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DIVISION COURTS.

OFFICERS AND SUITORS.

Clerks.—The Clerks of Division Courts, conveniently distributed as it were over Upper Canada, and being generally men of education, integrity and ability, conversant too, to some extent, with legal proceedings, present a machinery complete in all its ramifications for carrying out the provisions of any law needing local management.

The manifest tendency of legislation, of late years, has been towards decentralisation, until justice has now been brought almost literally to every man's door. And as the work of decentralisation proceeds, the officers of Division Courts, it is apparent, will be called upon to bear a portion of the burthen of it, at all events for a time.

The great barrier to the extension of local administration has ever been the difficulty in finding the requisite number of agents to carry it into effect—agents both capable and trustworthy. The proper selection of a requisite number of subordinate agents all over the country can never be satisfactorily made by the central power. It is otherwise where the power of selection is delegated to a responsible functionary resident in each county, who is placed in an independent position and beyond the reach of irregular influences. Now, the body of Division Court officers being selected by the local Judge, acting in most cases upon actual personal knowledge, are men of superior caste, and such men are more solicitous to receive an appointment of the kind when proceeding from such a source and made upon principles having reference solely to the fitness of the officer. A tenure also under such circumstances is more certain and satisfactory.

In several Counties we are acquainted with Clerks taken exclusively from amongst the *most* intelligent class; indeed, in the Courts we are most familiar with, *Simcoe*, with two exceptions, the Clerks are Magistrates or Reeves, in some cases both, and include the Warden of the County.

The natural result of all this is, that throughout Upper Canada, with some few exceptions, the public are well served; and they and their servants in the Legislature, in any new local work to be performed, will first think of Clerks of Division Courts as the very best persons to do it.

This was the case last Session, and a valuable provision in the Law of Debtor and Creditor, which operated injuriously in some particulars, has been greatly modified and improved by making Division Court Clerks in certain cases sub-officers as it were of the Superior Courts.

The act of last session, chap. 58, sec. 4, contains the provision to which we refer.

We propose to notice it briefly, with a view to informing Clerks to some extent upon this new duty cast upon them.

According to our custom, these remarks shall be as much as possible divested of technicality.

A word on the Law of Attachment of Debts due to Judgment Debtors.

To remedy a defect in the law, a provision was made in 1856, under which a party obtaining judgment against another could seize the *debts* due to the latter, and compel payment thereof to himself, in order to obtain the fruits of his judgment. This most advantageous provision enabled judgment creditors to recover their demands in cases where there were no goods or other tangible property to seize; but the judgment debtor had, nevertheless, debts due to him from third parties, which were made available to the original creditor. So soon as it was discovered, by examination of the debtor or otherwise, that certain persons were indebted to him, they were called upon, by order of a Judge, to appear before him and either admit or deny the debt. If they admitted it, an order of the Superior Courts was made upon them to pay it. If they denied it, a proceeding was had still in the Superior Courts to determine the matter.

This, so far as debts of a large amount were concerned, operated well enough, but where the debts were of small amount—five, ten, or twenty pounds—it operated most harshly. The person owing the judgment debtor could only be proceeded against by *him* in the locality and through the Division Courts for recovery of the amount claimed, or the determination of any difficulty respecting it; whereas, under the law spoken of, the *judgment creditor* could call the debtors of *his* judgment debtor before the Judge of the Superior Courts, or a County Judge at the County Town, and take subsequent proceedings in some of the Superior Courts, and thus great and needless expense and loss of time were incurred.

The remedy by the late Act is this: parties have only to appear *before the Division Court Clerk in their own Division*, and admit or deny the debt; if they deny it, *the proceeding to* enforce it or determine the justice of the claim is through the Division Courts.

Duties of Division Court Clerks under the 4th Section of the County Courts' Amendment Act, 1857.

Before proceeding further, it may be necessary for the better understanding of the matter, to give the substance of the enactments.

A Judge of the Superior Courts, or County Courts, on the application of a creditor who has obtained judgment against a debtor, may order that any debts due to him from a third party (such third party being technically known as the *Garnishee*) shall be attached to answer the judgment, and may order that the *Garnishee* (when the amount claimed from such *Garnishee* is within the jurisdiction of a Division Court) shall appear before the Clerk of the Division Court within whose Division the *Garnishee* resides, at his office, at some day to be appointed in the said order by the Judge, for the purpose of ascertaining whether he, the *Garnishee* denies or admits the debt, and to give him an opportunity of paying it, if so minded, without further trouble.

[Having reached our assigned limits, the continuation of this article is *postponed till next number.*]

BAILIFFS.

Duties of, acting under Executions—Provisions of a late Act.

Our attention has been requested to a provision "in the Common Law Procedure Act, 1857," and as it is most important that Bailiffs should have early intimation of it, we think it preferable to omit the portion of the serial article—the *Bailiffs' Manual*—for this number, in order to insert this information.

Section 24 of the Act referred to is as follows:—

"Where a writ against the goods of a party has issued from either of the said Courts, or from any County Court, and a warrant of execution against the goods of the same party has issued from the Division Court, the right to the goods seized shall be determined by the priority of the time of the delivery of the writ to the Sheriff to be executed, or of the warrant to the Bailiff of the said Division Court to be executed; and the Sheriff, on demand, shall, by writing signed by him or his deputy, or any clerk in his office, inform the Bailiff of the precise time of such delivery of the writ, and the Bailiff, on demand, shall shew his warrant to any Sheriff's officer; and such writing purporting to be so signed, and the endorsement on the warrant showing the precise time of the delivery of the same to such Bailiff, shall respectively be sufficient justification to any Bailiff or Sheriff acting thereon".

This enactment is to determine the question of priority where there are executions from the Superior Courts in the Sheriff's hands, and also executions from a Division Court in the Bailiff's hands, to be executed against the same defendant. There could be no difficulty in cases where there were several writs from a Division Court in the Bailiff's hands; he would of course seize under the first. But as the goods are held from the time an execution is delivered to the officer entrusted with the execution of it, questions of considerable difficulty might arise but for this provision. The substance of it is to place executions from all Courts on a common footing, and that executions from the Superior Courts shall have no precedence over executions from the Division Courts, but priority of time is to govern in all cases.

Now, as *the time of the delivery of the writ or warrant* to the proper officer *to be executed* is the criterion by which to determine the *right to the goods*, the first consideration that presents itself is the evidence by which this time of delivery is to be made appear. The direct, if not the best evidence of this, in respect to a Division Court execution, is the endorsement on the warrant, which should of course agree with the entry in the Clerk's books.

The author of the *Bailiffs' Manual*, speaking of executions from the Division Courts only, says:—"The day when received should be endorsed by the Bailiff on the execution, and if there be more than one against the same defendant the *hour* of receipt should be stated on each, to show the order in which the executions came into his hands."—(*L. J., Vol. 2, page* 202.) The enactment under consideration renders the performance of this duty more necessary, and calls for greater care and further precision, and both Clerk and Bailiff should be careful to make the proper entry.

In every case in which a Clerk issues execution to a Bailiff he should enter the day and *hour* he issues it, and the name of the Bailiff, if there be more than one for the Court, to whom it is delivered; and such Bailiff should, before he leaves the Clerk's office, make an endorsement on the execution, stating in words at length—it will be preferable to figures—the day and the *hour* when he received such warrant to be executed, and should sign such endorsement.

The endorsement may be in the following form:—

*On this twentieth day of August, A.D. 1857, at ——— o'clock in the ——noon, this Warrant was delivered to me to be executed by the Clerk of ——— Division Court of the County of ———, at his office in the Township of———.

Witness my hand,

———

Bailiff of the said Court.

Officers should bear in mind, that if by "any neglect or omission" the plaintiff is delayed, or loses the benefit of his execution, the officer in default will be responsible to him in damages.

(*To be concluded in our next.*)

SUITORS.

Punishment of Fraudulent Debtors—the "Judgment Summons" Clause in the Division Courts' Act.

Although what are commonly called the Judgment Summons Clauses have been in force in the Division Courts since January, 1851, their object and scope seem to be but imperfectly understood by the general run of suitors. No doubt, tens of thousands of pounds have been collected under their pressure that would never otherwise have been obtained, but their whole

* This endorsement could be easily printed in blank on the writs of execution.

and legitimate use are yet but imperfectly understood. It will be our aim in this, and one or two succeeding numbers, to explain their objects, uses, and the proper and most efficient mode of carrying them into effect.

The powers given by the 91st and subsequent sections of the Division Courts Act, are for the discovery of property fraudulently concealed or withheld by a judgment debtor—the enforcement of satisfaction by the debtor—and the punishment of fraud. The Hon. Mr. Justice Burns, in a very valuable letter published in 1847, on Division Courts, thus urged the necessity of giving such powers:—

"The want of such a power in the country has been felt as a real grievance by a large portion of the community. It is true that the power to punish for fraud in certain cases was provided for by the 8th section Stat. 5, Wm. IV., and some convictions have taken place under that Act, but the provision falls far short of what is necessary to discover the truth, and affords no remedy whatever to the creditor as to the matters complained of; the whole of the circumstances of the fraud must be proved by other than the testimony of the party; for unless the defendant seek the protection or indulgence afforded him by different statutes providing for such, no power is given to ask him a single question about his property. Creditors feel that the Act is almost a dead letter, for when property is to be made away with, concealed, &c., the intent constitutes the crime, and that intent, unless the parties wished to run into the meshes of the law with their eyes open as to the consequences, would be confined as much as possible to the immediate parties concerned, who could not be examined as witnesses against each other, for as both are rendered liable to misdemeanor, neither would be bound to criminate himself.

The small creditor would find, were he to proceed under this Act, that it would cost him to follow up the tedious and troublesome remedy by indictment more than any benefit he would derive; besides in case of failure exposing himself to a malicious prosecution, in a case too, where, if the defendant could have been interrogated as provided for by the Act, the creditor might triumphantly have succeeded in punishing the party, and might have made such discovery as would have led to the ultimate payment of his debt."

And Judge Gowan, in an address at one of his Courts, immediately after the provision came into force (1st February, 1851), which was published at the time, thus refers to the subject in connection with what had been said previously by Judge Burns:—

"The learned Judge (Burns) wrote in 1847; since then the evil has been on the increase. Various fraudulent acts have been resorted to by unprincipled debtors to get rid of honest debts, and so universal has it become that from the contagion of example unthinking, short-sighted people have, with a view merely to gain time or bring a creditor to accept "payment in stock," or the like, "put their property out of their hands," as the common phrase is.

"The ability to elude detection, from the defective state of the law, fostered this system of fraud, although parties often found, with all their ingenuity—for "honesty is the best policy"—that even a harsh creditor is better to deal with than a false friend. Add to this, the credit system is very general in this country, and improvident persons are often allured by the facility for obtaining credit to purchase articles not absolutely needed, and for payment anticipate the produce of a crop even before the grain is in the ground.

"This new provision will be a brain blow to fraudulent practices, and will also be some check on persons about to contract debts who have no reasonable certainty of being able to discharge them afterwards.

"The powers given are for the discovery of the property withheld or concealed, and for the enforcement of such satisfaction as the debtor may be able to give, and for the punishment of fraud.

"The last is by no means to be understood as imprisonment for the debt due. Under the Statute, a debtor cannot be imprisoned at the pleasure of the creditor merely, without public examination by the Court, to ascertain if grounds for it exist in the deceitfulness, extravagance, or fraud of a debtor. The man willing to give up his property to his creditors, ready to submit his affairs to inspection, and who has acted honestly in a transaction, although he may be unable to meet his engagements, has nothing to fear from the operation of this law. It is the party who has been guilty of fraud in contracting the debt, or by not afterwards applying the means in his power towards liquidating it, or in secreting or covering his effects from his creditors, upon whom the law looks as a criminal and surrounds with danger."

Thus much with regard to the objects of these clauses so well put by learned Judges intimately acquainted with the subject.

