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VOL. IV. TORONTO, FEBRUARY, 1858. No. 2.

THE UPPER CANADA LAW JOURNAL

AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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LAW SOCIETY OF UPPER CANADA,

(Osgoode Hall.)

Mich. Term, 21st Victoria, 1857.

On Monday, the 16th November, in this Term, the following Gentlemen were called to the Degree of Barrister-at-Law :—

Niel McLean Trow, Esquire,	Farquhar McOilliveay, Esquire,
Gilbert Tice Bastedo, "	Daniel Macmaw, "
James Agnew, "	Alex. Sutton Kirkpatrick, "
Robert Mc Farlane, "	Alfred Driscoll, "
James Maclennan, "(with honors)	Edward Wm. Jas. Tinney, "

On Saturday, the 21st November, in this Term, the Honorable Robert Baldwin was re-elected Treasurer of this Society.

On the same day Jacob Farrand Pringle and George Boomer, Esquires, members of the Society of the degree of Barrister-at-Law were elected Masters of the Bench

On Tuesday the 24th day of November, in this Term the following Gentlemen were admitted into the Society as members thereof, and entered in the following order as Students of the Laws, their examinations having been classed as follows:—

University Class:

Mr. Alexander Robert Morris, B.A.,	Mr. James Fox Smith, B.A.,
" James Webster, Junior, B.A.,	Charles Ingersoll Benson, B.A.

Senior Class.

Mr. Robert Swanton Appelbe,	Mr. Cornelius Danford Paul.

Junior Class:

Mr. James Robb,	Mr. George Simmie Phillip.
" James Shaw Sinclair,	" Frederic Henry Stayner,
" Edmund James Beatty,	" Samuel Barker.
" Thomas Deacon,	" James Cleland Hamilton.

Note.—Gentlemen admitted in the "University Class" are arranged according to their University rank. In the other classes, according to the relative merit of the examination passed before the Society.

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

For the Optime Class:

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

For the University Class:

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

For the Senior Class:

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

For the Junior Class:

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

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

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

Ordered—That in future all Candidates for admission into this Society as Students of the Laws, who desire to pass their Examination in either the Optime Class, the University Class, or the Senior Class do attend the Examiner at Osgoode Hall, on both the first Thursday and the first Friday of the Term in which their petitions for admission are to be presented to the Benchers in Convocation, at Ten o'clock A. M. of each day: and those for admission in the Junior Class, on the latter of those days at the like hour.

Ordered—That the examination of candidates for certificates of fitness for admission as Attorneys or Solicitors under the Act of Parliament 20 Vic chap. 63, and the Rule of the Society of Trinity Term, 21 Vic chap. 1 made under authority and by direction of the said Act, shall, until further order, be in the following books and subjects, with which such candidates will be expected to be thoroughly familiar, that is to say:

Blackstone's Commentaries, 1st Vol.; Smith's Mercantile Law; Williams on Real Property; Williams on Personal Property; Story's Equity Jurisprudence The Statute Law, and the Practice of the Courts.

Notice.—A thorough familiarity with the prescribed subjects and books will in future, be required from Candidates for admission as Students; and gentlemen are strongly recommended to postpone presenting themselves for examination until fully prepared.

Notice.—By a rule of Hilary Term, 18th Vict., Students keeping Term are henceforth required to attend a Course of Lectures to be delivered each Term at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

ROBERT BALDWIN,
Treasurer.

Mich. Term, 21st Victoria, 1857.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly, 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz :—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspaper in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interval of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. Wm. B LINDSAY Clk Assembly.

Legislative Council,
Toronto, 4th September, 1857.

EXTRACT from the Standing Orders of the Legislative Council.

Fifty-ninth Order.—"That each and every applicant for a Bill of Divorce shall be required to give notice of his or her intention in that respect specifying from whom and for what cause, by advertisement in the official Gazette, during six months, and also, for a like period in two newspapers published in the District where such applicant usually resided at the time of separation; and if there be no second newspaper published in such District, then in one newspaper published in an adjoining District; or if no newspaper be published in such District, in two newspapers published in the adjoining District or Districts."

J. F. TAYLOR,
10-tf. Clerk Legislative Council.

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IS published monthly in the City of Toronto, at $4 per annum if paid before 1st March in each year; $5 if paid afterthat period.

It claims the support of Judges, Lawyers, Officers of Courts, Municipal Officers, Coroners, Magistrates, and all concerned in the administration of the Law, on the following grounds:—

1st. It is the only Legal Periodical published in Upper Canada.

2nd. Each number contains Reports of cases—many of which are not to be found in any other publication.

3rd. Chamber Decisions are reported expressly for the Journal.

4th. Each number contains original articles on subjects of professional interest.

5th. Each number contains articles in plain language for the guidance and information of Division Courts, Clerks, Bailiffs and Suitors, and Reports of cases of interest to all whose support is claimed.

6th. Each number contains a Repertory of English decided cases on Points of Practice.

7th. It is the only recognized organ of intercommunication between Lawyers, Officers of Courts, and others concerned in the administration of law.

8th. It is the only recognized medium of advertising on subjects of legal interest.

9th. It circulates largely in *every* City, Town, Village and Township in Upper Canada.

10th. It exchanges with more than fifty cotemporary periodicals published in England, the United States, Upper and Lower Canada.

11th. It has now reached the fourth year of its existence, and is steadily increasing the sphere of its usefulness.

12th. It has advocated, and will continue to advocate sound and practical improvements in the law and its administration.

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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 sum 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.

DIARY FOR FEBRUARY.

1. Monday.... Hilary Term begins.
2. Tuesday.... Chancery Examination Term. Toronto and Cobourg, commences.
3. Wednesday Chancery Examination at Goderich commences.
5. Friday..... Paper Day, Q.B.
6. Saturday ... Paper Day, C.P. Examination at Goderich and Colourg ends.
7. SUNDAY .. *Sexagesima Sunday.*
8 Monday ... Paper Day, Q B.
9. Tuesday ... Chancery Examination at London & Belleville. Paper Day, C.P.
10. Wednesday Paper Day, Q.B.
11. Thursday.. Paper Day, C.P.
13. Saturday... Hilary Term ends. Chancery Toronto Exam. Term ends. Exam. at London and Belleville ends.
14. SUNDAY.. *Quinquagesima Sunday.*
16. Tuesday ... Shrove Tuesday. St. Matthew. Chy. Ex. at Chatham & Kingston
17. Wednesday Ash Wednesday.
20. Saturday... Chancery Examination at Chatham and Kingston ends.
21. SUNDAY .. *1st Sunday in Lent.*
23. Tuesday.... Chancery Examination at Niagara and Brockville commences.
25. Thursday .. Sittings Court of Error and Appeal.
27. Saturday... Examination at Niagara and Brockville ends.
28. SUNDAY .. *2nd Sunday in Lent.*

"TO CORRESPONDENTS"—*See Last Page.*

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,*" or "*Barrie.*"

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.

The Upper Canada Law Journal.

FEBRUARY, 1858.

REGISTRATION OF VOTERS.

The recent Parliamentary election, apart from political issues and party cries, is of interest to the legislator.

No more important or sacred trust can be confided to any people, than that of choosing parliamentary representatives.

The representatives ought to possess wisdom to discern what is required for the good of the public, honesty to assert it, and ability to carry it into effect. The electors ought to possess, at least, intelligence to discern the fitness of the candidate, and independence to support him.

If it be necessary that none but fit men should be selected —and that it is no one will deny—it is equally necessary that none but fit men should be allowed to choose.

In proportion to the intelligence and honesty of the electors, may we expect a reflection of these qualities in the elected. No guage exists by which we can measure either the intelligence or the honesty of an elector. We are left to predicate their existence, in some degree, from the possession of property. It is presumed that a man who has property, must, as a general rule, have been gifted with some intelligence to acquire it. The desire for the future enjoyment of it, inspires a desire for good government. A man really anxious for good government is, it is presumed sufficiently honest to vote against bad candidates for representation. By these imperfect rules it is sought to establish a qualification of voters.

It is, however, worse than useless for a law to direct that none but duly qualified electors shall vote, without at the same time enforcing the mandate. In what manner is it done at present? By the administration of a series of oaths. Is this mode effectual? We think not. The administering of oaths without other safeguards is not, according to the the teachings of experience, sufficient to keep unsullied the purity of elections.

Many in our community have a repugnance to take oaths on any or every occasion; others have none. On both these classes, as regards the public interest, the effect of the election law is bad. With respect to the first,—those who object to swearing needlessly; it is in the power of any candidate or his agent to insist upon putting oaths to any man, however qualified, and to whom the bare attempt is an insult and a wrong. In all probability he refuses to gratify the malice of his inquisitor, and declines to swear. What is the consequence? His vote—though known to all men to be good—is refused. Here the effect of the law is to *disfranchise* the most respectable and most worthy men in the community. With regard to the second class,—those who have no respect for an oath, the effect of the election law is most deplorable In the heat of an election contest, men are brought forward in a spirit of rivalry and and fool hardiness. These men, regardless of the awful responsibilty of an oath or ignorant of its meaning, take the book, and swear with defiant bravery—whether qualified or not—and have their votes recorded. Here the effect is to *enfranchise* the most reckless, daring, and unscrupulous men in the community.

The baneful effects of the present law, do not end here. The frequent administration of an oath, unaccompanied with solemnity, brings the oath into disrespect, and spreads demoralization.

Perchance men slip through without any oath. The excitement is great, the polling place is crowded, and to facilitate the closing of the poll, votes are received at random. Men come forward unknown to the Returning Officer, and assume the names of persons believed to be qualified, and through false impersonation excercise the right of franchise Here although there is no legal, there is moral perjury, a breach of good faith, direct and substantial lying. Upon the individual, the effect is positive demoralization; upon the community, it is actual fraud.

