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DIARY FOR JULY.

1. Sat .... Long Vacation com. Last day for Co. C. to equal-
2. SUN ... *3rd Sunday after Trinity.* [Roll of Loc Mun.
3. Mon ... County Ct. and Surrog. Ct. Term beg. Heir and [Devisee Sittings commence.
8. Sat .... County Court and Surrog. Ct Term ends.
9. SUN ... *4th Sunday after Trinity*
11. Frid.... Last day for Judges of Co. Cts. to make return of
16. SUN ... *5th Sunday after Trinity.* [Appeals from Ass't.
18. Tues... Heir and Devisee sittings end.
23. SUN ... *6th Sunday after Trinity.*
25. Tues... *St. James.*
30. SUN... *7th Sunday after Trinity.*
31. Mon ... Last day for Co. Clk. to certify County Rate to [Municipalities in County

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

Upper Canada Law Journal.

JULY, 1865.

HORSE RACING.

In these days of horse-racing extraordinary, when a French horse has had the unparalleled audacity to walk into England and quietly win the Derby, and so "achieve a victory later than Waterloo," it may not be amiss to give a brief sketch of the laws affecting horse racing, as they at present exist.

Under the Common Law wagers are said to be valid, but they are illegal if contrary to public policy or public morality, and so many kinds of games and wagers are illegal at the Common Law: (*Wood* v. *Elliott*, 3 T. R. 693; *Cousins* v. *Nantes*, 3 Taunt. 522; *Hussey* v. *Cuckett*, 3 Camp. 168; *Dalby* v. *Indian Moses*, 15 C. B. 365.) Several old statutes were passed in England for the purpose of preventing excessive and deceitful gaming, the principal of which are 16 Car. 2, cap. 7, and 9 Anne, cap. 14. The latter of these (sec. 2) makes illegal any bet on any game, including horse racing, amounting in the whole at any one time or sitting, to the sum or value of ten pounds, and the loser of such a bet, if he has paid over money under it, may recover the same back by action.

The preamble to 13 Geo. II., cap. 19, is worthy of notice; it recites that "Whereas the great number of horse races for small plates, prizes, or sums of money, have contributed very much to the encouragement of idleness, to the impoverishment of many of the meaner sorts of the subjects of this kingdom, and the breed of strong and useful horses hath been much prejudiced thereby," and "for remedy thereof" it enacts that no person shall enter, start or run any horse, &c., unless it be the *bonâ fide* property of the person so entering it, and that no person shall enter, &c., more than one horse, &c., for the same plate or prize. Section 2 of the same statute provides that no plate or sum of money shall be run for which is under the value of fifty pounds. And by section 5 horse races within the protection of the statute were limited to races taking place on Newmarket Heath and Black Hambleton.

The remedy supplied by this statute appears to have been effectual, and that more speedily than could have been anticipated, for we find section 11 of 18 Geo. II., cap. 34, reciting that "the thirteen royal plates of one hundred guineas each, annually run for, and the high prices given for horses of strength and size, are sufficient to encourage breeders to raise their cattle to the utmost size and strength possible," it therefore takes away entirely the restriction as to locality of the race—permitting it to be run in "any place," which words have been interpreted not to refer exclusively to regular courses or established places for racing: (*Evans* v. *Pratt*, 3 M. & G. 759.)

It will therefore be seen from these statutes, as explained by various decisions, that where the wager or bet exceeds ten pounds it is immaterial to consider whether the race is legal or not, for such excess renders the bet illegal; and so, if the race be for fifty pounds or upwards, but the bet exceeds ten pounds, it is illegal.

There are several cases in our own courts in which races were declared to be illegal, and where the money deposited with stakeholders was recovered back.

Sheldon v. *Law*, 3 O. S. 85, is the leading case, and is thus summed up by *Macaulay, J.*:

"1. If it was a wager on a horse race, and not a match, it was void, because there was no match for £50, and the race being consequently illegal, all bets thereon were void.

"2. If the bet in question constituted the match, then it was void, because the parties

did not own the horses, and it was in direct contravention of the 13th Geo. II.

"3. If not the match, but a wager upon a match, it would seem void, as exceeding £10, under 9 Anne, ch. 14, although at Common Law all wagers were legal."

This case was followed in *Anderson* v. *Galbraith*, 16 U. C. Q. B. 57, *Battersby* v. *Odell*, 23 U. C. Q. B. 482, and other cases to the same effect.

It may be mentioned that in England the provisions of the 13 Geo. II. cap. 19, so far as relates to the subject of horse-racing, have been repealed by the 3 & 4 Vic. cap. 5; while the provisions of the 18 Geo. II. cap 34, so far as they relate exclusively to horse-racing, are apparently not affected by the consolidated act respecting games and wagers, 8 & 9 Vic. cap. 109.

Thus it has been held in England, since the repeal of the 13 Geo. II. cap. 19, that a horse-race for money given by third persons by way of prize, is not illegal (*Applegarth* v. *Calley*, 10 M. & W. 723), and that a steeple chase for £50 or upwards is a lawful race, under the 18 Geo. II. cap. 34 (*Evans* v. *Pratt*, 4 Scott, N. R. 378). But where to debt for money had and received, the defendant pleaded that a certain race was about to be run, and that an illegal game called a lottery was set up by the defendant for certain subscribers of £1 each, in the whole amounting to £155, to be paid to defendant under regulations which were in substance as follows: that the subscriber whose name should be drawn out of a box, next after the name of the horse which should be placed first in the race, should be entitled to receive from the defendant £100; and the plea then alleged that the subscriptions were paid by plaintiff and others to defendant, and that plaintiff, under the regulations, became entitled to £100, it was held that the plea disclosed a transaction within the meaning of the English lottery acts, 10 & 11 Wm. III. cap. 17, and 42 Geo. III. cap. 19 (*Allport* v. *Nutt*, 1 C. B. 974).

Where a steeple chase was run according to certain rules and conditions, one of which was, "All disputes to be settled by the stewards, whose decision shall be final, and all objections to be made before starting," and among the horses which ran was a horse of the plaintiff and a mare of the defendant, and the latter having been declared winner was protested against as disqualified on the ground that during the race her rider had crossed the rider of another horse, which point was referred to the stewards, who by three against one decided against defendant's mare, it was held that the decision was not rendered void by the fact that one of the stewards who gave judgment against defendant's mare was interested in the result by having bet against her (*Ellis* v. *Haffer*, 4 Jur. N. S. 1025; 3 H. & N. 766). So where two out of three of the stewards, not being together at the time, signed their decision in favor of a horse, from which the third steward dissented, the decision was held binding on all parties concerned (*Parr* v. *Winteringham*, 5 Jur. N. S. 787; El. & El. 394). Although the judges of a horse race have power to decide finally who is entitled to the stakes as winner, such power does not accrue to them until the race has been actually run (*Carr* v. *Martinson*, 5 Jur. N. S. 788; El. & El. 456). The mere walking over the course does not therefore entitle the party present in default of the other to a decision in his favor (*Ib.*)

The proprietor of a race course is not responsible for the purse run for, unless upon clear proof of an express undertaking to that effect (*Gates* v. *Tinning*, 3 U. C. Q. B. 295. If the express undertaking be proved, he would clearly be liable (*Ib.* 5 U. C. Q. B. 540). The winner has no right to recover back his entrance money because the purse has not been paid over to him (*Ib.* 3 U. C. Q. B. 295).

It may be interesting to the owners of trotting horses to know that trotting matches, even though taking place on ice instead of the orthodox "turf," and in harness, are legal "horse races" within the statute, a horse race having been defined to be matching the speed of one horse against another. *Macaulay, C. J.*, "could not find," however startling such a sight would have appeared to an English jockey of the old school, "that a race between two horses driven in sleighs on the ice is not a horse race just as much as it would be if the two riders had ridden upon the horses, either in saddles or bareback over the same course:" (*Fulton* v. *James*, 5 U. C. C. P. 182.)

Law reports, generally so dry, at all events to the uninitiated, occasionally afford amusement as well as instruction; and the case of *Wilson* v. *Cutten*, 7 U. C. C. P. 476, was a

"smart thing," even in horse-racing, although the ingenuity of the perpetrator was very properly unsuccessful. A match was made by the owners of two horses, on the following terms, namely, that "Butcher" was to distance "Warrior" three times out of five, in mile heats. Two heats were run, in the first of which Butcher did distance Warrior, but in the second Warrior distanced Butcher. Upon this, his owner contended that he had won the race, as, according to the rules of racing, a distanced horse could not run again. It was held, however, that this rule did not apply in such a case, and that the race was not won; and that, as there had been in fact no race, the plaintiff was only entitled to recover the amount he had deposited with the stakeholder.

OTHER GAMES.

The question whether or not cock-fights are illegal, appears to be still undecided (*Martin* v. *Hewson*, 10 Ex. 737; 1 Jur. N. S. 214; 24 L. J. Ex. 147). A foot-race has been held to be "a lawful game, sport or pastime," under the proviso to sec. 18 of 8 & 9 Vic. cap. 109 (*Batty* v. *Marriatt*, 5 C. B. 818). But where a number of persons assembled together on a public highway, to enjoy a diversion called a "stag hunt," which consisted in one of the number representing a stag, and the others chasing him, this was held to be gaming under the meaning of section 72 of the English statute 5 & 6 Wm. IV. cap. 50, against gaming (*Pappin* v. *Maynard*, 9 L. T. N. S. 327). Half-pence used for pitch-and-toss are held not to be instruments of gaming within the 5 Geo. IV. cap. 83, sec. 4 (*Watson* v. *Martin*, 11 L. T. N. S. 372). The game of dominos is not in itself illegal, and playing at dominos does not necessarily amount to gaming, within the meaning of the statute (*Reg.* v *Ashton*, 1 El. & B. 286).

VACATION.

We are glad to see that some enterprising young gentleman has taken the trouble to procure the signatures of the bulk of the profession in Toronto to a compact to close their offices at the hour of three o'clock during the long vacation. "All work and no play makes Jack a dull boy" is an old saying, and perhaps the one acted upon by our young friends in this matter. It would be well, however, to remember that there is a converse of this proverb, which is much more generally true than the other. There never yet was a lawyer who made his mark in the world who was not an industrious and attentive student.

We notice in one of our exchanges that the profession in Ireland have gone a step further, for we find the Attorneys' and Solicitors' Society lately adopted a resolution approving of the principle of granting a half holiday on Saturdays to clerks in solicitors' offices. This might also, with advantage, be done in this country, *provided always*, that those concerned would make up the difference by steadier application during the week. Only those who work hard can enjoy a holiday.

JUDGMENTS.

QUEEN'S BENCH.

Present: Draper, C. J.; Morrison, J.

Monday, June 12, 1865.

Ball v. *Sprung.*—Appeal from the United Counties of Huron and Bruce allowed.

Robinson v. *Waddell.*—Appeal from the United Counties of Northumberland and Durham dismissed with costs.

Hazlitt v. *Hall*—Rule absolute to enter verdict for plaintiff, pursuant to leave reserved.

Macfarlane v. *Ryan.*—A plea of accord, without averment of acceptance in satisfaction, held bad. Judgment for plaintiff on demurrer. Leave to apply within a month to a judge in Chambers to amend.

Hamilton v. *Shanly*—Special case. Judgment of nonsuit to be entered.

Taylor v. *Rose et al.*—Appeal dismissed with costs.

Macdonald v. *Macdonell et al.*—Rule absolute to enter nonsuit.

Kerr v. *Brenton.*—Rule absolute to enter nonsuit.

Mills v. *Brent.*—Rule absolute to enter nonsuit.

Gossage v. *Canada Land Association.*—Rule absolute for allowance of bond for appeal.

Heath v. *Pentland*—Appeal from the United Counties of Northumberland and Durham. Rule absolute to strike out the appeal, on the ground that bond for appeal defective.

McDermott v. *Workman.*—Judgment for plaintiff on demurrer, with leave to apply to a judge to amend within one week.

The Queen v. *The Toronto Street Railway Company*—Rule discharged; conviction affirmed.

Craig v. *Corcoran.*—Rule absolute for new trial. Costs to abide the event.

Burns v. *McAdam*.—Rule absolute to set aside nonsuit and enter verdict for plaintiff.

Gwynne v. *Grand Trunk Railway Co.*—Rule discharged, without costs.

Shibley v. *Corbett*.—Rule discharged.

Oliphant v. *Lesslie*.—Rule absolute for new trial without costs.

McIntosh v. *Tyhurst*.—Rule discharged.

Dougall v. *Wilson*.—Rule absolute for new trial on payment of costs by defendant's attorney within one month; otherwise, rule to be discharged.

Stewart v. *Lome*.—Rule discharged.

Pickard v. *Wixon*.—Rule absolute to enter nonsuit.

The Queen v. *Smith*.—Rule discharged.

Bank of Montreal v. *Reynolds*.—Rule absolute to amend pleas and for new trial; costs to abide the event.

In the matter of Coe and the Corporation of the Township of Pickering.—Rule absolute to rescind by-law, with costs.

The Queen v. *McLeod*.—Rule *nisi*.

Leach v. *Leach*.—Postea to plaintiff.

Saturday, June 17, 1865.

Gamble v. *Great Western Railway Co.*—Special case. Judgment for plaintiff; Morrison, J., dissenting.

Park v. *Park*.—Rule discharged.

Herbert qui tam v. *Dowswell*.—Rule absolute to enter verdict for plaintiff for $100, on first count.

Vidal v. *Bank of Upper Canada*.—Rule absolute for new trial, on payment of costs within a month.

COMMON PLEAS.

Present: Richards, C. J.; Adam Wilson, J.: John Wilson, J.

Monday, June 12, 1865.

Hatch v. *The Queen*.—Appeal struck out.

Moore v. *The Corporation of the Township of North Gwillimbury*.—*Held*, that municipal corporations, unlike corporations created for the purpose of lending money, are not restricted as to the amount of interest they may receive and take for the loan of money.—Appeal from County Court of York and Peel allowed, and rule absolute for new trial without costs.

Grace v. *Thomas*.—Appeal from the County Court of Huron and Bruce allowed without costs, and rule absolute for new trial in court below upon payment of costs. (See report of case in 1L. C. G. 12.)

Fourdrinier v. *Hartford Insurance Company*.—Rule discharged. Leave to appeal refused.

Russell v. *Fraser*.—*Held*, that a memorial to a deed executed by grantor, the memorial being thirty years old, was good evidence of the existence of the deed, so as, after evidence of search, to admit of secondary evidence of the deed.

Fisher v. *Berry*.—Rule *nisi* to issue.

Moore v. *Boyd*.—Rule *nisi* refused.

Dickson v. *Grimshawe*.—Rule *nisi* granted.

Scott v. *Millar*.—Rule *nisi* refused.

The Queen v. *Finkle*.—Rule *nisi* refused.

Crooks v. *Dickson*.—Rule *nisi* refused.

Selby v. *Robinson*.—Rule absolute to reduce verdict to $193; as to the rest, discharged without costs.

Campion v. *Willoughby*.—Rule absolute for a new trial: costs to abide the event.

Bettes v. *Farewell*.—Rule discharged.

Young v. *Fluke*.—Rule absolute for new trial without costs.

McNiell v. *Kelcher*.—Appeal from Frontenac dismissed with costs.

Robinson v *Shields*.—Rule absolute discharged, upon plaintiff consenting to reduce verdict by $28. R. A. Harrison, for plaintiff, accordingly consented, and so rule discharged with costs.

Bagley qui tam v. *Curtis*.—Judgment for plaintiff on demurrer.

Bank of Upper Canada v. *Ockerman*.—Judgment for defendant on demurrer to plea.

Miller v. *Thompson*.—Rule absolute for a new trial without costs.

Hogg v. *Rogers*.—Appeal from the decision of the County Judge of the county of Grey. *Held*, that school trustees may, as often as necessary, make assessments for school purposes. Appeal allowed without costs, and judgment to be entered for defendant in court below.

Kerr v. *Kerwan*.—Rule discharged.

Saturday, June 17, 1865.

