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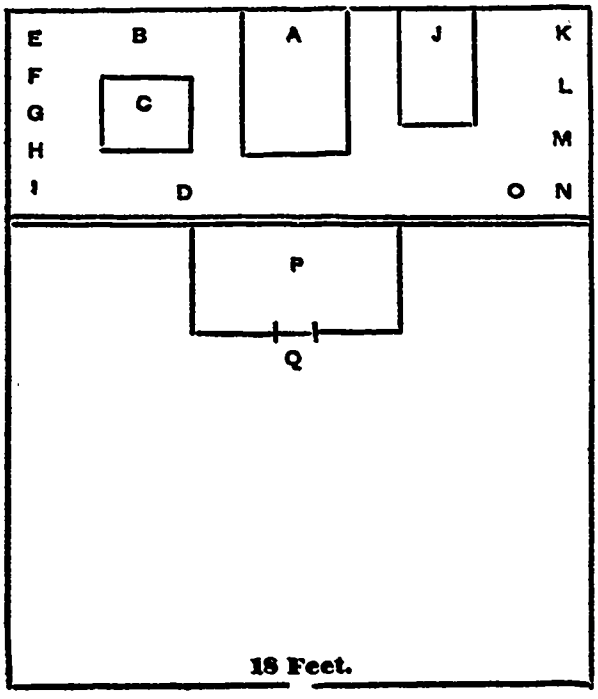
DIVISION COURTS.

OFFICERS AND SUITORS.

OFFICERS—*Answers to Queries by.*

"A Country Division Court Clerk" refers to some observations which appeared in a former number respecting the internal arrangement of Court Rooms on a simple and cheap plan, and asks us to procure for him a diagram. He expresses himself "desirous to have everything done decently and in order in his Court," and states "that if he cannot get paid out of the fee fund he is willing to pay out of his own pocket for the better accommodation of the Judge and suitors": this is the right spirit, and as the information sought for may be desired by other Clerks, we give a diagram, showing the arrangement of a Court Room in this County, which is 22 feet × 18 inside. Of course the proportions would be different if the room was larger:—



EXPLANATION.

A, is a platform 4 feet × 5, raised 18 inches above the floor, on which is placed a small desk and a chair for the Judge.

B, The Clerk's seat.

C, The Clerk's table, 2 feet 6 inches by 3 feet.

D, Raised stand for Bailiff.

E, *F*, *G*, *H*, *I*, Seats for Jurors.

J, A table 2 feet 6 in. by 4 feet, for the accommodation of professional agents, &c.

K, *L*, *M*, *N*, *O*, Seats.

In front and at the distance of 1 foot 6 inches from the raised platform and the Clerk's table a piece of scantling 3 inches by 6 runs across the room, and is supported by four posts 4 feet high, screwed on floor, strengthened by braces: it is shown by the double line.

P, A stand for witnesses and parties in a cause, 6 feet 6 inches by 4 feet; it is also made of scantling 3 inches by 1, and similarly supported. A part in front lifts with a hinge to allow persons to enter. If this stand were raised about a foot higher than the floor, we think it would be an improvement.

Q, A Stand for second Bailiff.

An erection of this kind allows the business of a Court to be conducted with great convenience to parties, and prevents the confusion and annoyance to suitors consequent on a crowded room, deficient in such arrangement, and the whole may be put up at the cost of some fourteen dollars.

Of course this simple moveable erection would only be resorted to in remote Divisions, but it is better than none at all. The proportions for a larger room can be easily found from the above diagram.

M.—In reply to your question we would say, that when two bailiffs are appointed to a Court, there is no statutory arrangement for the division of business; the Judge usually gives orders on the subject, assigning sometimes different beats to each officer. The division of cases for service is sometimes left wholly to the Clerk. In the absence of any regulation by the Judge, the Bailiff who first presents himself to the Clerk should receive all process then ready to be delivered for execution, or so many of them as he thinks he will be able to execute in good time. The object in any case is to have the public properly served, and the separation of a Division into two sub-divisions seems to be the best plan for securing the object in view. *Your* best course will be to obtain an order from the Judge for your guidance.

J. McM.—Should the Clerk of a Court be taken suddenly ill, and be unable to appoint a Deputy, and on the Court day neither Clerk nor Deputy Clerk be in attendance to perform the duties, the Judge would, of course, appoint a Clerk to act in the place of the Clerk so ill, who would therefore cease to be Clerk. In case of the sudden death of a Clerk, there would not, we apprehend, be any trouble in finding a new Clerk. The difficulty in the other case would be to find any one to accept an office for an uncertain period, as the old Clerk would of course be re-appointed so soon as able to resume his duties. We do not see the least *legal*

difficulty in the matter. But our correspondent is so far right in thinking it would be better if there was some express enactment on the point. By the English County Court Act there is a provision respecting Registrars (officers answering to our clerks) enabling the Judge to appoint a Deputy Registrar in case of the inability of the Registrar himself to do so; and this is further regulated by Rule in these words: "Whenever the Registrar or his lawful Deputy is absent from the Court, the Judge shall appoint a Deputy to act on behalf of the Registrar, and an entry of such appointment, and the cause of such absence (if known) shall be made on the minutes of the Court."

C.—It is *not* "the proper course, where a Clerk refuses on grounds which seem good to him to issue an execution to apply at once for a mandamus." The application should be first made to the Judge of the County, who will give the Clerk an opportunity of explaining the grounds of his refusal, and then decide upon the application. But if the County Judge refuses to order the Clerk to issue execution, then the party may apply to the Superior Courts for a mandamus against the Clerk. Should a professional man be consulted, there are two cases on the subject to which his attention might be called, viz., *Ex parte Christchurch (overseers)*, 2 Pr. Rep. 660; *Reg. v. Fletcher*, 2 El. & Bl. 379.

A.—The sale of any office connected with the administration of justice is an offence both against the common and statute law.

SUITORS.

Breach of Warranty, (continued from page 63.)

The consideration or promise and warranty.—A warranty is given in consideration of the plaintiff purchasing the article or thing in respect to which it is given, so that the plaintiff must be able to prove the purchase as well as the warranty where he brings a suit. They are necessarily so mixed up that proof of the one requisite generally involves proof of the other.

The general rule is, that although a liberal price be given for goods which the purchaser has an opportunity of inspecting, the law does not imply a warranty as to their goodness or quality, and no liability in general exists in regard to bad qualities or defects, unless there be a *special* warranty or fraud on the part of the seller.

Generally speaking, therefore, a party bringing an action must be able to prove an *express warranty*, but sometimes a warranty may be implied from the nature of the transaction or the position of the contracting parties.

Warranty express or implied.—With a view to prevent fraud and deceit between man and man in their dealings, the law implies a promise from each of the parties to a contract that he does not practice deceit or fraudulent concealment to benefit himself at the expense of others. Thus in the sale of goods the seller is taken to have promised, although he may not have promised in fact, that he does not at the time of the sale know that his title to the goods is bad, or that he has no right to make the contract of sale he professes to make; and if the seller is aware of any defect materially lowering the value of the goods in the market, the law supposes a promise from him to tell it to the intending purchaser, and the passing over in silence an important fact which ought in good faith to be made known, is equivalent in contemplation of law to an express representation, or even an implied warranty.

If goods are sold for a particular purpose, there is an implied warranty, that they are reasonably fit for such purpose. Thus a rope sold to lift goods by a crane—that it is sound: copper sold for sheathing a vessel—that it is fit for the purpose of sheathing vessels: and indeed the law implies a promise from tradesmen and manufacturers in general that the goods manufactured and sold by them for a specific purpose, and to be used in a particular way, are reasonably fit and proper for the purpose for which they profess to make them, and for which the goods are known to be required; and the law will extend this implied warranty, just so far as may be necessary to do justice and preserve good faith.

And so as to provisions in general there is an implied warranty that they are fit for use, and a man who makes a business of selling provisions and supplying victuals, is held to have warranted them to be good and wholesome, and fit for sustenance of man; but a private person who does not trade in provisions is not responsible for selling an unwholesome article of food, without fraud and in ignorance of its being unfit to eat. In case of sale by sample—wheat for example—there is an implied understanding on the part of the seller, that the sample is fairly taken from the bulk of the commodity; so that if the sample does not agree with the bulk in quality at the time of the sale, the purchaser is not bound by the contract.

The custom also of any particular business may establish an implied warranty. Thus in England, where sheep were sold as *stock*, and evidence was given that by the custom of the trade stock were understood to be sheep that were sound, it was ruled that it was an implied warranty.

An express warranty may either be verbal or in writing, and may be proved by a subsequent admission of the defendant: if in writing the plain terms of the written warranty cannot be contradicted or

varied by verbal evidence. In giving an express warranty, the word "warrant" is commonly used, as "I warrant these goods to be," so and so; or, "I warrant this horse to be sound in wind and limb," &c., but no particular form of words is necessary to constitute a warranty; and the word "warrant" need not be used. Many representations of the things sold are of such a nature and made under such circumstances that the party making them may be fairly considered to have given a warranty. Thus, if a jeweller represents a piece of crystal to be a diamond, he is responsible: if parties are dealing for a horse and the seller says "you may depend upon it, the horse is perfectly free from vice," that is a very sufficient warranty, though the word warrant has not been used. But a mere statement of the party's own opinion and belief upon a matter, concerning which the other contracting party can exercise his own judgment, is not a warranty, nor is evidence of the ordinary praise or commendation bestowed by a seller on the things he sells, even if he knows his praise not to be strictly true—mere puffs, which men resort to—sufficient to make out a warranty.

Trifling and unimportant representations, not seriously affecting the value of the contract, though untrue, do not make out such a case as a warranty could be implied from.

If goods are expressly sold "with all faults," the seller is not liable to an action in respect of defects, although he was aware of their existence, and did not disclose them to the buyer, unless some artifice or fraud were practiced to prevent the latter from discovering such defects. For an agreement to take a thing with all *faults*, does not mean it is to be taken with all *frauds*, and therefore a party is not allowed to use artifice to disguise faults and to prevent their being discovered by the purchaser, and then be permitted to shelter himself from his own fraud by saying "I sold with all faults."

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 43.

Sale and Disposal of Goods taken in Execution.

(*Continued from page 63.*)

The Bailiff holds Cheques, Bills of Exchange, &c., seized for the benefit of the plaintiff: as before mentioned, he may have handed them over to the Clerk for safe keeping, but still he is to be considered as the holder of them in trust for the plaintiff, who has a right to sue upon them under the 90th section of the D. C. Act, upon paying or securing all the costs that may attend the proceeding.

It frequently happens that after a seizure is made the defendant proposes terms to the plaintiff which the latter is willing to accept, and the Bailiff is requested to withdraw. There are a few acts within the range of a Bailiff's duties where he requires to exercise more caution than in withdrawing after a seizure. He is directed by the execution to levy the amount, and should an order to withdraw be afterwards denied, (and it often is when a plaintiff is disappointed or outwitted by a defendant,) the whole burden of proof lies upon the bailiff, and he must show distinctly the direction to him; otherwise he will be held liable for acting contrary to the requirements of the execution. To protect himself the Bailiff should insist on obtaining a request in writing to do what he is desired; which may be in the following form, if annexed to the execution:—

Request of Plaintiff to Bailiff to forego Execution and withdraw.

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

Between A. B., plaintiff,
and
C. D., defendant.

I, the above named plaintiff, do hereby request ——, Bailiff of the said Court, to whom the annexed execution is directed, to forego further proceedings thereon, and to withdraw from the levy made by him, and give up possession of the goods seized to the defendant; and I do hereby agree that no action or other proceeding at law shall be commenced against the said —— for so doing.

As witness my hand this——day of——, 185 .