The 91st Section enables any person having an unsatisfied judgment in a Division Court to summon the party against whom he has obtained judgment to appear before the Judge at a sittings of the Court, when he may be subjected to examination *upon oath*, on all or any of the following matters:—

COTEMPORARY LITERATURE.

THE MARRIED WOMAN QUESTION.

There are few subjects connected with the improvement of our jurisprudence, which have excited a more lively and a more general interest than the glaring imperfection of the law respecting married women. The unequal measure of justice dealt out to the husband and wife, in almost every particular, had long been matter of complaint; but, within the last two or three years, partly from accidental circumstances, and partly from friends of law amendment having directed their attention to the necessity of singling out the more gross instances of injustice—it may be said oppression—and consulting how far these might be met by practical and practicable remedies, the public mind has been directed to the two points of most importance, and to these alone; but with a concurrence of opinion exceedingly general, and with unprecedented earnestness. These points are, the state of the law or rather of its practice touching divorce, and the matters connected with it, and the law touching the property of married women. That some material change must be made in the half-judicial, half-legislative procedure by which a dissolution of the marriage tie is effected appears now inevitable; although it is far from probable that any measure will, at least in the first instance, be carried, which shall meet the exigency of the case, by placing both sexes and all classes of the community upon an equal footing, and by substituting a penal enactment for the admitted opprobrium of our law, the action of criminal conversation. But we purpose at present to point the attention of our readers towards the other great subject of

complaint, the denial of all rights of property to married women who are not protected by settlements. This subject has powerfully drawn the attention of the public, since the great petition of above 2000 women was presented to both Houses of Parliament, by Lord Brougham in the Lords, and Sir Erskine Perry in the Commons. A meeting very numerously attended was holden in the month of June; and it plainly appeared, both from the declarations of public men of various parties, among others Sir John Pakington, who presided, and from the proceedings of the Law Amendment Society, that immediate attention must be given to the strongly expressed wishes of the community.

The Society referred the subject to a committee, which entered into a full and comprehensive examination of it in all its relations, and received important information respecting the law of foreign countries. The law of France has since been very fully investigated by Mr. Macqueen, who repaired to Paris for the purpose of obtaining accurate information respecting its provisions and their practical operation; his principal object being to throw light upon the subject of separation and divorce, when the Report should come under consideration of Parliament, from the commission of which he had been secretary. The House of Lords ordered his paper to be printed, and it is found to contain very important information also upon the rights of married women as to property. The Committee of the Society was probably possessed of a portion at least of this information, and certainly had access to all the particulars of the changes in the English law, which have been adopted by the greater number of the American States Upon these materials, and especially after a mature consideration of the manner in which the new system works in the most important of these communities, the report was framed, and a bill carefully prepared; which Lord Brougham so far approved as to present early in February to the House of Lords, explaining its principles, and showing the necessity of some such amendment of our law, in a speech already in the hands of our readers.

It must, however, be remarked, that both the argument of the speech, and the resolutions which were moved as introductory to the bill itself, are by no means confined to the provisions of the measure as the only remedy for the evils complained of. That these provisions would prove the most effectual remedy may possibly be admitted. But if we consider for a moment what is the great practical evil, we shall be satisfied that something far short of the bill may be sufficient. It was not easy either for the Society or for Lord Brougham, who had the year before presented the great petition, proceeding from all classes of married women, to confine their attention to the hardships endured by one particular class, although these are the most crying by far of the grievances denounced. The hardship may be great of a dissolute husband taking possession of property given to his wife by bequest or donation, and leaving her in distress. But this is not only a more rare case, because of the general disposition to control the husband by the terms of the gift; it is a much less hard case than that of a wife, earning by her skill and her industry that which she has by law no right to call her own, and which may, at any moment, be carried off by the man who has deserted her, or who, continuing to live with her, yet leads an idle and dissolute life, supported by her gains, while he leaves her and her children in want. The most striking examples of this were laid before the meeting to which we have alluded:—One respectable manufacturer, who employed for a many years a great number of young women at considerable wages, from 20s. to 30s., and some as high as 40s. a week, declared that this had the effect of attracting husbands who, in very many cases, proved idle and dissolute, living upon the poor women's earnings, and leaving them and their children in want. He gave a detailed account of these instances, specifying the professions and trades of the men. But the Society's committee had evidence respecting persons in a still humbler rank; women labouring in the manufacturing districts of Yorkshire and Lancashire. It appeared that you had only to approach the premises of any spinner or weaver on a Saturday night, to be convinced of the control exercised by the husbands, and the futility of the objections made against giving the wife some right to her own earnings, on the ground of the domestic dissension which might be the result. Enough of that is apparent when the wife comes from the pay-table, and is seized by the husband to compel a surrender of her week's wages. They who have constantly witnessed these scenes, affirm that there is little risk of greater jars being occasioned by the proposed mitigation of the husband's rights. We may here only stop to note, that although the woman's petition was signed by persons well known in the world of letters and of arts, and although Lord Brougham adorns his statements by naming the "Linwoods, whose needle rivals the pencil of the Kaufmans," the real practical greivance in plain terms is that of the ordinary working class—that class to which the evidence before the meeting and before the committee refers, as we have now briefly stated it.

Now, in dealing with this grievance and devising a remedy fit to remove it, two courses were manifestly open; one was suggested at the meeting by Mr. Commissioner Hill, with a singularly happy allusion to the law of succession; that, as where a party neglects to make a will, or elects to die intestate, the law makes a will for him; so, where parties are married without a settlement, the wife should be regarded as a *feme sole* in respect of both former and after acquired property, of course protecting the husband against her debts whether contracted before or since the coverture, the support of the children resting upon both parties in the case of the wife having separate funds. The objections made to this plan are answered in the committee's report by referring to the actual expense of the United States: in the greater number, it has for many years been the law of the country, including the Northern and Central States. The concurrent testimony of the ablest lawyers, as well as of persons unconnected with the profession, is entirely in favour of this great change introduced into their jurisprudence; and they deride the apprehensions sometimes expressed, of its tendency to produce domestic quarrels. Indeed, they observe, naturally enough, that were such its tendency, we should experience it in the ordinary case under our English system of ante-nuptial settlement, or of property given to the wife's sole and separate use; whereas those arrangements are universally allowed to prevent rather than promote discord.

But it is manifest that there may great relief be afforded without having recourse to this, the most effectual remedy,

by another course of proceeding; and here, also, we have the experience of another country to guide us. It is not true, as has often been asserted, that there is any great fundamental difference between the law of France and our own in regard to the rights of married persons over their property severally. But there is a most important protection afforded to the wife in the very particular on which we have been dwelling, as the most ordinary, and also as the most marked case of injustice and oppression—the earnings which she makes either in trade or by labour. A wife in France when engaged in any branch of commerce, as keeping a shop (the most frequent instance), has entire protection against the husband's interference with her gains —she is termed *Marchande publique*, and must have her husband's consent to set up the trade; but, that consent once given, she has the same power of trading, and of contracting debts, as if she were a *feme sole*. If she only exercise the trade of her husband, as by superintending his concerns, or keeping his shop, she is not *Marchande publique;* it must be on her own account that she acts. The case is the same of her professional as of her commercial employment; her gains as an artist, or a workwoman, fall within the same description. But, in another particular, the law is favourable to her. What we have stated is part of the enactments in the codes. The *Marchande publique* is recognised, though not very distinctly, by the *Code Napoleon* (commonly called *Code Civil*) and the *Code de Procedure Civile;* but distinctly enough by the *Code de Commerce*, Tit. 1. The practice of the courts has considerably extended the wife's protection, affording her a much more easy and expeditious remedy than the process of *separation de biens*, by extending the process of *autorisation* given in the codes. It appears, by Mr. Macqueen's excellent and most instructive paper, that the judges are in use to receive the wife's complaints when her earnings are interfered with by her husband's creditors, and to give her a summary redress He mentions an instance which occurred under his own eye, of a servant whose arrears of wages were attached by the husband's creditors, and who, ' a single day, summoned him before the judge (probably *Juge de Paix*) and obtained protection. Of course the husband is heard, if he chooses to appear, but the judge decides as he is, by the text of the codes, authorized to do, in cases where the strict letter of the law requires his consent; in other cases—for example, the right of the wife to appear in court to an action, or to sue; here, if he cannot show cause why he should withhold his consent, the judge may give authority without it, (*Code Civil*, Tit. v. chap. 6.)

Now, the importation of some such law, or some such judicial practice, would effect an extraordinary amendment in our system, even if we went no further in relieving married women from the oppression of which they now so loudly, but not less justly, complain; and they who take the greatest objection to the larger measure recommended by the Society, and worked out in the bill lately introduced, can have no ground for resisting this less considerable though most beneficial improvement. When the resolutions were laid before the House of Lords, introductory of the bill, the first affirming the existence of the evil, and the necessity of a remedy, was by all admitted to be irresistible; the second, in favour of the measure given by the bill, alone seemed to create doubts and difficulties; the third, recommending such an addition to our procedure as we have now been describing, appeared to meet with a general concurrence. That it would prevent such cases from ever occurring as those to which we have been referring is certain; but perhaps the instance given at the late meeting by Sir Erskine Perry, illustrates more strongly than any other that could be cited, the inferiority of our practice to that of our neighbours. He was chairman of the committee to whose report we have frequently referred; and as, after doing his best to lose his seat in Parliament upon the late occasion, he happily failed, and is, most fortunately for the cause of law amendment, again in the House of Commons, let us hope that he will follow up his able and learned report; but if it should be found for the present not to meet with the acceptation which it so well deserves, that he will hasten himself to obtain the improvement, only less general and effectual, yet still of the greatest value, and which would at once make such things impossible as he has stated, and justly stated to be the opprobrium of our law. The instance given by him was that of a milliner at Paris, whose talents and conduct had gained the favour of an English lady, and who was strongly advised by her to settle in London. She came over; established herself; proved successful; carried on a thriving business. Her husband hearing of this, suddenly arrived in London; sold her stock in trade; collected the debts due to her; and returned to continue his dissolute life at Paris. "Oh, madam!" said she to her patroness, when about to leave London, "how can you bear to live in so barbarous a country?" It is needless to add that this outrage on all justice and all feeling would have impossible in Paris.—*Law Magazine and Law Review*, May, 1857.

NOT PROVEN.

* * * * * * *

This brings us to a more purely professional question, on which some erroneous views seem to have been current among English lawyers during the past week. The plea of not proven is substantially, and in all essential points, the same as our English verdict of not guilty. It has been supposed to be distinguishable from the latter verdict as expressing a *suspicion*—more or less strong—on the part of a jury that a prisioner is guilty, although his guilt has not been proved to their satisfaction. It has also been supposed that, after such a verdict, the prisoner may be tried again on the charges of which he has been acquitted. Both these views are erroneous, and have apparently no foundation in the letter or spirit of Scotch law. It is as much the principle of that law as it is of English law, that no man can be tried twice on the same criminal charge. "If the prosecutor allows the trial to go the length of an assize, and a verdict has been returned, no new trial can afterwards take place; and the desertion of the diet operates as a final acquittal, upon the established rule of the common law, that "no man can *thole* (undergo) an assize twice for the same crime:" (Burnet's Criminal Law of Scotland, 368) The Act 1701 affirms the same principle, and the only cases in which new trials have been allowed in Scotch criminal courts have been cases of which Burnet cites several, in which either no verdict has been returned, and new proceedings have been commenced; or in which the verdict has been set aside for informality; or in which the

first trial failed to hit the material issue of the second trial. Accordingly it is laid down in another work of authority: "If the verdict of the jury acquit the accused by either finding that he is not guilty, *or that the charge is not proven*, he is immediately dismissed from the bar, and cannot be pursued in a criminal action for the same offence by any prosecutor, or before any court. The rule is imperative, and cannot be infringed by giving a new designation or character to the crime, even though the acquittal should have arisen from the circumstance that the libel did not specify the crime which the verdict tended to prove, but a different one:" (Burton's M. L., Scotland, 349).