Davis v. *The N. B. Marine Insurance Co.*—Judgment for defendants on demurrer, in accordance with decision in Queen's Bench, with leave to appeal.

Bank of Toronto v. *McDougall*.—Rule discharged. Leave to appeal refused.

Ingalls v. *Reed*.—Rule absolute for new trial without costs.

Bank of Montreal v. *Scott*.—Leave to plaintiffs to withdraw demurrer on payment of costs, and leave to defendants to amend without costs.

Moffatt v. *Grand Trunk Railway Company*.—New trial on payment of costs by defendants, unless plaintiffs consent to reduce verdict to $100; but if defendants decline to take new trial, and plaintiff to reduce verdict, then rule to be discharged with costs.

Farewell v. *Grand Trunk Railway Company*.—Judgment for defendants on demurrer to second plea to first count, and for plaintiff on demurrer to second plea to second and third counts; defendants to be allowed to amend their second plea to second and third counts without costs.

Vidal v. *Bank of Upper Canada*.—Rule absolute for new trial on payment of costs within a month.

King v. *McDonald*.—Rule absolute to enter nonsuit.

SELECTIONS.

THE CAPITAL PUNISHMENT WITHIN GAOLS BILL.

The excitement which was caused by the prospect of the penal death inflicted in London in November last, and which broke out before the scaffold on the morning of the execution in rioting and robbery, has provoked an attempt at remedial legislation, while the commission on capital punishment is deliberating. To judge the scene of November by its outward appearance, it was on one side the rabble in fierce enjoyment of *paneum*, or rather *bacchum, et circenses*, and on the other the *laquearius* of the law, exhibiting his skill in entangling a malefactor. It required, therefore, only a moderate amount of humanity, and a still smaller share of philosophy and prudence, to rush to the conclusion that because hanging a man outside the prison walls was attended by a throng in brutal disorder, there ought instead to be an orderly official ceremony inside the prison. It was natural for some member to take parliamentary time by the forelock, and within the first fortnight or so of the session to propose that the Legislature should declare the expediency of all capital punishment being carried into effect within gaols. Such is the preamble of Mr. Hibbert's bill, which awaits the question of its second reading to be put after the Easter recess. But as Sir George Grey informed the House that publicity in giving effect to the extreme sentence of the law is one of the matters under consideration by the commissioners, we agree with the course advised by him, that before Parliament gives an opinion on this subject it had better be furnished with the fruit of the commissioners' inquiry.

Even under the recollection of all that recently took place at the Old Bailey, and with the sickening thought that it may be repeated again and again before this time next year with any degree of intensity, according to the circumstances of future murders, well worked by the press, patience in legislation is the more commendable, because publicity of punishment, as a principle, has hitherto received but little elucidation or discussion. Jurists have treated of punishment itself, in its reformatory and deterrent effects, as they result from a greater or less degree of severity in the exaction, or of cruelty in the nature, of the penalty. A large part of the argument on punishment has thus been directed to the question of softening or hardening the hearts of the criminal part of society, or of gaining or losing sympathy with the law. But the proposition whether, assuming that a particular punishment—such as flogging for violent theft from the person, or hanging for murder—is proper in kind, the lash or the gibbet should be used before the eyes of men, or the catastrophe should be removed from their presence, like the bloody decrees of fate from the Greek tragic stage, has not been examined by writers on jurisprudence. Various committees have sat on the criminal law from 1819, when it was requisite to consider whether capital felonies should continue to include those of above twenty barbarous statutes, such as 1 Philip and Mary, directed against Egyptians remaining within the kingdom one month, and others of George the Second's reign, against injury of Westminster-bridge, and sending threatening letters; and reports have been made on the ill results of excessive and indiscriminate vindication of the rights of person and property. But the existing commission is the first body which has been appointed to inquire into the principle which we have mentioned, as part of the system of capital punishment. Men have at present only the book of experience to which they can refer. But it is a book to be read cautiously on this occasion; for the very circumstance that certain punishments, which in former times used to be public, have now become private, might raise an argument that the tendency of civilisation is towards the principle of privacy; whereas we shall see that the consequenses which have resulted from the change furnish an argument at least as strong in favour of publicity.

Experience, if regard be had to broad facts in the history of punishment, would appear to sanction the withdrawal of executions from the public gaze. It is only necessary to mention some of the old modes, such as flogging a culprit drawn at the tail of a cart through the public streets, or setting him in the pillory to be insulted and pelted by those among the crowd who might be jealous above others of any offence against the majesty of the law. By the statute of the pillory of the 51 Hen. III. that engine was appointed for bakers, forestallers, and those who used false weights, perjury, and forgery. Lords of leets were to have a pillory, or otherwise it would be a cause of forfeiture: under the like penalty, too, they were to have a tumbrell for scolds and unquiet women. The corruption of the tumbrell's other name—the cucking stool, that is, scold's stool—into ducking stool, affords a further proof of the difference between later and former times, in the open display of punishment, for, according to Coke, 3 Inst., the scold, after her penance on the tumbrell, was "sowsed in the water." It is true that there is no privately inflicted punishment, at least in gaol, corresponding with the tumbrell or the ducking for a scold; but the treadmill and the crank, or other hard labour within the walls, may be fairly taken as modern substitutes for the pillory and the stocks. Flogging has been actually changed from a public into a private infliction. More germane to the matter of public hanging is the abolition—a generation or two ago—of the condemned man's procession from Newgate to Tyburn.* When his last journey on

* The last execution at Tyburn was in November, 1783.

earth was shortened to a few steps to the platform raised above the debtors' door, Monday, being market day at Smithfield, was regarded as the fittest for the sight. The market has gone elsewhere, but still Monday morning was the idlest of the six with the class of spectators at Newgate, and continued to be the day for carrying out the sentence of death, until it was lately altered, we believe, or intended to be altered to a quieter day—Tuesday. It is even proposed in the common council to procure the removal of these scenes altogether from the present central populous spot. The duration, too, of the spectacle has been much shortened. There are now no last farewells between culprits and their friends recognised by them in the crowd, no dying speeches, either defiant or admonitory. The very struggles of the dying man are partly hidden by the machinery.

In view of these it is impossible to deny the tendency of the people of this country for centuries past in the direction of privacy in punishment for crime. But some of the facts involved in this experience also show indisputably that publicity would have been a shield against much inhumanity. In 1861, we were among the first to call public attention to some cases of flogging in prison, the exposure of which drew down the indignation of the community, and led to the passing of the Juvenile Offenders Act of the next session, c. 18. A boy of eight, we showed, received twenty-four lashes with the birch in prison. Two boys of nine were cut with fifteen lashes, not of the birch but of the cat Children of ten had forty-eight lashes with the birch. A boy of eleven had twenty and fourteen lashes with the cat. A child of eight, eight lashes with the cat. It is sufficient to say that if such deeds had been attempted in the market place, the public would have forcibly prevented them. But the truth is that if flogging were publicly administered, such monstrous sentences never would have been passed at all. On this point some curious testimony was unwittingly furnished by Sir George Grey in the House on the 4th of this month. Respecting the flogging of boys by the police under the 10 & 11 Vict. c. 82, he said that in 1847 the question arose concerning the proper mode of carrying out the sentence of whipping boys, and it was deemed advisable that police constables should not administer a whipping unless under proper supervision. This was to prevent abuse. Sir Thomas Henry had assured him that the cries of the lads drew about the doors of the police offices a crowd, and that, in consequence, it was deemed advisable, in the metropolis, to refrain from sentencing boys to be flogged. Recently, Sir George added, the sense of the House had recoiled from a sentence of twelve lashes being inflicted on a boy of six years of age; and in another case, where a boy of ten years of age was being whipped, the surgeon who was present ordered the whipping to be stopped. "Unless due precautions are taken," said Sir George, "the law will break down." Such is private punishment, and such the influence of the publicity even of a boy's screams.

Public hanging is now carried out by the officers in the most merciful manner. If, through any mismanagement, there is the slighest increase of the criminal's sufferings, there are cries of anger and pity from the people. So great is the gentleness of demeanour and regard shown towards him in his last hours, that it is difficult to think of him otherwise than as an object of consideration, or to imagine that he could meet with other treatment were he put to death privately. But may not this very absence of distrust be the result of the check continually put by public observation on these official acts of the sheriff and his servants? We leave the question to the commissioners, not ourselves prejudging it.

Another question may be briefly asked. It is one of principle: Can any punishment, not being one of seclusion, be proper which is not fit for the public? Supplementary to this question, are the inquiries whether a man's last solemn moments and dying agony of spirit are a fit exhibition for a street multitude—fit, either as regards himself, or as regards the multitude itself. On the part of the multitude the attendance is voluntary; on his it is not. As to him, then, justice imperatively demands an answer to the inquiry. That point we also here leave to the commissioners, but with the reservation, that the alternative is not necessarily private hanging. The great question at the beginning of this paragraph must first be answered.

But as to the voluntary portion of the assembly, the vagabonds, the thieves, the prostitutes, the revellers in the face of violent death, like debauchees in Athens death-stricken with plague; like a doomed ship's crew abandoned to rum and licentiousness—what will the commissioners say of them? Much has been heard of them through the press at every execution. They have been used as a strong argument for Mr. Hibbert's bill: paradoxical as it may seem, they are an argument against it. The din of outrage and blasphemy under the gallows proves the presence there of the class most under the sway of violent passions, and therefore most requiring the check which such an example can afford. They are not outrageous and blasphemous because it is a hanging that goes on. They would be equally so if it were the public funeral of a great Commander or of a noble citizen. What ever good is to be done by the exhibition of capital punishment outside the prison must be done to the lowest and worst of the people. Their display of their habitual recklessness and profanity proves nothing to the purpose. To expect them to leave their habits, and come to an execution demurely to repent, or, being there, to change their hearts, would be there to expect a miracle. Nere-

theless, they are men, and they are the men to whom, if to any, the murderer's corpse, fallen suddenly by the arm of the law, where an instant before the living man stood, speaks as an unmistakeable warning.

Mr. Hibbert's bill takes all for granted. "It is expedient that all capital punishment should be carried on within gaols." The sheriff, the gaoler, chaplain (or other officiating minister), and surgeon of the gaol, and such other officers of the gaol as the sheriff may require, are to be present at the execution, and any justices of the peace who may desire to attend, and such other persons as the sheriff may think fit. So soon as the sentence has been duly carried into effect, the surgeon is to sign a certificate that the criminal was hanged by the neck until dead, and the sheriff, gaoler, and chaplain (or other person), are to sign, and any other person present may sign, a declaration that the sentence was duly carried out. The coroner is within twelve hours to hold an inquest and find whether the sentence was duly carried out on the prisoner condemned to death, but no officer of the gaol or prisoner is to be a juror. Printed copies of the certificate, declaration, and inquisition, are to be forthwith exhibited at the principal entrance to the gaol, and to be transmitted to the Home Secretary.

The bill is defective in providing only that the sheriff and others "shall be present at every such execution." It is usual, in order to make sure that the sentence has been duly performed, to allow the body to hang an hour, or some certain time. The official persons should be bound to remain in view of the body until it is taken down. The subsequent custody of the body until the inquest should also be provided for. The power given to the sheriff of allowing persons to attend may be intended in favour of reporters for the press; but it suggests a private exhibition of an odious character by tickets, or the like. As to the inquest, it is not easy to see how the coroner will obtain disinterested evidence. He can scarcely call on the friends of the deceased to indentify the body. The unofficial spectators would probably be unable to do so. The official persons could not be admitted witnesses at all, without nullifying the precautions intended by the bill. Apart from the indiscretion of any present legislation, neither in its frame nor in its provisions does the bill seem to have been sufficiently matured. —*Solicitors' Journal.*

USURY.

(*Continued from page* 148.)

II. Having endeavoured above to unfold and illustrate the practical bearing of usury in most of the states, we proceed now to review the accommodities of usury and the desirability or practicability of a reform in the law of New York.

1. We are told that the Mosaic law prohibited the Jews from taking interest: which, however, is proved to have been more a political than a moral precept, for it only prohibited them from taking usury of their own race, expressly allowing them to exact it of "strangers:" See Deut. xxiii. 20; Exod. xxii. 25; Prov. xxviii. 8; Lev. xxx. 36; Ezek. xxii. 12. Which is conclusive, for this stand point, that the taking of usury, or a reward for the use—for so the word signifies—is not *malum in se.*

Over-scrupulous writers have often drawn arguments from this source, and from the fanciful theories of Aristotle, Domat, and Pothier, that, as money is generally barren, to make it breed money is "preposterous."

Against the taking of usury, some theorists have held that it were a "pity the devil should have God's part, which is the tithe;" that the usurer is the greatest Sabbath-breaker, because his plough goeth every Sabbath; and that he is the drone Virgil speaketh of, *Ignavum fucos pecus a præsepibus arcent:* Virg. G. 4, 168; that userers should have "orange-tawny bonnets," because they do Judaize.

The believers in this school have held (and certainly upon untenable ground), that, in case of cross notes, *i. e.*, where A. gives his note to B., and B. gives his note to A., but A.'s credit is much better than B.'s, and it is a part of the bargian that the notes from B. to A. shall be greater than the notes from A. to B., that such a transaction is usurious, when in fact it is merely a sale of a man's credit.

The canon law likewise prohibited the taking of any interest for money loaned, pronouncing it a "mortal sin." It is not surprising, under such strenuousness, that the taking of interest should have been looked upon with profound jealousy, and as writers have said, "horror and contempt,"—and that this delusion should have augmented. In that age, when money, as such, was comparatively a secondary consideration,—not a merchantable commodity as now,—it may be readily imagined how thoroughly the popular mind became imbued with this sentiment.

There appears to be no foundation in natural or revealed religion, inhibiting a man from realizing a profit on his money as well as articles of merchandise, goods, or lands; or if Doe were to let his horse to Roe to go a journey, it is no more than just that Doe should receive an equivalent for such benefit; and within the purview of the statute, a compensation in such cases, greater than the rate of seven per cent., is a *hiring:* Ord on Usury 28; 4 Wend. R. 679.

2. The plea of usury, like that of infancy, has been generally looked upon with disfavor by New York jurists, and a defendant setting it up will be held to strict rules, both in the mode of pleading and in the substance of the defence itself.

Savage, C. J., in the case of *Martin* v. *Feeter*, Ord on Usury; 8 Wend. R. 533; 2

Kernan R. 223, observes: "Usury is a defence which must be strictly proved, and the courts will not presume a state of facts to sustain that defence, when the instrument is consistent with correct dealing." The law will presume nothing in favor of this defence, but rather against it: *Bailey* v. *Lane*, 21 How. Pr., 13 Abb. 354.

To establish a just medium, so that moneyed men will be induced to lend their wealth, and thereby quicken trade, has been considered by practical, far-sighted men as the safer and more politic rule, especially in governments whose organic law partakes either of the republican or democratic form.

In the Athenian Republic, Solon is said to have permitted parties to regulate the rate of interest by contract; but De Pauw observes, that usage finally fixed the rate at twelve per cent. in certain cases, and eighteen per cent. in others. Grotius believed that a "reasonable interest" ought to be allowed; as to what constitutes a reasonable rate of interest, must of necessity be determined and regulated by circumstances,—the peculiar state of society, commerce, and country, and the manner and kind of business transacted; for what would suit the demands of the people of China, would not meet with favor in England, neither will the rate of interest adapted to an inland state or city satisfy the people of a seaport city.

The late Henry Thomas Buckle (who was one of England's brightest intellects), in descanting upon Aristotle,—whom he considered little inferior to Plato in depth, and much his superior in comprehensiveness,—and of his purely speculative idea, that no one should give or receive interest for the use of money, remarks: "An idea, which, if it had been put into execution, would have produced the most mischievous results, *would have stopped the accumulation of wealth, and thereby have postponed for an indefinite period the civilization of the world.*"

Thus, upon Mr. Buckle's philosophy, the receiving a *reward for the use of money*, during the past few centuries, has not only not made the world more corrupt, but has produced a healthy zest in trade, yielding wealth and all the desirable elements of a true civilization.