A. B.

The 90th section of the D. C. Act provides for the mode in which goods taken in execution are to be sold: the first step after seizure is to advertise for sale the goods seized, and this should be done immediately after the seizure, or at least in sufficient time to enable the Bailiff to make a return of the execution to the Clerk within the time allowed by law. In the notice or advertisement of sale, which must be signed by the Bailiff, the goods should be described with reasonable certainty, and the day and hour and place (within the Division) at which they are to be sold should be clearly stated in the notice. It is necessary that advertisements be put up in the three most public places in the Division, at least eight days before the time appointed for the sale—that is eight clear days, neither the day of posting the notice nor the day of sale to be counted. Thus for a sale on the 10th of the month, the advertisement must be posted at latest on the 1st. It is not unusual, however, to

give a longer notice than eight days, in order to secure a better sale. The following Form may be used:—

Bailiff's Sale.

By virtue of —— Execution issued out of the —— Division Court for the County of ——, and to me directed, against the Goods and Chattels of ——, at the Suit of ——, I have seized and taken in Execution ——.

All which property will be sold by Public Auction, at ——, on —— the —— day of ——, at the hour of —— o'clock.

Office of the —— Division Court, ——, —— day of ——, 185 .

——— ———, *Bailiff.*

Although as a general rule no sale of goods taken in execution can be had until after the end of eight days at least next following the day on which such goods have been taken, yet if from any cause the party whose goods are seized thinks it to his advantage that a sale should take place at an earlier day, and makes request to that effect in writing under his hand, (sec. 90) the Bailiff will be authorised to sell, if it be equally advantageous to the party in whose favour the execution is to make prompt sale, rather than wait for the regular period of eight days. But it will be prudent to obtain his written consent before selling on short notice. The Form of Request and Consent following should be annexed to the Execution:—

Request of Defendant and Consent of Plaintiff to sale of Goods before the usual time.

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

Between A. B., plaintiff,
and
C. D., defendant.

I, the said defendant, do hereby request ———, the Bailiff to whom the annexed execution is directed, to sell and dispose of the goods and chattels now in his possession, under and by virtue of the said execution against me, forthwith, and before the expiration of the time fixed by law; and I, the said plaintiff, do hereby consent to such sale being made as aforesaid; and we, the said plaintiff and defendant, do severally agree that no action or other proceeding at law shall be commenced by either of us against the said Bailiff for so doing.

As witness our hands the——day of ——, 185 .

A. B.
C. D.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

MALLOUGH v. THE MUNICIPALITY OF ASHFIELD.

(Easter Term, 19 Vic.)

By-law—Motion to quash.

Upon a motion to quash a by-law to revise the wards of a township, it appeared that at the meeting at which the by-law was passed there were present four municipal councillors: that the motion was put by the reeve: two of the councillors voted for the by-law, the third made no objection, and the reeve declared the by-law to be passed.

Held, that the passing of the by-law having been put from the chair, and no dissent being expressed, that it was duly passed in accordance with the 8th section of 12 Vic., cap. 81. (6 C. P. R., 168.)

In Hilary Term, *Jackson* obtained a rule *Nisi* to quash a by-law, passed on the 10th of Dec., 1855, entitled, "By-law No. 13, for revising wards in the Township," on the following objections:—

First. That it was not passed by a vote of at least four-fifths of the members of the Municipality, or the members of the Municipal Council for the time being.

Second. That a majority of the freeholders and householders of the township for the year next previous to that in which the by-law was passed did not apply by petition in writing, praying for the alterations in the rural wards made by the by-law, nor was there any application or petition for the by-law.

Third. The by-law contains no clause limiting it to take effect on the 1st of December next but one after the same was passed.

Fourth. No vote of a majority of the freeholders and householders, at the general municipal election held for the year in which the by-law was limited to take effect, for altering the divisions of the rural wards as is effected by the by-law.

Fifth. The by-law recites no petition on which it is founded, nor that it was passed in compliance with the prayer of such petition and with the directions of statute 16 Vic., cap. 181.

Affidavits were filed, verifying the copy of the by-law produced, and the last four objections were supported by affidavit and by examination of the by-law. As to the first objection, an affidavit was made by one of the councillors that he was present at a meeting of the Municipal Council on the 10th of December, 1855, when the by-law was passed: that it was read once and declared by the reeve to be passed at that meeting: that during all that meeting only four out of five councillors were present: that four-fifths of the Municipal Council did not vote for the passing of the by-law, nor did it pass by a vote of at least four-fifths: that only two of the councillors actually voted for it, and the reeve, who appeared to be in its favour, then declared it was passed: that deponent did not vote for or support the by-law; but on the contrary, he told the other councillors he did not think they they had power to pass it: that defendant was opposed to the by-law, and did not vote for nor support it.

In the following term *C. Robinson* showed cause: he admitted that he could not controvert the truth of the matters stated in the last four objections: none of those formalities were observed. As to the first objection, he filed the affidavits of the reeve and the two councillors present when the by-law was passed, and of the township clerk, also present. Three of these in terms state, that the by-law passed unanimously; stating also, as explanatory, that the fourth member, whose affidavit was filed on moving for the rule *Nisi*, did not dissent from or vote against it. All four affidavits contain a statement to this effect. It is also sworn that directly after it was passed he (the fourth councillor) seconded a motion for the appointment of returning officers and the fixing the polling places at the elections for January, 1856, (see 12 Vic., cap. 81, sec. 170) according to this by-law; and a copy of the number as annexed to the affidavits, showing an entry to that effect. So far as those minutes show, however, there is no statement in fact of the passing of the by-law. The entry shows a resolution to abrogate the then existing division into rural wards and adopting a new division, and that a by-law should be framed for that purpose. No entry is made of the final introduction of the by-law, as certified and produced. *Robinson* contended this by-law was passed under 12 Vic., cap. 81, sec. 8, and then it might go into effect immediately. He urged the great inconvenience that would result from quashing this by-law: the present councillors were elected under it. The court are not absolutely bound to quash a by-law—Hodson v. The Municipality of York, Ontario and Peel, 13 U.C.Q.B.R.

S. Richards, in reply, argued that the affidavits filed in opposition to the rule rather sustained than met the first objection. From one of them it appeared there was voting; that the by-law did not pass *sub silentio;* and not one swears that the fourth councillor did vote *for* it. They say he did not dissent: did not oppose or vote against it.

DRAPER, C.J.—The 12 Vic., cap. 81, sec. 8, as amended by 13 & 14 Vic., cap. 64, sched. A, No. 1, reads thus: "That it

shall and may be lawful for the municipality of each township, from time to time, by any by-law or by-laws to be passed for that purpose, to divide such township into several wards; or when the same shall have been previously so divided, by act either of the district or county municipal council, or of the municipality of the township, then to divide the same anew into several wards as aforesaid, arranging or re-arranging the same, so as more effectually to accomplish the objects aforesaid; every which division by such municipality shall supersede that so to be made by such district or county municipal council, as well as every previous division made by such municipality itself: provided always, nevertheless, that no such *first mentioned* by-law shall be of any force or effect, unless the same shall have been passed by a vote of at least four-fifths of such municipality for the time being.(a)

The objects to be accomplished are stated in the 4th sec. to be, that the several wards shall, as regards the numbers of freeholders and householders entitled to vote at the election of township councillors, be as nearly equal as practicable, regard being however also had to the convenience of such freeholders or householders, and to the rendering each of such rural wards as compact as circumstances will permit.

The term "*first mentioned by-law*" in the proviso to the 8th section may suggest an enquiry whether the necessity for a four-fifths vote is not confined to a by-law to divide townships into several wards, and not to dividing anew, arranging or re-arranging, after the division has once been made.

The 16 Vic., cap. 181, sec. 6, enacts that the majority of freeholders and householders of any township may petition the municipality to have the township divided into wards, or that an existing division may be abolished, or that alterations to be specified in the petition may be made in such division, and makes it imperative in every such case for the municipality to pass a by-law, according to what is asked for: provided such by-law shall contain a recital of the petition, and that it was passed in compliance with the prayer of the petition and the direction of this section. The section contains other provisions as to when such by-law shall be limited to come into effect, and requires a vote of the electors in its favor after it has passed the municipality, and provides that it shall not be obligatory on the municipality to pass such by-law, unless the petition be signed by a majority of the electors named on the collector's-roll, and that four-fifths of the council need not concur in passing it. The 7th section makes provision for taking the votes of the electors on such by-law; and the 8th enacts, that after a by-law so passed has taken effect, as provided in the preceding sections, the municipality shall have no power to repeal it, except on a similar petition and subsequent voting of the electors.

I think it quite clear that these provisions do not repeal sec. 8 of 12 Vic., cap. 81; they provide a mode by which the majority of the freeholders and householders may control the council in the exercise of the powers conferred by that 8th section; but subject to that control, and while it is unexercised, they leave the power untouched. In the present case, it is not pretended that the freeholders and householders have taken a single step in reference to the arranging, re-arranging or dividing anew of the township into rural wards. The fact that they have not done so, and that the by-law is not passed according the provisions of the statute of 16 Vic., is made the foundation of four out of five of the objections taken. None of these objections have any application, unless the 8th sec. of 12 Vic., cap. 81, is virtually and impliedly repealed. It appears to me too clear to bear argument that the two may well stand together, and that the legislature meant they should do so.

We have then only to consider the first objection. I do not treat the proviso requiring the four-fifths vote, as rendering it necessary that a formal vote of each member shall be taken, one by one, in order to ascertain that four out of the five members support it. Suppose all five present, if when the question is put no one expresses his dissent, his opposition to its passing, but all acquiesce tacitly, it will be properly, in my opinion, taken to be a unanimous vote. There must be four members at the meeting when such a by-law is passed, and if only four they must be unanimous; but if the passing of such a by-law be moved, be put from the chair, and no dissent be expressed, I think it may properly be taken to have had the assent of all four, and therefore to have passed legally and in accordance with the proviso; and that one of such four councillors should not afterwards be heard to say he was not in favour of the by-law, did not vote for it, and therefore it was not passed by a vote of four-fifths of the council.

Looking at his affidavit closely, he does not assert affirmatively that he voted against it, but that he did not vote for or support it, and that he said he did not think they had power to pass it, and told the other members to have nothing to do with it. To which he adds, that he was opposed to it, without stating that he offered any act of, or expressed any opposition to it.

Perhaps if this had not been met we might have considered that the other members of the municipality were aware of his opposition, and that he was dissenting from the by-law being passed. But to the extent of his offering no opposition, expressing no dissent and offering no vote against, we have four affidavits meeting his negative of supporting or voting for the by-law by a negative of his dissenting or voting against it, and three of these affidavits assert it was passed unanimously, meaning no doubt *nemine contradicente*, and then presuming assent in all.

In the face of these affidavits I do not think we can say it is sufficiently proved to us that the by-law was not passed by a vote of four-fifths of the Municipal Council, and therefore the first objection also fails. And this renders it unnecessary to decide whether the proviso has the limited application suggested or extends to every by-law which might be passed under that section of the statute.

I am of opinion the rule should be discharged.

Per Cur.—Rule discharged.

(a) Vide sec. 118, as to the vote of the person presiding at the meetings of the council, and 16 Vic., cap. 181, sec. 39, proviso, as to when only four out of five councillors are present.

McGregor v. Pratt.

(Easter Term, 19 Vic.)

School trustees—Election of.

In replevin, defendant made cognizance as collector of school section No. 1. It appeared that prior to February 1854, school section No. 1 consisted of the town of Chatham and a part of the township of Harwich; there was also a school section in operation, known as section No. 2½. In February 1854 the township council of Harwich passed a resolution dividing the township into sixteen school sections: No. 1 of these new sections was formed of that part of the township of Harwich which together with the town of Chatham, had previously been No. 1 added to the whole of 2½ as it existed previously.

In January 1855 an election for No. 1 as created by the resolution of February, 1854, was held, at which one trustee only was elected, and the two other trustees elected the previous year for the then section gave defendant the warrant under which he acted.

Held, that there should have been three trustees elected for section No. 1 at the election in January, and that a warrant signed by the other two was inoperative.

(6 C. P. R., 173.)

