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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS.—*Forms under the late Act.*—We have received forms from Mr. Klotz and Mr. Lloyd, for which, it so happens, several applications were made to us by other Clerks. Through the attention of the gentlemen named, we are enabled to lay before our readers the subjoined forms under the late Act, which have been approved of by the Judges of the Counties they are intended for.

The form of Transcript from the county of Waterloo appears to be substantially the same as that used in the county of Simcoe. No doubt either may be safely followed:—

Form of Transcript of Judgment in use in Co. Waterloo.

TRANSCRIPT OF ENTRY OF JUDGMENT,

Pursuant to the Act 18 Victoria, chapter 125, section 3.

In the Second Division Court for the County of Waterloo, held ——— the ——— day of ——— 18 .

No.— Between ———, plaintiff, and ———, defendant.

It was ordered that the defendant do pay the plaintiff the sum of ——— for Debt, and ——— for costs, within ——— days.

Amount of Judgment,..... £
Additional Costs,.....
Additional Interest,.....

Total amount,.....
Amount paid.....

Amount Due.....

I, OTTO KLOTZ, Clerk, of the Second Division Court for the County of Waterloo, do hereby certify and state, that the Judgment in the above suit was recovered on the ——— day of ——— one thousand eight hundred and ———, and that the amount unpaid on the said Judgment is:—

Given under the Seal of the said Court this ——— day of ——— one thousand eight hundred and ———

Clerk.

To ——— Clerk of the ——— Division Court for the ——— Count— of ———

Form of Transcript of Judgment in use in Co. Simcoe.

In the First Division Court of the County of Simcoe.

Transcript of the entry of a Judgment rendered by the said Court at the sittings thereof, held at Barrie, in the said County, on the ——— day of ———, A.D. 185 , in a suit numbered———. A.D. 185 .

[L.S.]

Between ——— ———, Plaintiff,
and
——— ———, Defendant.

Judgment for Plaintiff ——— pounds, &c., for ———, and ——— pounds, &c., costs, to be paid in ——— days.

Amount of Judgment. (Debt and Costs) £0 0 0	Pursuant to the provisions of an Act of the 18th Victoria, chapter 125, I, Thomas Lloyd, Clerk of the said First Division Court, do certify that the above transcript is correct and duly taken from the procedure book of the said court, and that judgment in the above cause was recovered at the date above stated, viz., the ——— day of &c.; and further, that the amount unpaid on the said judgment is ——— pounds, &c., as stated in the margin hereof.
Warrant of Execution	
£0 0 0	
Paid ———, 185 ,	
Amount unpaid, . . £0 0 0	

Given under the Seal of the said Court this ——— day of ———, A.D. 185 .

——— ———, *Clerk.*

To ——— ———, Clerk of the ——— Division Court for the Count of

Form of Execution on Transcript of Judgment.

In the First Division Court of the County of Simcoe.

Between A. B., Plaintiff,
[L.S.] and
C. D., Defendant.

WHEREAS, at the sittings of the ——— Division Court for the ——— Count of ———, holden at ———, in ——— ———, on the ——— day of ———, by the judgment of the said Court the said plaintiff recovered against the said defendant the sum of ———, for ———, with ——— for costs; which said ——— and costs were ordered to be paid by the said defendant at a day now past, as appears by a transcript of the entry of such judgment, attested by the Seal of the said Court, certified and signed by ——— ———, the Clerk thereof, and sent and addressed to the Clerk of this ——— Division Court of the County of Simcoe, pursuant to the provisions of an Act of the 18th Victoria, chapter 125: And whereas it further appears by certificate at the foot of the said transcript, attested, certified, signed, sent and addressed as aforesaid, that the amount unpaid upon the said judgment is ——— pounds, &c., which said transcript and certificate is duly entered in the books of this Court.

These are therefore, &c., (as in schedule, form No. 20 to "of £5)," the said sum of ——— pounds, &c., and your lawful fees, &c., (as in form 20 to the end, only instead of using the words "to the Clerk of the Court," at the conclusion of the form, say "to the Clerk of *this* Court.")

Given under the Seal of the said First Division Court of the County of Simcoe, this ——— day ———, A.D. 185 .

To ——— ———, Bailiff of the said Court.

T. L.
Clerk.

BAILIFFS.—*Acting under Execution.*—To several Communications which have been received from Bailiffs, we give this present reply—that the questions proposed are too numerous and complicated to put in satisfactory shape in one number of the *Law Journal*; but we hope that a Treatise on their

office and duties, to appear in our columns, will *shortly* give information on every particular desired: if not we will undertake to resolve the questions ourselves at an early day.

There is one matter, however, that a "City Bailiff" submits which may not admit of delay. It is not in our opinion illegal for a Bailiff, acting under a D.C. Execution, to break open a stable-door on defendant's premises to seize a horse belonging to him without a previous demand and refusal. Although a demand should properly be made before such violent measures are resorted to, yet the act is not in itself illegal. The case of *White* v. *Wiltshire* related to the breaking open *an inner door of a dwelling-house*, and does not bear on the point.

The case *Penten* v. *Browne*, 1 Sid. 181, supports the view we take. It is the outer door of a *dwelling-house* or building connected with or within the same curtilage as the dwelling-house that may not be broken open to execute a *Fi. Fa.*

OFFICERS.—*Clerks and Bailiffs* will see that we are exerting ourselves on their behalf, and are willing to expend our monies for their benefit. The *Law Journal* has given them at least a full return for their support. Nearly every letter received expresses the utmost satisfaction, and many of the Officers have exerted themselves for the *Law Journal*. With the prospect of greatly increased value in the new Volume, we confidently ask Officers to make the Work known amongst their acquaintances who are not already subscribers, as this will tend to increase our usefulness by securing a wider circulation, and will enable us continually to keep on improving. In doing this, they can state the fact that the *Law Journal* is intended not only for Officers and Suitors of the Courts, but for Magistrates, Coroners, Local Authorities, and Municipal Corporations, as a reference to our pages will show. They can serve us and themselves by the same act, if each Officer would procure a few new subscribers to commence with the coming Volume. Some few Clerks and Bailiffs (less than ten per cent on all in U. C.) have hitherto not taken the *Law Journal*, we send them this number and will commence sending the numbers regularly with the new Volume. Those who are indifferent to information on the subject of their duties, or who do not think they will receive an equivalent for the trifling subscription, will be pleased to return the numbers in a cover open at the end, with their names marked *on the cover.*

SUITORS.

The Plaintiff preparing for Trial.—The plaintiff having entered his claim with the Clerk may find it convenient at the time to order out Subpœnas for his witnesses. It will be better to give in a list to the Clerk showing the names of the witnesses in full, with their places of residence. The safer course in all cases is to leave with the Clerk a sufficient sum for a tender of expenses to each witness: if it be suspected that any of them will be *unwilling to attend* a tender of expenses according to the Tariff is *indispensable*—to enable the Court to punish a witness for non-attendance, his expenses should be paid or tendered with the Subpœna. There is no obligation on the plt. to have the Subpœnas served by the Bailiff, for service by any literate person is just as valid, but to avoid any difficulty about the service, it is recommended to employ the proper Officer in all cases. Should the plt., however, undertake to serve, let him remember that a true copy of the Subpœna is to be given either personally to the witness or left with some person for him at his place of abode. If the plt. wishes to avail himself of the dft's. testimony he should summon him in the same way as any other witness.

It is not unusual for the plt. to defer taking out Subpœnas until he sees if the dft. pays or confesses or in part admits the demand, or whether he pleads a tender or puts in a special defence under some particular Statute. Defences, as a general rule, must be put in six days before the day of trial, so the plt. (unless the witnesses reside at a distance from the Clerk's office) should go not earlier than five days before the Court day, when he will be able to ascertain if a defence is put in and what witnesses will be necessary. It may be observed that the object of the Subpœna is to *enforce* attendance, but if a witness attend without a Subpœna it is sufficient, and he may be called on if in Court.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 182.)

MODE OF COMPELLING THE APPEARANCE OF PARTIES.

In acting under the general rule prescribed by the 16 Vic. (c. 178) the Justice, as has been already shewn, may issue a warrant or a summons in the first instance, as may be deemed expedient. In cases for small larcenies and other offences in the nature of a felony, many of which are now punishable on summary conviction, it will be proper to issue a warrant rather than a summons in the first instance. But let it be borne in mind, in issuing a warrant, that the information must be on oath, and the matter thereof substantiated to the Justice's satisfaction, and that greater caution is necessary than in a summons, for if the proceeding be erroneous and the defendant be arrested under the

warrant he can maintain an action for false imprisonment.

The SUMMONS.—If the case is one in which Justices have not the power, or do not deem it expedient to issue a summons, upon having the facts showing a *primâ facie* case before the Magistrate, he will issue a summons directed to the defendant, requiring him to appear and answer to the charge.

Before the passing of the Act 16 Vic., c. 178, there was no general form of summons, and it was directed, either to the party or to a constable, but a form is given in that Act, and it is requisite in *all cases* that the summons be directed *to the party.* In acting under those Statutes which provide a form of summons, it might render the proceedings more strictly regular if such form was adopted, but as that given in the recent Act contains all necessary requisites for every case, it will be proper to use it universally.[*a*]

The summons should recite briefly *the matter of the complaint*, but at the same time with sufficient fulness and certainty to apprise the defendant of the nature of the offence charged against him, that he may be enabled to prepare for his defence accordingly. It should also set forth the *names* and *additions* of the complainant and defendant—the *name and jurisdiction* of the Justice granting it, and when the information was laid before him—the *time and place* where the defendant is to attend—and it should be *dated* and bear the signature and seal of the Magistrate.[*b*]

(TO BE CONTINUED.)

[*a*] *Summons to the Defendant upon an Information or Complaint.*

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

To A. B. of ——, (labourer)

Whereas information hath this day been laid (*or* complaint hath this day been made) before the undersigned, (*one*) of Her Majesty's Justices of the Peace in and for the said (*County* or *United Counties, City, Town, &c. as the case may be*) of —— for that you (*here state shortly the matter of the information or complaint*); These are therefore to command you in Her Majesty's name, to be and appear on —— at —— o'clock in the forenoon, at ——, before me or such Justices of the Peace for the said (*County or United Counties as the case may be*) as may then be there, to answer the said information (*or* complaint), and to be further dealt with according to Law.

Given under (*my*) Hand and Seal this —— day of —— in the year of our Lord ——, at —— in the (*County, or as the case may be*) aforesaid.

J. S. [L.S.]

[*b*] It is said to be the practice before certain Police Magistrates, and in places where a great deal of business falls on one or two Magistrates, to sign summonses, &c., in blank, leaving them with the Clerk to issue at his discretion; this practice is objectionable and dangerous, and should be discontinued. It was at one time followed in England, but being regarded as highly censurable, and replete with mischief, it was condemned by the Courts there. The Judges of the Court of Queen's Bench have laid down the necessity of regularity and actual interference of the Justice himself in all the proceedings purporting to have taken place before him; and there is a case where a Magistrate was convicted and fined £100 on a prosecution, where his Clerk only had taken the examinations, although the Magistrate was very infirm, and had applied to have his name taken out of the commission. See *R.* v. *Abraham Constable* cited 1 Ad. & E. (N. S.) 894. See also, 7 D. & R. 633. *Caudle* v. *Seymour*, 1 Ad. & E. (N.S.) 889.

ON THE DUTIES OF CORONERS.

II.—PROCEEDINGS IN RELATION TO INQUESTS.

(CONTINUED FROM PAGE 185.)

10. *Casual Death—By a Fire.*

CAPTION *as ante p.* 184.] do upon their oaths say, that on the —— day of ——, in the year aforesaid, at the Town aforesaid, in the County aforesaid, the warehouse of T. C. there situate, casually took fire, and the said H. H. being then and there present, and aiding and assisting to extinguish the said fire, it so happened that a piece of timber, by the force and violence of the said fire, then and there accidentally, casually, and by misfortune, fell from the top of the said warehouse, in and upon the head of him the said H. H., by means whereof the said H. H. then and there received one mortal fracture on the head of him the said H. H., of which said mortal fracture the said H. H from the said —— day of ——, in the year aforesaid, until the —— day of the same month in the same year, there, and also at a certain Hospital situate in the Town aforesaid, in the County aforesaid, did languish, and languishing did live; on which said —— day of ——, in the year aforesaid, at the hospital aforesaid, in the Town and County aforesaid, the said H.H. of the mortal fracture aforesaid did die: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H. H. in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to his death, and not otherwise, and that the said piece of timber was the occasion of the death of the said H. H., and is of the value of sixpence, and the property, and in the possession of the said T. C.

In witness, &c. [*Attestation as ante p.* 184.]

11. *Casual Death—By being Burnt.*

CAPTION *as ante p.* 184.] do upon their oaths say that the said H. H., on the —— day of ——, in the year aforesaid, being alone in her room or apartment, in a certain dwelling house situate in the Township and County aforesaid, it so happened as she the said H. H. was then and there sitting by her fireside, that the woollen petticoat of her the said H. H., which she the said H. H. then and there had on her body, accidentally, casually, and by misfortune, took fire, by means whereof, and from the smoke and flames arising from the said fire, the said H. H. was then and there suffocated and burnt, of which said suffocation and burning the said H. H. then and there instantly died: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H. H., in manner and by the means aforesaid, accidentally, casually, and by misfortune, came to her death, and not otherwise.

In witness, &c. [*Attestation as ante p.* 184.]

12. *Casual Death—By Starvation.*

CAPTION *as ante p.* 184.] do upon their oaths say, that the said H. H., on the —— day of ——, in the year aforesaid, through the inclemency of the weather, and the want of the common necessaries of life, and by no violent ways or means whatsoever, to the knowledge of the said Jurors, at the Township aforesaid, in the County aforesaid, did die.

In witness, &c. [*Attestation as ante p.* 184.]

13. *Homicide by a Madman—Hanging himself.*

CAPTION *as ante p.* 184] do upon their oaths say that the said H.H. not being of sound mind, memory, and understanding, but lunatic and distracted on the —— day of —— in the year aforesaid, at the Township aforesaid in the County aforesaid, one end of a certain piece of small cord of no

value, into an iron staple then and there fastened into the ceiling of a certain room of him the said H.H. in the dwelling-house of one —— ——, there situate, and the other end thereof about his own neck, then and there did fix, tie, and fasten, and therewith then and there did hang, suffocate, and strangle himself, of which said hanging, suffocation, and strangling, he the said H.H. then and there instantly died; and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H.H. not being of sound mind, memory, and understanding, but lunatic and distracted, in the manner and by the means aforesaid, did kill himself.