Keeping in view the wants of commerce, the New York courts have invariably leaned toward the side of equity—frowning upon the plea of usury. And who can deny but that it is better for a people to have laws which will be administered with respect, and meet a ready acquiescence, than to have them evaded by the business community, and continually deprecated by the courts.

The New York statute (Vol. 3, tit. 3, secs. 1 and 2, 5 Cow. 144), rigorously provides that, no person or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action, than seven dollars in the hundred for one year; and that the amount paid above that rate, may be recovered back if an action for the purpose be brought within *one year* after such payment or delivery. And that (as amended in 1837), "all bonds, bills, notes, assurances, conveyances; and all other contracts of securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods, or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action than is above prescribed (*i. e.*, at the rate of seven per cent. *per annum*), shall be void."

Prior to May 15th, 1837, the laws against usury had much relaxed; but by an Act of that date the rigor of this statutory prohibition was restored in its fullest force—usury is thereby made a penal offence. In 1850 (Laws of New York Ch. 172), an Act was passed prohibiting corporations interposing the defence of usury in any case.

Fortunes are daily being made in Wall street, by money begetting money, despite this rigorous law; and no one rails on the man now-a-days who loans his money to best advantage, taking his chances of the breach of honor and law, nor is the matter even taunt ingly cast up to such lender, as was the wont a few centuries ago, against which old Shylock is represented as having retorted.

The disadvantages of this usury law of New York are apparent to every candid, thinking mind. Millions of dollars lie idle year after year in consequence. If the law were to be repealed or modified, who can doubt that there would be more merchants and greater thrift, as more capital would be employed in a thousand avenues, where now is naught but inactivity. For nothing can more promote thriftness in every branch of trade than a perfect freedom to buy and sell.

The statute makes an exception in contracts of *bottomry* and *respondentia*, when in fact in money loans the compensation received for the benefit, we submit, ought to be commensurate with the use and inconvenience or hazard incurred by the lender. There appears to be nothing in the nature of such contracts necessitating this sharp distinction. Some may hold, that prodigality would follow by greater facility in borrowing. It has never been so demonstrated by history; on the contrary, we submit (and against the position taken by Jeremy Bentham), that by restrictive laws in times of great emergency, or panic, money is largely enchanced, necessarily causing the greater pressure upon the distressed, compelling ruinous sacrifices of property, as in such times men will not lend at regular rates, and if more be stipulated for, would continually

tremble under usury's fearful arm. Men have thus been ruined, rather than run the risk of violating this law,—which perchance would lose for them both "itself and friend."

The prohibitory system thus aggravates the very evils which it is intended to mitigate, making often the poor poorer, as was realized in the panic of 1857, the rich more avaricious, the cautious more timid, the prodigal more prodigal, the rash more rash, and introducing many perturbations in society, which secretly impair or sap the foundations of truth and commerce.

Lord Bacon, in one of his moral essays, has discussed the question, examined the advantages and disadvantages of interest, and concludes that two things are to be reconciled: the one, that the tooth of usury be grinded, that it bite not too much; the other, that there be left open a means to invite monyed men to lend for the continuing and quickening of trade,—and recommends a general rate of interest, say seven per cent., as in New York, for ordinary cases, and a higher rate of interest in matters of trade.

The statutes of some of the states have wisely provided, that a greater rate than simple interest may be recovered if specified in writing, which has proved to be (as in Michigan and Illinois for example) far more advantageous than a law like that of New York. And even in California, where they have *no penalty* for usury, but parties are left free to contract for money or goods, commerce thrives almost beyond comparison. A usury law may be proved to be necessary in New York, but if so, we hold that the present one works indubitable evils. Let lawful interest still be seven per cent., to be taken by moneyed corporations; but would it not be most politic at the present time, to allow individuals to make their own contracts relative to goods and money, limiting them, say, to *ten per cent.* interest. Such a law would, without doubt, work a great benefit, as we should then have a quickening spirit in trade, and commercial men and the courts would respect and strenuously uphold the law; as with Lord Bacon, we believe, "it is better to mitigate usury by declaration than to suffer it to rage by connivance."—*American Law Register.*

J. F. B.

Our readers will be sorry to learn that one of most noted *habitués* of our courts of equity will be seen no longer. Miss Flight, well known to the readers of Dickens, better still to all equity barristers and solicitors, fell down dead in the Middle Temple this week. Though the account given of her by the eminent humourist above mentioned was more or less a pen-and-ink sketch from fancy, and some of the accounts which we have seen of her even in grave periodicals are absurdly exaggerated, still she was an appendage to the Court of Chancery too remarkable and long-standing to be permitted to pass away without a notice. It is not, so far as we know, true that she ever stopped a judge on the bench in course of delivering judgment, or exclaimed, "Oh, you vile man! oh, you wicked man! Give me my property! I will issue a *mandamus* and have your *habeas corpus!*" nor did we ever see a seat provided for her "beside the bar;" but it certainly is the case that she was constantly to be seen fingering dirty papers tied up with tape, essaying to commence, generally when the judge rose for luncheon, some unintelligible motion, or shaking her lean fist stealthily and in silence at him when she supposed that he was not looking that way. She had not, so far as we could perceive, any preference for or prejudice against any particular judge; in each court her proceedings were alike, and she distributed her attendance with no obvious partiality. What the mystery was between Miss Flight and the Bar no one can tell; she may have been the embodiment of a particular wrong, or the last representative of a superannuated servant; perhaps she was pensioned merely out of some stray idea of benevolence. However that may be, it is true that she received from the right learned Middle Temple a sum of — shillings per week, which she added to a sum of — shillings received from the right learned Inner Temple, and so she supported life. But why the learned of the law gave something for nothing, and were considerate of, and even respectful to, the little woman, let no man inquire. She has gone, and few of those who know aught of her history will grudge her a word of regret.—*Solicitors' Journal.*

SHOULD DISSENTING OPINIONS BE REPORTED.

The recently appointed reporter of the Supreme Court of the United States, in his preface, has expressed his intention to weed future reports of cases inferior in their interest, "so that decisions of value or decisions on points of value shall not, as they now too much are both in England and with us, be overlaid and buried by reports of matter sometimes often previously decided, and sometimes so perfectly plain as not to be worthy of either litigation or report at all." "In no other way," he says, "can the class of cases secure for any term of years a distinguishing reputation and authority." But another matter requires attention also. We refer to the number and length of dissenting opinions which are to be found in some of the past volumes of Supreme Court reports. Such opinions should not be tolerated in courts of last resort, except in the rarest cases; cases of constitutional or public law perhaps, and there, as everywhere, they are *most* undesirable. If the arguments on both sides are fully reported—as they ought to be in cases where there may be a proper difference of view—

there is no necessity for them. Every purpose of a dissenting opinion is answered by a mere entry of dissent. The ground of it is seen by intelligent readers in the argument of opposing counsel. And a dissenting opinion does nothing but invite disrespect to a judgment which ought to be received as only short of infallible. It does nothing but keep litigation on foot, when, by the judgment, litigation ought to be settled and to cease. When a judge has fully combatted his brethren in the conference it is, in our view, something like judicial treason for him—unless it is a case very exceptional—to show why the judgment of his fellows is worthy only of *dis*respect. The Legislature of Pennsylvania prohibits the publication *in the reports* of *any* dissenting opinions; leaving their authors to publish them if they like, as the late Judge Baldwin did his; at his own cost, and in a worthless volume by themselves.

In Massachusetts—the Supreme Court of which State has a higher reputation than that of any other State court, it is understood to be a *point of honor* among the judges, not —except in most rare cases—to make known their disagreement with the majority—that is to say, with THE COURT, even where in fact they do disagree; and in those few cases where they do disagree they seldom give a dissenting *opinion*. Hence, among other reasons, the esteem in which the decisions of that tribunal are held everywhere in the United States, and even in England itself, and the extent to which they are read and cited. Whatever heats disturb the conference—unity, agreement, infallibility—is the only aspect in which the reverend judges appear before their bar, their suitors, and the world. Obligatory on every court which challenges supreme respect, most obligatory is this *appearance*, at least, of unity in our Court of Courts, "our more than Amphictyonic council." Whatever family weakness may exist let the least possible, or none at all be *revealed*. If the error of the judgment is plainly erroneous, the world will be quite prompt to discover it. If the error is so deeply hidden that no one but the dissentient judge could discern it, it is not likely either that *he* will satisfy the world of its reality, or that by remaining satisfied the world itself will greatly suffer. And while he may himself think that he is making for the profession an argument that will outlast the stars, he may be making no argument at all, but recording only—an unfortunate fact about himself. Old things—some of them we may fairly hope have passed away. All things—all we mean that deviate from the better models—are becoming new.—*Legal Intelligencer.*

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court*

Paterson v. Todd.

Sale of lands under execution—Ejectment on sheriff's deed—Defects in the advertisement—Effect of—Proof of judgment.

Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title, even if he be one of the execution creditors

In ejectment upon a sheriff's deed for land sold on execution. It appeared that the sale had been duly advertised in a local paper for three months before the 27th of August, 1864; and that an advertisement incorrect in some particulars had been inserted in the *Gazette* of the 11th of June, 1864, and four next numbers, the errors being corrected in the sixth assertion—all these advertisements being of a sale on the 27th of August. On the 1st of October following, and in the five next numbers, the sale was advertised in the *Gazette* for the 12th of November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court-house, it was not shewn to have been continued there for three months. *Held* that the advertisements could not be considered a compliance with the statute, C. S. U. C., ch 22 sec. 207, but that the defects would not affect the purchaser's title.

Judgments may be proved at *Nisi Prius* by producing the original roll as well as by exemplification, but the clerk should not produce such roll without proper authority.

[Q. B. H. T. 18[illegible].

Ejectment for part of park lot number 8, being the north half lot numbered and laid down on the plan of the said park lot number 8 and park lot number 7, made by D. P. S Robert Lynn as lot number 59 on the east of Victoria street, in the city of Toronto, described by metes and bounds. Defence for the whole.

The claimant gave notice of title under a deed of sale to himself from the sheriff of York and Peel, made by virtue of certain writs of execution against the lands of the defendant, and under a deed of confirmation made by the sheriff and endorsed thereon.

The defendant gave notice of title under a deed from James S Murray.

The trial took place at the assizes for York and Peel, in January, 1865, before *Hagarty*, J.

The deputy sheriff was called as a witness, and produced executions against the lands of the defendant in three suits, and stated that the lands in question were sold on these writs, and that the plaintiff was the purchaser. He proved the execution of a deed dated 22nd November, 1864, reciting a writ of *fi. fa.* dated 2nd March, 1863, and renewed for one year from the first of March, 1864, at the suit of Henry Abrahsm Joseph against the lands of the defendant; reciting also a writ of *fi fa.* received by him on the 16th of March, 1863, at the suit of James Paterson and Robert A. Harison against the lands of defendant; and reciting also a third writ of *fi fa.*, dated 16th of March, 1863, and renewed for one year from the 3rd of March, 1864, at the suit of William Wakefield and Frederick Wi[illegible] Coate against the lands of the defendant—under which writs he seized, &c., and advertised, &c., and returned to the writ of Henry Abraham Joseph that he had seized, &c., but the lands remained on hand for want of buyers; and reciting a writ of *ven. ex.* to sell those lands; and that on the 12th of November, 1864, the sheriff

exposed for sale the land now in question under the writ of *ven. ex.* and the writs of *fi fa.*, and that the plaintiff became the purchaser; and did by such deed sell to the plaintiff in fee all the right, title and interest of the defendant in the same lands.

The deputy sheriff proved also a deed of confirmation indorsed upon the foregoing deed, and dated the 3rd December, 1864, executed by the sheriff, which last deed was executed to correct an inaccuracy in the description contained in the first.

He produced an advertisement, which was first inserted in the *Canada Gazette* on the 11th of June, 1864; stating, "To be sold by public auction, all the right, title and interest of Robert Money Todd, in and to the north half of lot No. 59, on the east side of Victoria street, in the city of Toronto, as laid out on a plan by Robert F. Lynn, P. L. S., of Park lots 7 and 8" (setting forth the abbutals) "under several writs of *fieri facias*"

"Henry Abraham Joseph, plaintiff, *v.* Robert Money Todd, defendant James Patterson and Robert A. Harrison, plaintiffs, *v* Robert Money Todd, defendant. Wm Wakefield and Frederick William Conte, plaintiffs, *v.* Robert Money Todd, defendant At twelve o'clock, noon, on Saturday, the twenty-seventh day of August, A.D., 1864, at the sheriff's office, in the court house, city of Toronto."

In the *Gazette* of the 16th July, 1864, the error in spelling Todd's name was corrected, the previous five insertions having been as above set out. The advertisement was correctly inserted in the *Leader* newspaper for three months., beginning in May, 1864. The corrected advertisement was, (beginning on the 1st of October,) six times inserted in the *Gazette*, but the day of sale named therein was the 12th of November, and of this day there was no advertisement in the *Leader*; but in the *Gazette* only the day of sale was changed, and it appeared there not as a postponement, but as a new advertisement. The sale was made as a sale adjourned from the 27th of August, and a correct notice of it was put up on the usual board at the door of the court house, where all these sales are advertised.

The plaintiff's case was then closed, but on its being objected that the judgments on which these executions were founded were not proved, the learned judge allowed this defect to be supplied. The plaintiff then called a clerk in the office of the County Court, who produced the original rolls from the County Court in these three suits.

The defendant's counsel objected, that the advertisements were irregular, that the time of sale must be advertised in the *Gazette* for six consecutive weeks, and in the local paper for three months, and that the advertisement in the local paper and that in the *Gazette* were quite different. He objected also to the mode in which the judgments were proved.

Leave being reserved to the defendant to move for a nonsuit on these objections, the plaintiff had a verdict

McMichael obtained a rule on the leave reserved, or for a new trial, on the law and evidence, and for misdirection, in this, that the plaintiff claimed under a sheriff's deed which was not valid, there having been no legal advertisement of the day of sale, or of the parties to the suit in which the sale was made, or of the sale itself, and so the sale was vitiated; and that the judgment was not properly proved—that being from another court, it could only be proved by exemplification. He cited *Doe Miller* v. *Tiffany*, 5 U C Q B 88.

Robert A Harrison shewed cause, citing *Roe* v *McNeill*, 13 U. C. C P. 191, 192; *The Marine das Doras*, 7 L T Rep. N. S 838; *Vindin* v. *Wallis*, 24 U C Q B 9; *Douglass* v. *Bradford*, 3 U C C.P. 459; *Jarvis* v. *Brooke*, 11 U. C. Q. B. 299.

DRAPER, C. J.—I think it impossible to say that the notices of sale comply with the Consol. Stat U. C., ch. 22 sec. 267, which requires an advertisement of sale in the *Canada Gazette* at least six times, specifying: 1. The particular property to be sold. 2. The names of the plaintiff and defendant. 3. The time and place of the intended sale; and that such advertisement shall also be published in a public newspaper of the county in which the lands lie, or that for three months a notice of such sale shall be put up and continued in the office of the clerk of the peace, or on the door of the court house or place in which the Court of General Quarter Sessions of the Peace for such county is usually holden; but nothing in the act contained shall be taken to prevent an adjournment of the sale to a future day.

Now, what are the facts? An advertisement, to the correctness of which no objection has been pointed out, was inserted in a local newspaper for three months before the 27th of August, 1864. A notice incorrect in some particulars, was also inserted in the *Canada Gazette* on the 11th of June, 1864, and in the four next ensuing weekly numbers of the *Gazette*. In the sixth insertion the errors were corrected, all six announcing the sale for the 27th of August, 1864 Then, on the 1st of October following, another notice was inserted in the *Gazette* for the sale of the lands on the 12th of November, 1864, and this is published in the five succeeding weekly numbers. It does not purport to be a postponement of the sale formerly advertised. But there was no advertisement for the 12th of November in a local newspaper, and though there was evidence that this new notice was put up at the door of the court house, it is not shewn to have been continued there for three months next preceding the sale, which I take the statute to require when there is no local advertisement.