Replevin for a horse. Writ issued the 24th of December, 1855. The defendant made cognizance as collector for the trustees of school section No. 1 in the township of Harwich, setting forth that plaintiff was a freeholder and a resident within that school section, and was duly assessed in the sum of £7 2s. 3d., as his proportion of a special school rate; that before the said time, when, &c.—viz., on the 11th of January, 1855—John Bennett, Thomas Harrison and David Wilson were duly elected school trustees of the said school section; and thereupon the school rates became their property: that defendant, before, &c., was duly appointed by the said trustees collector, to collect the said special rates: that John Bennett and

Thomas Harrison, being a majority of the said trustees, before, &c.—viz., on the 25th of November, 1855—issued a warrant under their hands and the corporate seal of the said school section, and required defendant to collect, &c.; and that the warrant required defendant, in case any of the persons named should make default in payment on demand, to levy the amount by distress of their goods and chattels: that ten days days after receipt of the warrant defendant required plaintiff to pay him the said sum of £7 2s. 3d.: that *plaintiff refused*; whereupon defendant, by virtue of the warrant, took and detained the said goods, &c., as a distress for the said special school-rate, which is still due. Verification—Prayer of judgment and a return. Replication—*De injuriâ.*

On the trial at Chatham, before *Hagarty, J.*, in April last, it appeared that prior to February, 1851, school section No. 1 consisted of the town of Chatham and of a part of the township of Harwich, within which part the plaintiff was a resident on the property in respect of which the school-rate mentioned in the plea was imposed. There was at the same time a school section in operation known as section No. 2¼. In February, 1851, the township council of Harwich passed a resolution which divided the township into sixteen school sections, one of which was united with Raleigh, and two others were united with Harwich. No. 1 of these new sections was formed of that part of the township of Harwich which, together with the town of Chatham, had previously been No. 1, added to the whole of No. 2¼ as it existed before February, 1851. In January, 1855, a meeting was held for the election of school trustees for the section No. 1 as created or designated by the resolution of February, 1854. One trustee only (David Wilson) was elected. John Bennett and Thomas Harrison (named in the plea) were two trustees for the old school section No. 2¼, elected on some previous occasion, and they acted with David Wilson without any new election, as apparently they might lawfully have done if no change of boundaries had taken place. The legality of this however was questioned at the meeting in January, 1855, and another meeting was subsequently held, when David Wilson and two other persons were elected; but it did not appear they ever acted. Evidence was given that no meetings were held, if they were necessary, either in the remaining part of the old section No. 1 or in 2¼ to petition for the formation of the new section No. 1. The inhabitants of No. 1 (as united with Chatham) were opposed to the union with No. 2¼. The warrant put in was signed by Bennett and Harrison, who with Wilson appear to have been the acting trustees for 1855. No objection was made to the legality of the rate. On the 26th of December, 1855, which was two days after the writ in this cause was sued out, the municipal council of the township of Harwich passed a by-law (which was put in evidence) which enacted, "That the several school sections and part sections as altered and established by the municipal council of the said township be and the same are hereby ratified and confirmed, as far as the said council can ratify and confirm the same—that is to say, all the boundaries of the said several sections and part sections as contained in the description hereunto annexed, and numbered one, two, &c., shall remain and be as they have been the boundaries of the several sections until this by-law is either amended or repealed."

The plaintiff's council objected—First. That this by-law, passed since the suit, could not help; and that a by-law, and not the resolutions, must be shown for the change in the school sections. Second—That no proceedings, as required by the statutes, were shown to justify the altering or uniting school sections. Third—That there was no notice before the alteration was made to the parties interested, especially to the plaintiff. Fourth—That if the alteration is upheld no consent of the inhabitants was expressed at the meeting in 1855, deciding how the school should be supported. Fifth—If the union were legal, still there was no legal election of the trustees. It was also objected, that there was no proper demand on plaintiff to pay the rate proved; but the plaintiff himself, being called as a witness, gave some evidence which might be considered sufficient to remove the objection.

Upon this it was agreed the plaintiff should have a verdict, with leave to the defendant to move to enter a nonsuit.

In Easter Term *McCrae* moved accordingly.
A. Prince showed cause.

DRAPER, C.J.—It seems to me that section No. 1, when it *consisted of part of the township of Harwich and of the town* of Chatham, was a union school section. If the resolution of February 1854 was operative to produce the changes intended, then, by the Common School Act of 1850, sec. 18, 4thly, the alteration could not go into effect before the 25th of December, 1854, and the election of trustees for the section No. 1, as altered, must, I apprehend, be held as if it were an entirely new section, in which case three new trustees should have been elected, according to the 4th and 5th sections of the act of 1850

The statute contains provisions for the election of trustees *in the event of no annual meeting being held, or in case of want of trustees* (see secs. 9 and 10); and some aid is given in construing the phrase "want of trustees" by sec. 12, 12thly, which provides for calling meetings for the filling up of any vacancy in the trustee corporation occasioned by death, removal, "or any other cause whatever." I refer to this in order to establish that if it were necessary to have elected three trustees for ...s section No. 1, as designated in the resolutions of February, 1854, there would be found provisions to meet the emergency of no sufficient election having taken place.

By the resolutions which are before us, and upon the evidence, two things are established, first, that the new section No. 1 contains the former section 2¼, as it were absorbs it into No. 1; and secondly, that a new section (2¼) is erected, which is stated to be united with Raleigh. The question presented then is, whether the changes by which the town of Chatham ceased to be part of section No. 1 and section 2¼ became a part of No. 1 fall in with the definition of alterations of a school section already established, or of uniting "two or more school sections into one." I think the latter affords the true answer, and among other reasons for this: The old No. 1, so far as the township of Harwich was concerned, was a school *section of that township united to Chatham*; and when in 1851 it was by the resolutions separated from Chatham it still remained a school section of Harwich; and when that which till that time was section 2¼ was made part of No. 1, and an entirely different 2¼ was created, it seems to me the result was to unite 2¼ to No. 1, not to unite No. 1 to 2¼. All this, which may seem at first sight a distinction without a difference, is to be considered in determining whether this change was not a uniting two sections into one, though not forming what is more strictly a union school section. The consequence of that conclusion is, that at the annual school meeting in January, 1855, three new trustees should have been elected for the newly constituted section No. 1. I must say I think this is the true conclusion. I assume that No. 1 united to Chatham had its own school trustees, possibly but not necessarily all *residing in Chatham*. But if any one resided in No. 1 in Harwich, and still more if all so resided, I do not see any reason why two trustees of section 2¼ should remain in office as of right, and the election take place to supply, by one new trustee, the vacancy created (by the arbitrary as far as I can see); it would be treating the trustees of No. 1 as out of office. The provision for trustees remaining in office until their successors are appointed would not apply to this case, because of the change of section.

In my opinion neither Bennett nor Harrison were lawful trustees for the new section No. 1, and therefore the defendant fails in his cognizance.

This conclusion makes it unnecessary to decide whether the resolutions were operative to effect the proposed change, or whether a by-law was not required. Such certainly is my

impression; and as at present advised, I think that objection fatal also. I incline also in favour of some others of the objections; but at present I do not desire to be considered as determining any but that relating to the right of the two trustees of section 2½ to continue in office and become trustees for the new No. 1.

I think, therefore, the rule should be discharged.

Per Cur.—Rule discharged.

PATTERSON v. ROSS ET AL.

(Easter Term, 19 Vic.)

Pleading.

To a declaration in assumpsit for breach of an agreement to clear a piece of land, defendant pleaded that after the making of the agreement and before suit to wit, on &c., defendants entered upon the work and partly performed the same, and would have completed the agreement with plaintiff *had not plaintiff* against the will and without the consent of defendants, wrongfully entered and expelled defendants from the land, and prevented defendants from completing their agreement.

Held bad, as being argumentative, not showing the alleged wrongful act of plaintiff to have been committed before defendants were guilty of a breach of the agreement.

(6 C. P. R. 191.)

Writ issued first September, 1855.

The declaration is in assumpsit on an agreement made the 15th of August, 1854, whereby, in consideration that plaintiff, at defendants' request, would permit the defendants to cut and take away the timber and trees growing on forty acres of land belonging to plaintiff, and to apply said timber to their own use, defendants agreed to cut down the timber and burn all the brush on the said forty acres, and to clear up, burn off, and render the said forty acres fit for sowing within a reasonable time after the removal of the timber, and to have as much as possible of the forty acres cleared off in time for the sowing of fall wheat in the year 1855.

That although defendants did cut and remove the timber for their own use, and although a reasonable time had elapsed for defendants to burn and clear off, to wit, twenty-five acres, in time for sowing fall wheat in 1855; yet defendants, although requested, did not burn any of the brush, nor clear off, burn up, and render any of the land fit for sowing fall wheat within a reasonable time after removing the timber, or in time for sowing fall wheat; *ad damnum*, &c.

Pleas.—Second. That after the making of the agreement and before the commencement of the suit, to wit, on &c., defendants entered upon the work and partly performed the same, and would have completed their agreement with the plaintiff, "*had not plaintiff*," against the will and without the consent of defendants, wrongfully entered and expelled defendants from the land, and prevented defendants from completing their agreement: verification.

Third. That at the time of making the agreement and always afterwards, and until and shortly before the commencement of this suit, to wit, on the first of August, 1855, it was, in consideration of the labour theretofore performed by defendants for plaintiff under the said agreement, agreed that the defendants should have a further time, to wit, until the first of September, 1855, to fulfil the agreement: that defendants were always ready during the last mentioned year, and until the first of September, 1855, to perform the agreement; "*had not plaintiff*," of his own wrong, and against the will and without the consent of defendants, hindered them from performing the same: verification.

Fourth. That after the making of the agreement, and before the commencement of this suit, defendants did burn and clear off all the brush on the said forty acres of land according to their agreement, "without this, that plaintiff hindered and prevented them from so doing": conclusion to the country.

Fifth. That upon the making of the agreement, and before the commencement of the suit, to wit, on the first of September, 1855, defendants were ready and willing to complete their agreement, *had not plaintiff* discharged and dismissed them therefrom.

Demurrer to second plea, for the circuitous and argumentative manner in which it is stated defendants would have completed the work had not plaintiffs prevented them, &c.—not averring that plaintiffs did prevent them: that the plea does not show that at the time of the alleged prevention a reasonable time for doing the work had not elapsed, or that the time for sowing fall wheat had not gone by.

Demurrer to third plea for same causes, and for repugnancy in stating that *at the time* of making the agreement declared on, in consideration of work done *under* that agreement, a new agreement was entered into.

Demurrer to fourth plea, that it traverses matter not alleged: that the averment of performance in that plea is too large.

Demurrer to fifth plea for the same reasons as the second, and that it does not appear plaintiff dismissed defendants till after the time for performance had expired.

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

I think all the pleas bad. The second, third, and fifth, do not show the alleged wrongful act of plaintiff to have been committed before defendants were guilty of a breach of their agreement. I incline to think also, the objection for the want of a positive averment that plaintiff did prevent, &c., valid. It is somewhat analogous to the case of a plea stating that by a certain indenture it was witnessed that the plaintiff did, &c., instead of averring directly that he did, &c.—1 Saund. 274. It is not a direct averment of plaintiff's interference, and so makes the statement of defendants' readiness uncertain. The plea is that defendants would have performed, &c., if the plaintiff had not prevented them. This seems to me to bad; just as a plea of the Statute of Limitations is bad in saying that the supposed causes of action, "*if any such there were*," is bad. This does not confess, nor does the allegation in these pleas affirm—Margetts v. Boys (4 A. & E. 489); but see also Wise v. Hodsoll (11 A. & E. 816), Eaveshoffer v. Russell (10 M. & W. 365.)

The fourth plea is clearly bad for the reason assigned, and was given up on the argument.

Judgment for plaintiff on demurrer.

BOICE ET AL. v. LAWSON.

(Easter Term, 19 Vic.)

Pleading—Demurrer.

The declaration stated that defendant was indebted for money, due in respect of the relinquishing and giving up of certain fixtures, fittings and furniture, "before then made and placed by plaintiff in and upon certain premises" by plaintiff before then relinquished and given up to defendant at his request.

Upon demurrer, on the grounds that the declaration does not show by whom nor to whom the fixtures, &c., were given up, nor that they belonged to plaintiff or were given up to defendant, that it is uncertain whether plaintiff charges defendant for giving up the premises, &c., or the fixtures, &c.