Nor do the evils of the present law end here. Instances have occurred where more votes have been recorded than there were living beings, including men women and children in the riding. Some partisan gets possession of the poll books with a London directory in his hand,

records wh le columns of Smiths, Browns, and Robinsons. And where is the check? Who is there in a large electoral division that can say there is no such person as John Smith? Who can prove that John Smith is not entitled to vote? There is no *record* to which reference can be made. There is in reality no adequate check. A scrutiny under such circumstances, is as hopeless as it is farcical.

For all these enormities, and more too that might be mentioned, there is one remedy, and that is a registration of voters.

The first complete system of the kind in England, was established by the Reform Act of 1842, (2 Wm. IV. c. 45) It makes a slight distinction between the mode of proceedings in cities and towns as compared with rural constituencies. In the former it is made the duty of overseers to prepare a list of persons entitled to vote. In the latter the persons entitled to vote are themselves required to inform the overseers, and claim the right. In the end, however, the result is the same. The list when prepared is kept open for inspection and additions allowed for a period prescribed for the purpose. Any one whose name is on it, may dispute the right of any other person to have his name on the list. So the list continues until the expiration of the time limited by law, when it is delivered by the overseers to the constable of the hundred. He delivers it to the Clerk of the Peace, who transfers it to the revising barrister. The latter appoints a day for opening his Court, of which the disputants are duly informed. All attend, and after a full hearing, a decision is pronounced, either for or against the claims of the particular elector. The barrister's work is then done, and the list as finally revised is sent to the sheriff and holds good for one year. In the event of an election taking place within that period, it is ready for use. The qualifications of each voter appears besides his name. So long as his qualification remains unchanged, and his right otherwise to vote exists, his name, without further trouble to him, remains on the list. To cover expenses, certain small fess are imposed; but are cheerfully paid. The system is not only simple in design, but complete in details.

When the English scheme had been tried and approved for a period of twenty years, the Legislature of Canada ventured to adopt it in part. By an Act of 1853, (16 Vic. c. 153) the experiment was made. The assessment roll of each City, Town, Township, Parish, or Village was made the basis of the Canadian system. It being necessary that this roll should show not only the name but the qualification of the voter, it was, it must be confessed, some guide. True the qualification of a voter for Parliamentary elections differed from that for Municipal elections; but the difficulty was got over in this manner. For parliamentary purposes the law always declared a positive qualification. That qualification was known to all men. The actual qualification of the particular voter was known by reference to the assessment roll It became the duty of some person to compare the one with the other, and either concede or deny the right to the franchise. That duty was thrown upon the Clerk of the Municipality. He, after a final revision of the assessment roll for Municipal purposes, was required to make a correct alphabetical list "of all persons entitled to vote at the election of a member of Parliament." He, without reference to the parties, passed judgment qualifying or disqualifying them in his discretion. The list so made out by him, was next on a fixed day delivered to the County Registrar, for the use of Returning Officers. No person was entitled to vote at an election, unless his name appeared on the list given by the Clerk of the Municipalisy to the Registrar of the County. In this way, a door was opened for abuses. When party politics ran high, the abuses were flagrant—so flagrant that the Legislature, two years after the establishment of the scheme destroyed it. In Lower Canada where Municipal organization was very imperfect, there were no assessment rolls upon which to rely. The consequence was, that from the root upwards, the proceedings for registration of voters in that section of the Province were had upon the plan of the English system, and though more expensive than that of Upper Canada, might if properly carried out have been much more satisfactory.

Registration of voters is again demanded. Shall it be as in 1853? If not, in what respects different? We think the conglomeration of Municipal and Parliamentary registration, so long as the qualifications are not similar, should not be renewed. While it did exist, it produced confusion, generated fraud, and brought disgrace upon a sy tem otherwise entitled to support. With this difference, the old method, improved in details, may be renewed.

The following we submit as proper stand points about which to weave details:—

1.—There must be the qualification of voters, declared as at present.
2.—All persons qualified must be enrolled, either upon their own application, or upon application made to them.
3.—The list of enrollment must be open for inspection for a reasonable time before completion.
4.—After completion, it must undergo revision by a competent person.
5.—To lighten the duties of the latter, and for the convenience of the electors, there must be decentralization into small divisions

We have not now space to enlarge upon these heads; but will merely indicate the machinery necessary.

1.—Each Division Court division, to be a Division for the registration of voters.
2.—The Clerk of the Division Court, to be the Clerk of the enregistration division.
3.—Due notice to be given to all electors so that all may come forward and have their names recorded.

4.—The County Judge—the Junior Judge where there are two—to go circuit and revise the lists.

5.—An appeal under certain restrictions to be allowed from his decision to the Superior Courts of Common Law.

6.—The list when revised by the County Judge to be sent to the County Registrar.

7.—The County Registrar to have the custody of the list, and give copies to Returning officers, and to others demanding the same.

In Lower Canada, where there are Circuit Courts corresponding with our County Courts, and Courts for the trial of small causes corresponding with our Division Courts, the same scheme may, we apprehend, with little modification be adopted.

COUNTY ATTORNEYS.

The County Attorney's Act came into force on the first day of last month, and it is probable that the appointments under it will be made this month.

An Act so important and covering ground so extensive, affords ample material for observation, and Local Crown Attorneys will require all the assistance that can be given to aid them in the performance of their varied important and most responsible duties. We confidently hope that fitness will be the sole consideration guiding to a selection for each County, and that the institution will receive a fair trial by engaging the best men in the County to carry it into effect.

Modelled after a system that has worked beneficially for ages in Scotland, and an improvement in some particulars on that system, we look forward with great confidence to beneficial results. In Canada it is not entirely new, for under the French government it existed almost as at present. The scheme has long been a pet one with us, and three years ago was advocated at length in this journal. But as we now purpose noticing only two or three points, we shall on this occasion leave the Act as a whole for further discussion.

The first duty under the Act will be the appointment of a Local Crown Attorney in every County. The qualification is a standing at the *Upper Canada Bar* of not less than three years, and being a *resident* in the County. Residence has reference to the time of the appointment and we see no difficulty in any person otherwise eligible qualifying himself, if not a resident on the 1st of January of the County to which he seeks appointment.

There are several decisions under the Courts of Requests Acts and other Statutes as to what constitutes a residence, and the law upon that point will be found in a tolerably settled state.

Taking the second and ninth sections together, it is to be presumed that every Clerk of the Peace of the proper standing at the bar, will be appointed. Although not compulsory, it will be obviously carrying out a most important feature in the Act, to unite, when practicable, the offices of County Attorney and Clerk of the Peace.

The first duty of the County Attorney on receiving his appointment, will be to take the oath of office before a County Judge, (sec. 6); his next, to give such security as may be required by the Governor for the due payment over of monies coming into his hands as Receiver of Fees. (sec. 15). The amount of this security will probably be fixed with reference to the amount received from the County and Division Court Clerks in each County. The amount received for last year will doubtless be taken as a guide, and two sureties required for amounts together equal to the fee fund collections. Candidates for the office will do well to bear in mind the provisions of section four, which enacts that neither County Attorneys nor their partners in business shall be directly or indirectly concerned for parties charged with crime—much difficulty may arise if this provision be not kept in view.

Until a County Attorney is apppointed, informations and papers will be sent as usual to the Clerk of the Peace and as a further preliminary investigation may be necessary or additional evidence required, it will be obviously desirable to examine these papers at an early day in order to prepare for the business of the ensuing Sessions. With these suggestions we now leave the subject intending to resume it next month.

CONTROVERTED ELECTIONS.

Proceedings before County or Circuit Judges.

From all that we can learn, many elections of members returned to serve in Parliament will be contested in Upper and Lower Canada.

The greater part of the contestations are likely to be on grounds other than "matters appearing upon the face of the Return or of the Poll Books or other documents of which the original or certified copies are by law to be transmitted to the Clerk of the Crown in Chancery, or kept by the Returning Officer."

In every case of this kind of which we have heard the necessary steps have been taken with a view to proceedings before County or Circuit Judges, according as the parties reside in Upper or Lower Canada, under the Act of last Session, (20 Vic. cap. 23.)

We purpose for the informantion of the Judges, of the parties, and of all concerned, inasmuch as the Act is a new one, and its working uncertain, to review the mode of procedure which it sanctions.

Hitherto in the case of a controverted election no evidence could be taken until the meeting of Parliament, the receipt

of a petition against the election, the filing of a recognizance and its approval by the Speaker, the appointment of a general election Committee, and the appointment by them of a select Committee to try the particular contestation.

The select Committee was authorized to hear all legal evidence offered, or upon its appearing that owing to the nature of the case and number of witnesses to be examined, such inquiry would be attended with great expense and inconvenience to the parties to make an order for the issue of a commission for the examination of witnesses, which commission was usually directed to a County Judge in Upper Canada, or a Circuit Judge in Lower Canada.

The nature of these proceedings being such as to cause great delay, much time was lost in awaiting the return of the commission and the evidence thereunder, so that often the session was far spent before the select Committee found itself in a position to proceed to business.

For remedy it was deemed advisable to pass a measure which would permit of the evidence being taken *before* the assembling of Parliament. It is entitled "An Act to *improve* the mode of obtaining evidence in cases of controverted elections," and recites that it is desirable "*more speedily*" to obtain evidence in such cases. Unlike the "Election Petitions Act of 1851," it is not taken from any English Statute, but from an Act of Congress of the United States of America, passed February 19, 1851, chaptered eleven. A similar Act existed in the United States as early as 1798, (cap. 11,) and was in 1800, (cap. 28,) extended for a period of four years, and then allowed to expire.