In witness, &c. [*Attestation as ante p.* 184.]

14. *Felo de se—Cutting his throat.*

CAPTION *as ante p.* 184] do upon their oaths say that the said H.H. not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, on the —— day of —— in the year aforesaid, with force and arms, &c., at the Township aforesaid in the County aforesaid, in and upon himself, in the peace of God and of our said Lady the Queen, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said H.H. with a certain razor of the value of sixpence, which he the said H.H. in his right hand then and there had and held, the throat of him the said H.H. then and there did strike and cut, thereby then and there giving unto himself with the razor aforesaid in and upon the throat of him the said H. H. one mortal wound, of the length of three inches and of the depth of one inch, of which said mortal wound he the said H. H. then and there instantly died: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H. H., in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder himself, against the peace of our said Lady the Queen, her Crown and dignity.

In witness, &c. [*Attestation as ante p.* 184.]

15. *Felo de se—By Poisoning.*

CAPTION *as ante p.* 184.] do upon their oaths say, that the said H. H., not having the fear of God before his eyes, but being moved and seduced by the instigation of the Devil, and of his malice aforethought, wickedly contriving and intending with poison, wickedly, feloniously, and of his malice aforethought, to kill and murder himself, on the —— day of ——, in the year aforesaid, with force and arms, at the Township aforesaid in the County aforesaid, feloniously, wilfully, and of his malice aforethought, a large quantity of a certain deadly poison called white arsenic, to wit, two drachms of the said white arsenic, into and with a certain quantity of tea infused in warm water, feloniously, wilfully, and of his malice aforethought, then and there did put, mix, and mingle, the said H. H. then and there well knowing the said white arsenic so as aforesaid by him put, mixed, and mingled with the said tea, so infused in warm water as aforesaid, to be deadly poison; and that the said H. H. a large quantity, to wit, half a pint of the said tea in which the said white arsenic was so put, mixed and mingled by the said H. H. as aforesaid, afterwards, to wit on the day and year aforesaid, at the Township aforesaid, in the County aforesaid, feloniously, wilfully, and of his malice aforethought, did take, drink, and swallow down, by means whereof he the said H. H. then and there became sick and greatly distempered in his body, and of the poison aforesaid, and of the sickness and distemper occasioned thereby, from the said —— day of —— in the year aforesaid, until the —— day of the same month, in the same year, in the Township aforesaid, in the County aforesaid, did languish, and languishing did live; on which said last-mentioned day in the year aforesaid, at the Township aforesaid, in the County aforesaid, he the said H. H. of the poison, sickness and distemper aforesaid, did die: and so the Jurors aforesaid, upon their oath aforesaid, do say that the said H. H. in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder himself, against the peace of our said Lady the Queen, her Crown and dignity.

In witness, &c. [*Attestation as ante p.* 184.]

16. *Excusable Homicide—In defence of person.*

CAPTION *as ante p.* 184.] do upon their oaths say that on the ——day of—— in the year aforesaid, at the Township aforesaid and in the County aforesaid, the said H. H. being in a certain common drinking-room belonging to a public-house there situate, known by the sign of the Plough, in which said common drinking-room, one T. C. of the Township aforesaid, in the County aforesaid, labourer, and also divers others persons, was and were then and there present, the said H. H. without any cause or provocation whatsoever given by the said T. C., did then and there menace and threaten the said T. C. to turn him the said T. C. out of the said common drinking-room, and for that purpose did then and there lay hold of the person of him the said T. C., and on him the said T. C. in the peace of God and of our said Lady the Queen then and there being, violently did make an assault, and him the said T. C. without any cause or provocation whatsoever, did then and there beat, abuse and ill-treat, whereupon the said T.C. for the preservation and safety of his person, and of inevitable necessity, did then and there, with the hands of him the said T.C. defend himself against such the violent assault of him the said H.H. as it was lawful for him to do, and the said H.H. did then and there receive against the will of him the said T.C. by the falls and blows which he the said H.H. then and there sustained by his the said T.C's. so defending himself as aforesaid, divers mortal bruises in and upon the head, back and loins of him the said H H., of which said mortal bruises he the said H.H. from the said —— day of —— in the year aforesaid, until the —— day of the same month, in the same year, at the Township aforesaid, in the County aforesaid, did languish and languishing did live; on which said —— day of —— in the year aforesaid, the said H.H. at the Township aforesaid, in the County aforesaid, of the mortal bruises aforesaid did die; and so the Jurors aforesaid upon their oath aforesaid, do say that the said T.C. him the said H.H. in the defence of himself the said T.C. in manner and by the means aforesaid did kil and slay.

In witness, &c. [*Attestation as ante p.* 184.]

(TO BE CONTINUED.)

U. C. REPORTS.

GENERAL LAW.

IN RE. SCOTT v. THE MUNICIPAL COUNCIL OF THE CITY OF OTTAWA.

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

School Trustees—Assessment must be equal in proportion to the ratable property.

[Q. B. T. T. 19 VIC.]

Mr. *Helliwell* obtained Rule *nisi* this term to quash By-Law 124, passed by the Municipal Council of the City of Ottawa on the 27th August last, on the grounds that the School Trustees of the said city had no authority to demand from the Municipal Council a distinct sum for each ward of the city for school purposes; and that the Municipal Council had no right to levy a different rate for each ward for such purposes.

The by-law is entitled "A By-Law to impose certain Rates for School purposes, during the current year, within the City of Ottawa."

It recites that the school trustees for the city of Ottawa had demanded from the Municipal Council the following sums of money, to be levied from the several wards respectively, for school purposes during the current year, viz.: from Ottawa ward, £340; from By ward, £335; from St. George's ward, £186; from Victoria ward, £136 10s.; and from Wellington ward, £154. And it enacts that in order to provide the several sums so demanded, there be imposed, levied, &c., in addition to all other rates, during the current year, the following rates on all taxable property in each of the wards, viz.: in Ottawa ward a rate of 1s. 2⅛d. in the pound; in By ward a rate of 8⅞d. in the pound; in St. George's ward a rate of 5d.; in Victoria ward a rate of 6⅛d.; and in Wellington ward a rate of 3d. 5-6 in the pound.

Robinson, C. J.—We do not find anything to warrant this by-law. It is certainly at variance with the leading principle of the assessment laws, which requires that all rates shall be imposed equally upon the ratepayers of the municipality, in proportion to their ratable property; and the school laws do not seem to sanction a departure from that principle in respect to rates to be imposed for school purposes. The intention of this by-law may have been just and reasonable, but no authority has been pointed out for such a mode of rateing.

Rule *absolute*.

In Re. Bryant *v.* The Municipality of Pittsburg.

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

Under 14 & 15 Vic., ch. 109, sec. 16, a By-law passed by a Township Municipality creating a debt on the credit of the Township, must be published before being passed.

The By-law must also contain in the body thereof a statement of the whole assessable property of the Township.

And it should express that the rate thereby imposed was imposed over and above all other rates; also, the sum to be raised in each year irrespective of the profits: also, the day when the by-law was to take effect.

[Q.B.T.T. 19 Vic.]

In Easter Term last Mr. *Hagarty* obtained a rule on the Municipality of Pittsburg to shew cause why a by-law No. 8 of last Municipality passed on the 16th of December, 1854, should not be quashed with costs.

1st, *Because* the money to be raised under it is for the purpose of paying off a debt occasioned by the purchase of a work out of the limits of the municipality, viz., the Cataraqui Bridge.

2nd, *Because* this by-law does not express that the special rate per annum to be levied under it is to be levied above and in addition to all other rates.

3rd, *Because* it contains no clause appointing some day within the financial year in which the by-law was passed when the same shall take effect.

4th, *Because* it never was duly published as required by statute 14 & 15 Vic. ch. 109, sec. 16, or in schedule of that Act, substituted for 12 Vic., ch. 81, sec. 177.

5th, *Because* it was not duly published as finally passed and amended, which the law requires.

6th, *Because* it provides that the money assessed for turnpiked roads in 1854 shall be applied to a sinking fund until the sum of £5,000 shall be paid off, which is a misappropriation of money assessed under a previous by-law.

On the 27th of June 1854 the municipality of Pittsburg passed a by-law (number 6,) to provide for taking and subscribing for stock in the Kingston, Pittsburg and Gananoque Road Company.

This by-law recites that it was desirable for the municipality of Pittsburg to contract a loan for enabling them to take stock to the amount of £7,500 in the stock of the Kingston, Pittsburg and Gananoque Road Company, and in connection therewith to acquire the Cataraqui bridge for the purpose of enabling the Company to make the said road, for the construction whereof it was formed; whereby the interests of the said municipality and surrounding country will be greatly benefitted, and the inhabitants thereof, as well as of the city of Kingston and others will be provided with greater facility for bringing their produce to market; and that in order to liquidate the debt or loan so to be created, it was necessary that a special rate, above and in addition to all other rates, should be levied annually on the whole rateable property of Pittsburg: which sum to be annually raised will amount to in 1854, £1,200, and in 1855 to £1,150, and so on diminishing gradually to 1863, when the sum would be £795.

It further recites that the whole rateable property of Pittsburgh, according to the returns for 1853, amounted to £84,000; and that the following annual rates in the pound upon rateable property would be required for paying the loan and interest, and for creating a sinking fund for paying the principal, viz.: for 1854, 3d. 3-7 in the pound; for 1855, 3d. 3-10, do.; for 1856, 3d. 6-35, do.: and so on diminishing the rate to 2d. 19-70 for 1863.

It then enacted that the municipality of Pittsburg should subscribe stock in the Kingston, Pittsburg and Gananoque Road Company to the amount of £7,500; that Debentures shall be duly signed for sums not less than £25 each, at 6 per cent interest, payable half yearly, to the amount of £7,500, redeemable 1-10th on the 5th of January in each year, (1855 to 1864 inclusive) with interest payable on 5th January and 5th July in each year; that for the payment of the said loan and interest, in the time limited, a special rate is levied each year on the said amount of rateable property in the township, amounting, &c., (following the recitals in the preamble); that the following annual rate in the pound, for the respective years following, shall in the said years be assessed and levied out of the said whole real and personal rateable property in the township, namely, for 1854, (enacting the rates stated in the preamble); that the said by-law shall come into effect on the day after the day of meeting of the Municipal Council of the said township, which shall be held with reference to the passing of this by-law under the Municipal Corporation Amendment Act of 1851, cap. 109, sec. 16; that the Municipal Council may dispose of the stock to be subscribed as they may think fit, and shall apply the dividends and proceeds thereof according to law, and for the advantage of the municipality; that all the enactments of the Parliament of Canada, then in force, as far as they are applicable to this by-law, shall be held to apply to it, and be incorporated therewith. A copy of a proposed by-law enacting only the above provisoes, was published on 25th March, 1854, with the ordinary notice signed by the Clerk of the Council, that it was a true copy of a proposed by-law to be taken into consideration by the municipality of Pittsburg on the 27th June, 1854, at which time the members of the municipality were required to attend, but when it was discussed on 27th June, 1854, a clause was added as the eighth and last clause, "that instead of £7,500 the Reeve shall take stock to the amount of £5,000 in the said Joint Stock Road Company, and that the rates for the payment of the interest and the redemption of the Debentures to be issued should be raised and levied to cover £5,000 only, the provisions of the by-law remaining the same as a guarantee, to the holders of the said Debentures;" and the by-law No. 6 passed on 27th June, 1854, in that amended form.

The by-law No. 8, which is now moved against was passed 16th December, 1854, it is intituled a by-law providing for the issuing of Debentures and payment of the interest thereon, authorised by by-law No. 6, passed 27th June, 1854, but not repealing the said by-law for taking £5,000 stock in the Kingston, Pittsburg and Gananoque Road Company, and for creating a sinking fund from the profits of the said Road, to relieve in part the full amount of taxes provided in the before mentioned by-law, and to assist in retiring said Debentures.

And whereas £5,000 has been subscribed for 1,000 shares in the Kingston, Pittsburg and Gananoque Road Company,

in connection with the purchase of the Cataraqui Bridge, and to prevent any loss to the township in the sale of the Debentures, the Reeve and Treasurer were thereby authorised and required to prepare and issue on the application of the President of the Road Company, Township Debentures to the amount of £5,000, bearing interest at six per cent per annum, payable half-yearly, to be redeemable at the end of ten years in manner therein mentioned; and such Debentures were directed to be prepared and issued in such sums as the Company may require.

2nd. That for paying the interest on the Debentures "an assessed rate shall be levied and collected of one penny in the pound per annum upon all rateable property in the said township, and if such rate should exceed the sum required to pay the interest, the surplus thereof shall be carried to the sinking fund with the profits of the stock until the Debentures shall have been taken up and paid.

3rd. That for redeeming the Debentures, the money assessed for turnpike roads in 1851, with the profits of the stock from year to year, shall form a sinking fund to be invested in some chartered Bank, or other safe securities at compound interest, until such sinking fund shall accumulate to £5,000, and the Debentures be fully paid off.

4th. That the Treasurer shall carefully invest the annual profits of the said Road as may be approved of by the Council (with directions as to the interest) until the sinking fund shall have accumulated to enough to pay off the Debentures at maturity; and that as the profits of the said Road and Bridge after the work aforesaid be finished, were expected to amount to 8 per cent or, £400 a year, should the sinking fund not produce sufficient to pay off the Debentures in ten years, the balance required to complete that sum shall be made up from the assessment of 1863 provided for in the by-law No. 6.

5th. That the Municipal Council shall direct their Treasurer to open an account with the township sinking fund, and to carry the sums therein provided to that fund, which account shall be examined by the township Councillors as therein directed; and a Resolution is to be passed for investing at interest the money belonging to the sinking fund, and the dividends on the shares in the said Road Company; and no part of such sinking fund is to be withdrawn for any purpose till the Debentures have by its operation been fully paid off: and when these shall have been so paid off with the money of the sinking fund that all credit in the Treasurer's books is to be closed, and the surplus, if any, is to be carried to the township fund, and used for township purposes.

The by-law concludes by saying, that by the operation of its provisions, at the end of ten years the whole proceeds of the stock in the road will become an annual income to the township, sufficient to defray the present annual expenditure of the municipality, without laying any assessed rates on the inhabitants.

Bryant, who moves to have the by-law No. 8 quashed, swears that before June, 1854, he was, and that he still is, a resident freeholder of Pittsburg and a ratepayer.

He sets out the by-law No. 6, of which he also annexes a copy,—

And he states that the by-law No. 8 was read a first time on the 25th of November, 1854, and the 2nd and third time on 15th December following.