Held, that the declaration was good, the words "before then made and placed by plaintiff in and upon certain premises, &c.," being merely descriptive of the fixtures.

(6 C. P. R. 193.)

The third count of the declaration is demurred to. It is as follows: "And in two hundred pounds, for money before that time and then due and payable from the defendant to the plaintiff, upon, for and in respect of the relinquishing and giving up of certain fixtures, fittings, furniture and improvements (before then made and placed by the said plaintiffs, in and upon certain tenements and premises) by the said plaintiffs, before that time quitted, relinquished and given up to and in favor of the said defendant, at his special instance and request." The causes of demurrer are, that the count charges the defendant for certain monies, due and payable in respect of relinquishing and giving up certain fixtures, &c.; and it is not shown by whom nor to whom the fixtures, &c., were given up, nor that they belonged to the plaintiffs, or were given up at defendant's request: that it is uncertain whether plaintiffs

charge defendant for the giving up &c. certain tenements, &c. or for the fixtures &c. thereon: that it is inconsistent, in alleging the giving up the fixtures, &c., said to be in and upon certain tenements &c., at a time when it is shown those tenements &c., with the fixtures &c., to have been already and before then given up and to be out of the possession of the plaintiffs.

The demurrer was argued during this term. *McMichael*, in support of demurrer, cited McDonnell v. Kelly, 4 U. C. Q. B. R., 394.

DRAPER, C.J.—I think the count perfectly good. The words, "before then made, and placed by the said plaintiffs in and upon certain tenements and premises," are descriptive of the fixtures, &c., the value of which the plaintiffs seek to recover; and reading them in that sense, the count is for certain fixtures &c. by the plaintiffs before that time quitted, relinquished and given up to and in favour of the defendant, at his request; which is a perfectly good count and free from every objection raised. In volume 2 of the fifth edition of Chitty on Pleading there is a form which, if not read as I think this should be, would be open to the same exception.

Per Cur.—Judgment for plaintiff.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by C. E. ENGLISH, Esquire, B.A.)

BARCLAY v. ADAIR.

Practice—Fraudulent plea.

A release by the *nominal* plaintiff made after the action is commenced by his *assignee*, cannot be pleaded as a defence to such action.

(March 5, 1857.)

This action was brought by the assignees of Barclay in his name, under a power of attorney contained in a deed of assignment by him to them of all his property, debts, &c., for the payment of debts, against Adair for the wrongful seizure of certain goods assigned by, and mentioned in a schedule annexed to, the said deed of assignment. The defendant expecting to nonsuit the plaintiff put in no defence, and a verdict was obtained against him for £400 at the Spring Assizes, held at Goderich A.D. 1856; he afterwards set aside this verdict and obtained a new trial. In September, 1856, Barclay executed a release of all claims against Adair, as well under this action as otherwise, and in the same month the defendant pleaded this Release.

McBride took out a summons to strike out this plea as fraudulent.

The defendant put in affidavits showing:

1. That he was not 21 years of age when he made above assignment.

2. That that assignment was obtained from him by false representations.

3. That the seizure for which this action is brought was made before the said assignment was given.

4. That the defendant paid the full value for the goods and bought of the authorized agent of the plaintiff—a clerk in his store.

BURNS, J.—The summons must be made absolute to set aside the plea of release. If it be true, as the defendant swears, that he has a good defence upon the merits, then as this action is for the benefit of creditors of the plaintiff, the defendant had no occasion to protect himself by taking a release. I cannot try upon affidavits whether the deed of the plaintiff was or was not made while he was under age, nor can I try upon affidavit whether it was fraudulently obtained from him. The deed appears to be quite regular. The release having been given in the progress of the cause, and after a trial, should not be permitted to stand in the way of a trial(*a*) what should become of the proceeds is another matter: 4 B. & Al. 419—7 Taunt. 48.

EVANS v. JACKSON ET AL.

Arbitration.

If it appear upon an application to refer a cause to arbitration under section 81 of C.L.P. Act, that defendants intend to set up defences upon which the opinion of a jury is desirable, no reference will be made under that section.

(March 10, 1857.)

The facts sufficiently appear in the judgment.

ROBINSON, C.J.—A summons was granted by *McLean, J.*, 5th inst., to show cause why the matters in difference in this cause should not be referred to such arbitrators as the parties may agree upon, or as a Judge of this Court may direct.

Defendants show by affidavit that plaintiff is suing money due him for certain work on the Grand Trunk Railway—done under a special agreement under seal—that there is a clause in the agreement by which the plaintiff bound himself to leave any difference that might arise under the agreement to the decision of Mr. Tait, agent of the defendants.

The defendants produce a receipt signed by the plaintiff after all the work done for £275 in full for all work executed by him, and in full for all claims and demands.

The plaintiff in his particulars claims £1828 as yet due to him on an account comprising ten items: he gives no dates, so that it may be, as the defendants assert, that nothing was done by him after giving a receipt in full.

If the parties will not agree to appoint arbitrators, I could only refer it to an officer of the Court, or to the Judge of the County Court.

I would willingly refer it to Mr. Heyden, the officer of the Court in which the action is pending—but if the defendants resist that, I cannot say I think it a fair cause to be referred; for it is reasonable to suppose the defendants do not simply mean to go into the items of the acount, but intend to set up the covenant to refer—and the receipt in full; on both of which defences questions may arise which it may be important for them to have disposed of by a jury under the direction of a Judge.

The defendants have omitted the course open to them under the clause of the C. L. P. Act, which applies to cases where the parties have bound themselves, as in this case, to leave any differences between them to a certain person named in the agreement.(*b*)

The defendants being unwilling to refer it to an officer of the Court, or to a County Court Judge, the summons was discharged.

(*a*) *Rowand v. Tyler*, M.T., 5 Vic., M. S. R. & H. Dig., Release II, 1.

(*b*) 91st sec. C. L. P. Act. 1856.

Travis v. Wanless et al.

Insolvent debtor—Application for discharge.

Since the repeal of 10 & 11 Vic., cap. 15, no insolvent debtor can apply to be discharged upon a mere affidavit of his not being worth £5, exclusive of wearing apparel. Proceedings must for that purpose be had under section 300 of C. L. P. Act.

(March 19, 1857.)

The defendants in this cause having been arrested under a *Ca. Sa.* and admitted to bail under 10 & 11 Vic., cap. 15, sec. 3, apply to be altogether discharged from custody on the ground that neither of them was worth £5 exclusive of apparel.

The plaintiff replied that this Act had been repealed by the C.L.P. Act, and the case of the defendants, as shown by their affidavits, does not come within sec. 300 C. L. P. Act, which now governs these applications.

McLean, J.—This is certainly the case, and consequently I must discharge the summons with costs.

Lewine et al v. Savage.

Practice—Satisfaction Piece.

An order to enter satisfaction on a judgment roll will not be granted, though defendant swears that the judgment is satisfied, if plaintiff deny it, and it be not otherwise clear that the judgment is in fact satisfied.

(March 10, 1857.)

Robinson, C.J.—This is an enlarged summons granted by *Richards, J.*, to show cause why satisfaction should not be acknowledged in this cause.

The judgment is for £2,003 12s. 2d. on a cognovit. It was given to secure intended advances of goods, upon a special agreement, which has been put an end to by the consent of the parties.

The defendant swears that he had a settlement after all advances made, and he was found to be indebted in £100, and no more—but he produces no evidence of such settlement and balance having been made.

He swears also, that after the settlement he went into the plaintiffs' service as a managing clerk or agent, at a salary of £300 a year, and that he was credited with this sum as paid by such salary according to the understanding between them.

One of the plaintiffs, Lyon Lewine, swears that the judgment is not all satisfied—that there is a *sum* of money due upon it, but does not say how much.

The summons has been enlarged from *19th January* to this day, *10th March*, at the instance of the plaintiffs, to enable them to show how much is due, on various pretexts—that the books are at Ottawa, and one of the plaintiffs absent at Quebec.

So it stands: further delay is asked. I have no objection to name a day sufficiently distant to prevent any further efforts to enlarge.

But if, at last, we have the defendant swearing to satisfaction, and the plaintiffs denying it, I do not see that the Court can order satisfaction to be entered—though in some cases when the plaintiffs are absent and satisfaction *clearly proved*, (which is not done here, for we have only the defendants word for it,) a satisfaction piece has been dispensed with.

Legear v. Lenox.

Practice—Writ of Capias—Amendment.

Error in the form of action in the body of a writ of Capias may be amended after arrest upon payment of costs.

(Feb. 26, 1857.)

McBride applied to set aside the writ of *Capias* copy and service in this cause, with costs for irregularity, on the ground that this action, being an action for Seduction, the writ should have been issued in an *action* on the *case* instead of in an *action* on *promises*.

Carrall, contra, happened to be at Chambers the same day with instructions to apply for leave to amend, appeared in the first instance, admitted the irregularity, and applied for leave to amend under the 291st sec. C. L. P. Act, 1856.

Hagarty, J.—I think this case comes within the meaning of the Statute, and will therefore grant the plaintiff leave to amend his writ on payment of costs.

Fisher v. Sulley.

Attachment—Execution—Irregularity.

Sections 55 and 56 C. L. P. Act only apply to suits in which an original process has been served. An *Execution* of a Superior Court always takes precedence of a warrant of *Attachment* of the Division Court. Attaching creditors in a Division Court, with the defendant to a judgment entered in the Superior Court, will not be admitted to take exception to such judgment on the ground of fraud.

(May 7, 1857.)

In this case final judgment had been entered upon 12th August last, on a confession of judgment "for the amount to be laid in the declaration": the true debt being £275.

No process issued on this judgment until 5th March last, when a writ of *Fi. Fa.* thereon was put into the hands of the Sheriff of the county of Wentworth, the amount in the body of the writ being £403 11s. 8d., the damages laid in the declaration filed—and it was endorsed: to levy £311 5s. 8d.

Previously to issuing this Execution, viz., on the 3rd March last, the defendant absconded from the Province, leaving some personal property; and on the succeeding days (5th and 6th) Astley Waterman and James Edwards respectively sued out writs of Attachment against the said defendant, under which the Bailiff of the Division Court of the County of Wentworth, on the same days, took possession of the personal property so left by the defendant.

After these goods had been attached the Sheriff, under the Execution, seized the goods and took them out of the possession of the said Bailiff.

On the 20th of April following final judgment was obtained in the Division Court by Astley Waterman and Jas. Edwards on their respective writs of Attachment, and immediate execution was ordered; and thereupon the attaching creditors notified the Sheriff and demanded of him payment of their respective judgments in preference to the claim under the execution then in his hands: this not having been acceded to,

S. M. Jarvis, on the part of the two attaching creditors, applied under 65 and 66 secs. C. L. P. Act, to set aside the judgment with costs, on the ground of fraud (the wife of the defendant having stated subsequently to the departure of her husband, that the debt had been paid in full, as shown by affidavits filed) or to amend the writ of *Fi. Fa* now in the hands of the Sheriff, by reducing the amount endorsed to the actual debt; and that the Sheriff should pay over to Astley Waterman and James Edwards the amounts of their respective judgments.

McDonald, contra, put in affidavit of the plaintiff, stating—that the defendant was indebted to him in the sum of £305 14s. at the time the Execution was issued, and that neither the

Execution nor the Cognovit were obtained for any fraudulent purpose whatever, but for a just debt: and contended that theirs was only a *Division Court* Attachment, and therefore could not stand against a judgment of a *Superior Court*; moreover, theirs is only a writ of *Attachment*, while ours is a writ of *Execution*, and consequently takes precedence of theirs, and the Sheriff had a right under it to take the property out of the hands of the Bailiff of the Division Court: (*Francis v. Burr*, 11 U. C. R. 558.)

As to the amount of the endorsement, he argued that it was evidently a mistake, but that defendant is the only party who could take advantage of it.—1 U. C. R. 337 and 9 Dowl. 1029.