Neither do the books disclose any authority for the theory that a Scotch verdict of "not proven" indicates that the jury wish to mark the prisoner as being in French phrase "suspect." Such a mode of attaching a stigma to one who has been by another portion of a verdict declared not guilty, would be manifestly an excessive extension of the judicial function. It is the duty, and only duty, of Scotch as of English juries, to convict or acquit a prisoner according to the legal evidence against him; and an extra-judicial expression of sentiment is equally inadmissable in both cases. The precise meaning of a verdict of "not proven" does not seem to be defined; but from the cases it seems merely to be a negative salve for the consciences of scrupulous men, by enabling them, when a lurking doubt remains in their minds as to the propriety of the direct affirmation of a prisoner's innocence, which may be supposed to be contained in a verdict of not guilty, to indicate by a verdict of "not proven," not that they *suspect* the prisoner to be guilty, but they do not think that he has been *proved* to be guilty.

In this point of view it is obvious that a verdict of "not proven" has some advantages which might be imported conveniently into English law. It is obvious that there are cases—and that of Madeleine Smith may be one—in which it is manifestly unjust to convert a jury into involuntary witnesses to a prisoner's chareter, by compelling them to declare him not guilty when the strongest moral misgivings may exist in their minds, as it would be to call upon them to avow their suspicion of the prisoner while they pronounce legal absolution. It is plain that both horns of the dilemma are avoided by a verdict which indicates, and is meant only to indicate, that the case for the prosecution has failed; and is a mere neutral and equi-distant proposition as far removed from an oblique imputation against the prisoner, as it is undoubtedly from an assertion of a belief in his innocence.—*Law Times*, July 18, 1857.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., *Barrister-at-Law.*)
(Hillary Term, 20th Vic.)

REGINA EX REL. MCKEON v. HOGG. SITTING COUNCILLOR FOR WARD NO. 1 IN THE TOWNSHIP OF EAST NISSOURI.

" " " v. MCDONELL, RETURNING OFFICER AT THE SAME ELECTION.

Contested Election—Right of Appeal—12 Vic., ch. 81, sec. 152—Bribery

The judgment of the county court judge, in a contested election case, upon a question of fact depending on conflicting testimony, will not be overruled. The intention of the statute was not to allow this, but to provide an appeal upon any legal question on which the case may have turned.

Quære, as to the effect of bribery at municipal elections.

In both these cases the relator was an elector, not an opposing candidate, and his complaint was that Hogg was illegally returned, not having a majority of legal votes, and that the opposing candidate (there were but two candidates) Lawrence Wheelan, ought to have been returned, having a majority of legal votes.

The votes objected to by the relator were objected to on various grounds—non-residence within the ward at the time of the election; not being in the collector's roll, or in the copy; and as to some voters, that their names had been fraudulently interpolated; and it was also complained that some votes offered for Wheelan had been illegally rejected.

The returning officer's conduct was complained of as being partial and illegal.

The summons was made returnable before the judge of the county court.

Among other objections, it was complained that the returning officer had himself voted, contrary to law. Without his vote the candidates stood each forty-six on the poll-book.

The judge of the county court, having heard the parties by their counsel, on the 31st of January, 1857, adjudged that five of the votes taken for Hogg were bad votes, not being of persons resident in the ward at the time of the election; and as to three of them, bad also as not being on the collector's roll for the ward, nor on the certified copy; and that one other vote was bad as being the vote of an alien: that the returning officer voted for Hogg, contrary to law (meaning, it is supposed, because in fact there was not an equality of legal votes for each candidate); and he struck off these seven votes of Hogg's, and also two other votes of persons whose names were fraudulently entered on the collector's roll just before or at the time of the election.

He found also that *four* votes offered for Wheelan were illegally rejected, and should be added to the votes for Wheelan. (Thus making the votes for Wheelan fifty, and for Hogg 37).

He found also that the returning officer had acted with gross partiality: that Hogg was not duly elected; and that Wheelan was duly elected, and ought to have been returned, and that he admitted, &c.; and he gave judgment against Hogg, and against the returning officer as regarded the proceeding against him.

In this term *Eccles*, Q. C., moved in each case to rescind or reverse the judgment, on the ground that the judge should have ordered a new election, and not seated the relator.

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

We see no ground for reversing or altering the judgment.

The 152nd clause of 12 Vic., ch. 81, makes the preliminary judgment of the single judge examinable by the court out of which the summons issued in term time, on an application made within four days (as this was); and enact that the same may be thereupon reversed, altered or affirmed by such court, with or without costs, to be paid by the party against whom the decision shall be, as the court shall think fit.

We do not consider that it was the intention of the legislature, in making this provision, to throw open the decision of the judge upon the merits to be overruled by this court, in case they should differ from him in their estimate of conflicting testimony. It was rather, we apprehend, to provide an appeal from the judgment of the individual judge upon any legal question on which the case may have turned. We are indeed not asked to examine the judgment in regard to the soundness of the conclusion, so far as it establishes that the relator and not the sitting member had the majority of legal votes, but in regard only to that part of the judgment which seats the relator.

And we see no ground on which we are called upon to reverse that part of the judgment, but this: that evidence is now tendered to us on affidavit, and perhaps was also laid before the judge before he pronounced his judgment, though that is not clearly made out, that the relator had made or insinuated to one or more voters, before or during the election, an offer to give or lend him a sum of money for voting for him.

There is no allegation that any money was given, or actually offered or promised, or that any vote was by such means obtained.

We are clear we cannot on this ground interfere with the judg-

ment. What the judge of the county court had to determine was, whether the returning officer ought to have returned the one candidate or the other, upon the proofs given in reference to the objections specified in the statement. That at least is the ordinary course; and if he saw that the returning officer, in reference to all such facts as he is authorised to determine and act upon, should have returned the relator, then he did right to adjudge the relator entitled to the seat, for that means no more than he is *primu facie* entitled to the legal result of the election. The returning officer had no power to reject a candidate on an allegation of bribery. If bribing, or attempting to bribe, would disqualify a candidate, or otherwise make void the election, the late member, or any one interested, may now, by a proper proceeding, call on Wheelan to defend his seat. But we express no opinion on the effect of such evidence as was offered. Our statutes do not, that we can find, make any express provisions to repress bribery at municipal elections, in imitation of those made in England by 5 & 6 Wm. IV., ch. 74. It would no doubt be an indictable offence.

Rule refused.

Street v. Faulkner.

Practice—Notice to Party to attend as a Witness—Payment of expenses.

When a party to a suit is notified to attend as a witness by the opposite party, a proper sum for his expenses should be tendered with the notice, or judgment will probably not be given against him *pro confesso* if he should fail to attend.

Action for dower claimed in the west half of lot No. 19 in the 1st concession west of Hurontario Street in the township of Caledon.

At a trial at Toronto, before *Burns*, J., the defendant, who had been served with notice to appear and be examined on the part of the plaintiff, was called but did not answer, and the plaintiff thereupon urged to have the issue taken *pro confesso* in her favor.

It was objected for defendant that it was necessary to shew that a proper sum of money had been tendered to the defendant to pay his expenses, as in the case of a witness. The learned judge thought that was not necessary to be shewn, though the defendant, if he had attended, might have objected to giving evidence till his expenses had been paid; and refused to enforce the provision against defendant of taking the issue against him *pro confesso*.

A verdict having been found for demandant, *Flanigan* for the tenant obtained a rule *nisi* on affidavits, to stay proceedings on the verdict, and for a new trial. He filed an affidavit of the tenant, that the demandant had accepted a sum of money from him in full satisfaction of her dower, just before the cause was tried.

This was not denied on the other side, and on the 10th of February last the rule was made absolute by consent of demandant's counsel; but notwithstanding the rule had been thus disposed of, the court were pressed to intimate an opinion upon the question that was raised at the trial—whether a party who has given to the opposing party notice to appear and be examined, is not bound to tender to him reasonable expenses, in order to entitle him to ask to have the issue taken *pro confesso*, in case the party notified shall not appear on the trial.

Robinson, C. J.—As the case no longer waits for any judgment from us, I shall only state it to be at present my impression, that where a party in a cause desires to make a witness of the opposite party, he has no reason to expect the advantage of his testimony without tendering him a fair sum to bear his expenses. A suitor is under no obligation to be present in court when his cause is tried, though he is in most cases present. He may be living at a distance, and may be poor or infirm, and unable to travel on foot. The statute, however is silent on the subject, and in cases where the expense would be little or nothing, I cannot say that we should hold the judge would do wrong if he should hold him bound to attend, and should take the case *pro confesso* against him if he failed, though we might perhaps in such a case grant relief under particular circumstances laid before us on affidavit.

It is proper, we think as a general rule, that expenses should be tendered, and also that the party should have notice of what he is required to speak to, for we must all have observed that it has grown to be very much a matter of course to give notice to the opposite party to attend and be examined, though in very many cases when he comes he is not put into the witness box, which looks rather as if sometimes the party giving the notice speculated upon the chance of gaining an advantage by the party not complying with it, although that compliance might not always be convenient, if he is to pay his own expenses. And it is material to consider that in all those cases in which the party who has brought his opponent to Court does not call him at the trial, the person so attending has not the opportunity of exacting his expenses before he is sworn.

We think, therefore, that a proper sum for expenses should be tendered, and that it ought to be understood that when that is omitted the party giving the notice will not be likely to gain any advantage from it if he should fail to attend.

March v. The Port Dover and Otterville Road Company.

Road Companies—16 Vic., ch 190, sec. 53—Pleading general issue "by Statute."

Where a road company were sued for not keeping their road in repair: *Held*, that they could not, under 16 Vic., ch. 190, sec. 53, plead the general issue, and give any special defence in evidence, the injury complained of not being any thing done by them in pursuance of the act, but a duty omitted.

Case against the defendants for neglecting to keep their road in repair, alleging that they took tolls thereon, and that it was and is their duty to keep the road in repair: that by reason of their neglect to do so the plaintiff, while travelling on the road, *with his horses and wagon*, had his wagon forced into a hole in the road, and the same and harness were thereby much injured, and plaintiff was thrown out of his wagon, and much bruised, &c.

Defendants pleaded not guilty, "by statute," not specifying any statute.

At the trial at Simcoe, before *Richards*, J., it appeared that the plaintiff had hired a team from another man to carry a load of goods. It was objected, that it being proved that neither the horses, waggon, nor harness belonged to him, he could not recover for any injury done to them, but only such damage as the jury might think proper to give for any injury done to the plaintiff's person.

The plaintiff, on the other hand, contended that he had a special property in the horses, waggon, &c., and was liable over to the owner, and could on that ground sue for the damage done to them and moreover, that the plaintiff's right of property was admitted on the record, and only the negligence denied.

The jury found 15s. damages for the personal injury, and £11 5s. for the damage to the horses, waggon and harness, and leave was reserved to defendant to move to strike out the £11 5s. from the verdict.

Galt obtained a rule *nisi* to that effect accordingly, to which M. C. Cameron shewed cause.

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

As I understand the evidence a hole had been suffered to remain in the road for some weeks, and the plaintiff driving at night drove his waggon into it.

The defendants are sued for culpable negligence, as being bound to keep the road in repair; and as they have pleaded no other plea than not guilty, they cannot be taken to have put in issue the plaintiff's right to the waggon and horses, which he has averred to be his, unless having marked the plea "by statute" they can give all matter of defence in evidence under the general issue. The statute 16 Vic. ch. 190, sec. 53, allows all road companies formed as this has been, to plead the general issue and give the special matter in evidence, in actions brought against them in any matter or thing done in pursuance of the act. Now, if the evidence had shewn that the defendants, in order to repair or improve the road, had dug a ditch or something else, in a careless and improper manner, without using the necessary precautions, and if they were used for an injury arising from their doing what what they had done improperly, then we think they would be entitled to the privilege given by this clause in making their defence, but we cannot hold that the merely allowing the road to fall out of repair is *any thing done by them in pursuance of the act*—it is only a duty omitted.