That is was not published in any public newspaper.—

That in consequence of its being passed, the members of the Municipal Council who passed it were all rejected at the last municipal election, and others chosen. That the Cataraqui Bridge referred to in the two by-laws is not within the limits of the township of Pittsburg.

ROBINSON, C. J.—The Joint-Stock Road Company, in which the stock has been taken, is one formed under the general statute relating to such companies, for the purpose, as the registered instrument expresses it, of constructing a macadamized road from the limits of the city of Kingston, east of the Cataraqui Bridge, to the village of Gananoque, and thence to the eastern limits of the township of Leeds, in the county of Leeds; and also other small branch roads specified in the article of association, which roads are all within the township of Pittsburg. The capital stock of the company is declared to be £18,000, to be held in £5 shares, and the reeve of Pittsburg subscribed 1,000 of these shares.

The Act of last session authorising corporations of cities and towns to take stock in, or otherwise aid public works out of the limits of such cities or towns and legalize what may have been done, before the Act, in that way, by the municipal bodies of cities or towns, cannot be applied to this case of a township municipality.

It seemed not to be contended in the argument that the Cataraqui Bridge is within the limits of the township of Pittsburg. The Legislature, in their Act 8 Geo. IV. chap. 12, sec. 3, appear to assume that it is not, and it is not contended that any part of it is within the township of Pittsburg.

But the municipality cannot be said to have purchased this bridge. They have only taken stock yearly to the amount of £5,000, in a road company, which is employed in making important improvements in the township of Pittsburg.

It seems to have been a strong motive with them for taking the stock, that it would enable the company to acquire the bridge: but we are not prepared to say that that would make their subscription of stock an illegal act.

There are, however, objections to the by-law No. 8 which we think we cannot avoid holding to be fatal to its validity. The by-law No. 6, in the first place, was clearly not so passed, as the statute requires, for it never was published before passing. A copy of a proposed by-law for the purpose of authorising stock to be taken, was published, but not a copy of such a by-law *as was afterwards passed:* and this is what the Statute requires (14 & 15 Vic. ch. 109, sec. 16), for it says expressly that the copy to be laid before the ratepayers is to be "a copy of the by-law at length *as the same shall be* ultimately passed."

And this is reasonable, if the reference to the ratepayers is to be of any use. It is true that the alteration made in this case, by the addition of the eighth clause, went to diminish the amount of stock to be taken, but it was not the less necessary on that account that the direction of the statute should be complied with. It may be very possible that some persons might approve of the by-law as it was originally framed, who would not approve of it with that alteration. But the by-law No. 6 was not moved against as illegal—and remains in force.

But we agree with the Solicitor-General's argument, that No. 8 is substantially a new and independent by-law, so far, at least, as to require the formalities required by the Statute 14 & 15 Vic. ch. 109, sec. 16 to be observed. It is more than a mere supplement to by-law No. 6.

It authorizes the only debentures that can now have issued for the amount borrowed. It imposes for the first time in connection with the loan a rate of 1d. in the pound to pay the interest, which is part of the debt. This is clearly not meant to be levied in addition to the rates specified in by-law No. 6. It is a new rate, and for a different amount of debt from that to which the published by-law related; and the rates authorized by No. 6 were no doubt not intended to be levied together with this new rate. Then, as we must look on by-law 8 as coming within the 16th clause of 14 & 15 Vic. ch. 109, it follows that the whole of the assessable property of the township should have been stated in the body of the same by-law; and it should have been expressed that the rate of 1d. in the pound was imposed over and above all other rates. The same by-

law also should have specified the sum to be raised in each year, irrespective (for the Statute directs that) of the profits upon the road.

It should have stated also the day when the by-law was to take effect. As the measure now stands, taking both by-laws together, we see that there is no rate imposed, and appropriated to the liquidation of the debt, which will be sufficient in itself to ensure the discharge of the debt. On the contrary, other sources are relied upon primarily,—and are not merely made available in aid of rates imposed, and by way of relief from those rates.

What the Legislature meant by their Statute is, that the creditor should have his debt secured by rates, which would certainly pay it, with interest, at the expiration of the period limited, whatever aid the municipality might provide from other sources, to come in aid of those rates and to the relief of the ratepayers. But when we read the by-law No. 8 attentively, it seems clear that the Legislature do not mean the rates imposed by by-law No. 6, to be levied.

And therefore by-law No. 8 authorized a debt to be created by the issue of debentures, which debt is not secured either by that, or any other by-law, in the manner the Statutes of the Province imperatively required.

Rule absolute.

Calcutt v. Ruttan.

Arrest—Bail to the sheriff—16 *Vic. ch.* 175, *secs.* 7, 8—*Construction of*—10 & 11 *Vic., ch.* 15.

The sheriff cannot of his own mere motion allow a prisoner charged in execution, and in his custody, the benefit of the limits.

A debtor who is admitted to the limits on giving a bond to the sheriff under 16 Vic., ch. 175, is bound to enter into and file the recognizance required by 10 & 11 Vic., ch. 15, within a month from the execution of such bond. If he does not, the sheriff must recommit him to close custody at the expiration of the month, or he will be liable as for an escape.

If the certificate of the filing of such recognizance, &c., be not delivered to the sheriff within a month, the bond to him is forfeited.

Semble, that it is obligatory on the sheriff to take a bond under 16 Vic., if the sureties are sufficient.

[13 U.C.Q.B. Rep. 220]

This was an action against the sheriff of Northumberland and Durham; the first count, on which all turned, being for a voluntary escape of J.N., on a *Ca. Sa.* The second count was for not arresting.

The second plea pleaded to the first count stated, that after J. N. had been arrested by the defendant at the suit of the plaintiff, the said J.N. being entitled to the benefit of the gaol limits, the defendant permitted him to go and remain upon such limits, under and by virtue of the *Ca. Sa.*, as in the *second* count mentioned; *absque hoc*, that defendant ever did, since the arrest of J.N., as in the second count, permit him to escape or go at large out of his custody, as sheriff of, &c., or that the said J.N. ever did, since his arrest, escape or go at large otherwise or further than the defendant hath set forth in this plea: verification.

Demurrer—That it does not appear on what security, or on what terms, if any, J. N. was at large upon the limits, nor is the plea any answer to the first count.

The third plea stated, that after J. N. was arrested, and while he was in custody on the *Ca. Sa.*, the said J. N. being entitled to the benefit of the gaol limits, under 10 & 11 Vic., ch. 15, the defendant took bail from the said J. N., in pursuance of sec. 7 of 16 Vic., ch. 175, that the said J. N. would not depart the gaol limits of, &c., and the said J. N. and two good and sufficient sureties, to wit, W. N. and A. B., by their writing obligatory, sealed, &c., acknowledged themselves to be held, &c, to defendant, as sheriff, &c., in the penal sum of £362 10s. (being double the amount for which J. N. was arrested) with a condition that if J. N. should remain within and not depart from the limits assigned, &c., and should forthwith surrender himself for recommital, upon a rule or order for that purpose being made, and should obey, &c., all rules and orders relative to the said J.N., then the bond should be void; and upon this bond being entered into the defendant permitted J. N. to go upon the limits. *Averment*, that J. N. has never departed from such limits, but still remains thereon and hath in all respects kept the condition of the bond, *absque hoc* that the defendant since the arrest has permitted J. N. to escape, &c., or that J.N. has escaped, &c., otherwise or further than is stated in this plea.

Replication, after over of the condition, which was read, "that if the said J.N. shall remain within, and shall not depart from or without the limits assigned, &c., and shall forthwith surrender himself to the custody of such sheriff for recommittal to close custody, upon a rule of court or judge's order for that purpose being made, and shall in other respects observe and obey all rules of court and judge's orders in relation to such party; or if the sureties do and shall at all times save harmless and keep indemnified the said sheriff for all losses, &c., which he shall or may bear, sustain or be put to, and from all actions and suits which now are or shall hereafter be brought, &c., rightfully or wrongfully, against the sheriff, on account of allowing the said J. N. to go at large upon the limits, then," &c.:—that, though true it is such writing obligatory was made, yet the plaintiff says that the period of one month from the time of the execution of the said writing obligatory had elapsed long before the commencement of this suit, and from the expiration of one month up to the commencement of this suit, the said J.N. was at large on the limits, and out of close custody: verification.

Demurrer—That the replication treats the defendant as a trespasser *ab initio*, because J. N. was at large on the limits after the expiration of a month from the making of the bond, otherwise the plaintiff should have newly assigned, admitting the plea and stating precisely his cause of action; that the replication is no answer at law to the plea.

The fourth plea was similar to the third, to the end of the condition of the bond, and then stated that J.N. did never in anywise break the condition, and did afterwards, to wit, on, &c., according to the provisions of the 5th section of 10 & 11 Vic., ch. 15, duly enter into the recognizance of bail thereby directed, and produced to the defendant a certificate from the Clerk of the Crown that such recognizance and affidavit of the justification thereof had been filed: verification.

Replication,—admitting the bond and the certificate—That one month from the execution of the bond had elapsed long before the recognizance of bail was entered into, and the certificate procured or produced to defendant, and that for the space of, to wit, ten days from the expiration of such period of one month to the time of the production of the certificate to the defendant, J. N. was at large within the limits, and out of close custody: verification.

Demurrer, on the same grounds as to the replication to the third plea; and further, that the certificate, still being in full force, is a discharge to the defendant from all responsibility respecting J. N. after his admission to the limits; that the plaintiff did not object to the taking of the recognizance or affidavit of justification, or except to the sufficiency of the bail.

The *fifth plea* stated, that the plaintiff was not in any manner damnified or injured by the grievances in the first count mentioned, and by the supposed default of the defendant: concluding to the country.

Demurrer—That the fifth plea is no answer, and sets up no matter of defence.

Vankoughnet, Q. C., for the demurrer.—*Armour*, contra, cited Wragg *v.* Jarvis, 4 O. S. 317; Griffiths *v.* Eyles, 1 B. & P. 413; Chambers *v.* Jones, 11 East, 408; York &c. R. W. Co. *v.* the Queen, 1 E. & B. 858; The Great Western R. W. C. *v.* The Queen, Ib. 871.

DRAPER, J.—It is not very easy, from the various enactments which, both before and since the Union, have been in force in Upper Canada, satisfactorily to deduce the precise intention of the Legislature, so as to have a clear guiding principle to assist us in coming to a conclusion upon doubtful questions of construction upon those acts. The right of the creditor to arrest his debtor before obtaining judgment has been maintained, varying from time to time the affidavit on which the writ should issue; and the right of the creditor to charge his debtor in execution under certain circumstances has also been upheld, though taken away for a short period by 7 Vic. ch. 31, which again was amended by 8 Vic. ch. 48. But different acts have from time to time been passed, some for the relief of the party arrested, others giving the creditor means of compelling a disclosure of the possession, or right to possession, or the disposal of any real or personal property by the debtor. We find provision made for the relief of indigent debtors by a weekly allowance, extended to debtors in custody on mesne process.—See 45 Geo. III. ch. 7; 2 Geo. IV. ch. 8; 4 Wm. IV. ch. 3. By other statutes provision is made for the discharge of debtors owing certain sums from custody after a fixed period of imprisonment (5 Wm. IV. ch. 3; 4 Wm. IV. chapters 3 & 5); and a protection against imprisonment for debt altogether, when the debtor has made a full and unreserved surrender of his property (8 Vic. ch. 48); while 5 Wm. IV. ch. 3, sec. 7, provided for the recommittal of a debtor fraudulently obtaining his discharge; and the following section of the same statute made the assignment, &c., of property to defraud creditors a misdemeanor, punishable by fine and imprisonment. The Act of 10 & 11 Vic. ch. 15, secs. 3 & 4, extended the right to a discharge to all debtors charged in execution, without reference to the amount of the debt, on their compliance with certain conditions. With the same view of mitigating imprisonment for debt, limits were assigned to the different gaols in Upper Canada. The first of the statutes for this purpose was the 2nd Geo. IV. ch. 6, which was repealed and other provisions substituted by 11 Geo. IV. ch. 3, which Act is still in force, though by 10 & 11 Vic. ch. 15, the limits of each gaol were extended to the whole of the district within which such gaol is situated. It provides that it shall be lawful for any debtor confined in gaol to be and remain at any part or place within such limits, without subjecting the sheriff to any action or suit for escape "*from such gaol limits*" (which is an obvious error, for so long as the party remained on the limits, he could not subject the sheriff to an action of escape from them.) The first act (2 Geo. IV.) has the words "*for escape from such gaol or limits,*" and shows what was meant, though the necessity of the two last words is not very apparent; provided, however, that it shall not be incumbent on the sheriff to allow any debtor the use of the limits, unless such debtor furnish good and satisfactory security that he shall not at any time during his confinement go or remove beyond such limits. The same Act (sec. 10) provided that the creditor might tender the like interrogatories to the debtor residing on the limits as might be tendered to an insolvent debtor—*i.e.*, touching or concerning or for the purpose of discovering any property or credits which the debtor might have, or which he might be suspected of having secreted or fraudulently parted with; and if the debtor do not answer the interrogatories within twenty days next after service of a copy on him, he shall be recommitted. The fifth section of 10 & 11 Vic. ch. 15, altered the nature of the security to be given, by providing that *all persons who were by law entitled to the benefit of the gaol limits,* and were desirous of obtaining the same, might enter into a recognizance of bail or bail-piece with two sufficient sureties, under a condition that such party should remain and abide within the limits, and not depart therefrom unless released by due course of law, and should obey all notices, orders and rules of court touching their remaining on the limits, or being remanded to close custody; that the sureties should justify by affidavit in double the amount for which the party was arrested; that the recognizance should be filed in the proper office, and notice be given to the plaintiff; and upon production to the sheriff of a certificate from the clerk of the court that such recognizance and affidavit have been filed in his office, *it shall be lawful for the sheriff to admit the arrested party to the limits,* and the sheriff shall be discharged from all responsibility respecting such party after such admission to the limits, unless he be again committed to close custody. By rules, which the courts are authorized to make, the bail must be duly allowed before the clerk issues the certificate. It seems to have been one object of this enactment to relieve the sheriff from the responsibility of deciding upon the sufficiency of the security tendered by the party desirous of obtaining the limits, which, under the former law, when he had to take a bond to himself, he was obliged to assume. By entering into a recognizance, the bail being also compelled to justify, and being liable to be excepted to, were not allowed until their sufficiency was reasonably established, and the duty of the sheriff was merely ministerial, his responsibility being limited to the safe custody of the debtor until admitted to the limits, or again after being remanded. Under this new procedure also the creditor became promptly aware that his debtor was on the limits, and was consequently liable to answer interrogatories under 11 Geo. IV., chapter 3.