Upon the whole the measure is a wise one, and when taken in connection with our Elections Petitions Act of 1851, (14 & 15 Vic. cap. 1) which is adopted from English Statute 11 & 12 Vic. cap. 98, confers upon Canada a more complete machinery for the trial of controverted elections than exists either in England or the United States of America.

It is the right of "any person" intending to contest the election of any one proclaimed or returned as being elected a member of the Legislative Assembly, upon grounds *dehors* the writ return Poll Books, &c., within fourteen days after the result of the election shall have been determined, to give notice in writing to the person whose election he intends to contest, of his intention to contest the same. The notice must "specify particularly the facts and circumstances upon which he intends to contest the election." (s. 1.)

The member when served is within fourteen days after service to answer the notice admitting or denying the facts therein alleged. He may go further. He may, besides breaking down the case of his adversary, raise up one for himself by setting forth in his answer any other facts and circumstances not appearing upon the face of the return, &c., upon which he rests the validity of his own election. Though he serve no answer, he does not suffer judgment by default. The person prosecuting the petition, must, notwithstanding give evidence of his allegations, which, whether an answer be served or not, may be rebutted by the returned member. Without an answer, however, he cannot except for the purpose of rebuttal offer any evidence whatever.

The next step is for any "of the parties" desirous of taking evidence respecting the facts and circumstances alleged in such notice or answer, to make application *in writing* to the Judge of the County Court in Upper Canada, or Superior or Circuit Judge in Lower Canada, residing or having jurisdiction within the Electoral Division, or in the District in which such controverted election was held. The application must be made *within six days* from the time when the answer of the returned member is served, or within six days from the expiration of the time allowed for serving the answer where none is served. To ground the application, there must be produced and filed at the time of making it a copy of the intended petition against the election, which must be subscribed by some persons who voted or had a right to vote, (14 & 15 Vic. cap. 1 s. 1,) a copy of the notice sworn to by the person who served it, a copy of the answer if any—if none, an affidavit denying that any was received, the recognizance and affidavits of sufficiency required by the Elections Petitions Act of 1851. (see 14 & 15 Vic. cap. 1, sch. A, 1, *et seq.*) Unless the application be made within due time, and upon proper materials it is not to be *received* by the Judge.

When the application is duly made it is the duty of the Judge *forthwith* to appoint a time a place for proceeding with the enquiry, of which *at least six days'* notice must be given to the party oppoing the contestation: (20 Vic. c. 23, s. 4.

The Judge is, for the purposes of the inquiry, deemed to be "a Commissioner for inquiring into, examining, and taking evidence upon all matters of fact and circumstances mentioned in the notice of the contesting party, and the answer (if any) of the returned member," (20 Vic. cap. 23, s. 6.) He has *all* the powers and rights, and is bound to perform *all* the duties and be subject to all the liabilities assigned by the Election Petitions Act of 1851 to any such commissioner (*Ib.*) The only limitation is that his powers are restricted to the questions of fact set forth in the notice of the contesting party and the answer, if any, of the returned member, and questions concerning the validity of the recognizance. (*Ib.*)

He appears to have power to commit for contempt, (14 & 15 Vict., cap 1, sec. 100,) to appoint one or more Clerks, Bailiffs, and other officers, (sec. 107–109); to name a person of the degree of barrister at law to sit for him as circuit or County Judge, &c., during the time that the enquiry is

being held and for twenty days after it is closed, (sec. 101–104. See also 20 Vic. c. 23, s. 6.)

On the day and place appointed, between the hours of ten and four o'clock, the Judge is to open his Court of *inquiry*. (14 & 15 Vic. c. 1, s. 112.) Before proceeding to business, he is to take the oath marked B. (3) to 14 & 15 Vic. c. 1, *mutatis mutandis* This he is to do under a penalty of £100. The oath ought to be taken and subscribed in the presence of the parties interested, or their agents, or such of them as may attend. He is to sit daily, Sundays and Statutory holidays excepted, from ten till four o'clock; and unless when holidays intervene has no power without consent of parties, to adjourn for a longer period than for twenty-four hours. (sec. 113.) An adjournment however may be made to any place within the County, or the District, City or Town in which the election was held, different from that in which the Court was opened. (sec. 117.)

Of course the Judge has power to send for persons and and papers, (sec. 118,) and for that purpose to issue warrants under his hand and seal. (sec. 127.) He must himself examine and cross-examine all witnesses, and is not to *permit or suffer* any barrister or counsel to plead before him, or to examine or cross-examine any of the witnesses! (sec. 119.) Witnesses misbehaving are liable to be committed to gaol without bail or mainprize, for any time not exceeding six calendar months. (sec. 128.)

The returned member may be called as a witness by his adversaries, (16 Vic., cap. 19; Dartmouth case, Pat. Elec. cases 30; Tavistock case, Pat. Elec. cases 1); but if called may decline to answer such questions as have a tendency to expose him to a criminal proceeding or a forfeiture. (Fisher v. Ronald, 22 L. J., C.P 63; Osborne v. London Docks Co.; 24 L. J., Ex. 140.) This may have the effect of defeating every attempt to wring from the member himself any acts of bribery or corruption, and seems strongly to demand some amendment. It might be enacted that witnesses shall be compellable to answer such questions when pertinent to the inquiry, but that such answer shall not be given in evidence against them in any subsequent proceeding, such for example as an action for penalties.

The power of the Judge to reject evidence is subject to the right to the party tendering it to offer a bill of exceptions (sec. 14 & 15 Vict., cap. 1, sec, 120) which the Judge must sign and transmit to Parliament for adjudication. (*Ib.*) The evidence taken is to be transmitted by the Judge to the Clerk of the Legislative Assembly, to be by him laid before the Select Committee for trying the election when such committee is appointed, (20 Vict., cap. 23, s. 7.)

ATTORNEYS AS MERCHANTS.

There was a time in the early history of this Province, when, from motives of necessity rather than propriety, one and the same person was permitted to follow both a profession and a trade. Then the card "A. B., Attorney at-Law, and dealer in lobsters," might not have offended good taste.

We can understand this, and the reason of it To draw a line between callings though inconsistent, when to endeavour to live by either alone would have been to starve, might at the time have been impossible.

Be this at may, the Legislature of Upper Canada in 1822 saw fit to prohibit the meretricious union. They declared by 2 Geo. IV. cap. 1 s. 44, "That after twelve months from the passing of the Act, no attorney of this Court (King's Bench) being a merchant, or in anywise concerned by partnership, public or private, in the purchasing and vending of merchandize in the way of trade as a merchant, shall be permitted to practise in the said Court during the time he may be such merchant or engaged as aforesaid, nor until twelve months after he shall have ceased to be such merchant or so engaged as aforesaid."

We infer that at the time of the passing of the Act, there were some attorneys who were also merchants, and that, for this reason, twelve months were granted that they might choose between the one calling and the other. After that period the callings were to be severed. Is it not right and proper that they should be so? In the first place, it is due to the profession that the status which the profession gives to a man among his fellow men should be maintained. In the second place, it is due to to the public that no man should be allowed ostensibly to trade with them as a merchant, but practically to manufacture law suits. Our only surprise is, that in the present state of the profession, there is a man who so far forgets himself as to outrage both these duties. We do no not say positively that there is such an one; but from the letter of a correspondent in other columns, we infer this to be the case.

In England there are several disabilities under which an attorney is placed. One is, that he cannot be a Justice of the Peace. Another is, that he cannot be a barrister. The disabilities are imposed for the good of the profession, and of the public. The man who knowing them becomes an attorney impliedly contracts not to follow any occupation, or accept any office incompatible with that of his profession. If he do, he breaks his contract, and is liable at the hands of the Courts of which he is an officer, to be punished by suspension or dismissal. Owing to this cause it is common for an attorney, desirous of doing what as a professional man he cannot do, to apply to be struck off the rolls.

Our s. 44 of 2 Geo. IV. cap. 1, though repealed by 20

Vic cap 63, is re-enacted by s. 22 of the latter It, as we have seen, prohibits an attorney from "being a *merchant* or *in anywise* concerned by partnership public or private, in the way of purchasing and vending of merchandize in the way of trade as a merchant." The word "merchant," strictly speaking, means a man who traffics or carries on trade with foreign countries, or who exports or imports goods and sells them by wholesale. (see Webster.) This cannot be the meaning intended by the Legislature, in the Act under consideration; for it falls short of guarding against the evil which the enactment is designed to prevent.

Many words describing particular avocations, have a popular as opposed to a strictly correct meaning. We speak of a man being a "watch-*maker*" who never made a watch in his life, and who never hopes to do so. If his knowledge enenables him to clean a watch, repair a balance wheel, adjust a hand, or insert a main spring, he does all that is expected of him by the public. If described strictly his name would be "watch repairer," and not "watch maker." So here we think the word "Merchant" must receive its popular meaning viz.: any person who deals in the purchase or sale of any goods, whether raw or manufactured; whether purchased in a raw or sold in a manufactured state; and whether purchased or sold by retail or wholesale. Such is the only *reasonable* interpretation to be placed upon the Act.

It is a maxim that *Ubi lex est specialis et ratio ejus generalis generaliter accipienda est.* Thus the Statute 5 Hen. 4, declaring that none be imprisoned by any *Justice of the Peace*, but in the common gaol to the end that they may have their trial at the next Gaol Delivery or Sessions of the peace, has been thought to extend to *all* other Judges and Justices; (Dwarris 567.) Here, it will be observed, there is a special provision, having a general reason with a general acceptation. So in the Act precluding attorneys from being "merchants," the reason is a general one which equally excludes retail traders and manufacturers, and must have a general acceptation so as to embrace them.