It becomes therefore necessary to enquire whether the validity of the sale is dependant on a strict compliance with the statutory requirements as to advertising.

In *Jarvis* v. *Brooke*, 11 U. C. Q. B 299, Robinson, C. J., observed, in effect, that upon general principles a defect or informality in regard to the notice of sale ought not to affect the validity of the sale, but should be treated merely as a direction of the statute which the sheriff is to observe at his peril, being subject to an action at the suit of the party injured if he neglects his duty in this respect, adding, "We have decided this on the principles of the common law where lands have been sold in execution." That case

related to a sale for taxes The same opinion is virtually expressed in *Jarvis* v. *Cayley*, at p. 289 of the same volume. "A failure to give due notice would not necessarily affect the validity of the sale" * * * "Irregularity of that kind would only be an objection in the mouth of the proprietor whose land was sold, or perhaps on the part of the public who were interested in having the sale duly advertised." This case was also on a sale for taxes. The cases of *Williams* v. *Taylor*, 13 U.C C.P. 219, and *Hall* v *Hall*, 22 U. C. C B. 578 (*a*), were also upon sales for taxes.

Those decisions rest upon grounds and considerations very different from such as exist in regard to sales upon execution. The language used in *Doe* v. *Beaumore*, 3 O. S. 247, does not apply to the latter class of sales. There is no forfeiture nor accumulated penalty for alleged default. It is the compelling payment out of a debtor's property of money due to his creditor, a course equally sanctioned by the principles of the common law and by statute. The substantial matter is the recovery of the judgment and the issuing of the proper writ to the proper officer to make the money adjudged to the plaintiff. In reference to the writ there are certain statutory provisions, the language of which is unmistakably imperative, for instance "Goods and chattels, lands and tenements shall not be included in the same writ of execution, nor shall any execution issue against lands and tenements until the return of an execution against goods and chattles; nor shall the sheriff expose the land to sale within less than twelve months from the day on which the writ is delivered to him," (Consol. Stat. U. C. ch. 22, sec. 252) The two former of these commands involve matters wholly within the power or control of the plaintiff or his attorney, and the third not much less so, for they must know the earliest day at which a sale can legally take place, and can give proper directions, which the sheriff must follow upon peril of the consequences of non-observance. But the language is less stringent with regard to advertisements—namely, "before the sale * * the sheriff shall publish." It is a positive command to him, but it is not, as in the preceding case, a positive direction as to the writ, or prohibition to its execution until a stated event has happened, for it is not said there shall be no sale until or unless the sheriff has advertised. I do not question that it may be irregular to proceed to sell without giving proper notice, but the defendant here contends that the sale so made is wholly void.

In determining this question (upon which we have found no direct decision in our own courts) we are bound to remember that ever since the Stat. 2 Geo. IV. ch. 1. sales of land have been required to be advertised in this manner, and that for upwards of forty years titles and interests in land have been sold by sheriffs in professed obedience to the law. It is in the highest degree probable that in numerous instances during all these years irregularities, errors or omissions have occured in the advertisements, and yet, so far as we are informed, there is no decision that a sheriff's sale under execution of land is invalid by reason of erroneous or defective advertisements in the *Gazette* or the local newspaper; and the language of the Chief Justice in *Jarvis* v. *Brooke* shews that there have been decisions (though unreported) the other way, where lands have been sold in execution. And though we might think that the purchaser could have little reason to complain where he was one of the execution creditors and also the attorney on record, if the proceedings were held nugatory by reason of any irregularity or omission in advertising, we think this no reason for incurring the risk of shaking other titles where the purchaser has had no such necessity or opportunity for watching the proceedings. We think we ought not, by decision given for the first time after so many years, to deter purchasers at sheriff's sales by holding it to be their duty to examine into every step of the sheriff's proceedings under a valid writ supported by a valid judgment: We should in fact be inflicting an injury on the debtor whose lands are offered for sale.

The only other point is the sufficiency of the proof of the judgment. Conceding fully that the clerk who produced the original rolls acted improperly and deserves censure, unless he was authorized by higher authority, I do not understand upon what principle the exemplification of a judgment is better proof of the existence of the judgment, than the original roll would be. No doubt has been raised as to the genuineness of the roll produced at *nisi prius*. The reason why exemplifications and examined copies of records were always admitted in evidence is thus stated by Chief Baron Gilbert, "Since you cannot have the original, the best evidence that can be had is a true copy; and the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of." (Gilbert on Evidence, p. 6) And in *Hennell* v. *Lyon*, 1 B. & Al. 182, Lord Ellenborough says, "The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable." Records also might be wanted to be put in proof at different places at the same time. For these or the like reasons copies of the records of Courts of Record, and even of courts not of record, being properly authenticated or proved, are admitted, but this does not prove that the originals are not evidence when they can be had, and the contrary is notoriously the law on the issue of nul tiel record, when the record belongs to the court in which the issue is joined.

For these reasons I think the rule must be discharged.

Hagarty, J.—I concur in holding that the rule must be discharged. I think the general view of the profession for a long series of years has been that any informality or non-compliance with the letter of the statute as to the advertising will not vitiate a sheriff's sale on an execution against lands, and that it never was the practice among conveyancers to institute any enquiry into the manner in which lands were advertised. It would be most unwise in my judgment to open such a wide field of enquiry into the validity of

(*a*) This case has since been affirmed in the Court of Appeal.

the innumerable titles to real estate sold in execution.

Morrison, J., concurred.

Rule discharged. (a)

Ham et ux. v. Lasher et al.

Costs—Motion to revise—Counsel fees, &c.

On a motion by plaintiffs to revise taxation, *Held*.

1. That under the rule of court of H. T. 22 Vic., 18 U. C. R. 58, now in force, no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the Master tax and allow more as between party and party.
2. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vic., and the Master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries.
3. A misnomer of a witness, *David* instead of *Daniel*, would be immaterial.
4. All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay.
5. No term fee is allowable unless there has been some proceeding during the term.
6. Attendance to hear judgment should only be taxed once—that is, attending when judgment is delivered.
7. Defendants could not tax the cost of enlarging plaintiffs' rule for their own convenience.
8. That service of subpœnas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.
9. That if a brief for second counsel was actually prepared, his accidental absence at the trial should make no difference.
10. Plaintiff having attended under defendants' notice, with out being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs.

The question of costs of this application was reserved until after the Master's report.

[Q. B., E. T., 28 Vic.]

J. V. Ham, in Hilary Term last obtained a rule *nisi* for review of taxation, the application having been referred from Practice Court, and that the Master should disallow:—

1. All sums over $40 for senior counsel fees at the several trials of this cause.

2. All sums over $20 for junior counsel fees at the same trials.

3 That the Master should ascertain what sums were paid to witnesses by the defendants before taxation, and should allow no more.

4. That the Master should inquire how much was paid and expended by those witnesses for their travelling expenses, and allow no more.

5 That the Master should disallow payments alleged to have been made to David Chapman.

6. In case the Master finds that Thomas W. Nash was paid before taxation, that he should inquire as to what other case Nash attended as a witness at the several assizes at which this cause was tried, and apportion the sum to be paid by the plaintiffs accordingly.

7. That the Master should disallow term fees and attendances to hear judgment when judgment was not given, and attendances to enlarge the rule at the instance of defendants.

8. That the Master should disallow the charge for two subpœnas, respectively dated 13th October, 1861, and 18th March, 1863, and copies thereof.

9 That the Master should disallow the copy of brief for second counsel at the first trial.

10. That the Master should tax to plaintiffs the expenses of the attendance at *Nisi Prius* of the plaintiff Eliza A. E Ham, pursuant to the defendants' notice, and set off the same against the defendants' costs.

It appeared that the defendants' bill was taxed at Kingston at £274 13s. 6d., and on revision by the Master here, was reduced to £195 17s. 0d, £78 16s. 6d. having been disallowed on revision. The bill was originally made up at £371 1s., and the deputy clerk of the Crown at Kingston disallowed £97 15s. According to the revision the bill was nearly double what it should have been.

Robert A. Harrison shewed cause. *Ham* supported the rule.

Alivan v. *Furnival*, 2 Dowl. 49; *Ward* v. *Bell*, Io 76; *Cleaver* v *Hargrave*, Ib 689; *Daniel* v. *McCleland* 61; *Griffin* v. *Hoskyns*, 1 H & N. 95; *Parsons* v. *Pitcher*, 6 Dowl. 600; *Miller* v. *Thomson*, 4 M. & G 260; Har. C. L. P. A 712, 713, 715, 716. 664; *Trent* v. *Harrison*, 2 D & L. 941; *Cross* v. *Durrell*, 29 L. J. N S Ex. 473; Rule of Court, H. T. 22 Vic., 18 U. C. R. 58, were referred to on the argument.

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

We think the rule must be made absolute on some though not on all the grounds moved.

As to the first and second objections The practice of granting counsel fees larger in amount than would be taxed by the Master, upon the order of the judge who tried the cause, has obtained as far back as my experience in our courts goes, and is a very old practice in England, where at an early time I believe the judges taxed the costs themselves. In the tariff of fees, published in Draper's Rules of Court, at p. 29, the Master's authority is limited to £5, and the power of the judge is expressly reserved. In the tariff of fees published after the passing of the Common Law Procedure Act of 1856, the power of the judge to increase the counsel fees which the Master is permitted to tax is limited to £20. And in Hilary Term 22 Victoria the last-mentioned rule was rescinded, and the authority to increase was given first to the taxing officer wherever the bill was taxed to allow £5 to senior counsel and £2 10s. to junior counsel, in special and important actions, subject to an appeal to the Master at Toronto, who was authorized to tax to senior counsel not exceeding £10, and to junior counsel not exceeding £5, with brief at trial, with a proviso that no more than one counsel fee should be allowed in any case not of a special and important nature This is the rule now in force, and under it we are of opinion that no single judge is authorized to grant an order for a larger fee than the tariff specifies, nor can the Master tax and allow more as between party and party. On these two points, therefore, the rule for revision must be granted.

As to the 3rd and 4th, the defendants are bound to strict compliance with the 165th rule of Trinity Term 20 Vic., and it is open to the plaintiffs to dispute any allegations, or the propriety of any charge, by affidavit, and the Master has authority to make all such inquiries as he deems necessary in order to satisfy himself, without any direction from the court as to what these inquiries should be. Otherwise the court

(a) See Osborne et al v. Kerr, 17 U. C. Q. B. 134, 141-2.

must enter into all the details, and virtually tax the bill themselves.

5th. If the Master is satisfied that there is merely a misnomer, a mere error and oversight in naming David instead of Daniel Chapman was a witness, and entitled to be and was paid, the error should not deprive the defendants of the amount really disbursed.

6th. All witnesses should be paid before taxation The Master taxes and allows actual disbursements proved, and not mere engagements to pay. The affidavit of disbursements is required to state that they did not attend as witnesses in any other cause.

7th. No term fees are allowable unless there has been some proceeding during the term. Attendance to hear judgment should only be taxed once—this is, for attendance when judgment is delivered. The defendants are not entitled to tax costs for enlarging the plaintiffs' rule for their own convenience.

8th If this objection refers to the service made by one of the defendants of two subpœnas on their own witnesses, the charge should be disallowed, unless at the time of the service such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.

9th. If the copy of brief for second counsel at the first trial was actually prepared, the accidental absence of the counsel at the trial should not deprive the defendants of this charge.

10th. The plaintiff, though notified to attend as a witness, is not bound to attend unless paid, and therefore has a sufficient protection without the unusual direction asked for.

Rule absolute.

Ham afterwards applied for costs of the application.

Cur. adv. vult.

Hagarty, J.—We reserve the question of the costs of this application and of the revision until the Master makes his report. We do not intend to depart from the usual course of making no order as to costs when the necessity of applying to the court arises from an error in judgment of the courts own officers. We are not prepared however to extend a total immunity from costs to parties who, it may possibly be made to appear, have by their own erroneous statements or misconduct caused that officer to err.

Bank of Montreal v. Reynolds et al.

Amendment—C. L. P. A. sec. 222—Construction of—Usury—Variance.

Under the C. L. P. A, sec 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a judge to determine is whether they are so necessary.

In an action on promissory notes, the defence set up being usury.

Held, that variances in the amount stated as intended to be loaned and in the sum stated as the excess beyond legal interest, were material.

The learned judge at the trial refused to amend in these respects, desiring the opinion of the court. *Held*, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P Act, sec 222, to allow it The amendment was therefore ordered, and a new trial granted. [Q. B, E. T., 28 Vic.]

The declaration was on two promissory notes, one dated the 21st of December, 1864, for $800, payable at the Bank of Montreal at Toronto, at three months after date, made by defendant Reynolds to defendant Wilcox, or order, and endorsed by Wilcox to the plaintiffs; and the other of same date, payable also at three months, in Toronto, for $600, made and endorsed as the first note. Both maker and endorser were sued.

The defence was usury,

At the trial, at Whitby, before Adam Wilson, J., on going into evidence, there appeared a variance in the amount stated as intended to be loaned, and also in the sum stated as the excess beyond seven per cent. The learned judge was of opinion the variance was material, though both sums were laid under a *videlicet*, but he desired the opinion of the court upon the question, and he doubted if the power should be exercised when the consequences were so serious and the defence was one of strict right. The plaintiffs therefore had a verdict.

Robert A Harrison obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial on both points. 1st. The materiality of the variance, the sums being laid under a *videlicet*. 2nd That the amendment was necessary for determining in the existing suit the real question in controversy between the parties, and that the statute made it imperative on the judge at *nisi prius* to grant it. He also moved in the alternative, that the amendment should be ordered by the court and a new trial be granted. He cited, as to the question of usury, *Masterman* v. *Cowrie*, 3 Camp 488; *Carstairs* v. *Stein*, 4 M. & S. 192; *Lee qui tam* v. *Cass*, 1 Taunt. 511; *Doe Haughton* v. *King*, 11 M. & W. 333; *Derry* v *Toll*, 5 Ex. 741. As to the variance, *Robson* v. *Fallows*, 3 Bing. N. C. 392; *Saxty* v *Wilkin*, 11 M. & W. 622; *Farewell* v. *Dickenson*, 6 B. & C 251; *Stanley* v. *Agnew*, 12 M & W. 827; *Dimmock* v. *Sturla*, 14 M. & W. 758; *Ackerman* v. *Ehrensperger*, 16 M & W. 99; *Bens* v. *Stover*, 12 U.C. Q B. 623; *Smith* v. *Trowsdale*, 3 E. & B. 83. As to the amendment, *Taylor* v. *Shaw*, 21 L. T. Rep. 58; *Ritchie* v. *VanGelder*, 9 Ex 762; *Brennan* v *Howard*, 1 H. & N. 138; *St Losky* v. *Green*, 8 C B. N S 370. S. C., 3 L T Rep, N S. 297; *Cordery* v. *Colvin*, 14 C B N. S. 374; *Doe Marriott* v. *Edwards*, 1 Moo. & Rob. 319; C. L. P. A. sec. 222, C. S. U. C. ch. 2, sec. 18, subsec. 2.

M. C Cameron, Q. C., shewed cause, citing Consol Stats. C. ch. 58; *Fox* v. *Keeling*, 1 Moo. & Rob 66, S. C., 2 A. & E 670; *Lee qui tam* v. *Cass*, 1 Taunt. 511; *Robson* v *Fallows*, 3 Bing. N. C. 392; *Fraser qui tam* v. *Thompson*, 1 U. C. Q B. 522; *Ritchie* v. *VanGelder*, 9 Ex 762; *Hughes* v *Bury*, 1 F & F. 374; *The Times Fire Assurance Co.* v. *Hawke*, 28 L. J. Ex. 317; *McKenzie* v. *Vansickles*, 17 U. C. Q. B. 226.

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

I have, though not without some doubt, arrived at the conclusion that the variances were material. The first, that in the amount to be loaned, was part of the contract, which must be stated with all the certainty of which it is capable, and which must be within the knowledge of the defendant Reynolds. The other I have much more

doubt about, for there is sufficient certainty of statement that the corrupt agreement was to take one-half per cent above the rate allowed by the statute for the time the note had to run, and the variance as to the amount actually taken might with the less apparent reason be deemed material.