The 16 Vic. ch. 175, sec. 7, made a change in the state of things, partially recurring to the former law. It recited that it frequently happened that parties in custody entitled to the benefit of the gaol limits were compelled to go to prison until a rule or order for the allowance of bail entered into by them shall have been made; and provided for remedy thereof, that when any such party should be arrested and in custody of the sheriff, it should be lawful for the sheriff to take from him a bond, with two or more sufficient sureties, for double the amount for which the party has been arrested, conditioned that such party shall not depart the gaol limits, and shall forthwith surrender himself to the sheriff, on a rule of court or judge's order for that purpose being made, and shall in other respects obey all rules of court or judge's orders in relation to such party; and upon the receipt of such bond, the sheriff shall forthwith allow the party the benefit of the gaol limits. The eighth section enacts, that if any defendant, after giving such bond to the sheriff, shall deliver to the sheriff the certificate that the recognizance and affidavit of justification (already referred to) have been duly filed, such defendant and his sureties shall thereupon be released and discharged from all damages for any breach of the condition of the bond occurring after the date of the certificate; provided that if such certificate be not produced within one month from the execution of the bond, it shall be lawful for the sheriff to commit the defendant to close custody, there to remain, as if no such bond had been given. The twelfth section provides, that the party arrested shall, after the execution of the bond, and admittance to the limits under the same, be subject to interrogatories, committal to close custody, and recommittal, with all other privileges and liabilities, in like manner as if he had been on the limits on a recognizance.

It is not altogether unimportant to bear in mind, that no person can be charged in execution unless the plaintiff has before judgment issued a capias against him; to do which, he must have sworn that he has reason to believe, and verily does believe, that the defendant was about to leave Upper Canada *with intent and design to defraud him;* or unless the plaintiff after judgment makes a similar affidavit, or in lieu thereof an affidavit that he hath reason to believe the defendant hath parted with his property, or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution, which would be a misdemeanor. If a debtor so charged gets the benefit of the limits, it is not, I think, too much to assume that the creditor should have early notification, that he may administer interrogatories, which notice he is sure to get, if a recognizance under 10 & 11 Vic. is entered into, while of the bond he has no notice at all.

No debtor, therefore, can be taken upon a *Ca. Sa.*, who is not accused, on the oath of the creditor, his servant or agent, of a fraudulent intent or act in relation to the payment of the debt or the disposal of his property; nor can he be detained as a prisoner if he can establish his insolvency, and answer such interrogatories as may be put to him respecting his effects, or his conduct in regard to them and to his business, in such a manner as will be satisfactory to a judge.

The second plea raises the question, whether a sheriff can, of his own mere motion, allow a prisoner charged in execution and in his custody the benefit of the limits. Whatever construction might have been put upon the 11 Geo. IV. ch. 3, it could not govern us now. I am not aware that this question has been directly adjudicated under that Act; but the 10 & 11 Vic. ch. 15, clearly leaves no such discretion in the sheriff, and under that Act the plea could not be sustained: for, however general the right may be that a debtor in execution has to be admitted to the limits, that right is clearly made contingent on his filing the recognizance of bail and affidavit of justification, and serving the certificate of the clerk on the sheriff. The only question remaining on this plea is, whether the latter Act (16 Vic.) makes any difference as to the sheriff's power or authority. As, in disposing of the demurrers to the replications to the third and fourth pleas, I must more particularly consider this Act, I shall content myself with saying that I do not think this Act so far changes the sheriff's position, and that in my opinion the plaintiff is entitled to judgment on the demurrer to the second plea; besides which there is a clerical error in this plea, which, though pleaded to the first count, in the traverse, answers only the second.

The questions arising on the demurrers to the replications appear to be, first, whether the debtor who obtains the limits by giving a bond to the sheriff, is not bound to enter into and file the recognizance, &c., required by the 10 & 11 Vic., within a month from the execution of the bond; secondly, whether, if he does not, it is not the sheriff's duty to recommit him to close custody at the expiration of a month, or he will be liable as for an escape; thirdly, whether a new assignment is rendered necessary by the third plea; fourthly, whether the fourth plea, which shows a recognizance entered into, but neither avers it to have been done within one month from the execution of the bond, nor even before the commencement of the suit, is answered by asserting that more than the month elapsed before the recognizance was entered into, without new assigning.

It certainly would have been more natural if the condition of the bond authorized by the 16 Vic., had, in analogy with the bail bond to the sheriff under the old practice, required the defendant and his sureties to procure the recognizance to be entered into, &c., within a month, and that in the mean time, and until it was entered into, the defendant should not depart the gaol limits. The omission to require this, and the general mandatory character of the direction in the seventh section, that upon the receipt of such bond the sheriff shall forthwith allow such defendant the benefit of the limits, might lead to the conclusion that a bond to the sheriff might be substituted for the recognizance required by the former Act, and when given would make it unnecessary to enter into the other. The eighth section, however, prohibits this conclusion, for it makes the delivery of the certificate of the filing of the recognizance, &c., to the sheriff a discharge from further liability on the bond, though it omits to say that such recognizance should be entered into within the month; and it ends by providing that if the certificate be not delivered to the sheriff within a month from the execution of the bond, *it shall be lawful* for the sheriff to commit the defendant to close custody. This, taken together with the recital at the beginning of the seventh section, quite satisfies me that the Legislature did not intend to substitute the bond *wholly* for the recognizance, but only *temporarily*, to prevent the absolute necessity of the debtor being kept in close custody until the bail by recognizance could be perfected and the certificate obtained. If, then, the debtor still had to perfect bail by recognizance, he must do it within a reasonable time, if the time had not been fixed by the Act; but when the Act names a time, at the expiration of which *it shall be lawful* for the sheriff, *ex mero motu*, to commit him to close custody, I look on that as a fixed limiting the time within which the certificate should be obtained and delivered to the sheriff.

But though the bond may be forfeited for not entering into the recognizance within the month, the question still remains, whether the sheriff be liable to an action for an escape, for allowing the debtor to remain on the limits after the month has expired, no certificate of the recognizance having been delivered to him. I have felt rather more difficulty on this point: but on the best consideration, I am of opinion he is. Wragge v. Jarvis (4 O. S. 317) decided that the sheriff was guilty of an escape, for allowing a debtor who had been duly admitted to the limits to remain at large upon them after an order delivered to the sheriff for the debtor's recommittal to close custody. Was it the sheriff's duty here to have recommitted? The taking of the bond, so far as regards the sufficiency of the sureties, is a matter on which the sheriff has a discretion, though, having taken it, he must allow the debtor the benefit of the limits. The creditor may in his election take an assignment of that bond, and wherever the sheriff may maintain an action on it, so may the assignee. It may be going too far to say that the authority given to the sheriff to recommit on failure to deliver the certificate to him within a month is obligatory on him, but it clearly, I think, shows that the non-delivery of the certificate within the month must be considered as a forfeiture of the bond; for it would be in the highest degree inconsistent to make the right to the limits absolute on giving a sufficient bond to the sheriff, and to permit the sheriff to deprive the party of that right while the bond remained in full force, while the condition was unbroken, and while nothing had happened to diminish the sufficiency of the sureties. As it appears to me, the bond is forfeited by the non-delivery of the certificate, which is a condition precedent to the right to the limits for more than a month from the execution of the bond, and if so the sheriff is guilty of a negligent escape at least, and should, instead of denying the escape altogether, plead what would be equivalent to a recapture or fresh pursuit; and it is in this view, I apprehend, that the filing the recognizance and delivering the certificate has been pleaded, though insufficiently, as it appears to me, to raise that question, because it treats the fact that the recognizance was at some time entered into, without either shewing it to be within the month or before the action brought, as an answer, which, as at present advised, I think it is not, and that so far both these replications are good.

Then, as to the former objection: each of these pleas expressly traverses any escape, unless the facts stated in the inducement to the traverse amount to one. The plaintiff alleges a fact additional to those contained in the inducement, in effect admitting them to be true, but shewing another circumstance, which he insists makes the sheriff liable for an escape. I think this is sufficient. It points out distinctly on what the plaintiff relies as the escape, which is his cause of action. The defendant might take issue on that fact, or demur in law: either way, the real question between the parties is brought up.

I am therefore of opinion that the plaintiff is entitled to judgment on the demurrer to these replications.

No attempt was made in argument to sustain the fifth plea, which admits the wrong complained of, and only denies the damage resulting from it. This is confessing without avoiding, and clearly bad.

BURNS, J.—The question raised by these demurrers is a very important one; and the conclusion I have arrived at—

after much doubt, however, how the two statutes, 10 & 11 Vic., ch. 15, and 16 Vic., ch. 185, secs. 7 & 8 should be construed—is, that judgment must be for the plaintiff. In order to get a clear view of what the Legislature intended in the provisions of the latter statute respecting a bond being given to the sheriff, it is necessary to get a clear view of what was intended by the statute 10 & 11 Vic., ch. 15. It will be seen, under the provisions of this statute, that the bond formerly given to the sheriff, that the execution debtor would remain upon the limits, and not subject the sheriff to an action for an escape, was abolished, and a recognizance of bail substituted. In consequence of the provision contained, that the sheriff should be discharged from all responsibility in case of the debtor being admitted to the limits, I have been hitherto induced to think that the substitution of the recognizance for the bond to the sheriff was enacted in case of sheriffs. Upon reconsideration I do not feel, that though it is susceptible of that view, yet that the Legislature contemplated that alone. The preamble recites that the law relating to imprisonment for debt required amendment, and that it was desirable to afford additional means for the discovery and application of the property and effects of judgment debtors in certain cases. In the taking of the bond to the sheriff to abide upon the limits, the sheriff exercised his own judgment as to the security—the plaintiff in the action had no voice whatever. Under the alteration the plaintiff must be called upon to show cause why the defendant should not be admitted to the limits on the recognizance, and he may except to the bail. The recognizance provided also for the defendant obeying all notices, orders and rules of court, touching the debtor remaining or continuing upon the limits, or being remanded or ordered to close custody. These provisions formed no part of the condition of the bond to the sheriff. The provision that the sheriff shall, upon the production to him of the certificate that the recognizance has been allowed, be discharged from responsibility, seems but the natural consequence of his admitting the debtor to the benefit of the limits. Still, however, being in custody upon the writ, and therefore to the extent of his being so admitted to the limits, the certificate of allowance, *quoad* the sheriff, may be said to be in the nature of a *supersedeas* of close imprisonment. On the whole, therefore, it seems to me to a certain extent this statute was intended to be more rigorous upon execution debtors. It is difficult, however, to say in what respect the Legislature considered its provisions more stringent than the law was before, for independent of the provisions I have mentioned, the Act does not seem to provide additional means for discovery or application of a debtor's property. I feel convinced, however, one object of the Legislature was, that the execution debtor should only be admitted to the limits through the knowledge of, and by means of the plaintiff being a party to the proceeding under which the debtor was admitted to the limits, which certainly was a material alteration from the law authorizing the sheriff to take the bond. This being so, then the question is, what is the effect of 16 Vic., ch. 175, secs. 7 & 8? If the intention of the Legislature was to restore the old law to the extent of allowing sheriffs to take a bond, and that the bond should be equivalent in all respects to the recognizance, there was no occasion then to have inserted the proviso about the defendant procuring and delivering to the sheriff the certificate within a month of the execution. Neither is there any sense in the making a proviso for the certificate being furnished within the month, if it be entirely optional with the sheriff to take the bond or not. I do not consider it is optional. I think the sheriff would be bound to accept a good and sufficient bond if tendered to him. I do not think the effect of the eighth section is to leave it optional with the sheriff to substitute a bond for the recognizance; for if so, then to that extent it would operate as a repeal of the 10 & 11 Vic., ch. 15. I think the Legislature intended to leave that Act untouched, except so far as to provide a remedy and means to prevent debtors being committed to prison until the allowance of recognizance could be perfected. The plaintiff in the suit was to retain all his rights given by the 10 & 11 Vic., ch. 15, and the 16 Vic., ch. 175, sec. 8, was to favor the debtor to the extent of thirty days to have the recognizance perfected.

Judgment for plaintiff on demurrer.

CHANCERY CASES.

GOULD v. HAMILTON.

Specific performance—Parol Evidence—Submission in answer.

A vendor executed an agreement to convey certain premises and receive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be made payable with interest: in a suit brought to enforce specific performance of the agreement and compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding of the parties was that interest should be made payable by the mortgage.

Where a suit was brought to compel the acceptance of a mortgage, for part of the purchase money, without interest, and the defendant in his answer thereto swore, "I have always said that I was ready and willing and have offered to complete the sale of the said propery to the plaintiff, provided interest on the unpaid purchase money was included in the mortgage;" and also, "I submit and insist that unless the plaintiff will consent to pay interest on the unpaid purchase money aforesaid, he is not entitled to any relief in this court." The court treated these statements as submitting to a decree for specific performance, with interest reserved by the mortgage, and made a decree accordingly.

[5 U. C. Chan. Rep. 192.]

The bill in this cause was filed by *Joseph Gould* against *William Hamilton*, for the specific performance of a contract for the sale of certain lands in the township of Uxbridge.

It appeared in evidence that the defendant had agreed to sell the premises in question to the plaintiff for the sum of £4,750, part of which was to be paid down and the balance secured by mortgage, payable in eight years. The memorandum evidencing the agreement made no mention of interest on the unpaid purchase money; the terms of it were "five hundred pounds down on completing the writings, and five hundred pounds a year until the whole is paid; said balance to remain on mortgage"—and three months were given to the purchaser to accept the proposition.

Shortly after the execution of the agreement, plaintiff paid £500 and took a receipt for it, and on that occasion the defendant remarked to plaintiff that the sum so paid was not sufficient to meet what defendant had to pay government on account of the land, but added, "however, there is the interest on the £4,000 which will make up enough." This conversation was repeated by plaintiff to a third party, who was examined in the cause, who asked plaintiff why he had not drawn the defendant's attention to the fact of the balance not carrying interest: to which plaintiff replied, "he did not want to have a flare-up with *Hamilton*, and that he would find it out soon enough." *Gould* subsequently tendered a deed and mortgage to defendant for execution, but he refused to execute the former or accept the latter unless the balance of unpaid purchase money was made payable with interest.

Thereupon the present bill was filed, seeking specific performance of the agreement according to the strict language of the instrument; that is, to compel defendant to accept a mortgage for £4,250, payable in eight years, without interest.