HAGARTY, J.—I think there is no ground for the charge of fraud in this case. We cannot presume anything against this judgment from the mere statement of the wife after her husband had been away, made in conversation, asserting that this debt was paid.

As I understand the facts, this *Fi. Fa.* was placed in the Sheriff's hands the same day that the Division Court Bailiff seized the goods on warrant of Attachment.

If this were a contest between a *Fi. Fa.* and an Attachment from the Superior Courts under the C. L. P. Act, I would be inclined to decide that this *Fi. Fa.* could not prevail, not being issued on a judgment such as the Act protects, *i. e.*, when a previous process had been served, &c. But in my judgment (and especially after the decision in *Francis v. Burr*, 11 U. C. R. 558) the statute only applies to writs of Attachment unchanged by the Act, and not to warrants of Attachment from Division Courts.(a)

The delivering of this writ to the Sheriff binds the goods under the statute of Frauds, and I do not think that being attached by an Inferior Court at the suit of one who was not then a judgment creditor, is to defeat this execution.

There are sound reasons for considering that Division Court warrants of Attachment, granted as they are for causes for which Attachments could not go in the Superior Courts, should not be allowed to defeat the legal effect of executions legally recovered in this Court.

As to the right of these Division Court applicants to impeach the consideration or validity of this judgment, I am at present against their right to be heard on a summary application of this nature. I see no privity between them and this execution defendant, and I leave them to contest these matters in such other way as they may be advised: (9 Dowl. 1029, 1 U.C. 337.)

Summons discharged.

THE QUEEN EX REL. GORDANIER v. PERRY AND HUFFMAN, (Returning Officer.)

Practice—Quo warranto—Costs—Power of agent of candidate to object to voter.

A judge in Chambers has power under the Statute to distribute the costs in *Quo Warranto* cases between the parties (*i. e.*, each party to pay his own costs instead of ordering either party to pay all.) An *agent* of a candidate at an election, though not an elector himself, may object to voters and require the Returning Officer to administer the qualification oaths.

(May 12, 1857.)

HAGARTY, J.—This case depends on the question whether certain votes given for the successful candidate (Perry) at a Township Reeve election, objected to at the time, and to whom the returning officer Huffman refused to administer the qualification oaths, can be allowed to remain on the poll; 89 votes were recorded for Perry—84 for the relator.

The relator's case is, that 14 votes were received for Perry, to which his agent objected, and to whom Huffman refused to put the oath.

Ten of these fourteen voters file affidavits showing their qualifications, and that they were clearly entitled to have voted as they did. Hardly any attempt is made in relator's affidavits to impugn the actual qualifications of the voters objected to. The case seems to rest on the technical ground that the returning officer's refusal to administer the oath entitles the relator to have them struck off the poll.

The difficulty seems to have occurred thus—the returning officer seems to have considered that no person but a candidate or duly qualified voter has a right to require any voters to be sworn. One Dallas, a non-resident and non-voter, attended at the poll as agent for the relator, and he it was who required the oath to be administered, and the returning officer refused to recognize him. I gather from the affidavits that the relator himself, though present most of the time, in no case asked to have any voter sworn, but that his agent demanded it in several cases. The affidavits are not clear on this point, but this seems the strong impression in my mind that the relator was present and never interfered, although hearing the returning officer declining to act on Dallas' request.

The statutes give no very definite direction as to the manner in which voters may be sworn, nor as to what constitutes a sufficient requirement to the returning officer to administer the oath. My opinion is that the returning officer should on request of either of the candidates or his agent, (whether such candidate was or was not a qualified elector) have administered the oath.

Anxious as we should always be to uphold all municipal elections against mere technical objections, one would naturally expect that if a returning officer erroneously or otherwise object to the demand of the agent as an unauthorised intermedler, in presence of the candidate whom he represented, the principal should at once avow his act, if he desired the benefit of it, and not stand by in silence, hearing his agent objected to, and not interposing. I repeat that it is not expressly stated that the relator did this, but such is the strong impression left on my mind by the affidavits.

The statute 12 Vic., cap. 81, sec. 122, directs that any person named in the collector's roll shall be entitled to vote at such election for the same without any other enquiry, and without taking any other oath that he is the person named in such collector's roll; that he is of the full age of 21, and is a natural born or naturalized subject of Her Majesty; that he is resident in the ward, &c., and that he has not before voted at such election. Section 124 empowers the returning officer to administer all oaths and affirmations required to be administered or taken at any such election.

I find no prohibitory words in the statute declaring that no person shall vote unless on being required he takes the oath, &c. Nor do I find that in the present case the omission of the returning officer to put the required oaths had any influ-

(a) See C. L. P. Act, note r, to sec. 85.

ence on the conduct of the relator in managing the contest, but I find him contesting it to nearly the end, and thus declaring that he was beaten, and allowing the return to be declared without protest or objection. I also find ten of the fourteen voters objected to proving clearly their right to vote and their ability to have taken the oath if desired so to do.

Perry had a majority of five; rejecting the four votes as to which no proof is offered, he would still have a majority of one and this without deducting from the relator's poll a voter named Dunbar, who is sworn to be under 21 years of age.

I do not notice the charge of bribery against the relator or his agents; the facts stated are very disgraceful to the parties concerned, if not contradicted or explained.

On the whole I do not feel that I should disturb this election; at most a mere error in judgment was committed, and I conceive the relator might at any time have prevented it by personally requiring the returning officer to administer the oaths.

I discharge the summons and order that each party shall pay his own costs.

Summons discharged.

JONES v. GREER.

Special endorsement—Irregularity—Appearances—Signing judgment.

In actions on *guarantee* the writ of summons may be specially endorsed according to the provisions of sec. 41 C. L. P. Act. *Illusory* appearances (i.e., when an address is given which is not sufficiently definite) cannot be treated as a *nullity*, and must be set aside before any other step in the cause is taken. The address of a defendant appearing in person need not be stated in a separate memorandum if it sufficiently appears in the body of the appearance.

(May 12, 1857.)

This was an action, commenced by a *specially* endorsed writ, on an agreement under seal whereby the defendant covenanted that one Joseph Corby should pay the plaintiff the sum of £100.

On 28th March last the defendant entered an appearance in person in the following words: "The defendant Edward Greer appears in person" (signed) "Edward Greer of the Township of Leeds"; and judgment was signed two days after for want of an appearance for the amount specially endorsed on the writ.

An application was made to set aside this judgment as irregular on the following grounds:

1. It was signed for want of appearance, when an appearance had been entered.

2. Because no declaration had been filed or served.

3. Because the special endorsement on which it was signed was not good, (the action being on a guarantee.)

Jackson, contra, showed cause. The Common Law Procedure Act, section 63, directs, "That every appearance by a defendant in person shall give an address at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service, and if such address be not given the appearance shall not be received"; and rule 138 of the new rules made under this Act, directs that such address must not be more than two miles from the office of the clerk or deputy clerk of the Crown where the writ was sued out, and that if such memorandum be not left, or if such address or place be more than two miles from the said office then the opposite party shall be at liberty to proceed by sticking up all papers not requiring personal service in such office. Now the defendant has not complied with either of these regulations; he has left no *seperate memorandum* of his address whatever, as this rule of Court requires, nor does the statement in the appearance at all indicate any place where papers may be served, which is the object of the provision in the statute. Moreover the township of Leeds is, I suppose, about ten miles square, so that for all we know his place of residence may be much more than two miles from the office of the Deputy Clerk of the Crown. The statute directs that such appearances shall not be received, and the rule of Court alone referred to authorizes the plaintiff to proceed by sticking up in the office such papers as do not require personal service; therefore the plaintiff was entitled to treat this appearance as a nullity, and as the writ was specially endorsed, there were no further papers requiring service by sticking them up in the office or otherwise, and the plaintiff was right in signing judgment.

As to the special endorsement the defendant has not shown that the instrument sued on is a guarantee, and even if it were one of the very examples given by the statute of Special Endorsement is on a guarantee, and hence this endorsement must be perfectly good.

HAGARTY, J.—I consider this appearance is insufficient, though if the address of the defendant had been sufficiently stated in the appearance itself, I would hardly hold it a fatal objection that a separate memorandum was not filed, for the address is given for the information of the plaintiff that he may more conveniently serve his papers, and it can make but slight difference to him whether he receives this information from the appearance itself or from a separate memorandum filed with it. The safe course is to obey the directions and file the memorandum required—it may be irregular to omit doing so. I also think that the endorsement is quite regular and within the provisions of the statute, even though this instrument be exactly a guarantee, which does not appear to be the case, and that judgment might properly have been signed on it without filing or serving a declaration, if the plaintiff were entitled to treat this appearance as a nullity, and on this point, in my opinion, the whole questions turns.

It is true the statute expressly declares that appearances not conforming to its requirements shall not be received, but this appearance has been received and does give a kind of address of the defendant, though it is not sufficiently definite, in other words it is what the statute calls an *illusory* address, and notwithstanding the strong language of the statute and the still stronger language of the Rule of Court in that behalf, I am bound to think that as the statute in the latter part of the 63rd section makes express provision for cases where an *illusory* or fictitious address has been given; that the plaintiff was confined to the course then pointed out and had no right to treat this appearance as a nullity, but should have applied to a judge in Chambers to set aside the appearance, and for leave to proceed as in the statute directed.(a)

I must therefore set aside this judgment as irregular, but as the appearance is really bad, and as there has been some

(a) Har. C. L. P. Act. note u, to sec. 63.

delay on the part of the defendant I will set it aside without costs, the defendant having leave to amend his appearance on terms.

Summons absolute without costs.

DIVISION COURTS.

(Reports in relation to.)

Fourth Division Court for the County of Elgin—D. J. Hughes, Esq., Judge.

ARCHIBALD GRAHAM, JUNR., v. COUGHLIN LUMLEY, THOMAS MILLS AND ENOCH LUMLEY, (TRUSTEES OF SCHOOL SECTION No. 5, DUNWICH.)

This suit is brought to recover damages for the alleged illegal seizure and sale of a hog of the plaintiff by the defendants, under a warrant granted by Enoch Lumley and Caughlin Lumley, two of the defendants, as School Trustees of Section No. 5, in Dunwich, to one Thos. Mills, who is also a Trustee and Collector of the School Section duly appointed, authorizing and requiring Mills after 10 days to collect from various persons, whose names are set forth in a rate bill, various sums of money set opposite the name of each—and in default of payment on demand by any person rated, authorizing and requiring him (Mills) to levy the amount by distress and sale of the goods and chattels of the persons making default. In the rate bill is set forth that the rate is for school fees for the year 1853 in School Section No. 5 aforesaid, and Henry Lumley is therein rated for 6½d. on taxable property to the value of £2, amongst other persons therein set forth.

Various objections were taken to the plaintiff's right to recover on the part of the defendants, but they admitted the seizure of the hog and its value to be £2:

Objection 1st. That no notice of action was served on defendant.

2nd. That the defendants should have been sued as a corporation, and not as individuals.

3rd. Defendants justify the seizure as ... property of Lumley and admit that Graham (the plaintiff) had paid his school fees but that the hog, being found in the possession of Lumley, under 34, 35, and 36 sections of the General Assessment Act, 13 and 14 Vic., cap. 67, and the 2nd clause of the 12th sec. 13 and 14 Vic. cap. 48, they had a right to seize and sell it.

4th. That because the defendant, Mills, did not sign the warrant as a Trustee, (the two other Trustees only having signed it,) he, Mills, should be acquitted of any damages.

On the part of the plaintiff it was contended that, supposing Trustees have a right to seize and sell property in possession of a person liable to the rate, whether belonging to him or another. The Trustees in this instance had acted illegally, because they had not assessed or put an equal rate on the whole School Section, and that a portion of the section was altogether left out of the contribution.