The defendants, if they meant to dispute the plaintiff's right to sue for the injury, should have pleaded specially, traversing his averment that the wagon, &c., were his.

This is the single point reserved for our opinion, and we are of opinion that the rule to strike the £11 5s. out of the amount of the verdict should be discharged.

CARSCALLAN V. MOODIE, (Sheriff,) AND DAFOE (Deputy Sheriff).

Since the publication of the first part of this case, we have had our attention directed to the recent statute, 20 Vic. cap. 3. It repeals the statutes 12 Vic. cap. 74, and 13 & 14 Vic., cap. 62, under which this case was decided; and contains a provision, the want of which created a great part of the difficulty experienced in the case. Neither of the repealed statutes mentioned any time within which to file a deed or mortgage of chattel property, and the court so construed to them as to hold that an execution coming in before the filing of such a deed or mortgage, though after its date, was entitled to prevail. The recent act which provides "that such shall be registered within five days from the execution thereof," (20 Vic. cap. 3, s. 12.) renders the judgment in Carscallan v. Moodie, comparatively unimportant. We therefore omit the remainder of the case to give place for matter more useful.—(EDS. L. J.)

CHANCERY.

PEGGE V. METCALFE.

(*Reported by* ALEXANDER GRANT, ESQ., *Barrister-at-Law.*)

Equity of redemption—Judgment creditor.

Where land, subject to a mortgage, is sold by the Sheriff under the statute 12 Victoria, chapter 73, the purchaser acquires only the title of the mortgagor at the time the writ was delivered to the Sheriff, not such as he had at the time of registering the judgment.

A judgment creditor, purchasing an equity of redemption at Sheriff's sale, cannot set up his registered judgment against a mortgage upon the premises made before the delivery of the writ to the Sheriff.

And *quære*, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts, as forming together a portion of the price of the land purchased.

(October 27, 1856.)

The amended bill in this cause was filed by *Caroline Pegge*, *Samuel Goodenough Lynn*, and *William Wallis*, the executrix and executors of *William Pegge*, against *Francis H. Metcalfe*, *Thomas Wilcoxon*, and *Thomas Eck*, the executors of *Samuel Pegge*, praying a declaration of the priority of the incumbrances of the parties respectively; a sale of the incumbered estate, and payment of the claims of the several incumbrancers according to their priorities.

Mr. *Turner* and Mr. *Hallinan* for plaintiffs.

Mr. *Brough* for defendants.

The judgment of the court was delivered by

SPRAGGE, V. C.—This bill is filed in respect of incumbrances created upon the estate of *Elisha Morton*. They stand thus in order of time—First, a mortgage by *Elisha Morton* to *William Pegge*, 14th of February, 1846. Next, judgments recovered by defendant *Metcalfe* against *Elisha Morton*, 20th of February, 1847, and registered the same day. Next, mortgage by *Elisha Morton* to *Silas Morton*, 10th of May, 1847, registered 7th of June, 1847, registered 7th of June, 1847. Next, registration of the first mortgage *Elisha Morton* to *William Pegge*, 8th of July, 1847. So that the position of the parties is, as between the two mortgages, that the second has obtained the priority over the first by prior registration; as between the first mortgage and the judgments that the mortgage has the priority. Thus under the authority of *Beavan* v. *Oxford* (a), while as between the judgments and the second mortgage the judgments are prior in date of recovery and registration.

The mortgaged premises were sold under the Provincial statute 12 Victoria, chapter 73, by virtue of writs placed in the Sheriff's hands on the 6th of July, 1847, upon a judgment recovered by one *McGregor* against *Elisha Morton;* and the above judgment creditor *Metcalfe* became the purchaser at the sum of £50; and the interest of *Elisha Morton*, that is, his equity of redemption was conveyed to him by the Sheriff's deed.

The bill as amended, is by the personal representatives of the assignee of the second mortgage against *Metcalfe*, and the personal representatives of the first mortgagee, and prays that the priorities of the several incumbrances may be declared and the land sold for their satisfaction, claiming priority for the two mortgages.

(a) 2 Jur. N. S. 121.

Independently of the statute it would seem that the first mortgagee having lost his priority over the second by the prior registration of the second mortgage, and the judgments having priority over the second mortgage, the first mortgage would be postponed to both, and the order of the incumbrances would be, *first*, the judgments; *secondly*, the second mortgage; and *thirdly*, the first mortgage; and the question arises upon the effect of the purchase by the judgment creditor of the equity of redemption of *Elisha Morton*.

The effect given by the statute to the taking in execution, sale, and conveyance under it, is to transfer and vest in the purchaser, all the legal and equitable estate, as the statute expresses it, right, title, interest, and property, and the equity of redemption of such mortgagor in the lands taken in execution, sold and conveyed "*at the time of placing such writ in the hands of the Sheriff* or other officer to whom the same is directed as well as at the time of such sale;" and to vest in the purchaser the same rights, benefits, and powers as the mortgagor could or would have had if the sale had not taken place.

The third section enacts that any mortgagee of the lands sold may purchase at the sale; but in that case he is to give a release of the mortgage debt to the mortgagor; and in case any other person shall become the purchaser, and the mortgagee shall enforce the debt against the mortgagor, the mortgagor may recover payment over from the purchaser, and the land shall remain charged with the amount in favor of the mortgagor.

If the statute had given to the sale and conveyance of the equity of redemption, the effect of vesting in the purchaser the estate and interest of the mortgagor *at the date of the registering of the judgment* instead of at the date of the placing of the writ in the Sheriff's hands, it would perhaps have been more consonant with the statutes which make a registered judgment a charge upon land. As it is, it admits mortgages made between these two periods, and what is sold is the mortgagor's estate or equity to redeem all mortgages subsisting at the latter period; and the amount due upon all those mortgages would necessarily be taken into account by any one bidding at the sale of such equity of redemption; that amount being part of his price for the land. The second mortgage having been made before the delivery of the writ to the sheriff, and the mortgagor's estate at that date subject to it, the estate acquired by *Metcalfe* by the purchase at Sheriff's sale, was the mortgagor's equity to redeem that as well as prior incumbrances, and if the assignee of that second mortgage had enforced payment of it against the judgment debtor, the mortgagor, might under the third section have recovered it over against *Metcalfe*. It is clear therefore that *Metcalfe* is the person to pay that mortgage, and that it remains a charge upon the land after the sale.

Then does the circumstance of the purchaser being also a prior judgment creditor, make any difference, or enable him to claim his judgment as a prior charge upon the land? If *Metcalfe* puts himself in the position of a prior incumbrancer notwithstanding his purchase, then the holder of the second mortgage is entitled to redeem him, and having done so, being himself only an incumbrancer is entitled to be redeemed by the owner of the equity of redemption, which is *Metcalfe* himself; so that *Metcalfe* would be redeemed in his character of prior incumbrancer, to redeem again as owner of the equity of redemption: to receive money in one character which he would be bound to pay back to the same party in another. If a stranger had become the purchaser there could be no doubt, I apprehend, that this second mortgage would continue a charge, and it would be strange if its so continuing could depend upon whether the purchase was by a stranger or another incumbrancer; the thing purchased being the same, by whichever the purchase was made.

It is not necessary to determine whether in the case of a purchase by a stranger he would be bound to pay off the judgment debts. If bound to do so the judgment debts as well as the mortgage debts must be taken to be part of the price of the land, and so a stranger purchasing would not without paying both, pay the whole price of the land; and *pari ratione*, an incumbrancer purchasing and setting up his incumbrance against subsequent incumbrancers would, by so doing, claim from another a portion of the price which he has himself to pay for the land.

If on the other hand the mortgage debts only, and not the judgment debts, are under the statute to be paid by the purchaser, that is as between himself and the mortgagor, still in a case where the judgment creditor is himself the purchaser he cannot claim an incumbrance in virtue of his registered judgment, as he would then be claiming an incumbrance upon his own land.

In either view it would seem to follow that a judgment creditor purchasing an equity of redemption at Sheriff's sale, cannot set up his registered judgment against a mortgage upon the premises purchased, made before the delivery of the writ to the Sheriff.

The decree will be for a sale of the mortgaged premises, the proceeds to be applied in satisfaction of the incumbrances, in the order of their priority.

Vankoughnet v. Mills.

Principal and surety—Indorser.

The holder of a promissory note sued the maker and indorser, and after execution placed in the sheriff's hands against both, the plaintiff, upon the application of the maker, entered into an arrangement by which he extended the time for payment of the amount, without the consent of the indorser.

Held, that this discharged the indorser from all liability.

The bill in this case was filed by the Honourable *Philip M. Vankoughnet* against the Honourable *Samuel Mills*. From the pleadings and evidence it appeared that the plaintiff had become an accomodation indorser of a promissory note for one *Jarvis*, which was negociated by him with the defendant; that default having been made in payment of the note, defendant sued *Jarvis* and the plaintiff at law, and recovered judgment; upon which he issued execution against both, and placed the same in the hands of the sheriff: that after the writ had been in the hands of the sheriff for some time, the maker saw the plaintiff in that suit, and by paying something on account of the interest and costs obtained from him some further time for payment of the balance of the execution; and the attorneys in the action wrote to the sheriff to that effect, with a direction to stay proceedings on the execution in his office. Afterwards, the maker of the note having in the meantime become insolvent, instructions were given by the attorneys to levy the amount out of the goods of the indorser, and the sheriff, having notified him of his intention to proceed to a sale of his goods, the present suit was instituted for the purpose of obtaining an injunction to restrain further proceedings on the writ.

A motion was now made for a decree in the terms of the prayer of the bill, pursuant to the order of 1853.

Mr. *Strong* for the plaintiff, referred to *English* v. *Darley* (2 B. & P. 61), *Mayhew* v. *Crickitt* (2 Swans 185), *Smith* v. *Knox* (3 Esp. 46).

Mr. *Connor*, Q. C., contra, cited *Exparte Wilson* (11 Ves. 410), *Owen* v. *Homan* (3 McN. & G. 378).

The judgment of the court was delivered by

Esten, V. C.—In this case a promissory note was given by Mr. *Jarvis* to defendant *Mills*, indorsed by the plaintiff. The plaintiff was an accommodation indorser, but it does not appear that this was known to the defendant; what was patent to him, however, on the face of the note was, that as between themselves, *Jarvis* was primarily, and plaintiff secondarily liable; in other words, that the relation of principal and surety existed between them, he should not therefore have given time, as he did, to the maker, without the consent of the indorser of the note. He says he thought that time was asked and given on account of both, but if he chose to take the fact for granted without inquiring, he must abide the consequences. It is well settled that time given to the maker of the note discharges the indorser. The learned counsel for the defendant attempted to distinguish this from cases in England, on the ground that one judgment was obtained against both maker and indorser, but we do not think this should vary the principle. The plaintiff has a right at any time to bring the money into court and put the judgment in force against *Jarvis*. This he was prevented from doing by the time given. There should be a decree for plaintiff with costs.

Mellish v. Green.
——— v. Brown.
——— v. Cossey.

Principal and surety.

The holder of a promissory note sued and recovered judgment thereon against the makers and indorsers, which was duly registered so as to create a lien on the real estate of the makers; subsequently the judgment creditor accepted from the makers of the note a composition of fifty per cent., and discharged their lands from further liability, expressly retaining the right to go against their personal assets, and the plaintiff in the action proceeded to execution against the goods of the indorsed. *Held*, that what had taken place operated as a discharge of the indorser from further liability; and a perpetual injunction was granted restraining further proceedings in such action against the endorsers.