The defendant, in his answer, swore that he never would have agreed to the sale in the manner he had unless upon the understanding that interest was to be made payable on the unpaid purchase money; that he had always been ready and willing and had offered to complete the sale provided interest on the unpaid purchase money was included in the mortgage: and the defendant by his answer also submitted and insisted that unless the plaintiff would consent to pay interest on the unpaid purchase money he was not entitled to relief.

It was shown that the property rented for about £250 a year, and that from this source defendant derived his chief

means of support. Evidence was gone into at considerable length in presence of the court, but the foregoing, together with the statement of facts set forth in the judgment, will be sufficient for a proper understanding of the case.

Mr. *Wilson*, Q.C., and Mr. *Hector*, for plaintiff.

Dr. *Connor*, Q.C., and Mr. *Vankoughnet*, Q.C., for defendant.

For the plaintiff it was contended that nothing was shewn which could prevent plaintiff from obtaining the relief sought in this suit; that the defence set up by the answer was not one of mistake, but only an omission of some stipulation, which it was not pretended had been discussed or mentioned between the parties—*Walker* v. *Walker* (a), *Willan* v. *Willan* (b), *Curson* v. *Bellworthy* (c), *Evans* v. *Llewellyn* (d), *Joynes* v. *Statham* (e), were cited on behalf of the plaintiff.

For the defendant it was contended that the whole manner of carrying on the transaction was suspicious, and that the evidence of *Perry* gave a strong indication of fraud: he states the agreement was drawn by himself, and only one copy of it made; after it was signed he says that he "agreed to take a share if it could be got without interest."

Bayley v. *Collet* (f), *Ashton* v. *Dalton* (g), *Birch* v. *Joy* (h), *Talbot* v. *Hamilton* (i), were, amongst other cases, referred to.

At the conclusion of the argument, his Lordship the Chancellor stated that he entertained no doubt of the right of the defendant to shew by parol what the intention of both parties was in making the agreement; and, without imputing fraud or any other improper motive to any person concerned, it was clear, he thought, that to enforce the agreement in the manner sought by this bill would be a harsh exercise of the discretion of the court; but, as the other members of the court desired to look into the pleadings and evidence, time would be taken for that purpose, and judgment pronounced at an early day.

The Chancellor said he had looked into the pleadings and evidence since the argument, and that he still continued of the opinion that the defendant was entitled to a decree in his favour.

Esten, V. C.—In this case the *onus probandi* may be said to rest on the defendant, as the agreement *primâ facie* imports the absence of interest; but it is apprehended that if the defendant succeed in raising a reasonable doubt as to the intention, the court could not make a decree in favour of the plaintiff for a conveyance of the property on payment of the purchase money without interest. Now, it cannot be doubted that the defendant has succeeded to this extent. I am strongly inclined to think, not only that he intended to reserve interest, but that the plaintiff either intended and expected to pay it, or, as the defendant had not mentioned interest, had the agreement drawn in the way it was with the view of availing himself of the omission if possible. It seems there should be a decree for specific performance;—the purchase money to be paid with interest, and the plaintiff must pay the costs of the suit.

Spragge, V. C.—This bill is filed for the specific performance of an agreement, entered into by the defendant on the 4th of March, 1854, whereby he agreed to sell to the plaintiff two parcels of land for £4,000, and a third parcel for £750. The terms of payment are thus expressed: "Five hundred pounds down on completing the writings, and five hundred pounds per year until the whole is paid, said balance to remain on mortgage." By the same agreement the plaintiff was to have three months "to accept" the bargain. The agreement does not provide that the instalments should be paid with interest; the plaintiff tendered for the defendant's execution a mortgage, by which the instalments were made payable without interest, which the defendant refused to execute because it omitted to provide for the payment of interest. Parol evidence has been given to shew that the true understanding and intention of the parties was that interest should be payable on the unpaid purchase money, and two questions are made; one, whether parol evidence is admissible to shew this, and the other, whether the parol evidence which has been given does shew it.

Upon the first point: its reception does not stand open to the common objection that parol evidence cannot be received to vary a written instrument. It is here offered to rebut the *primâ facie* equity of the plaintiff to a specific performance of a written agreement, which written agreement it is contended, and the evidence is adduced to prove, does not contain the true agreement between the parties; and for that purpose, I believe, there can be no doubt that parol evidence is admissible.

Then, as to the effect of the evidence: what passed between *Gould* and *Hamilton*, and what was said by *Gould* to others, all tend to shew that both parties understood and intended that interest was to be paid, and no expression used by either party tends to shew the contrary; and I think this material, because the non-payment of interest would certainly be a departure from general usage in the like cases, and would be more likely on that account to call for specific remark than if interest were intended to be paid.

To take first the evidence of *Bolster*: on the day of the bargain *Gould* told him that he was to pay £4,000 for the one portion of the property and £750 for the other, and asked him his opinion of the value of the property; *Bolster* told him he thought it cheap at that price, considering the probability of having a rail-road in the vicinity. It appears by the evidence of *Finch* that *Gould* computed £1025 as the difference made by the payment or non-payment of interest, and I take it from the evidence of *Perry* that *Gould* believed that he *might* have to pay interest, and that he was aware that interest would be looked for by *Hamilton*. In telling *Bolster* the price he was to pay he must have known that he was understood to mean that he was to pay interest upon the unpaid purchase money, otherwise the price he named was less than the true price by £1,025. I think it fair to infer therefore that he was aware that *Hamilton* understood that he was to receive interest, and that he himself understood that he was to pay it.

The evidence of *Widdifield* as to what took place the day before the bargain strengthens this: £4,000 is named by *Hamilton* to *Gould* as his price (exclusive of the west half.) And *Charles Richards* gives evidence that on the 9th (the day of the bargain) *Gould* asked *Hamilton* what time he would give him to pay for the property, and that *Hamilton* said he might take his own time. This answer necessarily implied that interest was payable; for if not, the vendor was in effect telling the purchaser that he might name his own price; and the sum that he, the vendor, had named as the price of the land, was no longer the price, but some other sum, to be virtually fixed by the purchaser.

Gould's relation to *Bascom*, and also to *Bolster*, of what passed on the occasion of his paying to *Hamilton* the first instalment of the purchase money, is also material. *Bascom* thinks that it was on that occasion, and it probably was so. *Hamilton* said something about interest, *Bascom* asked *Gould*, naturally enough, if he had challenged him about the interest, or told him that he was not to pay interest, and *Gould* said that he had not. He seems to have related what passed more at large to *Bolster*. The first instalment was £500, and *Hamilton* remarked to *Gould*, when receiving that payment, in allusion to a sum still due upon the land to the Clergy

(a) 2 Atk. 98; S. C. 6 Ves: 335, note.
(b) 16 Ves. 72.
(c) 22 Eng. Rep. 1.
(d) 2 B. C. C. 150.
(e) 3 Atk. 388.
(f) 23 L. J. 250 ch.
(g) 2 Coll. 565.
(h) 3 H. L. Ca. 565.
(i) 4 U. C. Chan Rep. 209.

Reserve fund, that the payment was not sufficient to pay off that charge, but that there was the interest on the unpaid purchase money, which would suffice; and *Gould* said he made no remark upon this, as he did not wish to have a *flare-up* with *Hamilton*, and *Hamilton* would find it out soon enough.

The least that can be drawn from this is, that *Gould* was conscious all the while that *Hamilton* understood that their agreement was that interest should be payable; for he spoke of it as a thing agreed upon to the person most interested in setting him right if he was wrong. But I think it is a just inference from what passed, that *Gould* himself understood the agreement in the same way; for he does not correct *Hamilton* when he gives him to understand that he is to pay him interest. I cannot understand his not doing so if he understood that interest was not payable. It was too material an ingredient of the bargain for the parties not to have thought of it. I think that *Hamilton's* telling *Gould* that he might take his own time for payment necessarily implied that it was payable; and I can only account for *Gould's* silence when *Hamilton* spoke of interest as payable upon one theory, that knowing *Hamilton* understood interest to be payable, and himself also understanding it to be so, but intending in his own mind to take advantage of the omission to provide for it in the written agreement, he yet felt a natural repugnance to own to *Hamilton* that he intended to take that advantage.

The evidence of *Perry*, as to the agreement between *Gould* and himself, *Saxon* and *Paxton*, that each of the three latter should have a fourth of the property in case it could be got without interest, is conclusive to this point, that it was not agreed or understood that interest was not to be payable; and I think that that agreement goes far to shew that it was understood, though not expressed in writing, that interest was to be payable.

The material part of the contract of purchase was drawn by *Perry*. On the same morning, but before the agreement was made, *Perry* and *Gould* went together to look at the property, and *Perry* says he cannot say whether on that occasion he and *Gould* had any conversation about purchasing in partnership. On the same day, however, after the contract was signed by *Hamilton*, the agreement for a share, if the property could be got without interest, was entered into: so that, even assuming that there was no intentional omission in the contract with *Hamilton*, *Gould* and *Perry* were very quick-sighted in perceiving that interest was not provided for; and *Gould* at least was very careful to conceal that circumstance from *Hamilton*.

Then, to look at the agreement itself: it was drawn, or the material part of it—that settling the price and terms of payment, by *Perry*—under circumstances which are not wholly free from suspicion. It is a mere informal memorandum of agreement, from which a conveyance to *Gould* was to be drawn and a mortgage from *Gould* to secure the balance of the purchase money;—*Gould* was to have three months to confirm or annul the bargain;—and there is nothing in the agreement to exclude the payment of interest. As to the last point: if interest is not provided for, as a general rule, it is not payable; but this instrument, drawn in the shape, and under the circumstances that it was drawn, furnishes no evidence that interest was not intended to be paid: any one upon reading it might be doubtful whether interest should be payable. Mr. *Bolster*, upon its being shewn to him by *Gould*, saw nothing but an omission to provide for its payment; and I may mention an instance of such omission in an instrument very carefully drawn; I allude to the conditions of sale under which an extensive and valuable property in this city was sold in a number of lots by auction; those conditions of sale were either drawn or settled by a conveyancer in considerable practice: the vendors were themselves professional men, and the auctioneer one in the habit of selling real estate: many purchased without noticing the omission; indeed it did not appear that more than one person did notice it. One of the purchasers claimed to be exempt from interest, and the matter came before this court. I only refer to this case to shew that very little weight is to be attached to the absence of a provision for interest as *evidence* that interest was not intended to be paid; for in that case it was very clearly made out that interest was to be paid.

I think that the circumstance that the agreement for purchase was binding only upon *Hamilton* is against the plaintiff; for while it was yet at his option whether to complete the contract or not, he was fully aware if he was not so, as I believe he was, from the first, that *Hamilton* had entered into the agreement understanding it in a sense materially different from that in which he, *Gould*, intended to enforce it against him—this at the least; for I think that *Gould* himself understood it in the same sense as *Hamilton*. His electing to complete the agreement in a sense which made it a different agreement from what *Hamilton* believed he was entering into, is a degree of unfairness which I think brings him within the principle of not coming into court with clean hands.

Mr. *Batten*, in his treatise, says: "The court insists that the conduct of the party seeking its aid be free from all reproach; he must have been guilty of no fraud, or misrepresentation or unfairness, or have even attempted anything of the kind." And among the cases which he cites in illustration is that of *Ellard* v. Lord *Llandaff* (a) before Lord *Manners*. In that case there was a lease for lives, and the last life was *in extremis*: this was known, to the lessee, who was applying for a new lease, offering to surrender the old one, and he did not disclose the fact to the landlord: he obtained an agreement for a new lease, the consideration being the surrender of the old one; and attempted to enforce the agreement in equity; but Lord *Manners*, in refusing specific performance, quoted the words of Lord *Hardwicke*, in *Buxton* v. *Lyster* (b), that "nothing is more established in this court than that every agreement of this kind ought to be certain, fair and just in all its parts. If any of these ingredients are wanting in this case, the court will not decree a specific performance:" and Lord *Manners* proceeds, "all the material facts must be known to both parties; and is it not against all principles of equity that one party, knowing a material ingredient in an agreement, shall suppress it, and still call for a specific performance?" In the case cited the court refused to execute the agreement because the party obtaining it left the other party under a mistaken impression as to a material fact. In this case the party obtaining the agreement left the other party under the impression that he was entering into a different agreement from that which he executed, and he, the plaintiff, concluded the agreement and made a payment upon it, concealing from the other party that the agreement which he intended to enforce was different from that which the other party believed it to be. There was a suppression and unfairness in all this that I think disentitles the plaintiff to the aid of this court.

I cannot doubt that *Hamilton* understood and intended that interest should be payable, and that *Gould* throughout knew that *Hamilton* understood and intended this. I am almost equally free from doubt that *Gould's* understanding of the original agreement was the same; that the minds of the two contracting parties agreed upon that point; but that their agreement was not correctly expressed when reduced into writing, and that *Gould* determined to take advantage of the error in the written agreement. I think, therefore, if that written agreement were enforced, this court would not be compelling *Hamilton* to execute the agreement which he and *Gould* entered into, but something else which *Gould*, the party coming here, knew at the time that *Hamilton* did not intend, and which, as I conclude from the evidence, he did not understand or intend himself.

(a) 1 B. & B. 241. (b) 3 Atk. 383.

I think that specific performance should be refused, with costs.

After the judgment had been pronounced,

Mr. *Hector*, for plaintiff, asked that a decree for specific performance, with interest on unpaid purchase money, might be drawn up, and contended that defendant had, by his answer, submitted to a decree in this shape—no other construction could reasonably be placed upon the language used by him—*London* and *Birmingham* Railway v. *Winter* (*a*), *Ramsbottom* v. *Gosden* (*b*), *Martin* v. *Pycroft* (*c*), were cited.

Dr. *Connor*, Q.C., objected to any decree being made other than dismissing the bill with costs; the bill prayed simply for a decree in the form which the plaintiff alleged he was entitled, and not in the alternative, if the court should think him entitled to that relief.

The Court thought the statements in the answer amounted to a submission to a decree, if interest were ordered to be paid on the unpaid purchase money, and directed the decree to be drawn up in that shape, and the plaintiff to pay the costs of cause.

WITHAM *v.* SMITH.

Sheriff's Sale—Parties.

Semble—That this court would entertain a bill for the purpose of compelling a sheriff to convey property sold under an execution; but to such a bill the execution debtor whose property has been sold must be made a party.

Where a sheriff sold property under an execution at common law, but before any deed was executed by him a settlement was effected by the debtor with the execution creditor, who thereupon desired the sheriff to refrain from completing the sale, and the sheriff accordingly refused to convey the property to the purchaser at sheriff's sale, who thereupon filed a bill against the sheriff to compel him specifically to perform the alleged contract, but it appeared that no memorandum evidencing the sale had been made or signed by the sheriff—

Held, that the contract must be in writing, under the Statute of Frauds.