I do not think it essential to recapitulate more of the evidence than bears on the points I have mentioned. As to the first objection the defendants urged I decided at the trial that a sufficient notice had been served upon the defendants, which was proven by the copy produced. As to the 2nd, I considered that the defendants are liable in their individual capacity for any tort they may commit, and that the fact of their possessing corporate powers protects them from being liable as individuals for the contracts they enter into, or from the consequences attendant upon any legal act they may perform or do within the scope of their authority; but that they are liable as individuals for any trespass they may commit, and their being members of a corporation does not shield them from being obnoxious to the action of any person who may prefer to prosecute them as individuals for a trespass or tort. As to the 3rd, I reserved my judgment for further consideration; and since referring to the clauses quoted, I find that the collector of these school rates has the same powers, by virtue of a warrant signed by a majority of the Trustees in collecting the school rate or subscription, and is to proceed in the same manner as ordinary collectors of county and township rates or assessments, &c.; and I find that county and township collectors have the power of levying rates by distress and sale of the goods and chattels of the party who ought to pay them, or of any goods or chattels in his possession, wherever the same may be found within the township, village, town or city, in which he is collector, and that no claim of property, lien, or privilege thereupon, or thereto, can be available to prevent the sale or payment of the taxes and costs out of the proceeds of the sale.

In this instance it appeared on evidence that the hog, the subject of the suit, had been sold some time previously to the seizure by Henry Lumley, (for the payment of whose taxes it was seized by the collector) to the plaintiff, and at the time of the seizure had strayed away from the plaintiff's farm to the premises of its former owner, and at the time of the seizure stood on the highway near his house. That Henry Lumley deceived the collector and tried to mislead him by first saying the hog was his, inducing Mills to seize it, and afterwards telling him it was *not* his—a course of conduct highly deceptive, dishonest and reprehensible. That the plaintiff himself informed the collector that it was his and not Lumley's, before it was sold,—and there was nothing like collusion between the plaintiff and Lumley to deceive the collector proven to have existed. I am therefore of opinion that the fact of the hog being found on the common highway would not justify the collector in seizing it, because it could not be viewed as then in the possession of Lumley, and that the statutes cited do not justify a seizure of the property of a third party under such circumstances. In this case the plaintiff is a third person, not liable in any way to have his property distrained, and in this case has a right to complain of an illegal seizure, although had collusion been proven, I should have decided differently, leaving the plaintiff to the consequences of his own deceit. As to the 4th objection or answer of the defendant, it appeared in evidence and by the admission of the defendant Mills, that he returned the money to the Trustees, and that he and those who signed the warrant disposed of the proceeds of the sale under it, and paid the teacher's salary out of the amount; and I therefore decided at the trial the defendant became a joint trespasser with the other Trustees by relation. It is unnecessary to decide the other questions, because the plaintiff is not concerned with them. It is therefore adjudged that the plaintiff do recover against the defendants two pounds; and it is ordered that the defendants do pay the same, with the costs of suit, to the clerk of the Court.

By the Supplementary Act of 1853, an appeal is given to the Chief Superintendent of Schools from decisions of the Division Courts in school matters to the Superior Courts of common law at Toronto, if made within one month; I therefore further order the entering of judgment to be delayed for one month, to give the defendants time to appeal from my decision: and, in the event of no such appeal being made, I do hereby order that judgment be forthwith entered for the amount so ordered to be paid after the end of the said month, with costs, to the plaintiff; and that the fee for hearing be increased and charged at ten shillings.

TO CORRESPONDENTS.

W. H. S., Burford.—Your letter has been received, but too late for notice in the present number.

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THE LAW JOURNAL.

MAY, 1857.

PRACTICE OF SUBPŒNAING COUNTY JUDGES.

The practice of subpœnaing Judges of the Superior Courts to produce their notes to prove what took place before them at a trial has long been discouraged; but we were not aware till lately that there had been any ruling in this country respecting County Judges. Our attention has been directed to the subject by a case which arose at the last Assizes for the County of Simcoe.

In an action of trespass (*Cole v. Ellison et al.*) *Judge Gowan* was called as a witness on the part of the plaintiff and answered, but at once addressed the presiding Judge, *Mr. Justice Burns*, stating that he had no knowledge of the facts in question but such as he derived in the course of a trial before him at the Quarter Sessions between the same parties on an Indictment for riot, and that he had reason to believe that he was called for the purpose of speaking in reference to the evidence taken before him on that trial. The plaintiff's Counsel, *Mr. McMichael*, at once admitted that such was the case. *Judge Gowan* protested against being called on to prove what had occurred before him as Chairman of the Sessions, on the ground of inconvenience both to the public and the Judge, and especially as any one who was present at the Court might as well be called to supply the evidence desired to be obtained from him. The Judge mentioned two cases in the County of Simcoe, in which he made a similar protest, which prevailed; one *Reg. v. Millady*, for forgery, before the *Hon. Chief Justice Draper*, to prove what took place on a trial in the Division Court; the other, *Switzer vs. Gilchrist*, which was an action on the case for maliciously suing out an Attachment from the Division Court, before the *Hon. Chief Justice Macaulay*.

The *Hon. Mr. Justice Burns* said he could not allow *Judge Gowan* to be called to prove what took place before him as a Judge—such a practice would be attended with great inconvenience—and that no peculiar necessity was urged in this cause; and *Judge Gowan* was not examined.

On looking at the practice in England we find two cases directly in point, and supporting the ruling of *Mr. Justice Burns*; *Florance v. Lawson*, an action on the case for a libel said to have been committed in a newspaper report of certain proceeding at Judges Chambers, was tried before *Lord Campbell*,—sittings at Westminster after Trinity Term, 1851. To prove what took place at Chambers it was proposed to call *Baron Platt*, the Judge before whom it took place. *Lord Campbell* said: "I shall not examine Mr. Baron Platt on such a subject." *Humfrey, Q. C.*, said he remembered several instances of Judges having been examined as witnesses. He instanced *Lord Cottingham*.

Lord Campbell said: "I shall not follow the example. I believe *Lord Cottingham* was examined "to say how far he had been influenced by a nod "from Counsel. No doubt there are cases in which "it would be necessary that the Judge should be "examined, but it would be very unseemly that "this should be done when the same facts could, "as in this case, be equally well proved by other "persons."

In principle there is no difference between a Judge of the Superior Courts sitting in Chambers and a County Judge acting as sole judge in a Division Court. Indeed in the case of *R. v. Amos*, in which it appeared that a Judge of an English County Court, (similar to our Division Courts) was requested to take down evidence, and declined doing so. He took down what he considered material, but wished "to guard against its being supposed that he took down the evidence in such a way that it could be used in an Indictment for perjury"; and *Lord Campbell* expressed his approval of the wish "to discourage a proceeding which

is highly reprehensible—that of summoning a Judge to prove a case of that sort": (*R. v. Amos*, Trinity Term, 1851.)

In another case the question came up before the late *Judge Talfourd*, at the Gloucester Assizes, (*R. v. Dalton*) and the same principle was affirmed. Dalton was indicted for perjury, committed in the County Court of Cheltenham; and when the case was called on *Mr. Francillon*, the Judge of the County Court said he had been subpœnaed to give evidence of what had passed at the trial before him, and thought it his duty to call attention to the circumstance. *Talfourd, J.*, observed: "There can be only one opinion on the subject. It would be most inconvenient to subpœna the Judge of the County Court for the purpose of supplying evidence which might equally well be given by any one else who was present: if such a practice were to grow up it would lead to great inconvenience, not only to the Judges but to the public—at the same time being aware that the learned Judge of the County Court had no objections to attend here as a witness. I have conferred with my brother *Patterson* on the subject, and we are of opinion that there is nothing in the law of evidence which would exempt the learned gentleman from obeying the subpœna, though it is plain that if through the pressure of his judicial business he had been unable to attend the Court would not issue an attachment against him."

As the County Judge was present, his evidence, it was stated, might be given, (*Mr. Francllon*, be it observed, had no objection to be examined) "but," added *Judge Talfourd*, "I had the entire "concurrence of my brother *Patterson* that this "must not be drawn into a precedent. *The very* "*same principle is as applicable to the Judge of the* "*Superior Courts as to the Judges of the County* "*Courts.* There is no principle that would apply "to *Mr. Francillon* that would not equally apply to "myself and my brother *Patterson.* It would be "most inconvenient if the Judges of the Superior "Courts or the County Courts were to be obliged "to attend in different parts of the kingdom, not "only in cases of perjury but in cases of new trial, "to produce their notes of the evidence given before "them; and if such a course were to be extensively practiced, it would be the duty of the Legislature to provide a remedy." Subsequently the County Court Judge stated that he had only taken notes of the evidence of plaintiff and defendant, but not of the other witnesses, "as he thought it more important to watch the demeanour of the witnesses than to take full notes of their evidence." Upon which *Cooke*, for the prosecution, said, "that in consequence of the intimation from his Lordship," and *Mr. Francillon* having no notes of the evidence, he would release him from attending.

With respect to notes, we believe it is not the practice, if we except two or three Judges, to take notes in the Division Court, and consistently with the prompt despatch of business on the Cause List, (perhaps 500 or 600 cases to be disposed of in a single day!) it seems scarcely possible to do so. Nor indeed does there seem in the generality of cases any occasion to do so; few minds can be advantageously applied at one and the same time to the facts and law of a case, and also to writing down evidence and then give a momentary decision. With respect to calling Judges as witnesses we take it the law may be thus stated. There is nothing to exempt Judges from the duty of obeying a subpœna, but the Courts will discourage the practice of calling them, and will not allow them to be examined to prove what took place before them, where the same evidence might be equally well given by any one else who was present.

A case in which the facts could not be proved by other persons as well a Judge is not at all likely to arise, so we may assume that practically Judges are exempt from being examined as witnesses or producing their notes to prove what took place before them.

THE COURT OF CHANCERY.

The Court of Chancery—yes, the words are written—words which make the timid quail and even the boldest to recoil. Somewhat frightened at our boldness, we venture to apply an eye to a chink in this mighty erection and take a brief glance at—shall we say like Blue Beard's room—the horrors within. No, we will not use so harsh a term, for unless able to view the whole it would be unfair to characterize the whole upon partial review. Our present purpose then is not to assail the Court as a distinct jurisdiction nor to cavil at the rules on

which it dispenses equity—but to direct attention to one or two points in procedure, and we challenge all and every to confute us if they can.

For the sake of argument then admitting the great fundamental principle of Equity-law and its general theory to be as nearly perfect as human law can be made, and admitting also that—since the introduction of the new rules at least—a suit can, where nothing occurs out of the usual course, be brought to a hearing as soon, or often sooner, than a suit at common law; and also admitting that in equity pleading some little technicality might be pardonable—for as pleading is the groundwork of the claim on the one side, and the defence or counter claim on the other, all the adverse party has to guide him as to what he has to prepare to oppose, and all the Court to guide them as to what is really contested, and consequently some degree of particularity and as much certainty as leaves no doubt as to what is meant, is absolutely necessary. We are willing not to complain on that head at least.

Admitting we say all this, yet in mere practice which relates to bringing questions or cases before the Court, the mode of introduction, as it were, which has nothing to do with the decision of the question or case at issue between the parties, or the mere carrying out in point of form or detail what the Court has already decreed in substance, *one is met at every step with some aimless or unnecessary clog or technicality*, which is merely a trouble to the practitioner, and *consequently an expense to the party litigant.* It has no practical value—it is not even the slightest guard to any right—and yet it must be followed with even more rigid exactness than in a Court of Law; for, note this ye outside Barbarians, if anything be omitted, all *has to be done over again.*

One consequence of this is to produce an extravagant and unnecessary dissimilarity between the Courts of Law and Equity. However long or short a time it may take to obtain the judgment of a Court of Law, when obtained it can *be acted on immediately* with little expense or trouble by suing out execution and placing it in the Sheriff's hands; while on the contrary, however long or short a time it may take to arrive at a judgment in Chancery, as a usual thing the *trouble and expense and technicalities only then begin.* This certainly is an evil not necessary—not incidental to the system.

