for specific performance, without any reference as to title. The defendant attended at registrar's office to settle the minutes without objecting to the omission. After the order was drawn up, defendant moved for a rehearing, and to amend the order by directing an enquiry as to title, and the order was made accordingly.

L. J. Re Jones's settled estates. *July* 9.

Practice—Purchase money in court—Reinvestment in land—Costs of investigating title—Two counsel.

A person who was interested in a considerable sum of money which had been paid into court by a corporation, as the purchase money of a settled estate, taken by them under their act, being desirous to reinvest it in the purchase of certain lands of great value, laid the abstract of title to the land before his own counsel. Subsequently he presented a petition for the investment, and the same abstract was laid before one of the conveyancing counsel of the court. The corporation having refused to pay the costs of employing two counsel, the court held that the fees for consultations between the two counsel were a reasonable charge, and that some allowance ought to be made towards the employment of a private counsel; but refused to allow the costs of the private counsel advising on the whole of the title.

V. C. W. Norton v. Nichols. *July* 12, 13.

Copyright of designs—Registration—Perpetual injunction—Trial at Law.

1. The inventor of a new and original design for a shawl, deposited one of the shawls containing the design in respect of which copyright was claimed, with the registrar of designs, unaccompanied by any drawing or specification.

Held, that the provision of the Copyright of Designs Acts, requiring a copy of the design to be deposited with the registrar had been sufficiently complied with.

2. Except under very special circumstances, the Court will not grant a perpetual injunction at the hearing without having recourse to a trial at law to establish the plaintiff's title, if claimed by the defendant.

V. C. K. Orange v. Pickford. *July* 6.

Power of appointment by settlement—Execution by will—Proof of execution and attestation.

Power of appointment is given by a marriage settlement to the use of such person, &c., as H. notwithstanding her coverture at any time or times during her life by any deed or instrument in writing, with or without power of revocation, to be sealed and delivered by her in the presence of two or more credible witnesses, shall direct, limit, or appoint. H. made her will with a very full attestation, and upon the question whether the power authorized execution by will.

Held, that it did.

REVIEW.

Report of the Chief Superintendent of Education for 1857.

We have just laid down the Report of the Chief Superintendent of Education for 1857, and although we had not time for a careful persual of its contents, yet we could not avoid being struck with the magnitude and comprehensiveness of the work which is here as it were mapped out. And as Canadians we could not but feel proud of the position which this Province may justly claim among the very foremost in its efforts for the education of the people.

How much credit is due to Dr. Ryerson for the present condition of our educational system—it is needless to say—we can all contrast the present with the past—we remember the opposition and obloquy he had to encounter, and we know how resolutely and successfully they were met.

We would only hope that bigotry and party feeling may never be able to undo that which if let alone, will in a few years we confidently believe rid itself quietly and silently of the imperfections which now adhere to it. No system of education can be devised in the study which shall be complete in all its details, much must be left to the teachings of experience, and in a new country like this, alterations and improvements will frequently have to be made in any system to suit the altered position of those for whose benefit it is intended. We cannot but feel that the system for which this Province is indebted to Dr. Ryerson, possessing in itself all the elements of growth, and the facilities of adaptation which are required to aid and to keep pace with the prosperity of the country.

We have heard much lately of the National Education of Ireland, and attempts have been already made by exalting it to disparage our own system. Now apart from all examination into the merits of either plan, we must be allowed to remark that a system of education cannot be stereotyped—that which may be suited to one people, and one set of circumstances, may be quite unfit for another. The Prussian Compulsory System would not answer in England, and what might perhaps have a measure of success in Ireland, would probably fail in Canada West. The statistics however adduced in the Report, s. 38, 46, prove beyond question, that, whatever may be its supposed advantages, the Irish system has not succeeded in anything like the same proportion as our own, while yet its expense has been enormously greater and it has evoked a far more bitter spirit of hostility.

We know not indeed that any system could be devised more free from objection than that which is brought before us in the pages of this Report. The religious difficulty is we think fairly met. The schools (whatever bigotry may *think* or political cant may *pretend*) are neither sectarian nor godless; while the permission recorded to the Roman Catholics to hold separate schools takes away all ground of complaint from those who do not wish their children taught the scriptures.