[5 U. C. Chan. Rep. 203.]

The bill in this cause stated that in the month of August, 1854, or about that time, and before the seizure thereinafter mentioned, the defendant, John Smith, then and still being the sheriff for the County of Brant, had placed in his hands and received for execution a certain writ of *Fieri Facias*, issued out of the Court of Queen's Bench at Toronto, in a certain cause in the said court then pending, wherein one *Henry N. Titus* was plaintiff, and one *Albert M. Titus* was defendant, the said writ having been issued at the suit of the plaintiff in the said cause against the goods and chattels of the said defendant in the said cause.

That shortly after the receipt of the said writ by the said defendant *John Smith*, as such sheriff, he, the said sheriff, under and by virtue of the said writ, duly seized upon a certain unexpired term in a lease which the said *Albert M. Titus* then held and had in a certain shop and premises, situate in Colborne Street, in the town of Brantford, in said county of Brant; and also upon certain trade fixtures in said shop, then being goods and chattels of said *Albert M. Titus*, seizable under said writ of *Fieri Facias*.

That the said defendant as such sheriff, after making such seizure, duly advertised the said shop and fixtures for sale, under said writ of *Fieri Facias*, by public auction, on and for the 24th day of the said month of August; and the said unexpired term of years and said fixtures were duly exposed to sale by him the said sheriff on that day, and on that day by him duly sold; and that the plaintiff at such sale became the purchaser of the said unexpired term, which was still unexpired, and trade fixtures, at and for the price or sum of £206; and the officer and agent of the said sheriff conducting such sale duly entered the name of the plaintiff (at the foot of the written conditions of sale, showing the terms upon which the sale was conducted) as the purchaser of said unexpired term and fixtures at and for the price of £206; that the plaintiff had made or caused to be made to the said defendant as such sheriff an application specifically to perform the said contract of sale, and to execute to the plaintiff an assignment of the unexpired term of said lease and to deliver to the plaintiff the said trade fixtures being in the said shop, but the said defendant had not done so: the prayer was for a specific performance of the contract by the defendant.

The defendant answered, setting forth at length the facts stated in the judgment, and submitted to act in the premises as the court should direct.

Mr. *Read*, for plaintiff: The defendant being an officer of a common law court is no ground of objection to this court interfering in the manner desired; on the other hand, if he were allowed to withhold completion of the contract, it would have the effect of destroying all confidence in sales by sheriffs; here the plaintiff only wants the sheriff's deed to enable him to obtain possession of the property sold. He referred to *Doe Hughes* v. *Jones* (*a*), *Tierman* v. *Wilson* (*b*), *Burnham* v. *Daly* (*c*)

Mr. *Crickmore*, for defendant: Before the sale was completed by the execution of a deed the judgment debtor paid the debt and put an end to the sale: besides, there is no written contract, within the Statute of Frauds, binding on the defendant,—if even this court will interfere with a sheriff in the discharge of his duty under a common law process.

The judgment of the court was delivered by

SPRAGGE, V.C.—The plaintiff files his bill as purchaser at sheriff's sale of the unexpired term in a certain lease of a shop and premises in the town of Brantford, and of certain trade fixtures in such shop. The sale took place on the 24th of August last. The stock-in-trade was sold at the same time, and one *Reynolds* became the purchaser. The bill is filed against the defendant as sheriff of the county of Brant, and prays specific performance of the contract entered into, as the bill alleges, by the sheriff to sell and convey to the plaintiff the unexpired term. By the terms of the sale the purchase money was to be secured by promissory notes, to be indorsed by some person to the satisfaction of the judgment creditor at whose suit the property was sold. It is unnecessary to refer to this point further than to say, that upon the evidence before us the purchaser, the plaintiff in this suit, was guilty of no default, but acted with diligence and promptitude with a view to carry out the conditions of the sale.

On the part of the judgment creditor, nothing was done to carry out the sale: he did not accept the proposed security, nor did the sheriff; although every thing that could reasonably be done by the purchaser was done, even to the extent of offering to pay the purchase money in cash, in lieu of giving promissory notes. The purchaser was thus unable to complete his purchase; and, after the lapse of a few days, an arrangement was made between the judgment creditor and debtor, whereby the leasehold premises and shop fixtures were transferred to the purchaser of the stock of goods, upon what terms does not appear, except that it was in satisfaction in whole or in part of the judgment debt; and the sheriff thereupon, under the direction of the creditor, refused to complete the sale to *Witham*, who filed his bill for specific performance.

The first difficulty is one of parties. In a similar case in this court (*Beamish* v. *Ruttan*) the court held that the execution debtor, whose property it was alleged had been sold, was a necessary party. It was *his* property that was the subject of the alleged contract of sale by the sheriff, and which it was sought to transfer to the plaintiff; and it was considered that he was the party really interested in resisting what was thus sought, and not the ministerial officer, who had no interest one way or the other.

It would be necessary, therefore, if there were no other defect in the plaintiff's case, that the cause should stand over in order to the making of the execution debtor a party.

(*a*) 1 C. & K. 57. (*b*) 1 V. & B. 165. (*c*) 16 Eng. Rep. 376.

(*a*) 9 M. & W. 372. (*b*) 6 Johns. C. R. 111. (*c*) 11 U.C.Q.B.R. 211.

But there appears to be another defect, which goes to the root of the plaintiff's case. Such a contract as the one sought to be enforced must be in writing, under the Statute of Frauds, and its being upon a sheriff's sale appears to form no exception. In the contract put in there is no signature by or on behalf of any one as vendor, and this is a bill against a vendor. It is true that the only defendant on the record does not take the objection, but another defendant must be added who may take it. And further, we think that it was not competent to the sheriff, under the circumstances, to admit a contract so as to bind others interested. Here there was an incomplete sale, not binding upon the sheriff, or upon either party to the suit in which the sale was made: while the sale was thus incomplete, an arrangement was made which rendered its completion unnecessary; and we are not prepared to hold that it was the duty of the sheriff, under these circumstances, to complete the contract thus incomplete between himself and the purchaser; and if such was not his duty, he could not be in a position now to make that a completed agreement by his admission which was not so when his duty properly ceased.

Upon the question of jurisdiction raised by the defendant, it is not absolutely necessary to decide: but we see no good reason to doubt it. The defendant says that he was a public officer of a court of common law, acting in the course of his duty in execution of the process of that court, and that if it was his duty to complete this sale and convey the property to the purchaser, it is the province of the court whose officer he was to compel him by order of the court, or by mandamus or otherwise, to do that duty.

It would seem to be an answer to the objection that the court does not interpose to compel him to do his duty as a public officer; but having entered into a contract in that capacity with a third person, a right springs up on the part of that person to have that contract enforced, and the proper forum for enforcing that right is this court. This court would interfere, therefore, not to compel a sheriff to perform his official duty, but to give effect to an equity which has accrued to a third person: upon this point, however, we do not mean to give any decided opinion, We think the bill must be dismissed with costs.

TO CORRESPONDENTS.

R.—P. S.—Much obliged by your wishes for our success. The practice you refer to we note for examination; the subject is one of some difficulty. What are "substantial objections." it is not in all cases easy to determine. Please fix more specific details of the difficulties you notice and your views. The other matter must be dealt with very delicately, anything calculated to cast a slur on the functionaries referred to may pave the way to lowering the standard in public estimation; a thing in these times to be rigidly avoided. We have in view a method of accomplishing good without being open to this objection. We will gladly receive any matter you may furnish.

H. T.—You can proceed by civil action or indictment. The 16 sec. stat. 4 and 5 Vic. ch. 26. declares that "If any person shall unlawfully and maliciously kill, maim or wound any cattle. every such offender shall be guilty of felony."

J. C. M.—We will give the case of *Francis* v. *Brown* in an early number.

W. D.—Every exertion must be made before the court will allow secondary evidence and properly so. In the late case of *Boyle* v. *Wiseman*, Park B., held, that in order to render secondary evidence of a private document admissible, it is necessary and sufficient to shew that all reasonable efforts have been made to procure the original.

THE LAW JOURNAL.

NOVEMBER, 1855.

CLERKS OF THE PEACE.

We are not about to discuss the merits of a line of railroad, nor the necessity for corporate powers to some company, nor any subject of popular interest; our theme at present is one on which the public pulse beats somewhat languidly—it is a matter in relation to the administration of Justice, a subject the most important, yet commonly the least regarded. Nevertheless, we hope to arrest attention at present, and to prepare the way for further discussion, and full and candid consideration.

We ask our readers to consider with us for a few moments the present position of the Officers of the Local Criminal Courts; for recent legislation has, in its effects, raised this question—are Clerks of the Peace to be starved out of office, and the offices knocked down to the *lowest* bidder, or is tardy justice to be rendered to these much injured Gentlemen? Appointed to office with the guarantee of an Act of Parliament for a settled remuneration for duties assigned to them, and ever willing to perform these duties, their incomes were reduced more than one-half by alterations in the law, without equivalent of any kind. Subsequently under the Jury Act, new duties were allotted to them, and the Hon. Robt. Baldwin, who introduced the measure, made himself fully acquainted with the amount of labor these duties would involve, and after mature consideration settled a Table of Fees which placed the office of Clerk of the Peace on something like a fair footing as respected remuneration. This Table was afterwards altered by Parliament, and the Fees lowered. The sweeping reduction then made (*over two-thirds of the entire income*) could never have been contemplated by those who urged for a reduction of the fees, nor intended by the Legislature, for what is it but depriving Clerks of the Peace of office—not certainly taking *them* from *the office*, but taking the *office*, by piecemeal, *from* them: and thus have these servants of the public been brought down to the starving point! No one will deny this, that all public offices should be filled by proper and efficient men; and it is equally apparent that a rate of payment, commensurate with the labour and responsibility, is necessary to secure Officials of the right stamp.

No complaints that we are aware of have ever been made against Clerks of the Peace: they are admitted to be, as a class, deserving and efficient Officers, and yet they have been thus hardly dealt with, and their claims put aside. Few take the trouble to examine the subject, and some would stifle enquiry by the sage remark—"They are not tied to the office; if it does not suit they can give it up!"

It is worse than idle, it is cruel to say that if dissatisfied they can resign. They *cannot* resign so long as the office yields a pittance barely sufficient to support life; at least it is so with many who have given up other business and employments, or removed from their farms or their stores, or withdrawn from professional business to accept the office; they cannot afford to begin life again, to

combat, with perhaps altered feelings and habits, for means and position. They have no resource but to continue as they are, for their incomes never enabled them to save against a "rainy day." They are entirely in the power of the Legislature which can dictate its own terms. We contend that it is illiberal and unjust in an employer, public or private, to engage a servant at an understood rate of payment for a term dependant on the good behaviour and efficiency of the employee, and afterwards arbitrarily to lower that rate without an equivalent to the party affected—it is mockery and cruelty combined to put the alternative, starve or resign!

Let it not be supposed that the ground of complaint lies merely in the fact of certain duties being transferred from the Clerk of the Peace to another officer; even on the work yet left them they do not receive anything like a fair compensation. For instance, before the present Jury Law the Clerk of the Peace had 2s. 6d. per hundred names extracted for the Jury lists from the Assessor's Rolls; by the recent Jury Act they have 700 entries to make (with critical accuracy) for every hundred names; and for this service, in the Table of Fees prepared by Mr. Baldwin, the moderate sum of 15s. was allowed: the last Act reduced this to 5s., and the other fees, with one or two exceptions, in the same proportion. It is only those who are acquainted with the details of their duties that can estimate the labour. With some knowledge of the subject, we confess that we were startled to find that in this County (by no means the most populous in Upper Canada) over 80,000!! entries are necessary to be made before the "Juror's Book" is completed, and about 3000 names to be compared with the ballots, besides the alphabetical arrangement. If space permitted, we might, by giving precise details in figures of the comparative labour and profit of the office, prove beyond question that Clerks of the Peace are greatly underpaid for the duties yet left them to perform. We say nothing on the subject of increased expense in living, for on this head Clerks of the Peace have as good right to receive consideration as others have, and the principle being admitted, it is unnecesary to enlarge upon it. We would suggest to Clerks of the Peace to put their complaints in a proper and connected shape, and to show specifically the way of redress.

Our own opinion is that the root of the evil lies in the system of fees, now universally condemned in the machinery of Courts of Justice, and that the remedy consists in the substitution of a salary for fees. An arrangement for the future (saving existing rights) might be advantageously made by combining the offices of Clerk of the Peace, Clerk of the County Court, and Deputy Clerk of the Crown. We have already reached our present limits in this article, but hope to be able again to resume the subject; in the meantime our columns will be open, to a reasonable extent, for information and suggestions on this important subject. One word in conclusion: Clerks of the Peace are not in the position to claim the assistance of a party, nor is the subject which so intimately concerns them at all exciting in its character; they are not able to bring to their aid the influence which surround wealth and high position. But they have *right* on their side. Let them, then, with boldness appeal to the justice of Parliament; let them specifically establish their grievances, and point out an effective remedy, and they will not want advocates within the Legislature, nor public sympathy and support without.

COMMITMENT UPON JUDGMENT SUMMONS.

(D. C. Act of 1850, secs. 91 & 92,)
Review of English Decisions bearing on.

(*Continued from page* 174.)

Buchanan v. *Kenning*, 1 C.C.C. 504.—Under the 8 & 9 Vic. 127, sec. 1, which provides that a debtor against whom a judgment has been obtained may be summoned before any one of certain Inferior Courts, and that if he appears to have the means of paying by instalments and shall not pay at such times as the Court shall order, the Judge may commit him for any time not exceeding forty days, it was held—affirming the decision of the Court of Common Pleas, and the judgments of Patterson and Coleridge J.J.—that a Summons to shew cause why the debtor should not be committed is necessary previous to the committal: Erle J. and Martin B. dissent.

In trespass for false imprisonment the defendant pleaded that W. T. recovered a judgment against the plt.; that the plt. was summoned before an Inferior Court under the 8th & 9th Vic., ch. 127, sec. 1, when an order was made for payment by instalments; that plt. made default, which being proved before the said Court, the Judge duly and according to the form of the Statute, and at the request of the dft., the attorney of W.T. acting upon his retainer, ordered the plt. to be committed to prison for forty days; that the dft. as such attorney delivered the warrant to an officer to be executed, who arrested the plt. and detained him in prison. Replication that the Judge did not order that the plt. should be committed *modo et formâ*. Held, reversing the decision of the Court of Common Pleas, that the traverse in the Replication put in issue the fact of his making the order of committal only, and not its validity. *Quære*, whether although the plt. below was entitled to his discharge on Habeas Corpus he can sue, under the circumstances, in trespass for an erroneous order of the Judge.