These were three several suits brought by *William Mellish*, *Joseph Morrell*, *John Russell*, and *Joseph Whitehead*, against *William Green*, *Major Brown*, and *William Cossey*: the *Buffalo, Brantford* and *Goderich* Railway Company being also made defendants in each cause, and the bills stated that the Railway Company having become largely indebted to the plaintiff for work done by them as contractors on the road, gave the plaintiffs their promissory notes for the liquidation of a portion of such indebtedness, which subsequently came to the hands of *Green*, *Brown* and *Cossey*, who sued and recovered judgment against the plaintiffs and the Railway Company, for the amount of the notes held by them respectively, which were registered in the several counties through which the railway ran, so as to form a lien on the railway land and real estate of the Company: that subsequently, for the purpose of carrying out a proposed transfer of the railway and real estate of the said Company, it was agreed that the Company should, within thirty days, pay ten shillings in the pound, and obtain a discharge of their lands from further liability in respect of the judgments which had been so obtained against them and the plaintiffs, which the Company accordingly paid, and obtained such release; which, by the terms of the agreement for such composition, it was expressly stipulated should not be construed to be a discharge of all indebtedness to the judgment creditors, but the residue should be and constitute judgment debts against the Company and be paid by them so far as their assets would extend.

The bill further alleged that the judgment creditors had issued execution and levied thereunder upon the goods of one of the plaintiffs, and prayed a declaration that the plaintiffs were released from all liability in respect of said judgement and entitled to have satisfaction entered thereon; and an injunction to stay proceedings on the execution.

The bill had been taken *pro confesso* for want of answer, and the causes came on to be heard together.

Mr. *Morphy* for the plaintiffs. The defendants did not appear.

The judgment of the court was delivered by

Esten, V. C.—We think the injunction should be made perpetual in these cases, and that the plaintiffs should have their costs of suit. The case of *Mayhew* v. *Crickitt* (Swans. 2, 185) shews that a creditor may remain passive but cannot forego any advantage he has gained to the prejudice of the surety. He is a trustee of it, in fact, for him. In the present case the creditors had obtained and registered judgement, which therefore formed a charge upon the real estate of the debtor. They thought fit, without the consent of the surety, to release this real estate which formed a sufficient and almost the only fund for the payment of their debts from a moiety of such debts, the other moiety being paid at the time. It would be higly unjust that they should throw the remaining moiety on the surety, who, we think, therefore, is very clearly discharged. We have no doubt that the relation of principal and surety exists in these cases, and that all the law affecting that relation applies to them with full force.

CHAMBERS.

(Reported for the Law Journal, by C. E. English, Esq.)

Clarke v. Clarke.

Affidavit to hold to Bail—Discharge of Defendant—Infancy.

An Affidavit to hold to Bail when the debt arises on a written or sealed instrument, need not set out the date or other particulars of the Deed, if it show distinctly the nature of the debt and the instrument on which it accrued.

Infancy is no ground for discharging a person from arrest.

(August 8, 1857.)

This was a Summons on plaintiff to shew cause why the Capias and Arrest should not be set aside with costs for defects in the Affidavit to hold to bail; and because defendant being an infant could not legally bind himself by a lease.

The Affidavit was in these words: "I, John Clarke, of, &c., make oath and say, that John Clarke, of the City of Toronto, is justly and truly indebted to me, this deponent, in the sum of fifty pounds for nine months' arrears of rent due and payable from the said John Clarke, and one John Tucker, for a certain term which is yet unexpired. And I, this deponent, further say, that I have good reason to believe, and do truly believe, that the said John Clarke is immediately about to leave the Province of U. C., &c.

The objections to the form of the Affidavit were, that it did not state the date of the lease, and how the rent was payable, whether monthly, quarterly, &c., and what rent per year or quarter, &c.

It was shown, and not denied, that the defendant is only eighteen years of age.

Plaintiff filed an affidavit, shewing that defendant had been for some months in trade, carrying on business as a grocer in Toronto; that he and Tucker applied to plaintiff to lease a shop of him in the village of Brampton; that plaintiff made them a lease not knowing defendant was under age; that he turned out another tenant to make way for them; and had often told defendant he would settle with him on easy terms if he would surrender his lease; but that he would neither do that nor pay the rent.

Robinson, C. J.—Infancy is no ground of discharging from arrest: (*Maddox* v. *Eden*, 1 B. & P. 480.) The defendant in an Affidavit filed states all the particulars of the lease, swears it is a written lease, signed and sealed, dated 1st October, 1856, for a store in Brampton, made to John Tucker and himself for three years, at £66 13s. 9d. a year, payable quarterly; that Tucker has absconded; that a man was in possession under the plaintiff when the lease was given; and that the deponent never got possession or received the key, and that Tucker carried the lease away with him, a few days after 10th November, 1856; that deponent wrote to plaintiff, telling him this, and that he had it not in his power to send him the lease; and that he, deponent, had no means to carry on the business.

I cannot go into the merits of the transaction or the defence of infancy, which deponent may or may not set up to the action.

The only question is on the sufficiency of the Affidavit in form, I take it to be sufficient on the authority of *Skeen* v. *McGregor*, 1 Bing. 242, and *Barnard* v. *Neville*, 3 Bing. 126.

Summons discharged.

Mercer v. Bond.

Collusion—Setting aside Judgment—Defence under 225th Sec. C. L. P. A.

A judgment regularly obtained in Ejectment will not be set aside for the purpose of allowing a third party (landlord) to come in and defend.

In general an application for a third party to be allowed to defend will not be entertained after judgment.

(August 8, 1857.)

Mr. Justice Burns granted a Summons on plaintiff to shew cause why the judgment and proceedings should not be set aside with costs, because the same was obtained by collusion between plaintiff and defendant, and why one Henry Harmer should not be allowed to appear and defend, or why the judgment should not be set aside and Harmer allowed to defend under the 225th section C. L. P. A. 1856, on the ground that he was in possession by himself or his tenant, James Bond.

Robinson, C.J.—It is quite clear that on the affidavits filed on both sides this Summons must be discharged.

1. The 225th clause referred in the Summons applies to cases where the action is still pending, and where a person desires before judgment to come in and defend. That is not the case here.

2. Bond was not at the time Harmer's tenant, according to what Harmer himself swears; his time had expired, and he had been treated by Harmer himself as a trespasser.

3. If the obligation to give Harmer notice of the proceedings was nevertheless incumbent on Bond; he swears that he did give it; and that is otherwise proved.

4. All fraudulent collusion is denied.

5. It is plain that Harmer has no beneficial interest, he only shews himself a squatter or one who has bought out a squatter's right; he does not attempt to question the plaintiff's right or shew a legal interest in himself.

The case referred to in the argument, 11 Ex. 86, has no bearing on this case; but was upon the question whether a landlord, who had been admitted to come in and defend, could properly be required as a condition to give security for costs, upon which point the court were decided.

The case in 1 El. & B. 608, was also an application before judgment, and only goes to shew that if Harmer had come in time, whilst the suit was pending, and applied to defend, he would have been admitted upon shewing that he had been previously in possession, and that Bond had received possession from him; but here the landlord moves to set aside a judgment regularly obtained, not to be admitted to defend pending the action.

If in fact he was kept in ignorance of this action by Bond, and if Bond was within the statute 2 Geo. II. cap. 19, though his term was long out, and if he has brought himself within the penalty of that act by not giving notice, Harmer has his remedy under the act against him; and if he has any title to the land he can bring ejectment. But all that he grounds his application upon is distinctly contradicted; and it is sworn by several that, being informed of the proceedings against Bond, he declared that having no title he did not mean to attempt a defence, and would incur no cost.

The affidavits which Harmer was allowed to file in answer to those on the plaintiff's side do not by any means neutralise them; and if they did, still I have not sufficient ground left for setting aside the judgment. *Thompson* v. *Row*, 4 Dowl. 115, is strongly against this application. I have not been able to find any such case as *Russell* v. *Rugulty* cited as having been decided here; but I am satisfied that neither that nor any other case that can be cited would support this application under such facts as are shewn.

Summons discharged.

Kerr et al v. Bowie.

Practice—Judgment—Irregularity—Delay

A judgment will not in general be set aside for irregularity after long delay or acquiescence on the part of the plaintiff.

In applications to set aside a *final* judgment signed on writs not specially indorsed, or indorsed so *improperly* on the ground that the judgment should have been interlocutory, plaintiff should *produce* the writ or copy shewing that it was not so endorsed, or that it was not a proper case for special endorsement.

(August 8, 1857.)

Mr. Justice M'Lean granted a Summons on plaintiffs to shew cause why the judgment and all proceedings thereon, and the writ of ca. sa. and arrest upon it in this cause should not be set aside with costs and the bail bond (to the limits) given up to be cancelled, because the judgment was entered without any assessment of damages or account of such damages being first taken according to law; and because the judgment had been previously ordered to be set aside; and because defendant was arrested on an irregular and void judgment; or why the amount for which judgment was entered should not be ordered to be reduced by a sum stated in affidavits and papers filed; or why the judgment should not be set aside and defendant allowed to plead on the merits.

Robinson, C. J.—I have read the affidavits and see no ground for interfering.

The defendant does not shew the Summons or copy, with special indorsement, so I have no means of knowing whether the case was one for specially indorsed Summons or not. I dare say from the statements made in defendant's affidavits it may not have been; but if not defendant should have moved to set the judgment aside as soon as he knew it had been entered, instead of which he moved last April against the *fi. fa.* alone as being issued too soon after

the judgment, *i. e.* within the eight days; and took no exception to the judgment.

As to the merits, in regard to amount it seems all right, there is no mistake of £10 in the calculation as sworn to, and the receipts are all credited.

Summons discharged.

FERRIE ET AL, EXECUTORS OF ADAM FERRIE V. G. W. R. CO.

Practice—Interrogatories—Inspection of Documents.

Applications having for their object the discovery of the contents of documents should in general be made under 175th sec. C. L. P. A., 1856.

Interrogatories referring merely to the question of damages, in case judgment be entered, will not in general be allowed.

(August 6th, 1857.)

The facts of this case sufficiently appear in the judgment.

ROBINSON, C. J.—This is an action under the Stat. 10 & 11 Vic. cap. 6, against defendants for alleged negligence which occasioned the death of the Testator.

The action was brought 10th January, and general issue pleaded 30th January, 1857.

The Testator was a practicing Attorney and Barrister in the Province, and was killed on 12th March, 1857, by an accident which occurred on the defendants' line of railway.

The Plaintiffs claim £15,000 damages as a compensation to his widow and children.

The defendant's solicitor makes affidavit that he believes that the defendants will receive material benefit if the plaintiffs shall be required to answer certain interrogatories which they desire to be allowed to propose; and he swears that the defendants have a good defence upon the merits, and that this discovery is not sought for the purpose of delay.

The interrogatories are to this effect:—

1. Asks for a copy of the testator's will.

2. Inquires what amount of assets plaintiffs had realised over and above all debts and liabilities due by the testator.

3. What property plaintiffs have under their control as executors not disposed of, and not included in the last interrogatory.

4. Who are the Legatees and Devisees under the will and the amounts which they will respectively derive under it.

5. Whether any of the Legatees or Devisees had any further expectations, reversion, or what not, included in the preceding interrogatories, and which may be derivable from other real or personal estate in which testator had an interest, and to set them forth fully, and their value.

6. Whether Mrs. Ferrie (the widow) or the child with which she is pregnant in case one should be born has any interest, claim or rights out of any property whatever in right of the testator, and not included in the interrogatories, or from any other source whatever, and to state such interest, &c.

The plaintiffs attorney in opposition makes affidavit that on 30th January defendant pleaded not guilty only, and issue joined the same day; and he contends that they should have made their application before pleading.

He objects also that the interrogatories are not such as should be allowed to be put.

The defendants desire the information as bearing upon the question of damages.

As the information is not desired for the purpose of guiding the defendants in pleading, but only for the purpose of enabling the defendants to shew matter in reduction of damages in case a verdict should pass against them, it can be of no consequence when the application is made. I cannot say that I perceive clearly the object of all these inquiries; for instance, as the defendants do not dispute the fact of plaintiffs being executors, I do not see why they should desire to see the will, but if they do, and it would be proper for the Court to grant inspection, the application, I think, should be made in the manner directed by the 175th clause merely to compel a production for inspection.