But not only is an attorney prohibited from being a merchant, but from being "*in any wise concerned*" in the purchasing and vending of "merchandize." Whatever is usually bought and sold in trade, whether of manufactured or raw material, is merchandize. Flannel, for example, is merchandize. A man therefore who buys wool, manfactures it into flannel, which he sells either by wholesale or retail, is "concerned in the sale of merchandize."

It is provided that a person contravening the Act "shall not be permitted to practise," which means that upon application he may be suspended or struck off the rolls in the discretion of the Court. This course we advise whenever or wherever the occasion arises. No case of the kind has *ever, that we can learn been before the Courts.* We are certain that there is no reported case. We hope that the day is far distant when there shall be occasion either to decide or report such a case.

LAW IN THE UNITED STATES.

In the United States, or at least in several States of the Union, legal polity is noted for two features detestable in our eyes—the one elective judiciary—the other the right to practice law without any previous professional test. Both of these are departures from the rules of "Old England," and if we are to judge from the subjoined, the departure is not for good.

We clip the articles from New York papers.

AMERICAN VIEW OF AN ELECTIVE JUDICIARY.

There seems to be a strange fatality about legislation in this State. Enactments which have no other object than to correct a particular evil, or to afford additional protection to the citizen—decisions which are apparently indisputable, and could be safely received as precedents—the dictates of common-sense and the intelligence of a practical lay public, are continually controverted, ridiculed, and rendered inoperative, by unexpected interference on the part of legal casuists.

Every-day instances of what we mean can be found in the law reports of the newspapers Injunctions are taken out to stay injunctions; orders are issued to shew cause for new trials; one Court condemns the legality of the contract which another Court affirms; while an incalculable amount of delay, expense, and labour is spent in enforcing even the simplest forms of law. Can it be matter of surprise that merchants and others should shrink from the employment of a lawyer to prosecute their claims, preferring an illegal or informal settlement, to the chances of a long protracted dispute, avoiding at the same time the certainty of a bullying cross-examination in a fetid Court, and the probability of appeal after appeal?

The fact is that New York has become the best lawyer-ridden city in the world. Sidney Smith has described the hereditary miseries of Englishmen in being taxed for the privileges of birth, marriage, sickness, and even death—our very cere clothes being charged with a duty of twenty per cent. But this was nothing to the bugbear that haunts us here, in the guise of an Attorney-at-law. No two cases, however similar, appear to be decided upon the same principles. The Democratic Judge reverses the decision of his Republican brother, and in his turn is over-ruled by an appeal to the Supreme Court, or compelled to modify his tone to the more pointed arguments of some fresh Counsel, or the outside pressure of a partizan newspaper.

Hence the dignity of the Court—the fitting respect for the person and voice of the Judge—is impaired, and his usefulness is destroyed. The culprit, if it be a criminal case, too often escapes unpunished, or is let off with a penalty altogether disproportioned to the offence and insufficient to deter other evil-doers:—while in equity, all that can be said is that arguments take the place of judgments, and the Counsel spend their time in wrangling, which the clients pay the piper. The old maxim "*Fiat justitia, ruat cælum,*" seems to be forgotten by the Bench, and political influence or a one-sided decision is likely enough to settle the question. The cause of this unfortunate state of things may be traced to the ill-advised system of appointing Judges in this State. That the expounders of the law should be elected by popular vote for a short term of years is an innovation, which fails in securing the services of the wisest or the most reputable of the learned profession. Moreover, the emolument and the dignity attached to the office not being sufficient to command the highest talent, the Judge is too frequently selected from the followers instead of from

the leaders of the bar. The result is that the administration of the law—with a few striking exceptions—is intrusted to men who are either influenced by political zeal, or who wish to make a name for themselves. In such hands justice too frequently becomes a farce; and the practising barristers must too often feel, if they do not express, their contempt for the character, learning, and discretion of their own presiding officer.

Our duty as historians is to point out facts, and to let our readers apply the remedy and profit by the moral. Can such a state of things be satisfactory? Does the Republican form of electing by ballot to public offices work advantageously in this direction? When will the last pound break the camel's back? When will the citizens of this great city unite in protecting themselves and their property from the timorous vacillations of the Bench, and the insolent usurpations of the Bar?

AMERICAN VIEW OF LEGAL EDUCATION.

It is true at all times, that a knowledge of law, considered as the science of morals and justice, should be one of the first subjects to receive the attention of those charged with education. We might dwell on this at length, were it not too obvious to need discussion. Circumstances have rendered this duty on the part of the collegiate institutions one of an imperative character at the present time. But a few years since, and the term of seven years was prescribed as the period for the study of the law before the candidate could present himself for admission to the bar. Nor was this time too long, for the experience of the profession abundantly shows that it is not until long after his introduction to the forum the lawyer becomes skilled in professional learning, so wide is the field of research, so numerous are the elementary treatises and reports, and so vast the labor requisite even for a familiarity with the standard authors. The seven years, however, are soon abridged to three, by counting the four years spent in a collegiate course as an equivalent to four of the legal course. Finally the rule itself was entirely abolished, and the path to professional practice has been opened to any candidate who may prove himself able to pass the requisite examination. What tests their examinations are of proficiency is too well known to need comment. The result is, that the bar is flooded with tyros, commencing practice without sufficient previous training and discipline, or even a pretence of that learning which is essential to the formation of a good lawyer. A young man thus thrown into active life, rarely, if ever finds that leisure which is necessary for study; amid the cares of business, the utmost he can do is to prepare himself as well as possible for the particular emergency, and his legal education thus becomes a matter of chance and accident—a result of personal experiences, depending entirely upon the cases upon which he may happen to be employed, and utterly wanting, therefore, in that method and accuracy, and knowledge of principles which long instruction can alone impart. The consequences of such a system are yet only partially felt. Our most distinguished lawyers and judges are the crop of the old planting; but when this seed has run out, and we come to reap the new harvest—when the bar and the bench are to be supplied from men who have approached the profession without sufficient education and learning—then some adequate remedy must be applied, or the very foundations of law and of justice will be subverted. We look for this remedy in the special training and education of those designed for the legal profession, in the college and the law school. The student at law requires as much, at least, of particular instruction in his department, as the student of medicine or divinity. The science of which he should become a master needs methodical and protracted study; it is spread over a wide range of text books; it is multifarious in its details, abstruse and profound in its principles, and to be well taught, demands able, skilful, and learned instructors. In our opinion, no greater boon could be conferred upon the community in which we live than the institution, in connection with one of our colleges, of a course of legal education, under the direction of competent professors, in which the students who throng the law offices of New York might participate whilst learning the practical duties of their profession. The wants of the age demand this, and the want must be supplied.

CHANCERY PROCEDURE.

It has been, time out of mind, the fate of the Chancery Court to be abused by the public, and of the Master's office to be abused by the profession. Here and at home such has been the fact.

Abuse, however, by no means implies a want of cause. It is as notorious that in England the evils of Chancery were as great as modern reforms have been beneficial. It is equally notorious that from the creation of a Court of Chancery in this Province in the year 1837, consisting of one Judge, until 1849, when it was made to consist of five, much cause of complaint existed.

The re-organization of the Court, the appointment of an able and experienced chief, the simplifying of procedure, these and such like steps tended much to alleviate mischief apparently inherent in the system. Still dissatisfaction is felt; still dissatisfaction is expressed. The cause of dissatisfaction is not now so much want of confidence in the tribunal itself as endless and vexatious delays. The hot-bed of delays is the Master's office. We shall not at present undertake to say whether the fault is attributable to the gentleman who holds the office, or to the insufficiency of the law which allows only one master for such an office. Into these matters we are glad to learn it is the intention of those most concerned—the practitioners of the court—to make an investigation with the view of proposing to government some necessary measure of relief. We subjoin an account of the proceedings of a meeting of Chancery practitioners held for the purpose:

OSGOODE HALL, 30th January, 1858.

At a meeting of the profession this day holden in pursuance of the notice for the purpose of taking into consideration the best mode of expediting references after decree: it was moved by Robert A. Harrison, Esq., seconded by Adam Crooks, Esq. That Robert J. Turner, do take the Chair. And on motion of Robert A. Harrison, Esq., seconded by John Roaf Esq., Adam Crooks, Esq., was appointed Secretary.

It was then moved by John Roaf, Esq., seconded by George Morphy, Esq., and resolved: That W. Vynne Bacon, Esq., John Hector, Esq., Adam Crooks, Esq., George Hemings, Esq., and William Davis, Esq., be a Committee to report upon the present state of the master's office, and to suggest reforms—the report to be presented to an adjourned meeting of the profession to be holden at Osgoode Hall on Saturday next at the hour of two o'clock.

ROBERT J. TURNER,
Chairman.

LARCENY AND EMBEZZLEMENT.

In the number of this Journal for September last, we attempted to draw the distinction between larceny, embezzlement, and breach of trust. When doing so we were conscious of our inability to accomplish the object satisfactorily; but rather than abandon our intention, completed the article. The distinctions we drew, though fine as

cob-webs, were, we thought at the time, and think still, supported by authority. Since then, the English Legislature passed an Act for the criminal punishment of Fraud by bailees or trustees, the design of which was not merely to deter from the committal of the particular offences provided against, but to remove difficulties in the law of stealing. It appears now that there is as much difficulty as ever, and that owing to hair splitting, criminals are still to go unwhipped of justice. Mr. Justice Crompton, in a late English nisi prius prosecution of a defaulting banker's clerk, is reported to have said, "I suppose I had better merely state the facts to the jury; for if I only told them as much about the law as I understand myself, I should tell them very little indeed. No human being knows the exact difference between embezzlement and larceny." More is the pity say we, and earnestly hope that something will be done to save the administration of justice from scandal and the just contempt of every man of common sense. We give in other columns a singularly able article from the *Solicitor's Journal and Reporter* on this topic, in every word of which we agree, and all of which we commend to the attentive perusal of our readers.