Let us take a simple case for example, the very simple case of a decree for sale of mortgaged property; although there is no real dispute as to how much is due, and though all appears on the face of the mortgage, yet one delay must occur in getting the Master's report, then six months delay to allow the mortgagor time to look about and consider whether he will pay it—then setting before the Master a scheme and printed conditions of sale—then numerous printed advertisements and more time to advertise sale—then more difficulty in settling the conveyance to purchaser and getting the sale approved, besides purchasers being deterred—and more delay occasioned by allowing the sale after it is at last made to some one to be again opened by any one who will offer any larger amount before the conveyance is made—when the sale already had goes for nothing. How much better for all parties concerned would it be if, instead of as is the case at present with a not very large property, either using the greater part of it in such useless costs or applying a great portion of what would otherwise pay the creditor to such wanton expense—the decree was in the first instance that the place should be sold by a stated day at public sale to the highest bidder at credit or for cash, as the Court thought fit, unless the money was in the meantime paid—and let the time of sale be simply advertised in the *Canada Gazette* and some local papers.

Justice is in effect denied when it is delayed by procrastination and by an artificial and complicated procedure—and delays, and vexatious delays, do in fact occur in the Court.

One excuse is that the Court is pressed with business; another, that the subordinate officers delay more than they should. This last excuse admits of an easy remedy, the employment of none but efficient persons, who will do their duty, confining themselves exclusively to their own peculiar department.

The pressure of business might be entirely removed, and with great benefit to the country and to the profession at large, by giving the Master at Toronto, and the Deputy Masters throughout the country, jurisdiction over the more ordinary Cham-

ber practice, and making that practice less complicated, with a simple method of appeal from the Master's decision to the Court or a Judge. It might be by simply transferring the decision with the papers to the Court or Judge.

This would relieve the Court of a large branch of mere routine. Then instead of having the time of three Judges taken up in very simple matters, why not have, as in England, three Courts—say the Chancellors Court, Vice Chancellor Esten's Court, and Vice Chancellor Spragge's Court—in any of which the cases should be brought and decided with an appeal to the Court of Chancery in which the Chancellor and two Vice Chancellors should preside as at present. This would be an arrangement similar in principle to the practice at Common Law. Proceedings at the Assizes reviewed by the Court in Term—and would be productive of great practical benefits.

Each Judge acting in his own Court in matters admitting of momentary decision, could give *viva voce* judgments, as was done in the Court of Chancery before the Chancellor left, and with so much advantage to suitors.

It is quite evident if such a mode were adopted it would dispose of the routine business at least three times as quickly as it could be done at present, and the time of the Court of Chancery proper would not be occupied.

There are those who think the Court of Chancery "is unquestionably the inert and impassable obsta-"cle in the way of legal reform, and that until it is "either extinguished as a nuisance or vastly reform-"ed in its operations little good can be expected." And there are those again who think that the union of Law and Equity as has always been the case in the Scotch Courts is the *beau ideal* of a Court of Justice.

The *mode* of equitable jurisdiction as administered in Chancery is peculiar to England, and the application of that mode to a young country like Upper Canada was at least a questionable policy.

Some of the decisions certainly are startling in the extreme, and subtle refinements are perhaps too steadily traced up—but we must not venture on the general question now.

We have fearlessly pointed out defects which few practitioners would venture to drag into the light, though they are known and felt by all; and we have the satisfaction of feeling that if not openly applauded, the many who have been worried by needless delays and technicalities will secretly approve of our course.

Evils that are inherent are more likely to be tolerated than those which are extrinsic and not necessary to a system. We have started the subject: we challenge denial of our facts, and we court discussion upon our suggestions. If we receive the sustenance which may be reasonably expected from amongst the many honorable and able practitioners in the Court of Chancery—good; if not, we must trust to our own resources, and endeavor to strengthen our position or take a bolder course. One thing is certain, that the form of Equity should not be allowed to occupy one single inch of the ground which belongs to substantial justice. Upon that ground we take our stand: time will show if we are to occupy unsupported and alone.

UNANIMITY OF JURORS.

The tottering fragments of ancient rules and customs remind us that a mighty change is being wrought in the English system of Jurisprudence. The hand of law reform is plied unceasingly, with great, if not good results. Is trial by jury to be subjected to a visit from the hand which has little respect for usage, unless backed by common sense? Is that feature of trial by jury which requires unanimity of opinion, to pass the ordeal unscathed? It is for reason to pronounce the judgment, and for man to carry it into execution. The chief ground of defence in favour of the present system is its antiquity, an argument which, if unquestioned, would find us to day entangled with all the webs of feudalism. Our forefathers had fortitude to burst the bands of feudalism, because both necessity and reason drove them to that course. Necessity influences the greater part of men more than reason—but when both work together action is certain. The human race, taken as a whole, is decidedly progressive in all that appertains to its material welfare. That part of it to which we belong is pre-eminently so. The desire of the present age is for improvement in all the arts and sciences. Experiments are being made, ranking in magnitude from a transatlantic telegraph down to Mr. Smith's new method of manufacturing churns. Indeed the whole fabric of Society is in motion—each man

striving to better his social condition. Hence feelers are thrown out upon all sides, of which feelers not the least insignificant is, and has been, that for law reform. A community is naught else than man in the aggregate, and man is a strange combination of the go-ahead and the stand still. He would fain change everything, but withal is afraid of destroying what at present he enjoys. The idea of reform is thus governed and restrained by that of conservatism. It is the conflict of these two elements of man's nature which secures mankind against the evils of hasty legislation. But it is possible to reform a thing without destroying it; for the true idea of reform is preservation and improvement. In this sense we use the term, "Law Reform." Now, cannot we preserve trial by jury and yet improve it? This is the rub. Does any one in his sober senses think that our present system of trial by jury is perfection? If not perfect, wherein is it defective? It is defective in this, that it imputes perfection to jurors, contrary to the experience of all mankind. It requires every case submitted to the opinion of twelve men to be unanimously decided either affirmatively or negatively, and requires the decision so given to be according to truth in substance and in fact. It is known to judges, lawyers, witnesses, and jurors, that there a right and a wrong in every case which has two sides. It is known that a being of infinite knowledge might always discover the right and separate it from the wrong. But it is also known that jurors who are only men, are not beings of infinite knowledge. It is the limit to man's knowledge which upraises difficulties in the way of his discernment, even when anxiously and righteously investigating the way of truth. And yet one man may have more knowledge than another, either because of his ability, his industry, or his situation in life. And with reference to a case submitted for his decision because of his profession, calling, or other peculiar aptitude. But to affirm that twelve men *thrown together pellmell in a jurors' box*, are equally competent to decide right from wrong, is to affirm a proposition which universal experience and a very moderate knowledge of human nature emphatically denies. Wherefore we assert that to expect a unanimous and a just verdict from such men in every case, and under all circumstances, is simply to flatter humanity by contradicting experience.

If in a particular case these expectations cannot be realized, to follow up disappointment by discharging the jury and weighing down the parties with costs is to inflict a positive wrong upon one party or the other in the suit. One party may be right, and if so the other party must be wrong. To punish both equally is a display of hopeless weakness. If in *every* case a unanimous and a just verdict cannot be had, why not in *some* cases admit a majority verdict? Why not lock up the jury for a given time, and if unable to agree within that time, presume that some one juror is either obstinately stupid or egregiously dishonest? When jurors are locked up for a length of time, it is a common remark that one of the suitors must have a "friend" on the jury. In such a case to insist upon an unanimous verdict, is to obtain either no verdict or a corrupt one. Is it not more likely that eleven out of twelve men, selected because of impartiality, are right, than one out of the twelve? But no; as the law now stands the presumption is, that the one is as likely to be right as the eleven! This is a presumption the opposite to that which maintains in every deliberative assembly under the sun. All assemblies that we can call to mind, summoned together for purposes of deliberation, are governed by the majority system. What then is a jury but a deliberative assembly numbering twelve men? They are not locked up in a room to play pitch and toss: they are expected to reflect, to think, to deliberate. The best proof that they reflect is the fact of their difficulty in arriving at an unanimous verdict. Then of twelve reflecting men who differ because they reflect, why should not the opinion of the majority in this as in other deliberative assemblies, be the received opinion of the whole? Is the enjoyment of Mr. Brown's house of more importance to him than the enjoyment of life, liberty and property, to 3,000,000 of his fellow countrymen in Canada? In the aggregate we allow life, liberty and property, to be decided in Parliament by the majority system, but individually refuse in a Court of Justice to abide by that rule. The system is an antiquated anomaly as insupportable as it is senile. Who ever thinks of requiring an unanimous award from three arbitrators in the event of a difference of opinion? Who ever thinks of requiring an unanimous judgment from three judges in the Court of Queen's Bench, Common Pleas, or Chancery, when

there is a difference of opinion? To indulge such an expectation would be to form a very low estimate of the morality and integrity of the individual judges. Why three judges in each of our three Superior Courts, and nine in the Court of Appeal? It is because a difference of opinion may arise in which even the opinions of the majority will be taken as the judgment of the Court. In the Court of Appeal the decision of five against four is the decision of the Court. In the remaining Courts, that of two against one. Now let us ask, are jurymen better able to reason and reflect than judges, chosen because of tried ability, so that while we demand unanimity from the one class of men we are contented with a majority decision from the other? Notoriously such is not the fact. Then why not have a change? The answer is that the element of conservatism keeps down the element of reform. Instead of boldness and decision there is fear and trembling. To satisfy all, even the most apprehensive, the change might be brought about gradually and imperceptibly, as a man ventures he knows not where. Only let us move forward and the light of knowledge will shine upon us—with knowledge, confidence—with knowledge and confidence, true progress. Let us retrace our steps instantly, if we encounter dangers which cannot be overcome, and which if not overcome will be at all injurious.

We would propose as follows:—

1st. That in criminal cases verdict should be unanimous, as at present.

2nd. That in civil cases *if possible* the verdict should be unanimous.

3rd. That if after being locked up for twelve hours the jurors cannot agree, then that the verdict of a two-thirds majority be the verdict of the jury.

In this proposal we essay nothing rashly. The substance of our propositions are the same as that of the Common Law Commissioners, who in 1831, after the expenditure of much thought, concluded as follows:

"We propose that the jury shall not be kept in deliberation longer than twelve hours, unless at the end of that period they unanimously concur to apply for further time, which in that case shall be granted, and that at the end of such twelve hours or such prolonged time for deliberation, if any nine out of them concur in giving a verdict, such verdict shall be entered on record, and shall entitle the party in whose favor it is given to judgment; and in failure of such concurrence the cause shall be made a remanet."—*Communicated.*

We give the above well written article, not as endorsing the views of the writer, but because he speaks the sentiments of a respectable body of thinking men within and outside of the profession: the subject is one of great importance to every member of the community, and no change should be made except upon grave consideration.

Averse to change except upon urgent necessity, yet we must in candour admit evils in the present jury system, and that they are becoming more formidable every year since the duty of selection was taken from Sheriffs and transferred, to the most part, to the ballot box. At every Court men are found acting who are wholly unfit for the task imposed by law upon them as jurors, and as a natural result verdicts are so uncertain and capricious that no sane lawyer would hazard a decided opinion upon the result of a case to be decided by jury.

This evil, one striking at the root of the administration of justice, needs some remedy; what that remedy should be, neither the profession nor the public are united upon. Some propose altogether abolishing trial by jury as only fit for a very primitive state of society, where no cases arise but such as are mere questions of damages, and they say that trial by jury never can be properly adapted to an intricate system of law like that of real property, or in relation to commercial transactions; others are for partial abolishment in all cases except where the Government is a party interested or where the opposite party demands a jury: others again think that juries ought not to be abolished but should be composed of persons better adapted than those now usually obtained for the disposal of the business brought before them; while another class of persons see with the writer of the foregoing article, a cure by changing the unanimous finding into a majority one.

With none of these do we agree. We would retain the trial by jury and the unanimous verdict, but we would secure the services of *the best men* to serve on juries,—and extend the principles of the Common Law Procedure Act so as *positively to withdraw* from jurors cases which experience has proved cannot be well and satisfactorily decided on a *Nisi Prius* trial.