On the other question I am free from doubt. The 222nd section of the Common Law Procedure Act, (Consol. Stat. U C, ch. 22) enacts, that "The courts and every judge thereof, and any judge sitting at *Nisi Prius*, or for the trial of causes, *may*, at all times, amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge seems fit, and *all such amendments* as may be necessary for the purpose of determining in the existing suit *the real question in controversy* between the parties *shall* be so made."

The 216th and 217th sections contain also provisions as to amendments of variances, less extensive, and left entirely as a matter of discretion to the court or judge at *Nisi Prius*.

We must suppose, as by the language we find, that the Legislature meant by the 222nd section to extend the power of amendment, and this is very fully done by the first and enabling part of that section, and then follows a mandate, that "all such amendments"—an expression large enough to include all that had been previously set forth—as should be necessary to determine the real question in controversy, *shall* be made.

The words "may" and "shall" so used in the same section, plainly to my mind convey, that amendments falling within the first part are discretionary, within the latter part that they are commanded. And the 2nd subsection of section 18 of the Interpretation Act (Consol. Stats. U.C. ch 2) leaves no room for doubt, "The word 'shall' is to be construed as imperative, and the word 'may' as permissive."

The only point, therefore, for the court or a judge under this latter part of the 222nd section, is whether the amendment is necessary for the purpose stated. If it be, it is imperative to make it. The Legislature have relieved the court and judge from considering the character of the action or of the defence. They give a simple rule, the necessity of the amendment for the purpose of determining in the existing suit the real question in controversy.

I have no doubt, therefore, the amendment asked for should be made, and that the rule should be made absolute for that purpose, and that there be a new trial, the costs to abide the event, including he costs of this rule.

My brother Hagarty having had no opportunity of considering the case with us, takes no part in the judgment.

Morrison, J., concurred with the Chief Justice.

Rule absolute.

COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

Moore v. Simons.

Setting aside judgment on default of appearance—Irregularities in office of deputy clerk of Crown in mode of entering appearance—Searching files.

Where an appearance properly entitled was filed in the office of a deputy clerk of the Crown, but was incorrectly entered in the "appearance book" by defendant's attorney, and plaintiff's attorney not taking the precaution of searching the files, was led to believe that no appearance had in fact been entered the judgment was set aside but without costs, as both parties had contributed to the mistake.

Remarks as to the irregularity and impropriety of attorneys making entries which should be made by the proper officer.

Quære as to the liability of such officer for damages arising from neglect in his duties in this respect

[Chambers, June 15, 1864.]

J. B. Read obtained a summons calling on the plaintiff to shew cause why the judgment for want of an appearance, signed in this cause against the defendant, together with the writ of execution issued thereon, and all proceedings had therein, should not be set aside for irregularity, with costs, on the following (amongst others) grounds: that such judgment was filed and signed after the defendant had duly appeared in the action. Affidavits were filed on behalf of the defendant shewing that the writ was served on the sixth of May, 1864, and that an appearance was filed in the office of the deputy clerk of the Crown at Hamilton on the day following, a copy of which appearance duly entitled in the court and cause was put in.

Osler, contra, filed affidavits in reply, to the effect that a book called "The Appearance Book" was always kept in the deputy clerk's office, and lay there on the counter; and that the deputy clerk, or the attorney entering the appearance also entered in this book a memorandum to the following effect, "—— v. ——, appearance, A. B., attorney;" that when an appearance was found entered in the Appearance Book, an inspection of the appearance itself was seldom required, and if not found in this book that the files of the office were rarely searched; that in this case the clerk of the agent of the defendant's attorney, who filed the appearance, entered it in the book referred to as "*Moore* v. *Ferguson*," instead of *Simons* (the defendant's name being *Norval Ferguson Simons*). The plaintiff's attorney swore distinctly that his attention was not drawn to the error, and that he signed the judgment *bonâ fide*, believing that the defendant had not appeared. No request was made by the defendant's attorney to the plaintiff's attorney before this application to waive the judgment

The following authorities were cited by counsel:—Con. Stat. U. C. ch. 22, sec. 53; *Street* v. *McDonell*, 2 U. C. Prac. Rep. 65; *Great Western Railway Co.* v. *Buffalo and Lake Huron Railway Co.*, *Ib.* 133.

John Wilson, J.—When the defendant entered his appearance he had done all that the statute required him to do. The duty of the deputy clerk of the Crown was to enter it in the appearance book. If the clerk of the agent of the defendant's attorney who filed it had not, according to a practice which has improperly obtained in Hamilton, as I am informed, assumed to enter

it in the book, and there incorrectly entered it, I should not have hesitated to set aside this judgment and made the plaintiff pay the costs. I cannot give countenance to a practice so objectionable as to allow the duties of the deputy clerk of the Crown to be performed by any one who may happen to bring an appearance to the office.

The incorrect entry of the appearance in the book, and the alleged information to the plaintiff by the deputy clerk of the Crown, "That no appearances had been entered except those in the book," appear to have led the plaintiff to believe that no appearance had been filed, and so he entered judgment and issued his execution.

The duty of the officer of the court admitted of no doubt. He was bound to enter the appearance in the book as soon as it was filed, and he ought not to have allowed the person who filed it to make the entry in the book. When he was required to enter the judgment his duty was to see that no appearance had been filed. His omission to do this contributed to the mistake, for it seems here to be admitted that the defendant did file his appearance. The deputy clerk of the Crown is not before me, being no party to this proceeding. It will therefore rest with those who are injured to consider how far he is answerable for his apparent share in the mistake.

Under the circumstances, I think, I shall best promote the ends of justice by ordering the judgment to be set aside without costs. The plaintiff will thus be made to pay for his want of caution in not requiring the files to be searched before he signed judgment. The defendant will bear his share of the loss in paying his costs of this application, for the officiousness of his agent in meddling with what he had nothing to do, and so meddling as to lead the plaintiff astray.

In conducting proceedings gentlemen will find it best to manage what properly belongs to them and no more.

Order accordingly.

Moor v. Boyd et al.

Change of venue—Principles which guide the court in applications for—Special grounds.

The plaintiff is *dominus litis* and entitled to lay the venue where he pleases, subject to the rules of court.

The court will not deprive the plaintiff of the right to lay the venue where he pleases, unless there is a manifest preponderence of convenience in a trial at the place to which it is sought to be changed.

If it be made to appear that there will be a great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue, the judge is at liberty to exercise his discretion in the matter, and to make the order if he sees fit.

In this case the judge was not satisfied that there would be a waste of costs by reason of the trial in the county where the venue was laid, and so on that ground he declined to change the venue.

The suggestion that the defendants could not obtain a fair and impartial trial in the county was not made out to his satisfaction, and on that ground, as well as others mentioned in the case, he refused to interfere.

[Chambers, March 28, 1865.]

Burns obtained a summons to change the venue from the County of Stormont to the County of the City of Toronto, on the ground that the cause of action arose in the City of Toronto, and the defendants witnesses reside at or near there, and the great additional expense of a trial at Cornwall, and the inability of the defendants to get a fair and impartial trial there, or to get a jury of tobacco manufacturers or merchants, and why the cause should not be tried by a special jury of tobacco manufacturers or merchants, or others skilled in the manufacture and quality of tobacco, and why for that purpose a writ of *venire facias* should not issue directed to the sheriff of the United Counties of York and Peel, if the *venue* be so changed, or if not to the sheriff of the United Counties of Stormont, Dundas and Glengarry.

The affidavit of the defendant Arthurs was filed on moving the summons. He stated that the cause of action, if any, arose in the city of Toronto and not in the county of Stormont. That the defendants had a good defence on the merits. That it would be necessary for defendants to subpœna not less than between twenty and thirty witnesses to support their defence; that they are material and necessary for that purpose; that the defendants intended to subpœna them; that the witnesses all reside in Toronto and Hamilton, and in the neighbourhood of those cities, except two who reside in Cobourg and Whitby respectively, and that none of them reside in Stormont. That all plaintiff's witnesses, as he believed, reside in Montreal, where their evidence could be taken under a commission. That the expense of subpœnaing and procuring the attendance of the witnesses at the trial at Cornwall would be at least $220 more than if the trial took place in Toronto. That a former action in relation to this claim was tried at Cornwall at the Fall Assizes of 1863; that deponent was present thereat for several days: that from what he then saw of the town and the jury, and the influence brought to bear on them by plaintiff, especially through some of the witnesses boarding at the same tavern where numbers of the jurors stopped, in circulating tobacco amongst them, as he was informed, and prejudicing their minds against the defendants, he verily believed the defendants could not and would not get a fair and impartial trial at Cornwall. That from the magnitude of the amount in dispute on the former trial, and the number of witnesses on both sides (being about forty), the cause was universally known and talked about in a small place like Cornwall; that the deponent was told and believed a prejudice was endeavoured to be got up by or on behalf of the plaintiff against the defendants, by it being represented that the reason defendants refused to receive the tobacco was on account of the fall in the price of tobacco and not because of its being a bad and not equal to the Union Jack brand (which it was to be); that the same would occur again in this cause he verily believed. That the Hon. J. Sandfield Macdonald was the plaintiff's counsel on the former trial, and is the plaintiff's attorney, and would, as deponent believed, be his counsel on the coming trial; that his influence in Cornwall and in the United Counties of Stormont, Dundas and Glengarry, both on his own account and his long residence therein, and being a member of Parliament for Cornwall or some of the counties aforesaid now and for so long before, and also speaking the Gælic language, which most of any jury to be got in said counties also speak is so great that the deponent verily believed it to be

utterly impossible on that account alone for the defendants to get a fair and impartial trial at Cornwall; that his influence is so great that it is almost a proverb that no stranger not living in said counties when he is opposed to him can get a verdict there even though entitled to it; that if the trial of this cause takes place then he deponent believed the defendants were certain to lose the verdict, whereas they are entitled to a verdict. That he deponent believed the case can only satisfactorily be tried by a jury of tobacco manufacturers, or of those engaged in the manufacture of tobacco or in the buying or selling thereof, as such a jury can only rightly understand the questions involved in the cause, and give a proper decision therein, and justly weigh and decide on the evidence; that such a jury cannot be got in the united counties as the deponent was advised and believed, but can be got in Toronto. That from the foregoing and other causes the deponent believes a fair and impartial trial could not be had in Cornwall; that the application is not made for purposes of delay but solely to save additional expenses and get a fair trial. That from the number of witnesses in the cause and persons attending court at the former trial, he, deponent, and a number of the defendants witnesses could only get accommodation at a private house, and that of an inferior sort.

The affidavits of six other persons who were probably witnesses for the defendants on the former trial, were also filed, they using almost the identical words of Mr. Arthurs, stated their opinion that the defendants could not get a fair trial in Cornwall for the following reasons:

1. The influence brought to bear on the jury by plaintiff through some of his witnesses boarding at the same tavern where four of the jurors at the former trial boarded, in prejudicing their minds.

2. The case being known and talked about in a small place creating a prejudice, by representations that defendants refused to receive the tobacco because of the fall in the price of the article.

3. The influence of Hon. J. S. Macdonald, and his speaking Gælic, rendering it impossible for a stranger to get a verdict when he is on the other side.

4. The case can only be satisfactorily tried by a jury of tobacco manufacturers or of those engaged in the manufacture of tobacco, or the buying and selling thereof; and such a jury could not be had in Cornwall but can in Toronto.

A further affidavit by William Murray of the City of Toronto, wholesale grocer, was also filed by the defendants. In this affidavit the first and third grounds mentioned in the other affidavits as above mentioned were struck out.

W. S Smith shewed cause. He filed, on behalf of the plaintiff: 1. The affidavit of the latter, stating that the town of Cornwall is the nearest place where the assizes are held to the city of Montreal, where all his witnesses reside. That he would require and have in attendance at court on the trial of the cause about forty witnesses to testify to the quality of the tobacco; that the witnesses are persons who were in his employ when the tobacco was being manufactured, and also merchants and tobacco dealers in the city of Montreal to whom he sold the same quality and brand of tobacco as that sold to defendants. That it would be necessary for his witnesses in giving evidence to see the tobacco that will be produced at the trial in order to speak of its quality. That the additional expenses of having the case tried at Toronto instead of Cornwall would be $600, and that great additional expense would be incurred in trying this cause at any assize town further from Montreal than Cornwall.

2. The affidavit of John B. McLennan, the partner of the attorney for the plaintiff, who stated he has resided in Cornwall for ten years, attended nearly all the assizes in that town during that time; that he was not aware nor did he believe that defendant Arthurs, or the other defendants whose affidavits were filed on this application by defendants, ever attended an assize in the said town either as witnesses, or plaintiffs, or defendants, except in the cause against the defendants tried in November, 1863, and that was the only opportunity they ever had of judging of jurors in the United Counties of Stormont, Dundas and Glengarry.

Richards, C. J.—The present Mr. Justice Willes when at the bar stated, *arguendo*, in *De Rothschild* v. *Shilston*, 8 Ex. 503, "the plaintiff is *dominus litis*, and entitled to lay the venue where he pleases, subject to the rules of court."

In giving judgment, Pollock, C. B., said, "The general rule on the subject may be thus stated: the application to change the venue may be made either before or after issue joined, as may be most convenient to the parties in the proper conduct of the cause. If the application be made before issue joined it is required that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. It will be sufficient however for him to rely on the fact, that the whole cause of action arose in the county to which he desires to change the venue, but if he does so he may be answered by any affidavits negativing this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined the affidavits in support of the application must shew that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course the affidavits are open to answer by the other party. In all these cases the court or judge will decide, after hearing both sides, whether the venue is to remain or be changed as prayed, or be made in some third county according to its discretion."

In *Helliwell* v. *Hobson et al.* 3 C. B N. S. 761, the head note of the case is, "the court will not deprive the plaintiff of the right to lay the venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to be changed."

In *Durie* v. *Hopwood*, 7 C. B. N. S. 835, the head note reads, "the court will not change the venue from the place the plaintiff has thought fit to lay it unless there be some great and obvious preponderance of convenience in trying it elsewhere."

Therefore in a breach of warranty on a sale of horses at Liverpool the court refused to

change the venue from Middlesex to South Lancashire, upon affidavit stating that the defendants witnesses all resided at Liverpool and in Ireland, the affidavits in answer stating that the plaintiffs witnesses, scientific men and others, all resided in or near the place where the venue was originally laid.

In giving judgment in this case Willes, J., referred to *Hellicell* v. *Hobson*, and intimated when the question decided in that case arose again it would require further consideration.

In *Jackson* v. *Kidd*, 8 C. B. N S. 351, Byles, J., said, "To induce a judge to make an order (to change the venue) three things are necessary: First, that the defendant's witnesses reside at the place to which it is sought to change the venue. Secondly, that the plaintiff's witnesses also reside there. Thirdly, that the cause of action arose there."

Erle, C. J., in giving judgment, said, "the principle on which the judges have been guided since the passing of the Common Law Procedure Act of 1852 is this, that if it be made to appear that there will be a great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue the judge is at full liberty to exercise his discretion in the matter and to make the order if he sees fit."

Schuster et al. v. *Wheelwright* 8 C. B. N S. 383, was an action brought against the captain of a vessel for conversion of a bag of specie. The vessel was out at sea; two bags of specie had been shipped on board of her, and the specie being taken on board another vessel at sea it was agreed between the captain of the burned vessel and the salvor that it should be referred to a gentleman at Liverpool what should be awarded for salvage. He awarded the salvor one of the bags In an action against the captain the venue was laid in London. On application to Crompton, J, at Chambers, he ordered the venue to be changed to Liverpool on an affidavit, that the plaintiff's cause of action, if any, did not arise in London or Middlesex, that it would be absolutely necessary for the proper defence of the action to adduce the evidence of several witnesses, some of whom resided at Whitehaven in Cumberland, and others near Queenstown in Ireland. That it would be attended with great and needless expense to defendant for necssary travelling expenses and loss of time of such witnesses attending the trial if tried in London. That the trial at Liverpool would be at considerably less cost, as it could be reached by steamer both from Queenstown and Whitehaven, and that the trial being of a mercantile character it would be conducive to a fair trial to hold the same in Liverpool.