TERMS IN CHANCERY.

We have received copies of the Rules lately issued by the Court of Chancery; and only regret that they were not before us when our "Sheet Almanac" was in course of preparation.

The following must be substituted for the terms mentioned in the Almanac.

1.—TERMS FOR THE EXAMINATION OF WITNESSES.

Toronto.....	From the first Tuesday of February till the Saturday of the following week; and From the first Tuesday of September till the Saturday of the following week.
Goderich....	From the first Wednesday of February to the following Saturday; and From the first Wednesday of September till the following Saturday.
London.....	From the second Tuesday of February till the following Saturday; and From the second Tuesday of September till the following Saturday.
Chatham ...	From the the third Tuesday of February till the following Saturday; and From the third Tuesday of September till the following Saturday.
Niagara....	From the fourth Tuesday of February till the following Saturday; and From the fourth Tuesday of September till the following Saturday.
Hamilton...	From the first Tuesday of March till the following Saturday; and From the first Tuesday of October till the following Saturday.
Barrie.....	From the second Tuesday of March till the following Saturday; and From the second Tuesday of October till the following Saturday.
Cobourg....	From the first Tuesday of February till the following Saturday; and From the first Tuesday of September till the following Saturday.
Belleville....	From the second Tuesday of February till the following Saturday; and From the second Tuesday of September till the following Saturday.
Kingston...	From the third Tuesday of February till the following Saturday; and From the third Tuesday of September till the following Saturday.
Brockville..	From the fourth Tuesday of February till the following Saturday; and From the fourth Tuesday of September till the following Saturday.
Ottawa.....	From the first Tuesday of March till the following Saturday; and From the first Tuesday of October till the following Saturday.
Cornwall...	From the second Tuesday of March till the following Saturday; and From the second Tuesday of October till the following Saturday.

2.—TERMS FOR THE HEARING OF CAUSES.

From the first Monday in April until the Saturday of the following week.

From the first Monday in November until the Saturday of the following week.

Beginning with this number, the Chancery Terms, like the Common Law Terms, and other dates important to the profession, will be noted in the "Diary" of the *Law Journal*, always to be found on the first page of each issue.

U. C. REPORTS.

We are pleased to observe the marked improvement in the Common Pleas Reports, and to discern the efforts made to bring up arrears. The last issue (Nos. 5 & 6, Vol. VII,) contains many cases decided as recently as last term. The Queen's Bench Reports still continue to be issued with regularity, showing the desire of the reporter to preserve—what he has deservedly earned—the reputation of being diligent in the performance of his duties. The last number of the Chancery Reports, (Nos. 5 & 6, Vol. VI) contains the new orders in Chancery, regulating the examination of witnesses and the hearing of causes.

LAW SOCIETY OF UPPER CANADA.

HILARY TERM—21st VICTORIA.

During the present term the following gentlemen passed the final examination previous to their call to the bar:—Edward Taylor Dartnell; Ernestus Crombie, M.A.; C. E. English, M.A.; Thomas Hodgins, LL.B. And the following gentlemen previous to their admission as Attorneys: Simpson Hackett Graydon, H. Massenburg, and W. Ring.

IMPORTANT TO MUNICIPALITIES.

There is an impression that it is not morally wrong for a member of a Municipal Corporation to be a party interested in contracts with the Corporation. The desire to benefit by such contracts is, however, in a great measure restrained by certain legal disabilities attached thereto. It is generally known that the existence of such an interest is sufficient to disqualify the person interested from being a member. But it is undecided whether a person once elected and afterwards becoming interested in such a contract thereby forfeits his seat. The spirit of the Municipal laws and the advance of public policy would seem alike to demand this result. Without expressing an opinion either one way or the other we have much satisfaction in adverting to a case reported elsewhere (*Collins* v. *Swindle*, p. 42), wherein the Court of Chancery refused an account of partnership dealings between plaintiff and defendant, it being shown that the partnership was effected for the execution of public works for a Municipal Corporation, of which plaintiff was a member at the time contract was made. A decision like this will, we are sure, meet the approbation of every honest man in Canada.

SPRING CIRCUIT, 1858.

EASTERN—MR. JUSTICE BURNS.

Cornwall	Tuesday	6th April.
Brockville	Wednesday	14th "
Perth	Thursday	22nd "
Ottawa	Thursday	29th "
L'Orignal	Monday	10th May.

MIDLAND—CHIEF JUSTICE COMMON PLEAS.

Belleville	Monday	8th March.
Kingston	Wednesday	24th "
Picton	Wednesday	7th April.
Cobourg	Tuesday	13th "
Peterborough	Tuesday	27th "
Whitby	Tuesday	4th May.

HOME—MR. JUSTICE McLEAN.

Niagara	Tuesday	16th March.
Merrittsville	Tuesday	23rd "
Hamilton	Tuesday	30th "
Milton	Tuesday	20th April.
Barrie	Tuesday	27th "
Owen Sound	Tuesday	4th May.

OXFORD—MR. JUSTICE HAGARTY.

Brantford	Monday	8th March.
Woodstock	Wednesday	17th "
Guelph	Friday	26th "
Berlin	Monday	5th April.
Stratford	Monday	12th "
Cayuga	Tuesday	20th "
Simcoe	Tuesday	27th "

WESTERN—THE HIEF JUSTICE OF UPPER CANADA.

London	Tuesday	16th March.
St. Thomas	Tuesday	6th April.
Chatham	Tuesday	13th "
Sandwich	Friday	23rd "
Sarnia	Tuesday	4th May.
Goderich	Tuesday	11th "

TORONTO—MR. JUSTICE RICHARDS.

Monday.....12th April.

TO SUBSCRIBERS.

Subscribers who desire to save one dollar, or one-fifth of their subscription money for the current volume, are required to make remittances before the issue of our March number; for every subscription paid after that period must be five dollars, and no less.

The attention of subscribers is also particularly directed to the announcement on our first page, that a business card not exceeding four lines *and* subscription for one year, is only six dollars.

Subscribers in arrear for Volumes II. or III. are respectfully requested to make remittances *without further delay*, and so save the proprietors of this Journal the disagreeable necessity of having recourse to a Court of Law for the recovery of their demands. The aggregate of the sums now outstanding is very large, and while the prompt payment of a small debt cannot be of any moment to the individual, delay at this time seriously affects the proprietors of the Law Journal.

We think it necessary to mention that the Index issued with our last number is for Volume II. and *not* III. of this Journal. The Index for the latter Volume is now in hand, and will be issued at the earliest possible period. With this Number the title-page to Volume II. is mailed to such subscribers as were on our list when that Volume was published. It ought to have accompanied the Index; but through an oversight was forgotten. No difficulty, however, can arise; for any binder will understand where to place the title-page and Index.

A LEGAL CURIOSITY.

The following description of Mr. Bellew, the well-known preacher, who came as an insolvent debtor before the County Court judge at Canterbury on the 13th inst, is a curiosity in its way:—"John Chippindall Montesquieu Higgin (from the year 1846 having assumed his maternal name of Bellew, also sued, committed and detained as John Chippendall Montesquieu Bellew), formerly of St. Mary Hall, Oxford, Oxfordshire, undergraduate, then of King-street, St. James's Middlesex, then of Fernacres-cottage, Fulmer-common, near Slough, Bucks, gentleman, in no profession or employ, then of Southgate, Middlesex, then of Eastbourne, Sussex, then of Worcester, Worcestershire, clerk in holy orders, then of Prescot, Lancashire, clerk as aforesaid, then of Albert-terrace, Bayswater, Middlesex, then for three months living on board the *Hotspur* ship, *en route* for the East Indies, then of St. John's Cathedral, Calcutta, East Indies, chaplain in the service of the Hon. East India Company, and for a few days while there having an exhibition descriptive of Nineveh, and lecturing thereon, then for three months living on board, first, the *Hindostan*, and afterwards the *Vectis* ship, proceeding from Calcutta to England, then of Glencoe-house, St. John's-wood, and afterwards of 2, Marlborough-terrace, St. John's-wood, then of 25, Thurloe-square, Brompton, all in Middlesex; assistant-minister of St. Philip's Church, Regent-street, Middlesex, aforesaid, also author of two volumes of sermons and next and late of the Rose Inn, Canterbury, Kent, same calling, a prisoner in the gaol of Canterbury, in the county of Kent.—*Law Times.*

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO QUERIES.

To the Editors of the Law Journal, Toronto.

Owen Sound, December 14th, 1857.

GENTLEMEN,—A grateful reader of the *Journal*, I beg to ask at your hands a full definition of the ninth item in the Schedule of Bailiffs' fees, reading, "Every Schedule of property seized, return, including affidavit of appraisal."

Under the sixth item touching mileage, and on the supposition that bailiff *could* not serve upon his *first* essay to do so, is he entitled to be paid for his travel upon that occasion, together with any subsequent necessary travel, if he should ultimately succeed in serving? And in connection with this, and remembering that the fee fund and the Clerk is paid for *alias* and even *pluries* summonses, I would further ask, is bailiff entitled, under the present Schedule, to mileage performed in *attempting* to serve the first issue or issues, when service is ultimately made; or is he (who does the hardest part of the work) the only one that the Legislature enacts shall get *nothing* for his labour?