This and the other interrogatories are probably intended to elicit answers which may tend to shew that the widow is amply provided for under the will. It appears to me that such information has not that bearing upon the merits that entitles the defendants to the discovery sought for, since the object of the law is not to afford or withhold compensation in case of such accidents according to the necessities of the parties damnified by the negligence, but according to the loss really sustained.

And I do not see any fair pretence for exacting from the plaintiffs that disclosure of all the affairs of the estate which such interrogatories call for.

I refer the defendants therefore to the Court if they desire to persist in their application.

Costs of opposing this application to be costs in the cause.

Summons discharged.

CARPENTER V. TOUT.

Practice—Non-payment of Weekly Allowance—Discharge of Defendant.

An application for discharge of defendant for non-payment of weekly allowance must be supported by an affidavit of the turnkey that the money has not been paid—if the Sheriff employ one, if not his affidavit should show it.

(August 10, 1857.)

The defendant in this case applied for his discharge from close custody on the ground of non-payment of weekly allowance, on an affidavit of his own and of the Gaoler, stating that the money had not been paid. He referred the statute shewing that the debtor or Gaoler are the only parties mentioned there to whom payment is to be made, and contended on that ground that his affidavits were sufficient.

ROBINSON, C.J, after looking into the practice refused to grant the Summons on the ground that no affidavit of the turnkey of the Gaol was produced, the Sheriff's affidavit not shewing that he did not employ a turnkey.

Summons refused.

MCGEE V. BAINES.

Interpleader—Claim of the Crown.

The Crown cannot be a claimant within the meaning of the Statute authorizing the settlement of claims of goods taken under execution by Interpleader.

(August 10, 1857.)

The Sheriff of the County of Simcoe made the ordinary application for an Interpleader issue in this case on an affidavit stating among other things that he was served with notice that the goods and chattels seized by him under the execution issued in this case were not subject to execution as it had all been assigned to the Crown for a Crown debt, and that he would hold the same at his peril.

ROBINSON, C. J., refused the order on the ground that the Crown was not a claimant within the meaning of the statute: that its claim could not be barred, and consequently such an order would be useless.

Summons refused.

TO CORRESPONDENTS.

LANDLORD.—You are not liable for repairs done by your tenant, unless you have bound yourself to pay for them.

JOHN EASTWOOD.—Your communication too late for this number; will be answered in our next.

ROBERT HENRY, Township Clerk, Clinton.—Your communication is answered in this number, under head "Correspondence."

A SUFFERER.—Refer to late Statute 20 Vic., cap. 62, sec. 3, and you will find relief.

X. Y.—Writs of Trial are abolished—ss. 51–56 of 8 Vic., cap. 13, are repealed by 20 Vic., cap. 58, sec. 19.

TO READERS AND CORRESPONDENTS.

No notice taken of any communication unless accompanied with the true name and address of the writer—not necessarily for publication, but as a guarantee of good faith.

We do not undertake to return rejected communications.

Matter for publication should be in the hands of the Editors at least two weeks prior to the number for which it is intended.

Editorial communications should be addressed to "*The Editors of the Law Journal, Toronto.*"

Advertisements, Business letters, and communications of a Financial nature, should be addressed to "*Messrs. Maclear & Co., Publishers of the Law Journal, Toronto.*"

Letters enclosing money should be *registered*;—the words "Money Letter" written on an envelope are of no avail.

Correspondents giving instructions with reference to the LAW JOURNAL should be careful to give *the name of their Post Office*. When a change of address is made, the old as well as the new Post Office should be given.

FINANCIAL MATTERS.

Parties in arrears for the LAW JOURNAL will particularly oblige the Proprietors by remitting the amounts due to them immediately. The aggregate of the sums now outstanding and unpaid is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time very seriously affects the Proprietors of the Journal. We expect, therefore, that our friends will pay *prompt* attention to this notice.

TERMS AND ADVERTISING CHARGES.

The Terms are 20s. per annum, if paid before 1st of March in each year; 25s. if paid after that period.

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NOTICE.

The UPPER CANADA LAW JOURNAL, when mailed from the Office of the Publishers, is not liable to postage.

THE LAW JOURNAL.

AUGUST, 1857.

OUR NEW ARRANGEMENTS.

This, as previously announced, is the first number under our new arrangements issued from Toronto. The other changes we have in contemplation will not be carried into effect until next January, when we shall commence a new volume. It will be our duty to advocate measures of law reform—to keep a record of the law as it is—and generally to serve the profession in a judicious and independent manner. Whenever or wherever abuses present themselves, we shall without fear, favor or affection expose them. Whenever the law undergoes changes of any kind we shall, so far as within our power, explain and make known the changes. We shall at no little cost endeavor to bring before our readers all cases of interest and utility in Upper Canada and in England. Occasionally we shall present from cotemporary legal publications articles of marked ability and undoubted usefulness. In addition, each number of this Journal will contain original articles upon subjects of especial interest to the profession. While extending the sphere of our usefulness we shall not in word or deed prove faithless to our former promises in relation to local and inferior Courts. In a word, without exclusively advocating the peculiar interests of any branch of the profession or any set of Courts, we shall strive to serve the greatest possible number of persons in the best possible manner. In making these changes we do but obey the great call of our generation, which is for progress and intellectual improvement.

CRIMINAL LIABILITY OF STEAMBOAT OWNERS, &c., FOR LOSS OF LIFE.

Recent events which have produced a deep sensation in the public mind have induced us to investigate that part of our law which is the subject of this article. The burning of the steamboat Montreal on the River St. Lawrence must long be remembered as one of the most terrible and heart-rending calamities that has ever taken place on our waters. The destruction of life is fearful to contemplate, and can only be compared with the anguish of the relatives and friends of the poor emigrants who in sight of their intended homes met death in its most dreadful and appaling form. To think that more than two hundred and fifty persons full of hope and expectation, having braved the ocean, were on an inland water, and on either side within a few hundred feet of land, by one stroke of death launched into eternity is an awful thought. It is the imperative duty of all men according to their stations of life to do their utmost to avert the recurrence of such calamities. The responsibility of the owners, captains and pilots of steamboats is great—very great, and should be brought home vividly and impressively to their minds. There must be for those who are governed by no higher motives the wholesome dread of stern unrelenting and uncompromising law. In referring to the Montreal we do so more by way of illustration than of animadversion. It is not our intention to prejudge the owners or officers of that vessel; but by pointing out the consequences of their conduct to warn all others similarly situated. It appears that an investigation into the causes of the burning of the Montreal has been had by a coroner's jury and has resulted in no very definite decision.

It is understood that the owner, the captain, the mate, and the pilots are in custody and are to be tried for the crime of manslaughter. It is charged that owing to the unsafe and dangerous state of the vessel which had been several times previously on fire to the knowledge of the owner and officers, that the lives of hundreds were jeopardized, and the lives of at least two hundred and fifty destroyed. It is averred that the owner purposely neglected to have the vessel, including the engine, inspected according to law, and the captain, though knowing the unsafe state of both, continued to sail the vessel. It is known that in consequence of the burning of the vessel a great number of persons were killed by burning and drowning. These are the assertions. Let us for the purpose of this dissertation presume them to be true. Are the owner, captain, mate, and pilots or any of them liable to be proceeded against as criminals? One useful test of crime is the intention of the party accused. This brings us to the distinction between acts of commission and of omission, in the former of which it is at all times more easy to reach the intention than in the latter. The burning of the Montreal was the result of an act either of commission or of omission or of both combined. Loss of life was the direct consequence of that burning. To run a vessel knowing her to be dangerous to life is an act of commission. To neglect to make her safe is an act of omission. The act of which the public complain in this case was not one of pure commission or of omission; but probably a union of both partaking more of the latter than the former. If the owner and officers of the Montreal designing to destroy the lives of the passengers received them on board of an unsafe vessel, the owner and officers would be guilty of murder. So if with a like design they purposely omitted to put the vessel in a safe condition. Thus it appears that murder may arise out of an act either of commission or of omission and under circumstances of both united. Murder, however, is not merely an unlawful killing, but a killing with malice, aforethought. It is not likely that any steamboat owner, captain, mate or officer would kill several hundreds of his passengers with malice aforethought. Still there are offences against the person of grave enormity into which malice as a motive does not at all enter. Of these manslaughter the crime next in degree to murder and nearly allied to it is the most prominent. The general doctrine seems well established that that which constitutes murder when of malice aforethought constitutes manslaughter when arising from culpable negligence: (*Reg.* v. *Hughes*, 29 *Law Times*, *Rep.* 266.) Whether the owner or officer of a vessel intentionally or carelessly do that which he ought not to do or neglect to do that which he is bound to do he is at least guilty of negligence. Either of these propositions involves a duty to be executed in the performance or non-performance of something present to the mind of the person and understood by him. There are duties which the statute law and others which the common law imposes upon steamboat owners and officers. It is their duty by statute to cause the hull of the vessel to be inspected by the proper officer in that behalf once at least in every twelve calendar months, and to cause the boiler and machinery to be inspected at least once in every six calendar months: (14 & 15 Vic., cap. 126, s. 7.) It is also their duty by Statute to carry certain lights, (*Ib.* s. 1), to have fog bells and ring them when in a fog, (*Ib.* s. 2), to carry fire engines and proper hose, (*Ib.* s. 10) to have in a conspicuous place a steam guage properly constructed, (*Ib.* s. 8), and such like. These are duties certain and defined, and if neglected cannot escape the description of culpable and gross negligence. It is, in fact, provided with reference to the foregoing duties that "if any damage to any person or property shall be sustained in consequence of the non-observance of any of the provisions contained in this Act the same shall in all Courts of justice be deemed, in the absence of proof to the contrary, to have been caused by the wilful default of the Master or other person having charge, &c.," and that "the owner thereof in all civil proceedings, and such master or other person in all proceedings whether *criminal* or civil shall be subject to the legal consequences of such default:" (*Ib.* s. 11.) It is not for us to say whether the rumor that the Owner and Captain of the Montreal neglected to comply with one or other of the foregoing statutable duties. We can only say that if these persons did, or any others for the future do so, the Statute is extensive enough to seize and strong enough to punish them. A recent Statute imposes additional duties on the owners and captains of steamboats "for the security of the lives of passengers," (20 Vic. c. 34), but as the principal of these duties are not to be obligatory until 1st April, 1858, we do not at pre-

sent further advert to them. Duties at common law are not defined—save by common sense and reason. It is surely the duty of a captain if he knew his vessel to be unsafe to report her to the owner. It is no less the duty of the owner if knowing her to be unsafe to see that she is made safe or else withdrawn from service. It is certainly the duty of the pilot to be at his helm in places of danger or of insecurity. These and many other duties of a similar kind will suggest themselves to the mind. Here we arrive at the consideration of a most important question, viz., how far any one man is answerable criminally for the acts of another, the owner for the captain, the captain for the pilot, &c. Owing to want of space we must defer the consideration of this branch of our subject for a future number of the *Journal.*

THE LOCAL COURTS OF UPPER CANADA.

We ventured to predict, a year since, that within a short space of time our Local Courts would be self-supporting; and we are now able to state, as a fact, that they are not only self-supporting, but give a large surplus.

The Judges and Officers of the Upper Canada County and Division Courts do not draw one penny from the General Revenue Fund. The fund necessary to supply these institutions is wholly supplied from small fees collected from suitors in the Courts.

The institution of a system of Local Courts, presided over by trained men as Judges, and acting under a uniform procedure, is due to the Honorable Mr. Draper. At first it was regarded with some jealousy, as an experiment of doubtful expediency, and for a time the result left perhaps even the author of the measure doubtful as to the result.

This early distrust was due, perhaps, in part to the favor in which the Superior Courts were held, the public confidence in the learned Judges who presided over them, and the sound and uniform principles on which the law was administered through these tribunals.

But the disfavor into which the Courts of Request and old District Courts, at least those of them in which non-professional men were Judges, had grown—the odium which they had in many instances incurred, contributed also to raise the feeling of distrust towards Courts occupying the place of the abolished Courts of Request and District Courts.