The court was moved to rescind the order on the ground that the affidavit did not warrant the change of venue. Byles, J., on the argument, said, "There certainly is no reason that I can see why the cause should not be tried at Liverpool rather than in London. The plaintiff's counsel contended that a plaintiff had a right to lay the venue where he pleases, and the court will not interfere to deprive him of that right unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue."

Erle, C. J., "Where a judge has exercised a discretion in the matter the party seeking to impugn it should shew the court some clear reason for thinking it had not been well exercised."

The plaintiff's affidavit shewed he had several witnesses who resided in London, and the removal of the cause to Liverpool would entail upon the plaintiff the necessity of employing fresh counsel. It was manifest, therefore, that convenience *as far as the plaintiff was concerned* greatly preponderated in favor of having the cause tried in London.

Erle, J., in giving the judgment of the court said, "Without saying what would have been my opinion if this had been an original motion to change the venue, I think the learned judge having in the exercise of his discretion made the order, the burthen of shewing that he has acted under a misconception is cast upon the plaintiff; he has failed to do this, and the rule must be discharged."

I shall consider the change of the venue in relation to the question of the expense of trying the cause in Toronto instead of in Cornwall. The plaintiff expects to have in attendance about forty witnesses, all of them residing in Montreal, about five hours run by rail from Cornwall, a distance of sixty-seven miles The defendants state they have between twenty and thirty witnesses residing in Toronto and the neighbourhood, distant 266 miles from Cornwall. If the plaintiff's forty witnesses were obliged to come from Montreal to Toronto they would require to travel 333 miles. The defendants say their additional expenses in trying at Cornwall would be about $220. Plaintiff says his additional expense in trying the case at Toronto would be upwards of $600. As to expense then it seems largely in favor of allowing the venue to remain where it is. It is suggested, however, that plaintiff's witnesses may be examined under a commission and the expense thus be saved. I think, however, in a case like this when the question is as to the quality of a manufactured article, the evidence taken on a commission would not be satisfactory. It would not be accompanied by that immediate reference to the samples to be compared and ready explanations that would be approved by a *viva voce* examination. I think the plaintiff not unreasonable in saying it would not be safe for him to rely on testimony taken under a commission.

The next argument as to convenience is, that it will be necessary to have a view of the tobacco disposed to defendants, and that cannot be had at Cornwall, as it is now in defendants warehouse here. I apprehend that enough of the article for all practical purposes on the trial can be forwarded to Cornwall at small cost. It is not in the nature of a fixture, and can readily be forwarded to Cornwall, the whole of it if necessary, I should suppose, without increasing the expense so as to make it range up to the difference of cost suggested by the plaintiff that would occur in trying the case at Toronto

The next point of convenience is, that so large an influx of people takes place in Cornwall during the sittings of the Superior Courts that the additional accommodation required for defend-

note and the witnesses cannot be obtained there. I should think this difficulty might be obviated by an early application to the innkeepers, and if a special jury is struck the court would probably fix a day for the trial of the cause, so that it would not be necessary to bring the witnesses there before that day. I cannot say that I feel pressed with this argument.

In *Hawthorn* v. *Denham*, 3 Irish Law Rep. 1, the court refused to change the venue to enable the parties to obtain a venue where a much stronger case was made than in this cause.

On the question then, that as the cause of action arose here and defendants witnesses reside here the cause can be more conveniently tried at Toronto, I am against the defendants, for I think as the plaintiff has much the larger number of witnesses residing in Montreal, when, if a day is fixed for the trial they may be brought up in four or five hours, the balance of convenience and expense is much in favor of not changing the venue.

The remaining question as to getting a fair trial at Cornwall still remains to be considered. The first objection is, that plaintiff's witnesses and others converse in presence of the jurors on the subject and inculcate the erroneous notion that defendants refused to take the tobacco that plaintiff manufactured for them because the price of the article had fallen and not because of its bad quality. As to this ground, I suppose, if these witnesses were unscrupulous enough to do this in Cornwall they might do so in Toronto; and it farther presumes what I am unwilling to admit without clear evidence of the fact, that intelligent jurors would allow themselves to be influenced by any such considerations as these. It will hardly be urged that this objection will apply to a special jury which the defendants now seek to have struck.

The next is, that the plaintiff's counsel and attorney is a member of Parliament representing one of the constituencies in those united counties, and that he has done so for many years past; and in addition thereto he speaks the Gælic language, which is the mother tongue of many of the jurors, and therefore the jury will give a verdict to his client when it really ought to be given for the defendants.

I have not met with any case at all approaching this as a ground for changing a venue. I find when an action was brought against the managers of a bank it was urged that there were a great many stockholders of the bank scattered through the county to which it was sought to change the venue, and that many of the leading inhabitants transacted their business with the bank, and in that way there might be a prejudice in favor of the defendants themselves. I have never heard it urged that because an advocate had great influence with the jurors that that was a ground for changing the venue. If so, I apprehend, when Sir James Scarlet was at the bar and retained against a defendant it might have been urged that his influence with the jury on particular circuits was so great that defendant could not get justice done him, and therefore he ought to have a change of the venue. I have not met any case in which the application has ever been made on such a ground. If the defendants put their case before a jury and justice is not done them the court always have the corrective power of granting a new trial to secure the ends of justice.

If the case be one requiring a larger amount of intelligence and a more careful selection than is usually possessed by a common jury, the defendants may obtain a special jury; and I am unwilling without the clearest possible evidence to justify it to cast such a reproach on the integrity and intelligence of the inhabitants of the United Counties of Stormont, Dundas and Glengarry, as to suppose they cannot try a case in which Mr. J. S. Macdonald is an advocate, and do justice to the party to whom he is opposed. The language of some of the judges in *Dowling* v. *Sadlier*, 3 Ir. C. L Rep., at pp 606 and 608, seem to me appropriate to this case:

Chief Justice Lefroy said, "Because it is suggested that a feeling existed * * * * is that to be made the ground for the civil excommunication of the special jury of the whole county? * * * * Ought the county to be stigmatized upon any such allegations?" The learned Chief Justice refers to the language of Mr Justice Wilmot in *Rex* v. *Hains*, 3 Burr. 1330, when he said, "it is only *supposed conjectured* they 'verily believe' that there cannot be a fair and impartial trial by a jury of the city. Nor in the nature of the thing can such a suggestion be credited. It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favour that party when sworn upon a jury." Moore, J., in the same case said, "it would at all times require a very strong and clear case to induce me to say that a fair trial could not be had in any county in Ireland I would be slow to say that if a man were interested in a matter of a political and exciting description he would therefore neglect his duty."

As to striking a special jury of tobacco manufacturers from those who are not witnesses in the cause I fancy that would be almost as difficult in Toronto as in Cornwall; then if the qualification be extended to those who deal in the article of tobacco by buying and selling, I think there is hardly a general dealer in the United Counties of Stormont, Dundas and Glengarry who does not buy and sell tobacco more or less.

On the whole I do not see my way clear in changing the venue as desired by the defendants, and that part of the summons will be discharged with costs to the plaintiffs to be costs in the cause.

As to the other branch of the summons I do not understand that it is opposed, and therefore *the order will go.*

I may mention, that I understand Mr. Justice Hagarty, when applied to in Chambers, refused to grant the summons to change the venue on the grounds stated in the defendant's affidavits.

I have looked at many more cases than those I have quoted from, but I thought it better to refer to those of the latest date, containing the views of the judges on this question of venue, so far as necessary to be considered in settling the questions presented on this summons.

Summons discharged *

* See also *Channon* v. *Parkhouse*, 13 C. B. N. S. 341; *Blackman* v. *Barnton*, 15 C. B. N. S. 432; *Brown* v. *Clifton*, 10 W. R. 86; *Ex Cale* v. *The Hull Dock Co.* 11 W. R. 284.

Leslie v. Forsyth et al.

Costs—Superior Court scale—When plaintiff entitled to—Money paid into Court.

Where, after plaintiff commenced his action in the Superior Court, defendant paid the sum of $152 in full of the suit which plaintiff accepted less costs, to be paid when taxed or agreed upon, it was *held*, that plaintiff under the circumstances was entitled to an order for full costs, the same as if the money had been paid into court.

[Chambers, March 31, 1865.]

Plaintiff obtained a summons calling on defendants to shew cause why plaintiff should not be allowed full Superior Court costs according to the scale of the Superior Courts, on grounds disclosed in affidavits and papers filed.

The action was brought by plaintiff against defendant Forsyth, a clerk of a Division Court and his sureties, under Con. Stat. U. C. ch. 19, secs. 26, 27, for non-payment of money collected by the clerk for plaintiff, an execution creditor.

Defendant not having pleaded, plaintiff signed judgment in default of a plea.

Plaintiff afterwards accepted $152 in full of his claim in the suit except the amount due for costs, which defendant agreed to pay when taxed or agreed upon.

The costs were afterwards taxed according to the Superior Court scale, but defendants contended that plaintiff was only entitled to County Court costs, and refused to pay the amount taxed. Thereupon plaintiff, with a view to the recovery of the costs, served notice of assessment, entered the record for assessment, and assessed damages at 1s.

Robert A. Harrison shewed cause. He argued that the case was one which was clearly of the proper competence of the County Court (Con. Stat. U. C. ch. 19, secs. 26, 27, ch. 15, s. 17), that the agreement to pay costs when taxed or agreed upon had no reference to any particular scale of taxation but only to lawful costs, which the costs taxed were not (*Keep* v. *Hammond*, 9 U. C. L. J. 157), that plaintiff by serving notice of assessment had abandoned the taxation of costs and thrown open the whole matter, and that the amount recovered being within the jurisdiction of the County Court the *onus* was upon plaintiff to shew that the cause was a proper one to be withdrawn from that court, which he failed to do.

G. D'Arcy Boulton, in support of the summons, argued that the cause was a proper one for a certificate, and that under any circumstances defendants having paid $152 damages on the suit had admitted plaintiff's right to bring the suit in the Superior Court as much as if the money had been paid into court, and so was entitled to the certificate.

Richards, C. J.—I think plaintiff is in the same position as if the money had been paid into court, the effect of which, I take it, would be to admit plaintiff's right to full costs. I do not think that either the Con. Stat. U. C. ch. 22, sec. 328, or the rule of court as to costs has any application to such a case. So under all the circumstances I have made up my mind to grant the certificate, but without costs of the application.

Order accordingly.

ELECTION CASES.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*

Reg. ex rel. Blakeley v. Canavan.

Con. Stat. U. C., cap. 54, s. 70—Sufficiency of real property in respect whereof to qualify—Incumbrances—Effect thereof.

Held, 1. That the real property in respect of which a candidate for the office of alderman in a city qualifies, may be of an estate either legal or equitable.

Held, 2. That the estate need not be free from incumbrances.

Held, 3. That if incumbered, and after deducting the gross amount of the incumbrances from the assessed value of the premises, there be still left a sufficient annual value in respect of which to qualify, that the qualification is sufficient.

[Common Law Chambers, February 27, 1865.]

On the 11th day of February last, an order was obtained for a writ of summons in the nature of a *quo warranto* directed to the defendant to show by what authority he exercised the office of alderman for St. Patrick's Ward, in the city of Toronto, and why he should not be removed from the said office.

The relator objected to the election of the defendant on the grounds—That the defendant was not at the time of the election possessed of the necessary property qualification for alderman; that at the time of the taking the last assessment for the city he was not then the owner of the property on which he claimed to qualify as freehold, and that he procured the said property to be rated in his name for the purpose of giving an appearance of qualification, being, in fact, not the owner or entitled to qualify therein, and never beneficially interested therein, and that if at any time he was beneficially interested therein, he was not at the time of his election beneficially interested to an amount sufficient to qualify him; that any estate which remained in him at the time of the election was not freehold, and insufficient as leasehold, both in value and estate; that the equity of redemption, if defendant was beneficially entitled thereto, was insufficient in value, and was not rated in respect thereof, and that the value of the leasehold in defendant's name was insufficient to complete his qualification.

In support of the statement and writ two affidavits were filed, that of the relator and of the assessor of St. Patrick's Ward.

It appeared from the affidavit of the relator that on the last revised assessment rolls for the city of Toronto the defendant was rated for premises on Strachan street, as owner of the annual value of $240, and as occupant of certain leasehold premises rated at $160 (regarding the latter no objection was taken); that the premises on Strachan street, on which ten dwelling-houses are erected, consists of lots 1, 2 and 3 on block B, west side of that street. That from memorials in the registry office it appears that at the taking of the assessment for 1864 the legal estate in these lots was vested in Captain Strachan. That he conveyed the same by deed, dated 18th August, 1864, to Mrs. Mary Ann Nixon, sister of the defendant, who mortgaged the same by deed dated 27th August, to the Western Canada Building Society, for $500, and that she also by deed dated the 23rd August, but not registered until 10th December following, conveyed the premises to defendant, subject to the

mortgage; and that the defendant, by deed dated 1st December, 1864, mortgaged the premises to one Hime for £275, payable in three years; both of which mortgages appear not to be discharged, and the relator stated his belief that the premises were not equal in value to the amount of the mortgages, and that he was informed that Capt. Strachan had contracted to sell the lots to one Baines, from whom Mrs. Nixon acquired her interest therein, but that the purchase money was not paid to Captain Strachan until after the taking of the assessment, and about the date of the deed to Mrs. Nixon. He also swore that he was informed the defendant is in insolvent circumstances, and that defendant never was beneficially interested in the premises in question.

The affidavit of John Clarke, one of the assessors for St Patrick's Ward for the years 1863 and 1864, verified extracts from the assessment rolls for these years, showing the manner and in whose names the property in question was assessed. In 1863 it appeared to have been assessed in the name of Ann Canavan and Thomas Barry and John Canavan, trustees. In 1864 it was assessed in the sole name of the defendant. Clarke swore that in 1863 it was assessed at the request of defendant in his defendant's name, for a Mr. Canavan; that in the month of March, 1865, the assessors assessed the premises in the same way, but that subsequently defendant told them that he wished his name inserted as owner, which was done in April, 1864, and before they had completed their assessment of the ward, and the same was so returned to the City Clerk on the 1st of May following, as required by law.

Robert A. Harrison shewed cause and read and filed several affidavits on the part of defendant. The defendant swore that in March, 1863, he purchased the premises on Strachan street, from Captain Strachan, getting a bond for a deed; that in August, 1864, Captain Strachan informed him that if he paid the balance then due he would allow him a discount; that in the same month he made an application in (his sister's) Mrs. Nixon's name to the Building Society for a loan of $500, with a view of paying Captain Strachan; that upon the request of the defendant and with his sister's consent, Captain Strachan conveyed to her the lots in fee; that Mrs Nixon executed the mortgage to the Society; that the sole reason of the deed being so made to Mrs. Nixon was in consequence of an arrangement between defendant and the Secretary of the Society, in which the mortgage was to be given in a third party's name, he (the defendant) executing a bond to the Society as additional security for the same. That on the 23rd August Mrs. Nixon, by deed, conveyed the premises to defendant in fee; that on the 1st December last, he (defendant) executed a mortgage on the premises to one Hime for £275. The defendant swore that this was solely executed as a security to Hime to take effect only on his (defendant) receiving from Hime two mortgages which Hime held as collateral security for advances made by Hime to the defendant and some of his clients; that he had not then, nor has he since withdrawn the two mortgages, and that they still remain in Hime's possession; and he further swore that at the time of his election Hime had not the slightest claims on the mortgage for £275, or on the premises contained therein; and he also swore that he did not cause himself to be assessed for the property for the purpose of giving himself a qualification, but solely on account and for the sole reason that at the time he was sole owner of the property, and that he is still owner.