I have been drafting a tariff of fees for submission to Parliament, and as I am curious to know the character of the objections (if any), yourselves and Judge Jones (if he will not be offended at my supposing that he may notice the matter again,) will offer to one item in its new dress, I here insert it.

"Where plaintiff or his agent will be satisfied with bailiff's return, that he (bailiff) does not know of any property whereon to levy, bailiff to be entitled to his return fee (3d). But if plaintiff or his agent indicates where defendant's goods can be found, or if plaintiff or his agent requires bailiff to go in quest of them (the goods), and if no goods be found, that then bailiff be entitled to necessary mileage."

In regard to service of summonses I have observed the same principle, for example, the plaintiff is required, by rule, to address of defendant, and my tariff provides that if defendant be not found in the Division, or to have been in it at the time of plaintiff entering suit, that then plaintiff shall pay mileage to the place he indicated.

Trusting that I shall not be deemed over officious for suggesting the appointment of one of the respectable young lawyers here as resident agent for the *Law Journal*, and wishing you and it marked success,—I am, gentlemen, your most obedient servant,

PAUL DUNN.

It would be rather difficult to give a full definition of the item, "Every Schedule," &c., without some practical acquaintance with the duty or some supposed case being put. Reading it in connection with the clauses of the Act, it would probably be held to apply to cases of seizure under attachment, and such seizures only.

It is clear that the Bailiff is entitled to mileage only in case of service. A previous trip or trips in attempting to serve, the Bailiff cannot charge for or include in computation of mileage. The oath is that the officer travelled (so many) miles to make *such service*.

To Mr. Dunn's proposed tariff we would not object.

To the Editors of the Law Journal.

Derry West Cottage, 15th Dec., 1857.

GENTLEMEN.—In your last issue, I see a request asked by Mr. Baker, Clerk of a Division Court, your opinion upon the 24 section of 20 Vic. cap 63, whether the words "or in any other Court of Law or Equity in Upper Canada" apply to Division Courts. I presume by your reply that agents are prohibited to appear in behalf of suitors in Division Courts as formerly. If so, you will have the kindness to give your opinion upon the meaning of the 30th and 36th sections of 20 Vic. cap. 60.—Your obedient servant, J. T.

We do not mean to say that agents are prohibited from *appearing* for suitors; but we certainly are of opinion that they are not entitled to the privileges of advocacy. There is a material distinction, and one recognised by several of the County Judges. Before the 20th Vic. cap. 23, the Judge acting in a Division Court had an undoubted right to decline hearing unqualified persons as advocates.

The 20th Vic. cap. 60, ("The Temporary Judicial District Act, 1857,") is a peculiar enactment, and must receive an appropriate construction. It provides for the administration of justice in unorganized tracts, and *ex necessitate*, if parties have advocates, they will be non-professional men.

But even if the strict view be taken, there is nothing in the 30th or 36th sections that militates with our views. They merely recognise a simple appearance by an agent, which in our opinion may be in any Division Court, notwithstanding the 20th Vic. cap 23.

To the Editors of the Upper Canada Law Journal.

GENTLEMEN,—Several occurrences have taken place about which myself, and I know several others, would wish to have your opinion. By sec. 3 of the "Act to extend the jurisdiction of the Division Courts in Upper Canada, 1855," we are obliged to receive transcripts from any Division Court in Upper Canada, when they are to be treated as judgments obtained in the Court where received; but the Act is silent as to *how* the money should be disposed of when paid in by the bailiff. The framer of the Act, I presume, intended that the Clerk should remit the amount of the suit and costs to the Clerk who sent the transcript; but by omitting a clause to that effect, much trouble has been caused. Some clerks contend that the plaintiff must call for his money; others that the Clerk who sent the transcript must send an order from the plaintiff, &c. This I conceive to be making obstacles to the easy working of an efficient clause in the Act above referred to, when none exists. Why not obtain a post office order for the amount (less the cost of such order) and mail it to the Clerk of the Court from whom the transcript was received? In almost all cases, it would cost the plaintiff as much as the debt, by loss of time and expenses, to have to go personally for his money; and I am sure such was not intended when the Act was passed, as it would in fact render the collecting of claims at a distance almost an impossibility. You will much oblige us by your opinion as to the best course to be adopted in such cases, as we all wish to afford every facility for the speedy collection of claims, but at the same time we do not wish to incur the responsibility of having to remit money at our own risk.

I remain, gentlemen, your obedient servant,

A CLERK OF A DIVISION COURT.

The plain duty of the officers of the Division Courts is to assist in every way in the easy working of the Courts. The idea that plaintiffs must present themselves personally to Clerks is simply absurd. In the absence of an express provision on the subject, we should say, 1st, that the Clerk who transmits the transcript, with directions to have the amount when made remitted to him, is *prima facie* the party to whom the money should be paid. 2d, that if he does not personally receive the money, it may be transmitted in such manner as he directs. We would suggest the following practice:—When a Clerk sends a transcript of judgment to be acted on in another Division, let him

forward with it an order to "transmit the money when made by mail in Bank notes, or by Post-office order." This we think would be sufficient authority to the receiving Clerk for transmission to the first-named Clerk of the money. The position of a Division Court Clerk is somewhat similar to that of an attorney—he is at all events under bonds to pay over monies, and is not like an ordinary agent. But if such order was signed by plaintiff, *both* Clerks would be perfectly safe.

In a former article (Vol. 2, page 81) we entered at length on the duties and responsibilities of Clerks in the payment over of monies,—to this we refer our querist for further information.

BAILIFFS' FEES.

We have just received a copy of a Petition to the Legislature from Division Court Bailiffs, now in course of signature, to which is appended a proposed schedule of fees copied below.

With the exception of the third, eighth, thirteenth, fifteenth, and eighteenth items, we see no objection in substance to this schedule, and with some few alterations in form that might save after-doubts, we should like to see it become law. The services of the Bailiffs were never fairly paid for, and what they ask seems reasonable enough.

The third item we are thoroughly opposed to. It would be a premium to carelessness, and might open a door to fraud. The fourth item is sufficiently large to embrace almost every case in which a mileage fee would be properly claimable. The only objection we have to the eighth item is that we think the fee too much. An allowance is in itself reasonable, but 10s would be enough—just half the amount the Sheriff is entitled to. The thirteenth item is objectionable on obvious grounds. The fifteenth item requires some explanation. If it is meant to cover the Bailiff's trouble in receiving and paying over money merely, we think 2½ per cent. would be ample. The eighteenth item we also object to.

We are glad to see that the question has been taken up with vigor, and we heartily wish the Bailiffs all the success they are entitled to.

Attending Clerk's office, and receiving Writ or Proceedings of any kind, each 3d.

For every mile necessarily travelled from the Clerk's office to serve or enforce each writ of any kind, 6d.

Mileage performed in attempting to serve or enforce the first issue or issues of any writ, to be chargeable when the *alias* or *pluries* writ is served or enforced.

Mileage performed in attempting to serve or enforce writ when defendant or party cannot be found in the township or place indicated by the plaintiff or other party to be chargeable. And in acting under writ of execution, where plaintiff or party will be content with bailiff's return, that he (bailiff) does not know of any property whereon to levy, bailiff to be entitled to his return fee only. But if plaintiff or party indicates any place where defendant's or other party's goods may be found, or if plaintiff or party should require bailiff to go in quest of goods, and if no goods be found, that then bailiff be entitled to necessary mileage.

Service of writ, when required to be personal, 1s; do., do., not personal, 6d.

Taking confession of judgment, 9d.

Attending Clerk's office and making return on writ or proceeding of any kind, 3d; except foreign writ or proceeding—on that 1s.

Attending Court, per diem, 20s.

Enforcing writ of execution or attachment, 5s., exclusive of necessary disbursements in removing property, &c.

Schedule of property seized, return (and, when necessary, including affidavit of appraisal), 2s 6d.

Every bond (and, when necessary, including affidavit of justification), 5s.

Advertising sale, as per statute, 2s 6d.

That it be in bailiff's discretion to employ a bellman, and that if he does so, he be allowed 2s 6d in each case.

For the act of selling, 5 per cent. on the amount realised; but not to apply to any overplus on the amount to be levied.

Collecting money under execution, 5 per cent.

Arrest of the person, whether under process, by *viva voce* order of the Court, or by virtue of his authority as peace officer, 10s.

Conveying delinquent to prison, exclusive of all necessary disbursements, 6d per mile.

Each return required by statute to be made at each Court, or oftener, 20s.

AMENDMENTS IN THE DIVISION COURTS' LAW.

We have had sent to us a copy of the Petition to the Legislature, suggesting certain amendments in the Division Court Law. We shall notice the subjects embraced at the appropriate time.

FEES OF CLERK AND BAILIFF WHEN OFFENDER IS IMPRISONED IN DEFAULT OF PAYMENT OF A FINE.

We have been asked to notice this question. It is suggested to us that "fines are imposed by a Judge at the sittings of Court where a party is guilty of contempt, and the offender, either unable or too obstinate to pay, goes to gaol. The clerk enters the order for the fine, prepares and issues the warrant of committal. The bailiff arrests and brings the party to the county gaol; but there is nothing specific in the Act as to how the clerk and bailiff are to be paid, and in a great many cases they get no pay at all. The fees of officers in such case are in our opinion fairly chargeable upon the fee fund collections. It is absolutely necessary to the proper conduct of business that Courts should have the power of punishing persons guilty of contempt or disturbing the proceedings of the Court. This power is given by the Division Court Act, and the authority for deducting the fees seems to us also to be given.