The public, however, soon discovered the advantage of trained professional men as Judges; and as the benefits of cheap and speedy justice administered in each county and township on settled principles were felt, the Division Courts and County Courts grew in favor.

As the system advanced in public confidence and esteem an extension of it was asked, and the Local Courts, at first very limited in powers, have now a most extensive jurisdiction.

The great difficulty with public men in securing any improvement in the law, is the cost. "I can carry *any* legal reform in *any* House, if I have not also to ask the money to carry it out," we once heard an experienced public man say. No doubt he was right.

Well, although for some years the Local Courts drew from two to three thousand pounds per anuum from the General Revenue, they are now paying institutions; and in this, as well as in more important particulars, exhibit the sagacity of the Hon. Mr. Draper, to whom Upper Canada is indebted for them.

Up to the year 1851, the jurisdiction of these Courts was very limited in amount, and a very large portion of business now satisfactorily done by them was transacted through the Superior Courts at Toronto.

But as early even as 1851, the deficiency in the amount of fees collected towards meeting the disbursements on account of the Courts, including the Judge's salaries, did not exceed £2,000 for the year. Since 1851, many Counties have been divided into two or more, with an additional charge on the fee fund collection for payment of as many additional Judges and other necessary disbursements. Last year, also, a measure of justice was dealt out by a slight increase in the County Judges' salaries, and yet the result is just as Mr. Attorney General McDonald stated (when submitting the measure for increase of salary) it would be—there is now *a surplus of fees* over and above all expenses.

To come to figures. In 1851 there was a deficiency in the fees collected in Local Courts, for the half year ending 30th June, of £911 19s. 6d., or in other words there was that amount taken from the general revenue of the Country to pay the necessary disburse-

ments on account of the Courts—that is, an amount equal to about £2,000 for the whole year (1851). For the half year ending 30th June last, there is a surplus, after paying all expenses, of between £900 and £1,000; and at the close of this year the Province will have drawn a revenue from the Local Courts of about £2,000 !!

This is the aggregate. Several of the smaller Counties do not, as might be expected, produce sufficient fees to pay their Court establishments; while others, larger and more populous, give a considerable overplus.

Those Counties which produce a surplus are: the United Counties of *York and Peel;* the County of *Simcoe;* the County of *Waterloo;* the United Counties of *Northumberland and Durham;* the Counties of *Brant, Middlesex, Wentworth, Kent, Grey, Frontenac, Lennox and Addington*, and *Elgin* (the last two small amounts). In all the other Counties there is a deficit.

The United Counties of *York and Peel*, the County of *Simcoe*, and the County of *Waterloo*, stand much above the others as the paying Counties.

For the half year ending the 30th June last, the surplus was as follows:—*York and Peel*, £888 14s. 6d.; *Simcoe*, £353 3s. 3d.; *Waterloo*, 331 17s. 6d.

The Counties much below the others in amounts received for fee fund, are: the United Counties of *Prescott and Russell*, and of *Huron and Bruce;* and the County of *Prince Edward*.

In the 20 Counties in which there is a deficiency, the aggregate is £1637 18s. 7d. for the last half year. In the 11 Counties exhibiting a surplus, the aggregate is £2539 19s. 4d. for the same period. The whole charge on the fee fund connected with the maintenance of the County and Division Courts is under £19,000 for the *whole* of the year. The net fees received the last *half* year considerably exceed £10,000.

These facts and figures afford material for reflection and observation; at present we merely refer to them as showing that the Local Courts are more than self-supporting, and that this important branch of the public service in Upper Canada does not cost the Province one shilling to maintain.

THE ACTS OF LAST SESSION.

Admission of Attorneys, 20 Vic., cap. 63.

The professed object of the Legislature when passing the Statute 20 Vic. cap. 63, was to provide that no persons should be admitted attorneys of the Courts, unless those having the necessary "capacity," and in other respects "fit" to act as such: (20 Vic. cap. 63, s. 6.) It is intended that every person before he shall be admitted as an attorney shall acquire competent skill and knowledge to conduct the business of an attorney: (per Abbott, C. J., *in re* Taylor, 4 B. & C. 344.) Each and all of the provisions of the Act have these objects, and these only, in view, and must be construed so as to carry them into effect. No section is more important than that which enacts that "every person who *now is* or *hereafter shall be bound* by contract in writing to serve as a clerk to any attorney or solicitor shall, *during the whole time and term of such service* to be specified in such contract (not exceeding the term of five years), *continue* and *be actually employed* by such attorney or solicitor *in the proper business, practice, or employment of an attorney or solicitor:*" (s. 9.) It may be that there is no new principle unfolded in this section; but one cannot help feeling that the principle though not new is couched in no doubtful language. In Upper Canada, where the struggle to serve continuously for five years is one that often necessitates engagements not purely professional, it is proper to inquire to what extent an articled clerk may accept employment beyond the pale of his profession. We, in the first place, premise that the operation of the section is so far retrospective that it applies to persons under articles at the time of the passing of the Act, which was 10th June, 1857. We also premise that the section is identical with s. 12 of English Statute 6 & 7 Vic. cap. 73. We find upon reading the section that, *first*, the subject of it is "a person who now is or hereafter shall be bound, &c.;" and that, *secondly*, particular duties are required of such person—that he "continue and be actually employed by such attorney, &c., in the proper business, practice, or employment of an attorney, &c., during the whole time and term of service."

First—Any person *sui juris* may be articled as a clerk to an attorney. There is no statute which disqualifies any class of Her Majesty's subjects; but as

there is a power of admission belonging to the Courts that power involves the power of rejection. It is the duty of the Court in a doubtful case to make inquiries as to imputations thrown upon the conduct of an applicant. In England, as the office of barrister and that of an attorney cannot be held together, it has been decided that a person who has served under articles, being at the same time a barrister, cannot claim to be admitted an attorney by virtue of such service: (*ex parte* Bateman, 6 Q.B. 853.) As the reason of this decision does not hold good in Upper Canada, the decision itself, it is apprehended, cannot be received without grave misgivings. In Upper Canada both branches of the profession are generally united in the one person. Besides our recent Act in certain cases not only authorises, but makes necessary, the service of barristers to attorneys, whereupon such persons are entitled themselves to be admitted as attorneys: (20 Vic. cap. 63, s. 5.)

Second—The clerk must *continue during the whole five years* to serve the attorney to whom he is articled, and to serve him *in the proper business, practice, or employment of an attorney.* The service must not only be for five years, but be *continuous* for the *whole* of that time. A service broken by devoting a part of the time to a different employment will not suffice though the actual service rendered may be more than five years. Therefore a person who, while under articles, held a situation incompatible with his profession, as surveyor of assessed taxes, was decided to be incompetent though the business of his office did not occupy more than one-eighth of his time: (*In re* Taylor, 5 B. & Al. 538.) So where an articled clerk, during the entire period he was under articles, was a salaried clerk attending a public office: (*In re* Ridout, T. T. 2 & 3 Vic., MS., R. & H. Dig," Attorney," I. 4.) The court cannot, where an articled clerk has devoted part of the five years to employments other than that of the profession, allow him for the months, weeks, and days actually served, and then allow him to re-article himself for the fractional part remaining: (*In re* Taylor, 4 B. & C. 341.) In such a case the service under the first articles cannot be coupled with the services under the second articles so as to make the period of five years: (*Ib.*) In some instances, where a service has been put an end to before the five years have expired, and there has been a definite and precise interval, and afterwards an additional binding and service, it has been held that the deficiency might be in that manner supplied: (*Ib.* per Abbott, C. J.) Clerks whose masters have, during the currency of the articles, died or left off practice, may enter into fresh contracts for the residue of their term: (20 Vic. cap. 63, s. 14.) So in case the master become bankrupt or insolvent under the direction of a Court the articles may be discharged or assigned: (*Ib.* s. 13.) Occasional and unavoidable absence by illness (*ex parte* Mathews, 1 B. & Ad. 160), even for a year (*In re* Hagarty, 6 O. S. 188; *ex parte* Hodge, 2 Jur. 989), will not render the service inoperative. Nor will an absence for several months, with the master's assent, if the whole period of five years be actually served: (*ex parte* Hubbard, 1 Dowl. P. C. 438; *ex parte* Frost, 3 Dowl. P. C. 323; *ex parte* Peel, 7 Jur. 724; *ex parte* Mathews, 1 B. & Ad. 160; *ex parte* Cross, 9 Dowl. P.C. 692.) If a clerk under articles to one attorney serve a part of his five years to another attorney, even with his master's assent, this is not a service under articles such as intended by the Act (*ex parte* Angell, 4 Jur. 656; *ex parte* Hill, 7 T. R. 456; *ex parte* Rowle, 2 Ch. Rep. 54), but service for one year with the Toronto agent of his master is allowable: (*In re* Gilkeson, H.T. 7 Wm. IV. MS., R. & H., Dig. "Attorney," I; see also s. 4 of 20 Vic. cap. 63.) There is nothing to prevent a clerk from devoting his extra hours in the employment of an attorney other than his master: (*ex parte* Blunt, 2 W. Bla. 764; *ex parte* Llewellen, 2 Dowl. N. S. 701.) Where a person who had articled himself for three years served only two months and then abandoned the contract, and after the expiration of three years mentioned in the contract his articles were assigned to another attorney with whom he served the residue of the time it was held that as the original articles had expired the assignment and service after the assignment was ineffectual: (*ex parte* Unthank, 2 M. & P. 453.) The service must not only be in the "*proper business*" (L's case Barnes 39, *the Scrivener's Co.* v. *the Queen*, 12 L. J., Ex. 492) of the attorney, but at the place of business where the attorney resides: (In re *McIntosh* v. *McKenzie*, M. T. 1 Vic., MS., R. & H. Dig. "Attorney," I. 2.) If the master be a lunatic during a part of the service the service during that time is inoperative: (*ex parte* Brown, 9 Dowl. P. C. 526; *ex parte* Turner, 10 L. J., Q. B. 356.)

NOT PROVEN.

The trial of Madeleine Smith in Glasgow, for the murder of Emile L'Angelier, in consequence of the wide spread interest it excited, has had the effect of provoking some comparisons between the English and Scotch systems of jurisprudence as to trial by jury. According to the English law there is no verdict of "Not Proven." The jury is called upon to pronounce the accused either "guilty" or "not guilty." When the accused is tried, and a verdict pronounced, he is no longer liable to be again put upon his trial for the same offence. It now seems contrary to the general impression that the Scotch verdict of "Not Proven" is in effect the same as our verdict of "Not Guilty," and that a prisoner such as Madaleine Smith, as to whom the verdict of "Not Proven" is pronounced, may plead that verdict in bar of future proceedings for the same offence. In another place we give an extract from an article recently published in the *Law Times* of England, in which the writer conclusively establishes the legal effect of the verdict of "Not Proven" to be as we have stated.

The law of husband and wife does not fail to engage a fair share of public attention in England. Recently in Canada there was much discussion amongst newspapers upon the same topic. A Bill to amend the law as to husband and wife was introduced during the last Session of the Legislature, but did not become law. There is certainly a feeling which day by day gains strength that the law as to married women is not as it ought to be, and must be amended. In this number we offer our readers a short article from the English Law Magazine and Law Review, headed "The Married Woman Question."

By the obliging attention of MR. ROBINSON, the Reporter to the Court of Queen's Bench, and of MR. GRANT the Reporter to the Court of Chancery, we are enabled to publish several cases of importance in those Courts in advance of the regular series. Our Chamber Reports by MR. ENGLISH, are also continued in this number.

Trinity Term, 1857, the following gentlemen have been duly called to the Bar:—Mr. Patrick McGregor, Mr. Robert Mahon Allen, Mr. Shubael Park, Mr. G. D'Arcy Boulton, Mr. R. T. Wilkinson.

We have not been able in this number to find a place for our usual MONTHLY REPERTORY. It will however appear in our next. Owing to our change of publishers, our arrangements are not yet in all respects as complete and satisfactory as we would desire.