In the preceding article we believe the reasoning unsound in some particulars; for instance, in the assumed analogy between the Houses of Parliament,

the Superior Courts, and the jury tribunal: the suggestions also are open to objections, but we have not space at this time to enter into the discussion, and would in any case prefer eliciting the well considered opinion of others in the first instance. We have however come to the deliberate conclusion that Mr. Baldwin's jury scheme, fair in theory in its practical application, has proved an entire failure; that the first wheels are defective, and operate consequently to destroy the value of the whole machine; and moreover that it was modelled on a principle which in its provisions it essentially ignores. The principle was *distrust!* distrust in an individual officer, one permanent and responsible, deliberately chosen by the Crown. The palpable repudiation of this principle was the delegation to an everchanging body of totally irresponsible persons—persons out of the reach of public opinion and independent of the Crown—of a duty requiring not only honesty and care, but trained intelligence for its right discharge.

Herein we believe is the great fundamental error which has given rise to many existing evils, and unless some cure be applied even what is good and excellent in the jury system will be wasted by degrees under the pressure of internal malady.

THE NON-POLITICAL CHARACTER OF LEGAL PERIODICALS.

The only safe rule for the Conductors of a Legal Periodical is—Editorially, no politics. Following the course of the Law publications at home, *The Law Journal* was commenced on that basis, and it has been uniformly preserved. In the *Law Times* of the 11th April last, the position of law journal is clearly put thus: As lawyers we have no politics, as lawyers our business is only to watch the law while it is being made, with design to make it as perfect as possible, and then to interpret it, after it is made. The *Law Times* is of no party; it knows no party, and supports none; cares not what ministers are out or in; asks not whence any measure comes—regards only the measure itself—and endeavors, with what success its readers must say, to look at it and treat it from the legal point of view, and that only.

One of the admirable results of legal education is, that it trains men to the discussion of all kinds of topics upon their own merits without importing their own passions into the conflict. Hence it is that the legal mind can more readily arrive at truth than others who cannot so readily pass, as it were, out of themselves, and can look at things only from their own point of view. As usual when you cannot share a man's notions and prejudices, he calls you insincere, and protests that you have no opinion at all. In this he is wrong. You can see more clearly than he can; *you* look at both sides of the question when *he* looks but at one, and consequently yours will be the sounder judgment.

BOOK NOTICE.

THE CANADA EDUCATIONAL DIRECTORY AND CALENDAR FOR 1857-8: *Containing an Account of the Schools, Colleges, and Universities—the Professions—Scientific and Literary Institutions—Decisions of the Courts on School Questions, &c. Edited by* THOMAS HODGINS, *B. A. Univ. Col., Toronto. Publishers—Maclear & Co., Toronto.*

This is a useful publication, and one in which a mass of information, not easily attainable, is aptly included. The List of Local Superintendents of Common Schools throughout the Upper Province will be most useful to County and Municipal Township Officials, as well as the Decisions of the Superior Courts on School Questions. As a hand-book of the educational institutions of the country, it will be interesting to the general reader. The Editor has performed his task with efficiency, and the work is altogether creditably got up. Its very low price (1s. 3d. cy.) should ensure a large circulation. If it were only for the value of the Decisions collected at the end of it, School Trustees should possess themselves of the Manual.

CORRESPONDENCE.

BEAMSVILLE P.O., May 25, 1857.

To the Editors of the U. C. Law Journal:

SIRS,—Has a man a right to vote in more than one School Section? If he holds freehold in three different sections in one Township, can he vote and take part in each section at the same time?

In regard to Union Schools, has the Council full power to alter the boundaries of the section, so far as the Township is concerned, without any reference to the Reeve and Superintendent of the adjoining Township?

An early answer to the above questions will much oblige

Your obedient servant,
JOHN S. WALKER,
Reeve of Township of Clinton.

[*Query* 1.—Every freeholder or householder has a right to vote in a School Section, wherein he has the necessary qualification. The declaration required on challenge at a School Election is, that declarant is a freeholder or householder in such section. Residence is not mentioned in any part of the Act as a requisite of a voter.

Query 2.—The Township Council has no such power: 13 and 14 Vic., cap. 48, sec. 18, subsec. 4, states explicitly that Union School Sections may be formed and altered by the Reeves and Local Superintendent, out of parts of which such sections are proposed to be formed at a meeting appointed for that purpose by any two of such Town Reeves.

In *Re Ley and the Municipality of Clarke*, 13 Q.B.R. 433, the Chief Justice in his judgment made the following observations: "It is further objected that the Municipal Council had not the power of altering the boundaries of a Union School Section. . . . . .

This objection, appears to us, entitled to prevail; for under the latter part of the 18th clause (13 & 14 Vic., cap. 48,) it is to the Reeves and Local Superintendents of the two townships that the jurisdiction is given to form or alter Union School Sections consisting of parts of different Townships, and the Township Council of either Township are precluded from exercising a power of that kind."

Our Correspondent may find the case from which the above quotation is made, reported in the *Law Journal*, volume 2, page 106.—Eds. L. J.]

LEGAL OBITUARY.

Setting of a great Legal Luminary.—The *Boston Evening Transcript*, of Saturday May the 2nd, brought to us the intelligence of the sudden death of our fellow citizen, Joseph K. Angell, Esquire. He had gone to Boston on Friday noon to give his personal attention to a new law book which he had been preparing on the "Law of Highways," and which is now passing through the press of Messrs. Little & Brown. The *Transcript* states that "he was taken ill in the afternoon, and carried to the Massachusetts General Hospital," where he died of apoplexy on Friday evening. Mr. Angell was born in Providence, April 30th, 1794, being a lineal descendant of John Angell, one of the earliest settlers of the town, and at the time of his death he had just entered upon the sixty-fourth year of his age. Though we believe he never engaged in the practice of his profession, he was exceedingly fond of jurisprudence as a study: for many of its investigations his mind was singularly fitted, and in several special branches of the science he had made large acquisitions. He was Editor of the *United States Law Intelligencer and Review* from 1829 to 1831, and also for several years reporter to the Supreme Court of this State, being the first who received that appointment, and the editor of the earliest volume of the Rhode Island Reports. As a legal writer, Mr. Angell has acquired a wide and enduring reputation, and as such his name is honourably known, not only throughout the United States, but also in Great Britain, where, as we have had the opportunity to know, his works have repeatedly received the most flattering commendations. The subjects which he has treated are all of unusual practical importance, and the selection of such subjects is of itself a favorable indication of the cast of his mind and the character of his judgment. His published works, so well as we can now recall them, relate to the "Law of Water-courses," the "Law of Tide-waters," the "Law of Private Corporations," the "Limitations of Actions at Law and in Equity and Admiralty," the "Law of Carriers," and the "Law of Fire and Life Insurance." These are the honorable achievements of his life, and what is no common proof of success for any writer, each of them on its first publication has immediately become an authority and taken a high position in the legal literature of the age. Of the treatises we have named above, that on "Water-courses" was first published in 1824, and has passed through four editions; that on "Tide-waters" was published, we believe, in 1829, and it passed to a second edition in 1847. The work on Corporations, in the preparation of which he was associated with Hon. Samuel Ames, the present Chief Justice of the State, was first published in 1822, and has passed through five editions; that on "Limitations" first appeared in 1839, and had reached a third edition in 1854; the excellent treatise on the "Law of Carriers by Land and Sea," in many respects the most widely useful of his works, was first published in 1849; the first edition being soon exhausted, a second was issued in 1851, and a third has already passed through the press, and is on the eve of publication by Messrs. Little & Brown, of Boston. His latest published work is that on the "Law of Fire and Life Insurance," which was issued in 1854, and was received with such favour that a second edition was demanded and made its appearance within a year from the date of the first. We have already referred to the high estimation in which these works of Mr. Angell are held by the members of the legal profession. We have repeatedly heard gentlemen of eminent legal and judicial position, both in this State and in Massachusetts, express the opinion that, after Story and Kent, no common law writer is so widely known or so highly respected. Lord Brougham also, while Lord Chancellor of England, pronounced his treatise on the "Limitations of Actions" to be "much the best treatise on that important subject in the English language." His fame is thus not only an honour to his native State, but forms no inconsiderable item in the judicial reputation of the country.—*Providence Journal, May 4th.*

Obituary.—It is our melancholy duty to record the death of John Scott, Esquire, late Judge of the County Court of the Counties of Huron and Bruce, and at one time the Parliamentary Representative of this city. He died at New York on the 1st May, in the thirty-fifth year of his age. His body was brought here, and interred at Hull on Thursday last. He had many warm friends in this vicinity, who will hear with grief of his early decease.—*Ottawa Citizen.*

Obituary.—On Monday night the Bar of New York sustained an irreparable loss, in the death of the Hon. Thomas Oakley, Chief Justice of the Superior Court, the bench of which he had adorned by his industry and learning for twenty-nine years. He was born in 1783, in Duchess County, and had been elected twice to the State Legislature, twice to Congress, and had held the office of Attorney General of the State prior to his elevation to the Bench

APPOINTMENTS TO OFFICE, &c.

ASSOCIATE CORONERS.

MICHAEL FLANAGHAN, Esquire, to be an Associate Coroner for the city of Kingston.—(Gazetted Feb. 7, 1857.)

ROBERT BYRNS, of Morpeth, Esquire, M.D., to be an Associate Coroner for the County of Kent.—(Gazetted Feb. 21, 1857.)

JOHN GEORGE GREY, of Penetangore, Esq., M. D., to be an Associate Coroner for the united counties of Huron & Bruce.—(Gazetted March 7, 1857.)

ROBERT WILLIAM EVANS, Esquires, M.D., to be an Associate Coroner for the united counties of Leeds and Grenville; and, CHARLES GREAN, Esquire, to be an Associate Coroner for the county of Hastings.—(Gazetted March 14, 1857.)

JOHN R. DICKSON, Esq., M.D., and CRAWFORD W. P. De L'ARMITAGE Esquire, to be Associate Coroners for the city of Kingston.—(Gazetted March 28, 1857.)

HENRY C. MERRYWEATHER, Esquire, M.D., to be an Associate Coroner for the county of Halton.—(Gazetted March 28, 1857.)

THOMAS JOHNSTON, Esquire, to be an Associate Coroner for the county of Carleton.—(Gazetted April 4, 1857.)

DUNCAN CAMPBELL, M.D., ROBERT M. WILSON, M.D., and ANGUS COOK, Esquires, to be Associate Coroners for the county of Lincoln.—(Gazetted April 4, 1857.)

WILLIAM BETTRIDGE, Esquire, M.B. and M. A. to be an Associate Coroner for the county of Middlesex.

JOHN R ARDAGH, M.D., and PETER CLELAND, Esquires, to be Associate Coroners for the county of Simcoe.—(Gazetted April 11, 1858.)

GEORGE E. BALL, Esquire, to be an Associate Coroner for the county of Hastings.—(Gazetted April 11, 1857.)

NOTARIES PUBLIC.

JOSEPH MILES, of the village of Florence, in the county of Kent, gentleman to be a Notary Public in Upper Canada.—(Gazetted Feb. 14, 1857.)

ALFRED FRANCIS WRIGHT, of Toronto, Esquire, Barrister and Attorney-at-Law, and ROBERT RUSSELL LOXCOMBE, of Bowmanville, Esquire, Attorney-at-Law, to be Notaries Public in Upper Canada.—(Gazetted Feb. 28, 1857.)

WILLIAM THOMAS BOYD, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada.—(Gazetted March 14, 1857.)

ROBERT REVEL, of Woodstock, Esquire, to be a Notary Public for Upper Canada.—(Gazetted 27th March, 1857.)

JAMES BARR, of the Township of North Norwich, Gentleman, to be a Notary Public in Upper Canada.—(Gazetted 11th April, 1857.)

ARCHIBALD J. KEILER, of the Township of Mornington, JOHN J. VOLLEKER, of Sebastopol, County of Bruce, and JAMES BENSON, of the Co. of Bruce, Gentleman, to be Notaries Public in U.C.—(Gazetted April 25th.

CLERK OF THE PEACE.

JOHN M. LAWDER, of Niagara, Esquire, to be Clerk of the Peace for the County of Lincoln, in the room of J. A. Woodruff, Esq., resigned.—(Gazetted 2nd May, 1857.)