The 15th section of the D. C. Act requires an account of fines levied, "deducting expenses of levying," &c., and the principle of payment of such expenses being recognized, it would be absurd to suppose that where the money cannot be made, officers are themselves to bear the expense, the proceeding being of a public nature—one to compel respect to the laws. The 15th section indirectly authorizes the County Treasurer to deduct monies disbursed by him "on account of the Division Courts holden," &c. Under this power it is that the printed forms of quarterly returns, &c., are supplied and paid for, and certainly the expense of services necessary in carrying out the orders of a Court, and which suitors are not answerable for, must be deemed "disbursements on account of the Courts." If such orders were not executed the Courts would soon fall into contempt.

Whenever such a case as above suggested arises, we would recommend clerks to specify the items of charge and return of fees, sending a receipt for the same to the County Treasurer. We have no doubt that the disbursement, if put in this shape, would be sanctioned by the Inspector General's Department.

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

(For the Law Journal.—By V——.)

[CONTINUED FROM PAGE 13, VOL. 4]

THE PRACTICE ON PROCEEDINGS BY WAY OF INTERPLEADER.

It is provided (sec. 7 D. C. Ex. Act) that it shall be lawful for the Clerk of the Court, upon application of the officer charged with the execution of the process under which property has been seized, "as well before as after action against such officer," to issue summons calling before the Court out of which such process shall have issued, or before the Court holden for the Division in which the seizure has been made, as well the party issuing the process as the party making a claim of the nature before specified.

When interpleader process is issued the effect is to arrest all proceedings in any action that may have been commenced against the bailiffs connected with the claim, for it is enacted that "thereupon any action brought in any of her Majesty's Superior Courts of Record in Toronto or in any local or inferior Court in respect of such claim shall be stayed."

Every bailiff deeming it necessary to seek the protection of an interpleader should act promptly in the suing out a summons. He has in certain cases the choice of two Courts in which to proceed—the Court from which the execution issued, or the Court holden for the Division in which he makes the seizure, when it happens that the seizure is made in another Division. The application to the Clerk should be in writing, and care should be taken to obtain the correct name and address of the claimant; the goods claimed should also be specified, and the reasonable value set down to guide the Clerk in rating the fees, and for the information of the Court. The date of the seizure should also be named. The following, or a form to the like effect, would answer:—

BAILIFF'S APPLICATION FOR INTERPLEADER SUMMONS.

In the Division Court, County of .
Between A. B., Plaintiff,
and
C. D., Defendant.

By virtue of a writ of execution (or "attachment") in this cause, dated the day of , 185 , from this Court, I did on the day of 185 , seize and take in execution, (*specify goods, chattels, &c., claimed*) as the property of the defendant, the following goods and chattels, viz., one horse and cow, &c., the whole about the value of pounds. E. F., of the township of , &c., now claims the same as his property. You will therefore be pleased to issue an interpleader summons to the plaintiff and to the said E. F., according to the statute in that behalf.

To Clerk of the Division Court, County .

Dated, &c. *Bailiff.*

The Court fees are payable in the first instance by the bailiff, and will in general be regulated by the value of the goods seized; but if the claim be afterwards dismissed, "the costs of the bailiff shall be retained by him out of the amount levied, unless the Judge shall otherwise order." (Rule 54)

With regard to the costs of an interpleader proceeding, it is only necessary to say that, as a general rule, they will abide the result of the suit. If the claimant had no sufficient ground for his claim, he will have to pay them. Should he succeed in making good his claim, the execution creditor will have to pay the costs. In certain cases it may be that costs will be divided between the contending parties, or ordered to be paid out of the proceeds of the property seized. The bailiff will not have to pay the costs in any case unless he appears to have acted in an improper manner; and the Judge may therefore think it proper to let him bear the costs of the proceeding.

Interpleader summonses are to be served in the same manner as the ordinary process of the Court. (Rule 53.)

LARCENY AND EMBEZZLEMENT.

Many persons probably supposed that when the Act for the punishment of fraudulent trustees was passed, it would put an end to the gross legal anomalies, by virtue of which some of the most serious crimes against property frequently escaped with entire impunity. The measure was, no doubt, in many respects, an excellent one; but the reports of the trials on the winter gaol delivery show that it did not succeed in banishing all chicanery and absurdity from what is probably the most important branch of the criminal law—the law of theft. To an ordinary apprehension, few things are more astonishing than the fact that lawyers should see any difficulty in defining theft. "I hear," said Dr. Johnson, "of a cow, and I define her—'animal quadrupes ruminans,' &c. But, sir, cow is plainer." In somewhat the same way jurors must often regret that the simplicity of the eighth commandment should be marred by the intricacies of the law of possession, felonious intent, and *asportavit*. The strangely unsatisfactory state in which, even with the benefit of the Act to which we have referred the law still remains upon this subject, received a strong illustration from a case tried last week at Lincoln before Mr. Justice Crompton. A man named Wright had been in the employment of a banking company at Boston, which had a branch establishment at Wainfleet, over which he presided. His business was to receive the payments of depositors over the counter, and to pay cheques, on the other hand, across it, and he was from time to time furnished by the bank with such sums as were necessary, beyond his receipts, to enable him to make these payments. He transmitted weekly accounts to the bank, in which he debited himself with the sums which he had received, either from customers or from Boston, and credited himself with the amounts which he had paid. At considerable intervals a committee of the proprietors used to come and verify the accounts, by examining the cash in the strong box; and they kept a key of it, rather for the purpose of asserting their title than for actual use. They made a visit for this purpose in the course of last autumn, at a time when the prisoner, by his own account, ought to have had in hand a balance of upwards of £3,000. When they arrived he called them aside, and told them in the plainest manner, that he had appropriated to his own purposes considerably more than £2,000 of the balance due, and he repeated the same statement before the magistrates. To most men it would seem hard to imagine a simpler case of theft; but to the law this conduct presented a problem of a very formidable kind. A *verbosa et grandis epistola*, in the shape

of an indictment, containing fourteen counts, was sent down to Lincoln from a London *officina*, which certainly did not in this instance deserve the the title of *officina brevium*. The first ten counts charged the prisoner with embezzlement—sometimes as a clerk; sometimes as one acting in the capacity of a clerk; sometimes as the servant of the bank; sometimes as the servant of the public officer of the bank; and the £2,000 was described with an equal prodigality as being the property of four or five different people. Finally, four other counts were added, framed on the Act for punishing fraudulent trustees. This, however, was but the beginning of troubles. When the prisoner's guilt had been duly proved, a display took place, which lazy journalists usually describe by the phrase "a legal discussion of considerable length ensued." We, unfortunately, must not shelter ourselves under so convenient an euphemism. The question was, whether there was any, and what, evidence to go to the jury on any, and which of the fourteen counts. It was, in the first place, unanimously agreed, that the late Act would not apply, partly because it was not retrospective, and partly because the prisoner could not be looked upon either as a bailie or a trustee; but upon the counts charging embezzelment, there arose a a great debate As the charge was embezzlement, it was competent to the jury to convict of larceny, and the question was, whether the evidence proved the one or the other crime Embezzlement is the appropriation by a servant of money received on his master's account before it reaches his master's posssesion. If the money be taken afterwards the offence is larceny. In this instance, therefore, if the prisoner put into his pocket the money of the customers as fast as they paid it over the counter, his crime would be embezzlement: but if he put it into the strong box and then took it out again, it would be larceny; and in the same way, if he could be shown to have taken the money sent to him from the Boston bank, he would also be guilty of larceny. All that could be shown was, that by some one or all of these methods he had fraudulently possessed himself of upwards of £2,000; but, inasmuch as his pilfering had extended over several years, it was impossible to say that any particular sum had been taken in any particular manner; and thus it seemed doubtful whether the prosecution had succeeded in proving anything more than an alternative case against the prisoner— in proving namely, that he had either embezzeled or stolen the property, though it still remained uncertain which of the courses he had taken. If this were so, the prisoner would be entitled to an acquittal. Mr. Justice Crompton, however, ruled, that as the peculations had extended over such a length of time, the strong improbability, that all the money should have been taken before it was put into the strong box, afforded evidence from which the jury might infer that some of it was taken out of the strong box itself, and the jury having drawn the required inference the man was convicted of larceny from his master, and sentenced to ten years' penal servitude accordingly.

This result, was no doubt, perfectly satisfactory, but it shows a state of things which is very much the reverse. If, instead of stealing the money at different times, the prisoner had stolen one large note for the whole amount, and if the same uncertainty as to the nature of his offence had prevailed, he would have been acquitted; not because any human being could feel a shade of doubt as to his guilt, but because it would have remained doubtful which he had done of two things admitting of no moral difference whatever, whilst the legal difference between them can hardly be recognised, except by a most practised eye. "I suppose," said the judge to the counsel in the case, "I had better merely state the facts to the jury, for if I only told them as much about the law as I understand myself, I should tell them very little indeed. No human being knows the exact difference between embezzlement and larceny." Surely this suggests the necessity for taking a course which ought to have been taken long ago. These wretched distinctions all turn upon an unmeaning theory, or ghost of a theory, about what is called possession. In the eyes of somebody, of whom we know nothing except that, whoever he was, he lived in an indefinite period, ranging over the 13th, 14th, and 15th centuries, it was essential to the conception of larceny, that goods should be taken out of the owner's "possession;" and this unfortunate phrase has haunted the courts and perverted justice ever since. There is possession in fact and constructive possession; there are cases in which somebody else's possession is your possession, and there are other cases in which it is not. Your possession may suffer all sorts of changes; sometimes you lend it, sometimes you give it up; sometimes you cede it simply; sometimes in a "qualified" manner. In short, it is a sort of legal will-o' the-wisp, which has no other occupation than that of giving thieves a chance of escape, and leading honest men into the mire. Why cannot we exorcise this most absurd, and yet most mischievous of perturbed spirits? Why should not a short Act be passed, giving an entirely new and reasonable definition of theft, which would cover not only larceny, but embezzlement, and perhaps false pretences as well, and providing that, after its passing, the whole common law upon the subject should at once cease and determine? The objection usually is, that this would be to codify "the common law," which it is said, would be a fruitful parent of woes unnumbered to the whole commonwealth—as if the law of treason, and the law of inheritence, had not been codified, and as if Magna Charta itself was not an example of the same process. Indeed, we might go even further back, and appeal to William the Conquerer, who, in the fourth year of his reign, to the great gratification of his subjects, codified the whole common law of the land, by the oaths of twelve knights from each shire.