There is doubtless much room for improvement in the actual working of the Common School System. The teachers are not in many instances properly qualified either as to knowledge, or training, and sufficient care is not taken to secure the regular attendance of the children. This evil, however, necessarily incident to a new country and a young system, is gradually becoming less, and as the municipalities have the remedy in their own power, the fault is theirs and not that of the system if it continue at all.

The present method of inspection of the common schools is we confess very unsatisfactory.

The inspectors, who are appointed by the petty patronage of the county councils, may be very good no doubt, quite competent to manage a farm, or to conduct a little retail business, but they are for the most part uneducated and utterly unacquainted with school management. If modest, they deal in indiscriminate praise, if captious they are apt to find fault with the teacher for that which it is often out of his power to remedy, and although they may in some instances be gentlemen of acknowledged attainments and ability, yet engaged as they are in other pursuits they can seldom find sufficient leisure to pay even the few visits necessary to entitle them to their paltry salaries of from twenty to thirty pounds. The true remedy for this state of things would seem to be to appoint one well educated and trained inspector for each county, to pay him well, and to insist that the inspection of the schools should be his business, and not merely the work of his leisure hours.

With regard to the Grammar Schools, the whole state of the law requires amendment. The trustees have indeed power to engage and to dismiss the teacher, but they have no means of aiding him. Whenever it may be necessary to employ assistant teachers to provide or enlarge a school-house, recourse must be had to the county councils, and as unfortunately a prejudice has existed against the Grammar Schools as being institutions for the few, and connected exclusively with the municipalities in which they may happen to be situated, assistance is often sought in vain. It is not therefore to be wondered at, that trustees feeling themselves powerless, take very little interest in the schools with which they are connected, and that the

success of these is made to depend wholly on the energy and zeal of the head master. While therefore, a few of them as Barrie, Toronto, and Galt, have risen to honorable eminence, the majority are, it must be owned neither more nor less than common schools in which a little Latin is taught. And this state of things must continue so, while the salaries offered are so paltry that competent teachers will not accept them, and while the trustees remain powerless to aid in that or any other way.

The multiplication too of so called Grammar Schools, and the formation of what are called Union schools, has a direct tendency to perpetuate the evils of which we have been speaking, to lower the standard of education and to cause the Grammar Schools to be looked upon as municipal rather than county institutions. The senior Grammar school should, we think be made emphatically the educational centre and main spring for the county. It should be made intermediate between the common schools and the university. Prizes of tuition, money or books, should be offered in it for competition among the pupils of the Common Schools as a means of producing among them the healthful rivalry which the university scholarships are intended to call forth among the Grammar Schools.

We would therefore express our total disagreement with the suggestion of the present inspector, "that the management of the Grammar Schools should be transferred from the county councils to the municipal authority of the city, town, or village where they are situated." To this we think there are at least three strong objections:

1. The schools would become mere local institutions.
2. The trustees would in general be selected from an inferior clan as the choice would be restricted and the election would inevitably be made to suit party purposes.
3. The county councils could not in that case be expected to aid in the support of the Grammar Schools.

Looking to the interests of the law, we are anxious to have the condition of the Grammar Schools made better than it is. With the exception of those already mentioned, few of them send men into our profession prepared by previous education to rise above its barren technialities. To make a sound lawyer, capable of appreciating and applying the noble principles of British justice, something more is requisite than the study of forms and precedents. The mind must be previously disciplined to habits of reflection and accurate deduction, and nothing more certainly gives solidity and sinew as it were to the reasoning powers, or more enlarges and quickens the perceptions than the studies which are pursued in good Grammar Schools.

No after labour we are convinced will make up for the want of such early training.

At present there is we know great room for improvement both in the amount and quality of the instruction given in our Grammar Schools, but this and the other imperfections we have pointed out, we consider to arise rather from the youth of the Educational system, and the position of the country than from any error in the system itself, and we have no doubt that a few years hence when party opposition shall have subsided, and time have been given for the gradual correction of acknowledged defects, when the incompetents shall have been replaced by qualified teachers, from the Central Institution Toronto, our Grammar Schools will be found equal to those in any other country in the world.