James McGill Strachan swore that he being the owner in fee of the property in question in March, 1863, gave a bond for a deed for the same to defendant conditional on payment of £140, within three years, to execute a conveyance thereof to defendant; that in the month of August, 1864, he suggested to the defendant that he would allow him a discount if he would take out his deed for the lots; that in same month defendant applied for the loan referred to; that he (Strachan) executed a deed to Mrs. Nixon for the purpose as understood between defendant and himself of Mrs. Nixon executing the mortgage to the Society for the loan; and that he (Strachan) received the proceeds of the loan, and he further swore that he is satisfied that at the time of the last assessment and at the time of defendant's election defendant was possessed of the property in question to his own use and benefit.

Mrs. Nixon swore that she accepted the deed and executed the mortgage at the instance of the defendant, and afterwards conveyed the property to defendant, as stated above, all of which was done for the sole purpose of facilitating the loan, and that she had no interest whatever in the property.

H. L. Hime swore that in December last defendant requested him to hand over to him (defendant) two mortgages amounting to about £300, which defendant had deposited with him as collateral security for notes discounted, for the purpose, as he stated, of filing bills to compel payment of the amounts secured by them, and that the defendant proposed substituting in lieu thereof a mortgage on property of his own; that he (Hime) consented, and that defendant on the 10th Dec. last delivered to him a mortgage made by himself for £275 on the property in question; he swore that defendant did not take away the two mortgages, but merely took an indenture of assignment of the same, from which defendant said he could obtain the particulars of the two mortgages; and he further swore that at the time of defendant's election, and when he subscribed his declaration of office in January last, although the mortgage was in his office and registered, that he did not hold it other than as he (Hime) terms it, as an escrow, and that he had no claim whatsoever against the same, or the properties therein mentioned, and he stated that the defendant had not since taken away the mortgages.

Mrs. Ann Canavan swore that she never had any estate in the premises in question, and that she always understood it to be defendant's property.

Thomas Barry swore that he is a co-trustee with defendant by virtue of a power in a deed of trust made in 1856, between A. Burnham, of Cobourg, and the defendant; that he does not hold or ever held as trustee or otherwise for Ann Canavan, named in such trust deed any property on Strachan street, and verily believes

that she has not or ever had any property there; that he was appointed a trustee in 1862, and is still acting as such.

William B Canavan swore to Barry and defendant being the trustees aforesaid; that he had consulted from time to time with his mother, Ann Canavan, the *cestui que trust*, regarding securities held by the trustees for her benefit. That some time in 1863 defendant represented to Mrs. Canavan th t he had purchased the property on Strachan street from Capt. Strachan, and requested her to allow it to be held as part of her trust property, and to allow him (defendant) an amount of money for the same; that Mrs. Canavan declined to accede to such proposal, or accept the same, and that she did not accept it, and that she has no interest in it, and stated that she had just reason to believe that the property is defendant's He also conducted the making of the assignment to Mrs. Nixon for the person already mentioned, and that she executed the deed in his presence to defendant, and swore that the property from the time defendant purchased from Captain Strachan was his to the present time.

C. S. Patterson and *Lauder* for the relator.

Morrison, J.—Under the 70th clause of the Municipal Act the persons qualified to be elected aldermen in cities are residents who ha.. at the time of the election in their own right, &c, as proprietors or tenants freehold or leasehold property, rated in their own names on the last assessment roll to at least in freehold to the annual value of $160, or leasehold to $320, and so in the same proportion in case the property is partly freehold and partly leasehold, and the clause defines the term leasehold to include a tenancy for a year or from year to year, and that the qualifying estate may be either legal or equitable.

As it is admitted here that the property in question was assessed in the name of the defendant, and was rated on the last assessment roll at a sufficient amount to qualify him for the office, the only question to be determined is whether at the time of his being so assessed, and at the time of his election, the defendant was possessed of an equitable estate on the premises. Upon the argument Mr. Patterson pressed upon me that taking the mortgage of $500 and the mortgage for £275 into account, and assuming the latter to be a subsisting mortgage and a charge on the property, the defendant had not such an interest in the property as was sufficient to qualify him within the meaning of the act. With regard to the £275 mortgage—when I consider the circumstances sworn to by the defendant and the mortgagee, under which the mortgage was made and the sworn disavowal of all claim and interest therein mentioned, and that that disavowal is based upon the fact that the purpose for which the mortgage was made was never carried into effect: if it were necessary for me to determine the point, I would hold that it was no encumbrance on the property.

The 70th enacting clause is silent as to encumbrances. If the Legislature intended that the qualifying property should be encumbered, or if encumbered, to be reduced for qualification purposes proportionably, it is not unreasonable to suppose that it would have so enacted in express words. We find the Legislature so speaking in other statutes with reference to property qualification for members of the Legislature, justices of the peace and others, where the amount is stated to be over and above all incumbrances thereon. The concluding words of the clause, declaring the estate may be either legal or equitable, in my judgment points among other estates, to that which is subject to incumbrances.

But even if I held that the amounts of the two mortgages were both to be deducted from the assessed value of the premises with a view of ascertaining whether the defendant had a sufficient qualification, it still appears he is sufficiently qualified. The assessors having rated the property at $240 annual value, I must assume that it was assessed as being of the value of $4.000, and deducting $1,600, the amount of the two mortgages, would leave $2 400 as the rateable interest of the defendant, giving an annual value of $144, which, being added to $80, half of the annual value of the rated leasehold property, would make $224—more than sufficient to qualify the defendant for the office to which he was elected.

On the whole case, and from all the facts disclosed upon the affidavits filed by the relator and on the part of the defendant, I am of opinion that at the time of the defendant's election as alderman he was possessed as proprietor of equitable estate in the premises sufficient to qualify him for the office; and that the office of alderman for St Patrick's Ward, in the City of Toronto, be allowed and adjudged to the defendant, and that he be dismissed and discharged from the premises charged against him, and do recover his costs of defence.

Order accordingly.

Regina ex rel. Hartrey v. Dickey.

Con. Stat. U. C. cap. 54, sec. 70—Qualification of aldermen in cities—Declaration of office.

Where a person elected alderman of a city made a declaration of office, inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the *quo warranto* summons against him, qualified in respect of other property, his election was upheld.

[Common Law Chambers, Feb. 27, 1865]

On the 14th February last, an order was obtained for a writ of summons in the nature of a *quo warranto*, directed to the defendant, to show by what authority he exercised the office of alderman for the ward of St. Patrick, in the city of Toronto, and why he should not be removed from the said office.

The relator's objections were the following:—1st, that the defendant had not the necessary qualifications at the time of the taking the last assessment for the city—that is, he was assessed, with two others, his partners, for $195, annual value of an iron foundry, and for a vacant lot on Beverley-street at $67; 2nd, that the defendant was not the owner in fee simple of the land and premises set out in his declaration of office; 3rd, that the vacant lot mentioned in defendant's de-

claration of office is not his property, and that the other lands mentioned in the declaration are heavily incumbered with mortgages to the amount of £700 and upwards.

In support of the relator's statement, only one affidavit (his own) was filed, which, after setting out that he was qualified as an elector and voted at the election, stated that defendant was a candidate for the office of alderman, and being elected, took his seat in the City Council; that the defendant, in his declaration, made by him after his election, stated as his property qualification for the said office, "An estate of freehold, to wit, a foundry and premises and vacant land on Beverley-street, in St. John's ward;" that he had examined the last revised assessment rolls for the city for 1864, and found that the name of defendant, jointly with John Neil and James J. Dickey, appeared thereon as rated for the said iron foundry and premises on Beverley-street as freehold for $195. and that defendant is rated for a vacant lot on the same street as freehold for $67; and that these properties are the same as mentioned in defendant's declaration: he further stated that he was informed by S. Brough, Esq., that the defendant induced him (Brough) to make a proposition to defendant in writing, proposing terms on which he (Brough) would sell the vacant lot above mentioned—it being his (Brough's) property—to defendant, which Brough did, and that defendant never accepted the proposition, nor did he (Brough) ever convey the lot to defendant; that it appears by the last assessment roll for the city for 1864, this vacant lot had been originally rated to Brough, but his name was erased and the name of defendant inserted therein instead; that Brough told the relator, defendant had not paid him anything for the lot, and that he (relator) believes that defendant procured his name to be put on the assessment roll for the purpose of appearing as qualified for the office of alderman; that having searched the records of the registry office for the city, he verily believed that defendant has no legal estate in the land and premises described by defendant as a foundry, &c., in his said declaration; and that by the records in the registry office the property claimed by defendant is encumbered by mortgages to the amount of £700.

Blake, Q C, showed cause, and filed several affidavits on the part of the defendants.

John Carr, clerk of the City Council, testified that on the 15th April last, he was the owner of a house on Denison avenue, in St. Patrick's ward; that on that day he leased the same for one year thereafter, quarterly, to defendant, and that defendant entered into occupation of the same as his tenant, and was assessed in the last revised assessment roll as tenant thereof at $100 rent, the lowest actual annual value of the premises; that the lease has ever since continued, and is still in full force and virtue. He further stated that as clerk of the Council he had the custody of the last revised assessment rolls of the city, and he testified to correct and exact transcripts of those portions of the rolls in which defendant appears as assessed in the ward of St. Patrick. By this transcript the defendant appears to be assessed as follows:

BEVERLEY STREET.

No.	*Assessment.*	
No. 538	Nathaniel Dickey John Neil, J. J. Dickey,	Annual value. As owners, *foundry*, &c.....$195
536	Nat. Dickey, as owner, house.....	84
537	" " "	72
349	(Originally S. Brough) owner vacant lot.....	67

Revised, and name of N. Dickey inserted.

DENISON AVENUE.

1069 Nathaniel Dickey, occupant..... 100

He further stated that defendant appealed against the assessmens of $100 on the vacant lot; and having stated to the Court of Revision that he was the owner, his name was inserted, and he procured the assessment to be reduced to $67. He further swore that as city clerk, having the city books before him, and being familiar therewith, he prepared for defendant his declaration of qualification, and informed defendant that it was, as he believed it in fact to be, taken correctly and sufficiently from the assessment books; and he stated that he did not include the leasehold property, because he believed, as he still believes, that defendant's qualification in Beverley street was sufficient.

James J. Dickey, a brother and partner in business of the defendant, swore: that defendant and one John Neil and himself, for some years past, and at the present time, have been and are co-owners in fee of the land on which the foundry is erected, and assessed in the roll at $195; that the lands are subject to a mortgage to the Scottish Amicable Society for £500 sterling, principal money, and no arrears of interest. He stated that last June he and his partners were prepared to pay it off, and applied to do so, but that the company's agents refused, unless upon a six months' notice, and subsequently an agreement to extend the time for four years was made, giving additional security for the payment of the mortgage money upon certain shares in another society, worth in cost at present at least $2,150, and payable in 1868, with a high rate of interest, compounded half-yearly, and which in 1868 will amount to a sum much larger than the mortgage on the premises; which shares were to be transferred to the solicitor and agent of the mortgagee, and to Edward Blake, Esq., their solicitor, as trustees for both parties: and he further swore, that independent of that security, the mortgaged premises are worth $6.000, and that they would not accept any less sum therefor; that on the 1st May, 1864, Mr. Brough agreed with defendant for the sale to him of the second lot on Beverley-street, and that Brough signed and delivered to defendant an agreement for the sale, which agreement was verified and produced, and by it Mr. Brough agrees to sell the premises, letting them out to the defendant for £400, payable in ten years, with interest half-yearly, to be secured by mortgage on the lot; conveyance to defendant and mortgage back to be prepared and executed as soon as conveniently may be; defendant to pay the taxes for the then current year, 1864. Mr. J Dickey further stated, that he was present at a conversation between defendant and Mr. Brough on the subject of the purchase; that there being some incumbrance on the lot, which

Mr. Brough was to pay off or have the time for payment extended, the defendant assuming the same, it was agreed that Mr. Brough should make arrangements in respect of the incumbrance, and the contract should then be completed by conveyance. In the meantime defendant should enter into possession, which he did, and has since continued in possession; and he stated that defendant is the owner in equity of the fee of the premises.

The defendant himself, in his own affidavit, stated, that J. J. Dickey was the person who managed the transactions with the Scottish Amicable Insurance Society, and he incorporated the several matters stated in J. J. Dickey's affidavit, and stated that they were true. And as to his declaration of qualification, he stated that he supposed and believed that it included the other properties mentioned in the affidavits; that as it was prepared by the clerk of the Council, he did not closely examine it, as the clerk knew the properties he was assessed for, and who informed him at the time that it included property more than sufficient for his qualification.

McMab for the relator.

MORRISON, J.—As to the first objection, after a careful examination of the affidavits filed on the part of the defendant, in connection with the fact that the last revised assessment roll shows that the defendant, besides being rated with his partners for the foundry premises, and as sole owner for the vacant lot, that he was also rated as sole owner for two other properties rated at the annual value of $156, and also a leasehold property to the value of $100, and holding the views I have expressed in the previous case of *Regina ex rel. Blakely* v. *Canavan*, respecting equitable estates and incumbrances, I am of opinon that defendant, at the time of his election, was duly qualified for the office of alderman.

The relator having suppressed the fact of the defendant being rated for the property valued at $156, and not negativing the defendant being possessed of them at the time of his election, I do not think it necessary to call on the defendant for further affidavits relating to those properties.

As to the second and third objections, they are directed specifically against the validity of the defendant's declaration of office, not against the validity of the election, or the defendant's qualification at the time of his election.

The authority for the issuing of the summons herein is founded upon the 128th section of the Municipal Act, which enacts, that if the relator shows, by affidavit to a judge, reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matter contested. The clause and the subsequent sections are all directed to the trial of the validity of the election and the due election of the relator or some other person. The declaration of office referred to in the relator's statement is required to be made by the 175th section, but I see nothing in the act declaring that if the person elected omits making such declaration, or makes a defective one, or that he is not seised or possessed of the estate therein mentioned, that his election shall be void, or that it should be held that he was not duly elected. The statute, on the other hand, provides, by the 183rd clause, that if the person duly elected does not make the declaration of office within twenty days after his election, he is subject to a penalty, and by the 15th clause of the Interpretation Act, the wilful and corrupt making of any false statement in any declaration required or authorized by any of the consolidated statutes of Upper Canada, shall be a misdemeanor, punishable as wilful and corrupt perjury.

But even if the objections were open to the relator, it is quite clear from the affidavit of the clerk of the City Council, that having the custody of the assessment rolls, he drew up the declaration for the defendant, and inserted in it, as he thought, sufficient property for the purpose, and that it was a mere omission on his part to insert the other property for which the defendant was rated as proprietor

As to the merits of the whole case, the defendant has fully met the objections attempted to be set up by the relator.

I am of opinion, therefore, that the office of alderman for St. Patrick's ward, in the city of Toronto, should be allowed and adjudged to the defendant, and that he be dismissed and discharged from premises charged on him, and do receive his costs of defence.

Order accordingly.*

GENERAL CORRESPONDENCE.

ST. CATHARINES, June 22nd, 1865.

To the Editors of the Law Journal.

GENTLEMEN,—As the point submitted in the following question is of great importance to many students, will you be kind enough to give your opinion of it, and oblige

ONE OF THEM.

Under subsec. 2, sec. 3, cap. 35, Con. Stat. U. C., is a student disqualified for admission who keeps (say) one Term after his articles have expired, although at the time of keeping the Term he is under a new agreement with his principal?

Is he also disqualified under the Rules of the Law Society?

[We do not understand what our correspondent means by "a new agreement with his principal." The Law Society have in more than one instance permitted clerks to go up for examination when their articles have expired in the Term in which they go up or *immediately after it*; but in no case when a Term has intervened.—EDS. L. J.]

* See *Regina ex rel. Grayson*, v. *Bell*, 1 L. J. U. C. N. S. 130

MONTHLY REPERTORY.

COMMON LAW.

Probate. April 21.

Birks v. Birks.

Probate of two testamentary papers — Mistake— Admissibility of parol evidence—Testamentary papers not inconsistent with such other—The first not revoked by the last.

A testator, having erased a clause in his will after the execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made: but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last will and testament. (13 W. R. 638.

Q. B. April 27.

Reg. v. Windsor.