We find that Messrs. Armour & Co., have the American edition of Shelford on the Law of Railways, The work is noticed on this page.

This extensive firm have always early supplies of standard American Law Books, and speaking from experience we can assure our readers of their punctuality and fair dealing with customers who send orders for English or American books.

NOTICES OF LAW BOOKS.

"*The Law of Railways, including the Consolidation and other General Acts for Regulating Railways in England and Ireland, with copious notes of decided cases on their construction, including the rights and liabilities of Shareholders, allotees of Shares, and Personal Committee-men, with forms, &c., by Leonard Shelford, Esq., of the Middle Temple, Barrister at Law. First American, from the Third London Edition with copious notes and references to late English Cases; and American Statutes and Decisions, by Milo L. Bennett, LL.D., one of the Judges of the Supreme Court of Vermont.*" In two Volumes large Octavo. Published by Chaucey Goodrich, Burlington.

Although we have now Railroads in every direction, it is not more than four years since the first line of Railroad of any extent came into operation in Canada, consequently the attention of the profession has not been yet much directed to the study of the Law of Railways. With the many statutes passed by the Legislature authorizing the construction of new lines, and the numberless schemes for the like purpose before the public, it has become a matter of necessity that the profession should be thoroughly up in the Law bearing upon Railways.

The best English work upon this important topic is by Shelford. The last edition was published in 1823. The American Edition before us brings the law down to July, 1855.

Our opinion of the superior value of the American Editions of English works when produced by reliable authors is well known to the readers of this Journal, and is fully sustained by the work now before us. The original text is preserved, and the notes and additions of the learned Editor "Judge Bennett" is distinguished from Mr. Shelford's work. We have examined with care a large portion of the very copious and very valuable matter with which the American Editor has enriched the original work. No one can doubt that he thoroughly understands his subject, and possesses the peculiar talent necessary to impart the knowledge he has acquired.

It seems to have been made an objection in the United States that the work contains too many English statutes.. This fact lends it peculiar value to us, in Canada, most of our statutes being *verbatim* copies from the English ones, while the American decision cover ground common to this country and the United States, which is scarcely touched on by the decisions at home, for instance, in relation to the subject of *fences, taxes*, &c., and many other subjects as viewed in reference to a state of things in a new country.

It is with peculiar satisfaction we recommend this edition of Shelford to our readers, and we trust they will be induced to avail themselves of the instruction which an attentive perusal cannot fail to bestow.

Messrs. Armour & Co. of Toronto, have the book for sale.

CORRESPONDENCE.

Townships Clerk's Office.
Clinton, Aug. 11th 1857.

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

Sir,—I have been requested by the Reeve and Councillors of the Township of Clinton, to put the following questions, and to request an answer through the Law Journal, viz:

1st.—How and in what manner can Township Councils legally invest the Moneys derived from "the Upper Canada Municipalities Fund."

2nd.—Can Township Councils Levy and Collect Tolls on any Plank or Macadamized Road less than two miles in length.

I remain your obedient servant,
Robert Henry,
Township Clerk, Clinton.

Query 1.—"The Upper Canada Municipalities Fund," (18 Vic., cap. 2, sec. 1,) apportioned among the City, Towns, Incorporated Village, and Township Municipalities in Upper Canada, (19 & 20 Vic., cap. 16, sec. 1,) makes part of the Municipality and is applicable to any purpose for which funds are applicable, (18 Vic., cap. 2, sec. 5,) and may be by By-law set apart for any purpose, which special purpose shall be mentioned in *such* By-law and *invested* in the purchase of Provincial Consolidated Loan Fund or Municipal Debenture for the purposes mentioned in such By-law, (19 & 20 Vic., cap. 71, sec. 2.)

Query 2.—Township Municipalities may, we think, levy and collect Tolls on Plank and Macadamized Roads less than two miles in length, when such road though less than two miles *are complete,* (12 Vic., cap. 81, sec. 191, as amended by 14 & 15 Vic., cap. 109, Sch. A. Nos. 26. 28. also 16 Vic. cap. 190, sec. 28-59.) [Ed., L. J., U. C.]

APPOINTMENTS TO OFFICE, &C.

JUDGES OF ERROR AND APPEAL.

The Honorable JAMES BUCHANAN MACAULAY, late Chief Justice of the Court of Common Pleas for Upper Canada, a Judge of the Court of Error and Appeal for Upper Canada; to take rank or precedence therein after the Chief Justice of the said Court of Common Pleas for the time being.—(Gazetted July 25, 1857).

COUNTY JUDGES.

GEORGE McKENZIE CLARKE, of Osgoode Hall, Esquire, Barrister at Law, to be Judge of the County Court of the United Counties of Northumberland and Durham, in the place of George M. Boswell, Esquire, granted leave of absence for six months.—(Gazetted Aug. 1 1857.)

RECORDERS.

JOHN BOWER LEWIS, to be Recorder and Police Magistrate in and for the City of Ottawa.—(Gazetted Aug. 1, 1857.)

SHERIFFS.

JAMES BONWELL FORTUNE, of Cobourg, Esquire, to be Sheriff of the United Counties of Northumberland and Durham, in the place of Henry Ruttan, Esquire, resigned.—(Gazetted Aug. 1, 1857.)

ASSOCIATE CORONORS.

JAMES BOWIE, Esquire, M.D., and PETER ROLPH SHAVER, Esquire, M.D., to be Associate Coroners for the County of Perth.—(Gazetted May 2, 1857.)

PETER MAITLAND, of Montague, Esquire, to be an Associate Coroner for the United Counties of Lanark and Renfrew—(Gazetted May 9 1857.)

GEORGE BROWNSON, WILLIAM SCOTT, SIMEON W. TRUMPOUR, CHRISTOPHER S. McKIM, JOSEPH CONNOLY, ALLEN RUTTAN, JOSEPH NORTHMORE, DEMETRIUS SPINNING, and WILLIAM R. ALLEN, M. D., Esquires, to be Associate Coroners for the United Counties of Frontenac, Lennox and Addington.—(Gazetted June 16, 1857.)

JOHN IRONS, Esquire, M. D., to be an Associate Coroner for the United Counties of Peterborough and Victoria. (Gazetted June 20, 1857.)

JOHN SCOTT, Esquire, M. D., to be an Associate Coroner for the United Counties of York and Peel.—(Gazetted June 20, 1857.)

CHARLES ROLLS, Esquire, M. D., to be an Associate Coroner for the County of Middlesex. (Gazetted May 25, 1857.)

ORMAN SKINNER, Esquire, M. D., to be Associate Coroner of Wentworth.—(Gazetted July 25, 1857.)

CLERKS 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, Esquire, resigned.—(Gazetted May 2, 1857.)

NOTARIES PUBLIC.

THOMAS MOORE BENSON, of Toronto, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 2, 1857.)

GEORGE MACAULAY HAWKE, of Toronto, Esquire, Solicitor, &c., to be a Notary Public in Upper Canada.—(Gazetted May 19, 1857.)

ANDREW JACKSON PETERSON, of Berlin, Gentleman and ADAM CROOKS, of Toronto, Esquire, Barrister at Law, to be Notaries Public for Upper Canada.—(Gazetted May 16, 1857.)

NICHOLAS HUTCHESON, of Peterborough, Gentleman, to be a Notary Public in Upper Canada.—(Gazetted June 20, 1857.)

ROBERT LYON, of Ottawa, Esquire Barrister at Law, and

NEIL McLEAN TREW, of Windsor, Esquire, Attorney at Law, to be Notaries Public in Upper Canada.—(Gazetted July 25, 1857).

JOSEPH DEWITT VANNORMAN, of Simcoe, Esquire, Attorney at Law, to be a Notary Public for Upper Canada.—(Gazetted Aug. 8, 1857.)

RICHARD BAYLY, of the City of London, Esquire, Barrister at Law, to be a Notary Public in Upper Canada.—(Gazetted Aug. 22, 1857.)

RETURNING OFFICERS.

LEVI WILSON, Esquire, to be Returning Officer for the Town of Milton. (Gazetted June 20, 1857.)

WILLIAM ROBERTS, Esquire, to be Returning Officer for the Village of Waterloo.—(Gazetted June 20, 1857.)

JUSTUS WILLIAMS, Esquire, to be Returning Officer for the Town of Oakville.—(Gazetted June 20, 1857.)

WILLIAM A. THOMSON, Esquire, to be Returning Officer for the Village of Fort Erie.—(Gazetted June 20, 1857.)

ROBERT WILLIAM CANA, Esquire, to be Returning Officer for the Village of Mitchell, County of Perth.—(Gazetted July 25, 1857.)

GEORGE W. BROUSE, Esquire, to be Returning Officer for the Village of Iroquois, County of Dundas.—(Gazetted July 25, 1857.)

SUPERIOR COURTS.

AUTUMN CIRCUITS, 1857.

EASTERN—SIR J. B. ROBINSON, C. J.	
L'Orignal	Wednesday, 23d Sept.
Ottawa	Monday, 28th Sept.
Perth	Tuesday, 6th Oct.
Brockville	Tuesday, 13th Oct.
Cornwall	Thursday, 22nd Oct.
MIDLAND—MR. JUSTICE RICHARDS.	
Whitby	Monday, 21st Sept.
Peterboro'	Monday, 28th Sept.
Cobourg	Thursday, 1st Oct.
Belleville	Monday, 12th Oct.
Picton	Thursday, 22nd Oct.
Kingston	Tuesday, 27th Oct.
HOME—MR. JUSTICE HAGARTY.	
Sydenham	Tuesday, 22nd Sept.
Milton	Monday, 28th Sept.
Merrittsville	Monday, 5th Oct.
Barrie	Monday, 12th Oct.
Niagara	Monday, 19th Oct.
Hamilton	Wednesday, 28th Oct.
OXFORD—MR. JUSTICE BURNS.	
Cayuga	Tuesday, 22nd Sept.
Simcoe	Wednesday, 30th Sept.
Brantford	Tuesday, 6th Oct.
Woodstock	Friday, 16th Oct.
Guelph	Monday, 26th Oct.
Berlin	Monday, 2nd Nov.
Stratford	Monday, 9th Nov.
WESTERN—MR. JUSTICE McLEAN.	
Goderich	Tuesday, 22nd Sept.
St. Thomas	Tuesday, 29th Sept.
Chatham	Tuesday, 6th Oct.
Sandwich	Tuesday, 13th Oct.
Sarnia	Tuesday, 20th Oct.
London	Tuesday, 27th Oct.

TORONTO—CHIEF JUSTICE, COMMON PLEAS.
Monday, 12th October.

DIVISION COURTS OF THE COUNTY OF LAMBTON.

First Division.—Clerk, Thos. Forsyth—Sarnia.—The Town and Township of Sarnia, Enniskillen, and the first to the sixth Concessions of the Township of Plympton, both inclusive.

Second Division,—Clerk, James F. Elliot—Warwick.—The first three Northern Concessions and six Southern Concessions of the Township of Warwick, such Northern and Southern Concessions commencing from the Egremont Road in the said Township and the ten Northern Concessions of the Township of Brooke.

Third Division.—Clerk, George M. Webster,—Drenden.—The four Southern Concessions of the Township of Brooke and all the Townships of Euphemia and Dawn.

Fourth Division.—Clerk, Thomas Carolan,—Wallaceburgh.—The Township of Sombra.

Fifth Division.—Clerk, Thomas Scott,—Errol.—The nine Northern Concessions of the Township of Plympton and the sixteenth and seventeenth Concessions and the Lake Shore Roads from Lot 63 to 83 inclusive of the Township of Bosanquet.

Sixth Division.—Clerk, James Wyld,—Widder.—The five Northern Concessions of Warwick and the first to the fifteenth Concessions inclusive of the Township of Bosanquet, and the eighteenth and Nineteenth Concessions and the Lake Shore Road of the said Township from Lots number one to sixty-two inclusive.

Seventh Division.—Clerk, Wm. McPherson,—Moore-town.—The Township of Moore.