It is with no little satisfaction that, on reading the pages of the Superintendent's Report, we are led to reflect on the vast amount of good that must have already been effected by our public libraries in almost every county, and every township, and by one extended school machinery, and that in view of the increasing zeal and more matured experience of the educational department, we look confidently forward to a steadily accelerated progress.

GENERAL RULES AND ORDERS OF THE SURROGATE COURTS OF UPPER CANADA, as directed by the Judges appointed under the 14th Sec. Surrogate Courts Act, 1858, including Rules as to Guardianships under 8 Geo. IV., cap. 6. Forms, Table of Fees, &c.—Thompson & Co., Toronto.

Every Lawyer and Surrogate Courts' Officer must possess himself of a copy of the above Rules and Forms to which we have before now referred, and which justify our preconceived notions, founded on the known ability of those chosen to frame them. A knowledge of the Act would of course be of little use without a knowledge of the Rules and Forms, framed under it. The latter will be found to be suited to every particular case, and elaborated so as almost to prevent the possibility of a mistake being made by those who will have to use them.

The book is prefaced by a table of Contents and a very excellent Index.

THE LOWER CANADA JURIST for December is received. As usual it abounds with interesting and useful decisions. There are contained in the number the reports of sixteen ajudicated cases, the most important of which to an Upper Canadian lawyer is *Nordheimer* v. *Hogan* et al. It determines that an hotel keeper has no lien for board on a piano brought into the hotel by a permanent boarder or against the owner of the piano.

THE GREAT REPUBLIC MONTHLY. New York: Oaksmuth & Co., for February is received.

Its contents are varied and interesting. The following is a list of the contents:—Caius Julius Cæsar. Crystaline—the Created. The History of the Great Republic. The Emerald Isle. The Reapers, (Poetry). Negro Minstrelsy. Valentine-Day. The Street Musicians of New York. William Caxton. Life and Travels in the Southern States. Old St. Paul's in New York. Niagara, (Poetry). College life in America. Pear Talk, (Poetry). Samuel Hahnemann Desert Lands. (Poetry). Margranna Lane. Impotence, (Poetry). Seven years in Ye Western Land. New York Cosmopolitan Fashions illustrated. The Minstrel Lover's Serenade. Comic Hits at the Times.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

ALBERT PRINCE, of the city of Toronto, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.—(Gazetted January 8, 1859.)

FREDERICK C. MACARTNEY, Esquire, of Paris, to be a Notary Public, in Upper Canada.—(Gazetted January 15, 1859.)

THOMAS A. LAZIER, of the Town of Belleville, Esquire, to be a Notary Public, in Upper Canada,

CHARLES F ELLIOT, of the Town of Sandwich, Esquire, Barrister at Law, to be a Notary Public, in Upper Canada.—(Gazetted January 22, 1859.)

JOHN ALBERY, of the village of Meaford, Esquire, to be a Notary Public, in Upper Canada.—(Gazetted January 29, 1859.)

CORONERS.

HENRY McNAUGHTON, Esquier, M. D., Associate Coroner, county of Wellington.

TIMOTHEUS POMROY, Esquire, Surgeon, Associate Coroner, county of Hastings.

ROBERT C. McMULLEN, Esquire, Associate Coroner, county of Lambton.

JOHN MAHAFFY, Esquire, M. D., Associate Coroner, county of Grey.—(Gazetted January 8, 1859.)

DAVID C. McINTYRE, Esquire, M D., and DONALD HENDERSON, Esquire, M. D., Associate Coroners, for the county of Middlesex.—(Gazetted January 22, 1859.)

HENRY JOHN PHILPOT, Esquire, Physician and Surgeon, Associate Coroner, for the county of Norfolk.—(Gazetted January 29, 1859.)

TO CORRESPONDENTS.

PAUL DUNN, OTTO KLOTZ, BAILIFF, T. H., and JOSEPH JEFFREY.—Under "Division Courts."

A MAGISTRATE, A SUBSCRIBER, ENQUIRER, JOHN FENSI, MICHAEL MYERS, R. K., and JAMES PORTER.—Under "General Correspondence."

A. H., Wardsville.—Too late for this number.