Habeas corpus—Extradition treaty with America— 6 & 7 Vict c. 66—Forgery—Forgery by the law of the State of New York.

The 6 & 7 Vict. c. 76, s. 1, which was passed to give effect to an extradition treaty between England and the United States, provides that, in pursuance of that treaty, any person charged with the crimes of "murder, &c., forgery committed within the jurisdiction of the United States," who shall be found within the territories of her Majesty, shall, upon requisition being made by the United States' authorities, be delivered up to their custody.

Held, that an offence, which had no common element with forgery by the law of England, but with respect to which the local Legislature of New York had enacted previously to the conclusion of the extradition treaty, that any person charged therewith should, after conviction thereof, be deemed guilty of forgery, was not within the purview of 6 & 7. Vict. c. 76, s. 1. (13 W. R. 655.)

Ex. May 3.

Martin v. Gribble.

Bankruptcy Act, 1861, *s.* 192—*Composition deed —Inequality.*

A composition deed, by which the creditors are entitled to the composition only on signing, is bad. (13 W. R. 691.)

Ex. May 10.

Whittaker v. Lowe.

Bankruptcy Act, 1861, *s.* 192—*Majority of creditors in number and value—Secured and unsecured creditors.*

In determining whether the requisite majority in value of the creditors have assented to a composition deed, the value of the securities held by them is not to be deducted from the debts of secured creditors. (13 W. R. 723.)

B. C. May 11.

Staniforth v. Richmond.

Practice—Setting aside writ of summons serve abroad—Cause of action out of jurisdiction.

If a defendant, served with a writ of summons abroad, appears, he will not be allowed to set aside the writ upon the ground that the cause of action declared on did not arise within the jurisdiction of the court, and it makes no difference that the writ was not specially indorsed. (13 W. R. 724.)

B. C. May 10.

Reg. v. The Trustees of the Hearts of Oak Benefit Society.

Mandamus—Secretary of benefit society—Office of public nature.

A rule nisi granted for a mandamus requiring the trustees of a friendly society, registered under the Joint Stock Companies' Act, to restore one, who had been secretary of the society, to his office. (13 W. R. 724.)

CHANCERY.

V. C. R. May 3.

Oakden v. Pike,

Vendor and purchaser—Condition of sale—Waiver —Delivery of abstract.

An estate was sold by auction and a memorandum signed on the back of the particulars, one of the conditions being that the abstract shall be delivered and objections taken within a specified time, and if not so made, the title shall be considered so far, as accepted. The abstract was sent in, and certain requisitions made in time; but, subsequently, on the opinion of counsel, a doubt was raised on the construction of a will set out in the abstract, but without the residuary clause, to which the vendor's solicitor replied, that they were willing to execute a disentailing deed, &c., but that, of course, the conditions were not waived.

Held, that the delivery of the abstract was the sending of that document, and the setting out of the will sufficient; that the objection not being sent in time, and the condition not waived, the title must be considered as accepted, and the vendors were entitled to a decree. (13 W. R. 673.)

V. C. W. May 6.

Dilley v. Matthews.

Will—Construction—Illegitimate children.

Testator, after appointing "my wife, Sarah, guardian of my infant children," gave the income of his property "to my said wife," and after her death the principal to his children.

At the date of his will testator had a wife living, who had deserted him, but no legitimate children. He was living with a woman (Sarah N.), and had gone through the ceremony of mar-

riage with her; several children having been born during their cohabitation.

Held, that Sarah and her children were sufficiently indicated by the testator to enable them to take under the bequest contained in his will.

L. J. April 18, 19, 26.

Lloyd v. The London, Chatham and Dover Railway Company.

Injunction—Breach of covenant—Mistake—Acquiescence—Public policy.

Where a breach of covenant is proposed, the court will not refuse to interfere on the ground that there has been a mistake on the part of both parties in the form of the covenants; or that the aggrieved party may have already permitted some other infringement of the covenant; or on the ground of inconvenience to the public (Knight Bruce, L. J., dissentiente).

Before the court would refuse to enforce a covenant, it must be clear that no substantial damage could arise from the breach of it. (13 W. R. 698.)

V. C. K. May 8, 9.

Bell v. Wilson.

Mines—Deed reserving mining rights—Construction—"Minerals"—Freestone.

Where, in a conveyance of land in Northumberland, there is an exception of "all mines and seams of coal and other mines, metals and minerals" in favour of the vendor, freestone is not included in that exception. Although the word "minerals," in its most extensive sense, means all that composes the earth's crust, including the superfices, it is not so in the case of vendor and purchaser.

Every case of exception in a conveyance depends on its own circumstances, and the intention of the parties. (13 W. R. 708.)

REVIEWS.

New Manual of the Costs, Forms, and Rules in the Common Law Courts of Upper Canada. *By* A. G. McMillan, *of Osgoode Hall, Student-at-Law.* Toronto: Rollo & Adam, 1865.

We have already briefly noticed this work, and have since carefully examined it. We have no hesitation in saying that it supplies—and well supplies—a want long felt in the profession. It deals with a subject of much difficulty, and the labour of the author is by no means to be judged of by the number of pages he has written. Many would have despaired of success on such a subject; but he has persevered, and produced a work alike useful to the profession and creditable to himself. It should be a *vade mecum* to every practising lawyer and zealous law-student. Lazy lawyers and lazy law-students may not see much to admire in it; but a practitioner or student, really in earnest, will not be without it.

It is prefaced by short historical sketches of the Superior Courts of Common Law and the County Courts. Next follow some remarks on the recent Stamp Act (27 and 28 Vic. cap. 5.) Then we have an elaborate tariff of costs in the Superior and County Courts, alphabetically arranged according to the subjects in respect to which costs may be taxed. This we look upon as a most valuable repository of "useful knowledge," and one essential to the completeness of the work. The author, unmindful of labour, has appended to each page references to decided cases on the subjects appearing on the face of each page. Were there nothing more in the book to recommend it to the patronage of the profession, we should consider this repository more than value for the cost of the work.

It may not, perhaps, be out of place here, for fear of a mistake, to draw attention to note (*a*) on page 42, where it is stated that a judgment creditor will not be allowed the costs of a garnishing application, either against the judgment debtor or the garnishee, on the authority of *The Bank of Montreal* v. *Yarrington*, 3 U. C. L. J. 185. The late case of *Evans* v. *Evans*, 1 U. C. L. J. N. S. 19, 51, decided first by *Spragge*, V. C., in chambers, in accordance with the former case, but subsequently reversed on appeal to the full court, is an authority the other way,—his lordship then saying, that since giving his judgment in chambers he had conferred with one of the Common Law Judges, and had been informed that it was now the practice at law to grant the costs of a garnishing application when there was a sufficient fund out of which to pay them. Note (*s*) on page 56, with respect to sheriff's poundage, should also be supplemented by a reference to the late cases of *Winters* v. *The Kingston Permanent Building Society*, 1 U.C. L. J. N. S. 107; *Buchanan* v. *Frank*, Ib. 124; 15 U. C. C. P. 196, which decide that a sheriff is not entitled to poundage unless he *actually levies the money*, no matter whether the money is made by *pressure* of the writ or not. These cases, however, were probably not decided in time to be noted. We publish in another column an important case on the subject of taxation of costs (*Ham et ux.* v. *Lasher*), to which we also refer those interested.

Mr. McMillan also gives us some remarks on preparing and taxing bills of costs, accompanied with references to decided cases, which remarks we heartily recommend to every man who may be interested in a correct and complete bill of costs. It is no disgrace to be able to produce to the taxing-master a complete bill of costs. The disgrace is rather in presenting to him a slovenly one, containing many items which ought to have been omitted, and omitting some that ought to have been inserted. And this, according to our experience, is the rule at Osgoode Hall. The consequence is not only loss to the profession, but increased evil, and vexation to the taxing-officers of the courts. There is a science in the

preparation of a bill of costs which any man of average intelligence can learn, if he but take the trouble. The fact is, men do not study this as they do other branches of the profession. But even this should not be neglected.—"The labourer is worthy of his hire." The value of the services of the legal labourer is regulated by statutes and rules of court; if he is too ignorant or too lazy to make himself acquainted with the tariffs and their proper application, he entails upon himself a loss that could easily be avoided.

But, it may be said, what is the use of all this material if we do not know how to put it together? This want also has been anticipated by the author. He publishes forms of bills of costs under different circumstances, which, as guides, will be found of great service. There are no less than sixteen such forms, apparently carefully compiled. The use of them, after reading the first part of the work, will enable any student to prepare and to tax bills of costs, which will annoy no man—which will be a gain to his master and a pleasure to himself as well as to the taxing-officer.

The work would not be complete without the publication of the Stamp Act, which is given in full in the volume before us; and in order to make his book as widely useful as possible, the author has given us tables of fees in Division Courts, Equity side of the County Court, Surrogate Courts, and Registry Offices. He also publishes the schedule of fees allowed to Clerks of the Peace; then follow fees before the Heir and Devisee Commission, sheriffs' fees, fence-viewers' fees, and *quo warranto* costs. His remarks on conveyancing charges are deserving of attention. It is everywhere felt that this branch of the law demands a remedy, which it is hoped our legislature will ere long supply.

We next have nineteen forms of practical value, with an example of a country attorney's bill of a simple motion in chambers, made by a Toronto agent. Then follow new rules of Court as to costs, &c.; and the work closes with an alphabetical index, which, taken with the alphabetical repository in the first part of the work, makes the book not only full of useful knowledge but easy of access.

We congratulate Mr. McMillan on the completion of his unpretending but most useful book. The labour of the practitioner is much lightened by the publication of such a work. No practitioner or student should be without it. The gain in one day, in an office of ordinary practice, by the use of the work in the preparation of bills of costs, would more than pay the expense of a copy of the work.

We trust the return to Mr. McMillan, not merely in direct gains from the sale of the work, but in indirect advantages in being the author of a work so practical, on a subject so useful to the practical lawyer and law-student, will be such as to repay him for the labour bestowed upon it.

CHANCERY AUTUMN CIRCUITS, 1865,

FOR THE EXAMINATION OF WITNESSES & HEARING OF CAUSES.

THE HON. THE CHANCELLOR.

Toronto.....	Tuesday.....	29th August.

EASTERN.

THE HON. THE CHANCELLOR.

Ottawa.....	Tuesday.....	19th September.
Cornwall.....	Saturday.....	23rd "
Brockville.....	Tuesday.....	26th "
Kingston.....	Thursday.....	28th "
Belleville.....	Monday.....	2nd October.
Peterborough..	Wednesday.....	4th "
Lindsay.....	Monday.....	9th "

WESTERN.

THE HON. VICE-CHANCELLOR SPRAGGE.

Simcoe.....	Thursday.....	12th October.
Goderich.....	Monday.....	16th "
Woodstock.....	Friday.....	20th "
London.....	Tuesday.....	24th "
Chatham.....	Monday.....	30th "
Sandwich.....	Thursday.....	2nd November.
Sarnia.....	Monday.....	6th "

HOME.

THE HON. VICE-CHANCELLOR MOWAT.

Niagara.....	Thursday.....	26th October.
Hamilton.....	Monday.....	30th "
Brantford.....	Monday.....	6th November.
Guelph.....	Thursday.....	9th "
Barrie.....	Tuesday.....	14th "
Cobourg.....	Monday.....	20th "
Whitby.....	Friday.....	24th "

By the Court.

A. GRANT, Registrar.

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Seth Wheaden	Belleville.
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D L Beaudry	Montreal.
D. Guimont	Cape St. Ignace.
W A. Clark	Clarksburgh.
W. & A. McGillivray	S. Plantagenet.
J S. Foulds & Bros.	Hastings.
Samuel Ross	Brockville.
Geo. Craig	Southampton.
Wm H. Carney	Owen Sound.
Wm. Smith	Brockville.
Adolphe Belanger	Montreal.
John Warren	Oshawa.
Peter Lenfesty	Owen Sound.
R J. O'Loane	Stratford.
Andrew McNab	Beaverton.
Simon Kleiser	Toronto
John Lougel	Lennoxville.
Thomas Story	Ottawa.
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P M. Lawrason	New Durham.
Weber & Wells	Waterloo.
J W. Inman	Hamilton.
Jas. O. L. Gibson	Whitby.
Joseph Hatch	Woodstock.
Edward Ferguson	Southampton.
D S. Shoemaker	To Walsingham.
Alexander Waters	Owen Sound.

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Robert Edgar	Owen Sound.
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Geo Rice	Toronto.
Samuel Thompson	Toronto.
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J. B Duplaisis	Montreal.
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W. McClellan	Norwich.
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Gerard Hamilton	Napanee.
John Sim	Peterborough.
John Mohr, jun	Aylmer.
H. & A. Robinson	Tp. King.
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R. J. Earl	Chatham.
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Christian Clemens	Tp. Waterloo.
Fairchild & Allison	Quebec.
David Fraser	Tp Esquesing.
Paxton & Bros	Montreal.
Arnold Sluman	Wolfe Island.
Jas. Spiers	Madoc.
John Donough	(Huron & Bruce).
Elliott & Co	Montreal.
Horace Glass	Tp. Billio.
R. M. Gifford	(Haldimand).
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Chas N. White	Tp Burford
Elijah Haight	Mohawk.
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P. Watson	Stratford.
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Geo. Ansley	Guelph.
Jas. H. Dixon	Berthier.
Jas. John. jun. & F. J. Dougall	Windsor.
John Dougall	Montreal.
Hugh Coburn	Tecumseth.
John Reeve	Clinton.
Chas. H. Baldwin	Kemptville.
James R Ross	Seaforth
W. C. Husband & R. McMaster	Georgetown.
S. D. Hess	Tp. Barton.
James Leishman	Montreal.
Henry Hall	Woodstock.
Samuel R. Warren	Montreal.
P. M. Weber	Waterloo.
J. McGregor & Co.	Picton.
John Hindvine	Fenelon.
E T Boulton	Cobourg.
John D. Fee	Stratford.
M. W. Dean	Tp. Hamilton.
C. E. Bullock	Brighton.
Alex. Bradburne, jun	Markham.
Wm. Jones	Ameliasburgh.
James Hope	(Frontenac).
Thomas Crow	Scarborough.
Jacob Taylor	Welland.
W. M. Shaw	Georgetown.
W. DeQ. Sewell	Bowmanville.
Louis Cotè	Quebec.
John Buckland	Coaticook.
James Reeve	Chatham.
Henry Longpre	Montreal.
Ambroise Laberge	Montreal.
James Neelands	Late of Stratford.
John C. Irwin	Toronto.
D. B. McEnery	S. Catharines.
Thomas Lamb	Napanee.
James Thompson	Tp. Uxbridge.
John Parsons	Orangeville.
Wm. Clarke	Orangeville.
Wm. Ryan	Montreal.
Walter Ross & Co	Picton.
Stevenson & Sutherland	(Co. Perth).
Robert Metcalf	Carleton Place.
Paul Boire	St Jacques Mineur.
Silas Smith	Kirkfield.
Richard Johnson	Delta.
John Buchanan	Ingersoll.
Henry Fanning	Belleville.
D. C. McKinnon	Tp. Caledon.
Wm. A. & B S. Curry	Montreal.
John Donogh	
John Davis	Davisville.
Charles Diament	Clinton.
F. Johnston	Wanstead.
George Dolman	Wyoming.
Thomas Lalor	Toronto.
J. M Wrong	Port Burwell.
D. McMillan	Cornwall.
Telesphore Lemay	Three Rivers.
Wm. J Taylor	Tp. Albion.
George Hinman	Stratford.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

WILLIAM HENRY RICHEY ALLISON, of Picton, Esq. Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

JOHN McINTYRE, of Kingston, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

GEORGE DEAN DICKSON, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

REGISTRARS.

JOHN HIGGINSON, Esquire, to be Registrar of the County of Prescott. (Gazetted June 17, 1865.)

TO CORRESPONDENTS.

"A Member of the Profession." We think that a clerk of a county court is entitled to fee for taxation. As to the fee for computation, we are not so certain. We do not understand, from your query, whether there is any computation *in fact*

"One of them"—Under "General Correspondence."