But if he can the attorney for the party is liable for ordering the warrant of the Judge to be put in execution.

In re. *T. Kenning* 1 C. C. C. 16 (Trinity 1847) the proceeding was also under 8 & 9 Vic., ch. 127, sec. 1. The judgment debtor having been ordered to pay the debt by instalments, was committed to prison in default of the payment of one instalment. The prisoner having been brought up on Habeas Carpus, and the warrant not showing that the debtor had been summoned to show cause why he made such default, it was held defective, and the prisoner was discharged.

In giving judgment the following language was used by Coltman, J.:—"It now appears to me to be clear that the act done in this case is not a ministerial but a judicial act, and that being so we have to proceed according to all rules and general principles that regulate our law as laid down in the case of *Harper* v. *Carr*, 7 T.R. 270; it decides that in cases of this nature where a judicial act is to be done, it can only be regularly done after hearing what the parties have to allege. * * * * * It seems to me that the Judge ought to enquire before he commits or determines whether he should sentence a party for forty days, or for what less term than that. He must exercise a discretion on that point, and ought to be aware of all the circumstances that can be brought before him by the party who has committed the default. It appears in this case the Act has not been satisfied, and that the party ought to be discharged

(TO BE CONTINUED.)

THE LAW SOCIETY OF UPPER CANADA.

Beyond what may be gathered from the official list published in the *Gazette*, little is either known or heard of the working of "The Law Society of Upper Canada"; it is with pleasure, then, that we transfer to our columns an article which lately appeared in the Toronto *Daily Colonist*, descriptive of the system of examination in force. Now that "classification" is practically carried out, we trust that candidates will not be content with "passing" merely, but will endeavour to acquire high honours on their admission.

The *Colonist* says:—

This Society does not usually attract much public attention. Its rules may be well understood by members of the legal profession, but are little known to the public. From time to time, as each periodical examination occurs, we are treated to a list of newly admitted students, or newly fledged barristers; sometimes as many as twenty—sometimes as few as three. The names of successful candidates are invariably gazetted, and when gazetted, copied by newspapers generally throughout the Province; beyond this no interest seems to be taken by the public in the working of the Society.

The information afforded by the *Gazette* is for the use of the public, who, in their various dealings with each other, may have use for the lawyers. As a general rule each corps of newly made barristers is allowed to pass before our eyes without comment and without remark.

Last term we find no less than nineteen gentlemen, all called to "defend the right and punish the wrong-doers." This term we find only five. What is the reason? Is the practice of the law on the decline? No! such is not the cause; there is a different cause. Let us examine the list of successful candidates as called this term. There is a classification introduced new to us, and new in fact. One gentleman is called "with honours." Two are simply "passed." Two are called "*ad eundem*." The call with honours is the new feature. The call *ad eundem* has existed for some time; those called *ad eundem* are generally members of the legal profession, nurtured at home and entitled to practice at home, but transplanted of their own free will and accord to this Province. Such gentlemen, upon the production of certain testimonials, became entitled as a matter of courtesy, to a call by the Law Society of Upper Canada. This custom is regulated by Upper Canada Provincial Statute, 2 Geo. 4, ch. 6, sec. 2. Facilities are also afforded by Statute 13 and 14 Vic., ch. 26, to members of the Lower Canada Bar desirous of practising in Upper Canada; but in this latter case, an examination in the laws of Upper Canada, to the satisfaction of the Law Society of Upper Canada, seems to be necessary. Then as respects the call of gentlemen who study in Upper Canada with the object of practising in Upper Canada. Formerly there were no particular books prescribed as necessary to be read by a candidate before examination. He was examined in the different branches of law, and his knowledge tasked, no matter from what source derived. Some examinations were comparatively simple; there was no true test of legal knowledge—many passed without more knowledge of law than that absolutely necessary, and perhaps, fortuitously sufficient to pass them; thus many, though not sound lawyers, might succeed in attaining a call. To meet this evil, or with some such view, the new rules have been passed; they were passed during last Hilary Term. These rules name certain books necessary to be read by all applicants for call; in addition to these books there are other books to be read by applicants for call with honours. In this respect the Benchers have not acted without precedent. In many universities, we might say in all universities, there is a classification of prizemen. Men differ in their habits and abilities—some are more studious than others—some more talented others—some more ambitious than others—some more courageous than others. The Law Society, to encourage aspirants to the bar to noble efforts, have introduced the class for honours. A candidate may elect the class through which he proposes to receive his call. It is optional. If he do not venture the honors, he may nevertheless be called to the bar, technically expressed "passed." But if he aspire to a triumph, then he competes for honours, and if successful is called with honours. The principle is not a new one; whether it will work well or not, in Upper Canada, remains to be seen.

As we have already observed, three candidates passed during the present term, two of whom were simply called to the bar; the third was "called with honors." This was Mr. Robert A. Harrison, already known to the profession as one of the editors of Robinson and Harrison's Digest, and much respected by our citizens generally, as a young man of many personal good qualities, and of high promise. He has been the first to avail himself of the new opening to distinction which the Law Society has just offered to those willing to climb—

"The steep where fame's proud temple shines afar."

We are happy to congratulate him upon his entire success on this occasion—a success the more gratifying to the candidate, accompanied as it was by a high compliment paid him

by our respected Chief Justice, Sir J. B. Robinson, who is ever ready to greet kindly every worthy aspirant in the profession, of which he himself is so distinguished an ornament.

We would call attention to the advertisement on page xlii. of this number: we feel convinced that there are many in the Profession in Upper Canada who will consider it worth their while to furnish the desired matter.

SURROGATE COURT.

(Notes of English Cases in relation to)

PREROGATIVE COURT.—WHITING *v.* DEAL. [*Nov.* 6, 1854.

Will—Subscribing witnesses—Names written by deceased.

THOMAS CLEVERLY died in the month of May, 1851. After his death a paper was found, purporting to be his will; it was all in his own handwriting; there was a full attestation clause, with the names of two persons, but without their address or description. Two persons were appointed executors. The whole of the property was given to W., in whose house the deceased resided. The only next of kin of the deceased was R. The executors and legatee refused to take probate, or administration with the will annexed, or to propound the will when cited to do so by the next of kin. The reasons for their refusal were contained in an affidavit, in which the legatee deposed, "that about the month of October, 1853, the deceased produced the paper writing in question, at the same time informing him, the deponent, it was his will, and requested him to read it, which he did; whereupon he asked the deceased where he got the will executed; to which the deceased replied, 'At a public house in the Blackheath-road, by two men,' but he did not name the public house, nor the persons who had witnessed the will; that the deceased then took possession of the will; that, about a month before the deceased's death, he handed the will open to him, deponent, and requested him to take possession of it, as the whole of the property was bequeathed to him, which the deponent accordingly did, and kept possession thereof until the death of the deceased." The necessary steps towards obtaining probate of the will were then taken, when it appeared that the year of its date was written on an erasure. This required an explanation from the subscribing witnesses, or one of them. They could, however, neither of them be found. In consequence of the deceased having said that the will had been executed at a public house, in the Blackheath-road, inquiries were made at all the houses of that description in that neighbourhood, but no trace of the witnesses could be discovered. The affidavit further stated, that from the similarity of the handwriting of the names of the witnesses to that of the testator, the executors and legatee believed that the names of the subscribing witnesses were written by himself. The executors had by proxy formally renounced probate of the will, as also had the legatee of administration with the will annexed.

Hughes moved for letters of administration of the effects of the deceased, as having died intestate, to be granted to R., the next of kin of the deceased.

SIR J. DODSON.—Nobody will take probate of this will. The executors refuse to propound it, and have, moreover formally renounced; and the legatee declines to take administration with the will annexed. I have, therefore, no alternative but to grant the motion.

PREROG. COURT.—BROWN *v.* BROWN ET AL., by Guardian.

Administration—Widow—Separation—Practice.

B. died without a will, leaving a widow and two infant children. He had separated from his wife on suspicion of her adultery, and there was a deed of separation; the children were allowed by him to live with the wife. Evidence was given as to the fitness of the widow to take the administration:—

Held, that notwithstanding the circumstances of the separation, the Court might grant the administration to the widow.

SIR J. DODSON, after examining the facts in evidence, said, "Now, under these circumstances, ought I to take away the administration of the deceased's effects from his widow? I say take away, because, according to the ordinary practice of this court, she is considered to have a prior right to it. In support of his argument to that effect, the learned counsel cited the case of *Lambell* v. *Lambell*, 3 Hagg. 568; but that was a question with respect to the will of the deceased being found in his repositories with the seal torn off, and not as to the right of administration. On application being subsequently made to the court for the grant to pass to the widow, the court observed: 'The grant is discretionary, and, as the widow lived separate, I decree it to the brother.' But it does not at all appear under what particular circumstances the deceased was living separate from his wife; and it must be remembered that the brother had an equal interest with the widow. I think there is nothing in that case. *Congers* v. *Kitson*, 3 Hagg. 556, was also referred to. In that case there was a contest for the administration, and the court granted it to the sister in preference to the widow, whom it condemned in costs. The circumstances, however, of that case were entirely different from the present; the widow had, during her husband's lifetime, been living with, and had in fact been married to, another man. The court, of course, refused to commit the administration to the widow. The case of *Chappell* v. *Chappell*, 3 Curt. 429, was also cited. In that case the deceased died, leaving a widow, a brother, and two nephews and two nieces, the children of a deceased sister. The brother opposed the grant to the widow, against whom various objections were urged; but that case was very different from the present, in which the widow has been described by the relatives themselves in very favorable terms indeed. In that case the court said: 'I think I ought to exercise my discretion in favor of the brother, in order to protect the interests of the children, (as nephews and nieces) and ought not to leave the widow in possession of their shares of the money for so long a time as must intervene between the grant and the payment to the minors. It is chiefly in reference to this circumstance that the court so decides, for I do not mean to say that otherwise there is sufficient reason for refusing to intrust the widow with the management of this property.' Yet Mrs. Chappell was not only separated from her husband, but had actually married again during her husband's lifetime. I do not think there is in the present case sufficient reason for refusing to intrust the widow with the management of the property. There are no other interests but the widow's and children's, and these children are the children of the widow, were intrusted to her care by the deceased himself, and have continued under her care up to the present time. She seems to be a fit and proper person, not only from the letters of the relatives, but from the affidavit of Mr L., the solicitor, who swears to his belief 'that she is a fit and proper person to become administratrix, and to have the care and charge of the infant children of the deceased, by reason that she is an affectionate mother, a woman of education, and of domestic habits.' It is in the discretion of the court; and I do not think, looking at all the circumstances of the case, that it is one in which I should depart from the usual course. I therefore decree the administration to the widow."

MONTHLY REPERTORY.

Notes of English Cases.

CHANCERY.

V.C.W. LADY ANDOVER *v.* ROBERTSON. *July* 28.

Lessor and Lessee—Covenant—Injunction—Agreement.

A. B., lessee of a house, agreed with the landlord of another house which adjoined, that if the lease of the latter were re-

newed, certain windows should be closed up. The lease was not renewed, but a new lease was granted to another lessee, previously to which A. B. and the landlord agreed that the windows, instead of being closed, should be treated in a particular manner; and in the lease such lessee covenanted so to treat them:—

Held, upon a bill filed by A. B. against the subsequent lessee that the latter must be restrained from violating this covenant. The interference with the privacy of a lessee in the enjoyment of his tenement is not of a trivial nature, and the court will interpose its authority to protect the enjoyment.

C. of Appeal—WHEATLEY *v.* BASTOW *pe* COLLINS. *Aug.* 2.

Solicitor—Improper Conduct—Acting without Authority—Names struck off the Roll.

A solicitor having, without authority from his client, given a brief to counsel to consent to the payment of the client's money out of court, after cause was shown, was ordered to be struck off the roll.

V.C.S. PERRY *v.* WALKER. *Feb.* 24.

Mortgage—Mortgagee in possession of unfinished houses—Forfeiture of Lease—Liabilities of Mortgagee.

Plaintiff, a builder having under leases for terms of years, with covenants to repair, of two pieces of land and the messuages thereon erected, which were unfinished, mortgaged the same to the defendant to secure advances made by him to the plaintiff. The mortgage contained a power of sale, and a clause enabling the mortgagee to apply the proceeds in re-imbursing himself in respect of ground rent, taxes, and repairs, and in the next place, the mortgage debt and interest. The mortgagor was to indemnify the mortgagee until possession taken. The defendant entered but did not finish nor sell the houses, nor did he pay the ground rent. The lessor entered under a proviso in the original leases, completed the houses, and let them at an advanced rent:—

Held, that the leases were forfeited by the wilful neglect and default of the defendant the mortgagee, and that he was liable to the plaintiff the mortgagor in respect of the forfeiture.

H. OF L. PURSELL *v.* NEWBIGGING. *May* 10.

Legacy—Vesting—Suspending the vesting till execution of trusts.

W., by will, bequeathed all his estate to P., in trust, to pay W.'s debts, then certain annuities which were to increase in a certain manner, by the death of the annuitants, till they reached to a certain sum, the annual free produce to belong to P.; and then the testator said, "after executing the purposes of the trust, the free residue of the trust funds shall pertain and belong to P. and the heirs of his body," with limitations over P.:—W. died before some of the annuitants:—

Held, that the residue vested in P., during his life, and the vesting was not suspended by the will until all the annuities ceased to be paid.

V.C.W. TUPPER *v.* TUPPER. *July* 17.

Charity—Substitution—Will—Codicil—Revocation.

A testator, by his will, gave to three charitable institutions sums amounting to £850, and directed the same to be paid out of his pure personalty. None of these charities were obnoxious to the law against mortmain. By a codicil, after reciting the gift of the three legacies, he revoked the same, "and in lieu thereof," gave to the extension fund of a house of charity in R. street £1,000. The gift of the £1,000 was wholly inoperative at law under the mortmain act, 9 Geo. II. c. 36.

Held, that the three legacies given by the will, were absolutely revoked, notwithstanding that the legacy of £1,000 was professed to be given in lieu of them.

V.C.W. HAVILAND *v.* LEIGHTON. *May* 4.

Will—Construction—Next of Kin according to the statutes of distribution—Lapse.

In a will a gift was made of personal estate to A. for life, and afterwards to B., her husband, for life, and then to such persons as A. should appoint, and in default to the person or persons who should be next of kin to A., according to the Statute of Distribution, in the like manner and proportions, as if she had died without ever having been married. A. died in the lifetime of the testatrix, leaving the testatrix, who was her mother, and a nephew of the half blood, (no relation to the testatrix), her next of kin, according to the statutes. The testatrix died. B. the husband, and the nephew, survived; the nephew being then the sole next of kin to the daughter, A.

Held, (upon a demurrer) that the nephew was entitled, and that there was no lapse.

COMMON LAW.

H. OF L. MANSON *v.* BAILLIE. *June* 19.

Solicitor and Clients—Trustees—Solicitor employed by his co-trustees.

M., a solicitor, and five others, were appointed and acted as executors under the will of A., whose assets consisted chiefly of law-suits, in which C. was personally interested. M. was also the principal legatee. The trustees, by letter of attorney, appointed M. as acting trustee to manage the trust and account to them for the funds after deducting his reasonable charges and costs. M. thereupon kept on all the law-suits, conducting them at his own discretion, and resenting all interference of his co-trustees, refusing for seven years to give them any account of the trust funds. At length, after exhausting all those funds, he delivered his bill of costs, showing a balance of £2,000, for which he claimed to hold them personally liable.

Held, there being no express contract, that any such inference from the circumstances, as that he was to be remunerated in the ordinary way by his co-trustees was extravagant.

Craddock *v.* Piper, 1 Mac. & G. 664, discredited.

THE STUDENT'S PORTFOLIO.

THE DUTY OF AN ADVOCATE DEFINED—BRINGING SUITS—DEFENDING PRISONERS.*

"There is a distinction to be made between the case of prosecution and defence for crimes; between appearing for the plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one.

Every man, accused of an offence, has a constitutional right to a trial according to law: even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. These are the panoply of innocence unjustly arraigned; and you cannot deprive guilt of it, without removing it from innocence. He is entitled, therefore, to the benefit of counsel to conduct his defence, to cross-examine the witnesses for the state, to scan, with legal knowledge, the forms of the proceeding against him, to present his defence in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law. The courts are in the habit of assigning counsel to prisoners who are destitute, and who request it; and counsel thus named by the court, cannot, with professional propriety, decline the office. It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner.

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* From Judge Sharswood's *Professional Ethics*.

It is a different thing to engage as private counsel in a prosecution against a man whom he knows or believes to be innocent. Public prosecutions are carried on by a public officer, the Attorney-General, or those who act in his place; and it ought to be a clear case to induce gentlemen to engage on behalf of private interests or feelings, in such a prosecution. I certainly think that it ought never to be done against the counsel's own opinion of its merits. There is no call of professional duty to balance the scale, as there is in the case of a defendant. It is in every case but an act of courtesy in the Attorney-General to allow private counsel to take part for the Commonwealth; such a favor ought not to be asked, unless in a cause believed to be manifestly just. The same remarks apply to mere assistance in preparing such a cause for trial out of court, by getting ready and arranging the evidence and other matters connected with it: as the Commonwealth has its own officers, it may well, in general, be left to them. There is no obligation on an attorney to minister to the bad passions of his client; it is but rarely that a criminal prosecution is pursued for a valuable private end, the restoration of goods, the maintenance of the good name of the prosecutor, or closing the mouth of a man who has perjured himself in a court of justice. The office of Attorney-General is a public trust, which involves in the discharge of it, the exercise of an almost boundless discretion, by an officer who stands as impartial as a judge. "The professional assistant, with the regular deputy, exercises not his own discretion, but that of the Attorney-General, whose *locum tenens* at sufferance, he is; and he consequently does so under the obligation of the official oath."* On the other hand, if it were considered that a lawyer was bound or even had a right to refuse to undertake the defence of a man because he thought him guilty; if the rule were universally adopted, the effect would be to deprive a defendant, in such cases, of the benefit of counsel altogether.

The same course of remark applies to civil causes. A defendant has a legal right to require that the plaintiff's demand against him should be proved and proceeded with according to law. If it were thrown upon the parties themselves, there would be a very great inequality between them, according to their intelligence, education, and experience, respectively. Indeed, it is one of the most striking advantages of having a learned profession, who engage as a business in representing parties in courts of justice, that men are thus brought nearer to a condition of equality, that causes are tried and decided upon their merits, and do not depend upon the personal characters and qualifications of the immediate parties.† Thus, too, if a suit be instituted against a man to recover damages for a tort, the defendant has a right to all the ingenuity and eloquence he can command in his defence, that even if he has committed a wrong, the amount of the damages may not exceed what the plaintiff is justly entitled to recover. But the claim of a plaintiff stands upon a somewhat different footing. Counsel, as it appears to me, at least have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends his sense of what is just and right. The courts are open to the party in person to prosecute his own claim, and plead his own cause; and although I admit that he ought to examine and be well satisfied before he refuses to a suitor the benefit of his professional skill and learning, yet in my view it would be on his part an immoral act to afford that assistance, when his conscience told him that his client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him. "It is a popular but gross mistake," says the late Chief Justice Gibson, "to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself, in his office of attorney, with all fidelity to the court as well as the client; and he violates it when he presses for an unjust judgement, much more so when he presses for the conviction of an innocent man. ..... The high and honorable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience." The sentiment has been expressed in flowing numbers by our great commentator, Sir William Blackstone:—

> "To Virtue and her friends a friend,
> Still may my voice the weak defend:
> Never may my prostituted tongue
> Protect the oppressor in his wrong;
> Nor wrest the spirit of the laws,
> To sanctify the villain's cause."

Another proposition which may be advanced upon this subject is, that there may and ought to be a difference made in the mode of conducting a defence against what is believed to be a righteous, and what is believed to be an unrighteous claim. A defence in the former case should be conducted upon the most liberal principles. When you are contending against the claim of one, who is seeking, as you believe, through the forms of law, to do your client an injury, you may justifiably avail yourself of every honorable ground to defeat him. You may begin at once by declaring to your opponent or his professional adviser, that you hold him at arm's length, and you may keep him so during the whole contest. You may fall back upon the instructions of your client, and refuse to yield any legal vantage ground, which may have been *gained through the ignorance or inadvertence of your opponent*. Counsel, however, may and even ought to refuse to act under instructions from a client to defeat what he believes to be an honest and just claim, by insisting upon the slips of the opposite party, by sharp practice, or special pleading—in short, by any other means than a fair trial on the merits in open court. There is no professional duty, no virtual engagement with the client, which compels an advocate to resort to such measures, to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men's sins.

Moreover, no counsel can with propriety and a good conscience express to court or jury his belief in the justice of his client's cause, contrary to the fact. Indeed, the occasions are very rare in which he ought to throw the weight of his own private opinion into the scales in favor of the side he has espoused. If that opinion has been formed on a statement of facts not in evidence, it ought not to be heard,—it would be illegal and improper in the tribunal to allow any force whatever to it; if on the evidence only, it is enough to show from that the legal and moral grounds on which such opinion rests. Some very sound and judicious observations have been made by Mr. Whewell in a recent work on the elements of moral and political science, which I know I shall be excused when they are heard, for quoting at length:—

'Some moralists,' says he, 'have ranked with the cases in which convention supersedes the general rule of truth, an advocate asserting the justice, or his belief in the justice, of his client's cause. Those who contend for such indulgence argue that the profession is a mere instrument for the administration of justice: he is to do all he can for his client: the application of laws is a matter of great complexity and difficulty: *that the right administration of them in doubtful cases is best* provided for if the arguments on each side are urged with the utmost force. The advocate is not the judge.

"This may be all well, if the advocate let it be so understood. But if in pleading he assert his belief that his cause is just when he believes it unjust, he offends against truth, as

* Per Gibson, C. J., in Rush v. Cavenaugh, 2 Barr, 169.

† "There are many who know not how to defend their causes in judgment, and there are many who do, and therefore pleaders are necessary; so that that which the plaintiffs or actors cannot or know not how to do by themselves, they may do by their serjeants, attorneys, or friends." Mirr. of Justices, ch. 2. sec. 1.

any other man would do who in like manner made a like assertion:

"Every man, when he advocates a case in which morality is concerned, has an influence upon his hearers, which arises from the belief that he shares the moral sentiments of all mankind: This influence of his supposed morality is one of his possessions, he is bound to use for moral ends. If he mix up his character as an Advocate with his character as a moral agent, using his moral influence for the advocate's purpose, he acts immorally. He makes the moral rule subordinate to the professional rule. He sells to his client not only his skill and learning, but himself. He makes it the supreme object of his life to be not a good man, but a successful lawyer.

"There belong to him, moreover, moral ends which regard his profession; namely, to make it an institution fitted to promote morality. To raise and purify the character of the profession, so that it may answer the ends of justice without requiring insincerity in the advocate, is a proper end for a good man who is a lawyer; a purpose on which he may well and worthily employ his efforts and influence."*

Nothing need be added to enforce what has been so well said. The remark, however, may be permitted, that the expression of private opinion as to the merits of a controversy often puts the counsel at fearful odds. A young man, unknown to the court or the jury, is trying his first case against a veteran of standing and character: what will the asseveration of the former weigh against that of the latter? In proportion, then, to the age, experience, maturity of judgment, and professional character of the man, who falsely endeavors to impress the court and jury with the opinion of his confidence in the justice of his case, in that proportion is there danger that injury will be done and wrong inflicted—in that proportion is there moral delinquency in him who resorts to it.

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent of the several Division Courts in every County of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF WELLINGTON.

Judge of the County and Division Courts—ARCHIBALD MACDONALD, Guelph.

First Division Court—Clerk, Alfred A. Baker,—Guelph, *Bailiff*‡; *Limits*—The town and township of Guelph.

Second Division Court—Clerk, William Lesslie,—Ingram's Inn, Puslinch, *Limits*—The township of Puslinch.

Third Division Court—Clerk, Andrew Hewatt, Rocktown,—Eramosa; *Limits*—The township of Eramosa.

Fourth Division Court—Clerk, John Cadenhead,—Fergus; *Limits*—The township of Nichol, concessions—Nos. 1 to 10; the township of Garafraxa and the township of Peel, from the 14th concession eastward.

Fifth Division Court—Clerk, William Tyler,—Ernnville; *Limits*—The townships of Amaranth, Erin, East Luther and Garafraxa, except the ten first concessions.

Sixth Division Court—Clerk, John Cadenhead,—Elora, *Limits*—The township of Pilkington, and concessions eleven to fourteen inclusive to the township of Peel.

Seventh Division Court—Clerk, John Cookman,—Allanville, Peel, *Limits*—Concessions one to ten inclusive of Peel township and Maryboro West.

Eighth Division Court—Clerk, Thomas Grieve,—Arthur, *Limits*—Township of Arthur, East Maryboro, township of Minto, and West Luther.

APPOINTMENTS TO OFFICE, &c.

JUDGE OF THE COUNTY COURT.

JOHN STRACHAN, of Osgoode Hall, Esquire, Barrister-at-Law, to be Judge of the County and Surrogate Courts of the United Counties of Huron and Bruce, in the place of John Scott, Esquire.—[Gazetted 17th November, 1855.]

CLERK OF THE PEACE.

GEORGE OGLE D'OLIER, of Peterborough, Esquire, to be Clerk of the Peace for the United Counties of Peterborough and Victoria, in the place of W. H. Wrighton, Esquire, resigned.—[Gazetted 17th Nov. 1855.]

NOTARIES PUBLIC IN U.C.

ALISTER M. CLARK, of Toronto, Esquire, Attorney-at-Law; JOHN BILLINGS, of Oshawa, Esquire, Barrister-at-Law, WILLIAM HENRY SPANTON of Toronto, Esquire, Barrister-at-Law, and COLLIN WILLIAM FOSTER, of Brockville, Esquire, Attorney-at-Law, to be Notaries Public in Upper Canada.—[Gazetted 17th November, 1855.]

JAMES ROYD DAVIS, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—[Gazetted 24th Nov. 1855.]

LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Michaelmas Term, 19th Victoria, 1855.

On Monday the 19th November, in this Term, Robert Alexander Harrison Esquire, was called, *with honors*, to the degree of Barrister-at-Law.

On the same day, John Thomas Anderson, Esquire, was called to the degree of Barrister-at-Law.

On Tuesday the 20th November, in this Term, Frederick Kingston, Esquire, was called to the degree of Barrister-at-Law.

On Saturday the 24th November in this Term, the Hon'ble Robert Baldwin was elected Treasurer of this Society.

On the same day the following Members of the Society, of the degree of Barrister-at-Law, were elected Masters of the Bench, viz.:

Lewis Wallbridge,	Esquire.	Alexander Campbell,	Esquire.
John Hawkins Hagarty,	"	Stephen Richards, Junior,	"
Richard Miller,	"	Thomas Galt,	"
George Alexander Phillpotts,	"	David Breakenridge Read,	"

George William Burton, Esquire.

On Tuesday the 27th November in this Term, Edward Martin and Charles Ingersoll Carrall, Esquires, were called to the degree of Barrister-at-Law.

On the same day the following Gentlemen were admitted into the Society as Members thereof, and entered in the following order as Students of the Laws, their examination as having been classed as follows, viz.:

UNIVERSITY CLASS	Mr. William Henry Harrington Hume,
Mr. John Thompson Huggard, B.A.,	" Michael Driscoll,
SENIOR CLASS.	" William Nicholas Miller,
Mr. Marcellus Crombie,	" Richard Barrett Bernard,
JUNIOR CLASS.	" John Ben McLennan,
Mr. William Henry Wilkison,	" William Ferguson, Junior,
" James McCauley,	" Charles Frederick Goodhue.

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

For the Optime Class:

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

For the University Class:

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

For the Senior Class.

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

For the Junior Class.

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

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

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

NOTICE.—By a Rule of Hilary Term, 18th Victoria, students keeping Term are henceforth required to attend a course of Lectures, to be delivered each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's certificate of such attendance.

Lecturers for the ensuing year.	Subjects.
H. Term—P. M. S. Vankoughnet, Esq. -	*Real Property.*
E. Term—H. C. R. Becher, Esq. - - -	*Evidence.*
T. Term—Henry Eccles, Esq. - - - -	*Pleading.*
M. Term—Secker Brough, Esq. - - - -	*Executors and Administrators.*

Hour of Lecture—From 9 o'clock to 10 o'clock, A.M.

ROBERT BALDWIN, *Treasurer.*

Michaelmas Term, 19th Victoria, 1855. n11-2m.

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* Whewell's Elements of Moral and Political Science, vol. 1, p. 257.

† *Vide* observations *ante*, page 196, on the utility and necessity for this Directory.

‡ We have not yet received a List of the *Bailiffs* for these Counties.