The truth is, that there is no part of the law which stands so much in need of codification as the common law, and common-law definitions of crime probably need it more than any other branch of it.—*Solicitors' Journal and Reporter.*

The New Rules, Orders, and Instructions, for regulating the Practice of the Court of Probate in England, have been issued. They fill no less than 108 large folio pages. They are in three series:—

1st. Rules, &c., for the contentious business.
2nd. Rules, &c., for the non-contentious business.
3rd. Rules, &c., for the District Registrars.

—*Law Times.*

U. C. REPORTS.

QUEEN'S BENCH.

(Hilary Term, 20th Victoria.)

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

FERRIE ET AL., EXECUTRIX AND EXECUTOR OF ADAM FERRIE, THE YOUNGER, v. THE GREAT WESTERN RAILWAY COMPANY.

Action by executors for death of testator caused by defendants' negligence—Measure of damages—Interrogatories proposed by defendants to plaintiffs after issue joined as bearing upon the question of damages—How far allowable and when they should be proposed—Form and nature of such interrogatories—When and how objections should be made.

In this case an application was made in Chambers, on the 5th of August, 1857, to administer interrogatories to the plaintiffs under the Common Law Procedure Act, 1856, section 176.

The Action was brought under the statutes 10 & 11 Vic., ch. 6, against defendants for alleged negligence which occasioned the death of the testator.

The general issue was pleaded, and issue joined thereon on the 30th of June.

The testator was a practising attorney and barrister in the Province, and was killed on the 12th March, 1857, by an accident which occurred on the defendants' line of railway.

The plaintiffs claimed £15,000 damages as a compensation to his widow and child.

The defendants' solicitor made affidavit that he believed the defendants would derive material benefit if the plaintiffs should be required to answer certain interrogatories, which he desired to be allowed to propose; and he swore that the defendants had a good defence upon the merits, and that the discovery was not sought for the purpose of delay.

The interrogatories were as follows:

1. Asking for a copy of testator's will.

2. Inquiring what amount of assets the plaintiffs had realized, over and above all debts and liabilities due by the testator.

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

4. Who were legatees and devisees under the will, and the amounts which they would respectively derive under it.

5. Whether any of the legatees or devisees had any further expectations, reversions, or interest, not included in the preceding interrogatories, and which might be derivable from any other real or personal estate in which the testator had an interest; and to set them forth fully, and their value.

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

The plaintiff's attorney, in opposition, made affidavit, that on the 30th of June the defendants pleaded not guilty only, and issue was joined on the same day; and he contended that the defendants should have made this application before pleading.

He objected also that the interrogatories were not such as should be allowed to be put.

The defendants desired the information, as bearing upon the question of damages.

ROBINSON, C. J.—As the information is not desired for the purpose of guiding the defendants in pleading, but only for the purpose of enabling 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 the inquiries. For instance, as the defendants do not dispute the fact of the 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 it, the application I think should be made in the matter directed by the 176th clause—merely to compel a production for inspection.

The other interrogatories are probably intended to elicit answers, which may tend to shew that the widow is amply provided for under the will, and considering the condition of the estate. 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 the application. Costs of opposing the application to be costs in the cause.

Irving, in this term obtained a rule to shew cause why the defendants should not have leave to administer the interrogatories.

Patterson shewed cause. *Becher*, Q. C., supported the rule, citing Blake v. North Midland Railway Co. 18 Q. B. 93; James v. Barns, 34 Eng. Rep. 434.

The interrogatories mentioned in this application are set forth in the judgment of *Burns*, J., and, it will be observed, are not precisely the same as those proposed in Chambers.

MCLEAN, J.—The interrogatories are drawn with a view to ascertain what the testator's will was; who the legatees and devisees are; the amount of assets over and above liabilities, and the amounts which the legatees and devisees will derive under it; whether any of the *legatees* or *devisees* have any further expectations or reversions, or other interest, which may be derivable from real or personal estate in which the testator had an interest, and their value, to be fully set out. Whether Mrs. Ferrie, the widow, or the child with which she is pregnant, in case one should be born, has any interest, claim or right, out of any property in right of the testator, not included in previous interrogatories, or from any other source whatever, and to state such interest.

This application was made in August last, in Chambers, before Sir *J. B. Robinson*, the Chief Justice of this court, but he declined making the order, considering that the information sought for has not that bearing upon the merits that entitles the defendants to the discovery, and not thinking that there was any fair pretence for exacting from the plaintiffs that disclosure of all the affairs of the estate which such interrogatories call for. Leave was given at the same time to apply to this court, if they desired to persist in the application.

The motion being renewed in full court under the leave given, it becomes necessary to decide whether the application can properly be granted or not. The 176th section of the Common Law Procedure Act, 1856, provides, that in all causes in any of the superior courts, by order of the court or a judge, the plaintiff may with the declaration, and the defendant may with the plea, or either of them by leave of the court or a judge may at any other time, deliver to the opposite party or his attorney, provided such party would be liable to be called and examined as a witness upon such matter, interrogatories in writing upon *any* matter upon which discovery may be sought, and require such party within ten days to answer the questions in writing, by affidavit to be sworn and filed in the ordinary way; and any party omitting without just cause sufficiently to answer all questions as to which discovery may be sought, within ten days, or such extended time as the court or a judge shall allow, shall be deemed guilty of a contempt, and be liable to be proceeded against accordingly.

The 177th section provides the substance which must be stated in an affidavit, in order to support the application, the same in effect as contained in the affidavit of defendants' solicitor filed on behalf of the defendants.

The statute provides that in *all* causes, by order of the court or a judge, interrogatories may be put by either party to the other, upon *any* matter upon which *discovery may be sought*, so that, if there is any matter connected with this suit upon which the defendants desire to have a discovery, they have a right to apply and a right to obtain an order. Of course the matter on which a discovery is sought must be such as in the opinion of the court or judge is material in the cause, otherwise the order would not be made necessary. The affidavit of defendant's solicitor does not shew how the facts with respect to which the defendants seek a discovery can be material in this cause, but it is stated that in the opinon of the deponent the defendants will receive material benefit by the plaintiffs being required to answer certain interrogatories. Whether that benefit is to consist in a reduction in the amount of damages,

or in a total discharge from any liability, can only be known by the tenor of the interrogatories; but in either case I apprehend that, if such benefit is reasonably expected to be derived from the plaintiffs' answers to the interrogatories, the defendants are entitled to have the interrogatories put for the purpose of eliciting such answers. Then with respect to the interrogatories which may or may not be put, I incline to think that the court or judge are not called upon to decide in the first instance as to their propriety, if the subject matter to which they point is material in the cause, and benefit is expected to arise to the party seeking discovery from the answers. If interrogatories are irrelevant or improper, the party called upon to answer may, as in the case of an ordinary witness, refuse to give any reply; and in such case, if any application were made to punish for a contempt under the 175th section of the act referred to it would become the duty of the court or a judge to say whether any contempt had in fact been committed in refusing to answer.

In this case the interrogatories seem to be intended to elicit facts which shall go in mitigation of damages, rather than in discharge of them altogether, and I cannot say that the object which the defendants have in view is not strictly legitimate and proper on their part. If under all the circumstances the plaintiffs are not entitled to the large amount of damages claimed by them, it must surely be competent to the defendants to elicit from the plaintiffs any thing which can have a tendency to establish that fact. If, for instance, the testator had his life insured, and the plaintiffs, as his executors, had received after his death for such insurance an amount, the interest of which would exceed the annual income of the testator while living, and exercising his ordinary avocations, it must surely be competent to the defendants to shew that the widow can have sustained no pecuniary damage by the death of her husband; and the action being for the injury arising in a pecuniary point of view, nominal damages only, if any, could in such case be recovered. If, again the testator was a person in very affluent circumstances, so that his death could not deprive his wife or family of any thing to which they were accustomed while he was living, it could scarcely be said that they had sustained any pecuniary loss; and if that kind of loss is all that a jury can be called upon to estimate, as appears to be decided in various cases, (see *Blake* v. *Midland Railway Co.*, 18 Q B. 93), then a jury could not be expected to give damages to cover a loss which was not felt, however great the loss in other respects might be.

It may be said that it is unreasonable to require the plaintiffs in this action to make public all the affairs of the estate, and to shew what legacies are given or expected, and to whom or from whom; but when the executors have brought an action to recover for a pecuniary loss, they must be prepared to shew the extent of the loss sustained. If the estate which they represent is one of extreme wealth, it would seem unreasonable that they should be pressing for large damages, which are not necessary to the comfort or support of the testator's family, on whose behalf the action is brought. If, on the other hand, the estate is limited or cramped in its means, the evidence of that fact would establish good grounds for rendering increased damages, in proportion to the advantages derived from the exertions of the testator in sustaining and advancing his family; and if the estate be embarrassed in its circumstances, so that an exposure of its affairs might induce creditors to press their claims, who would not otherwise be disposed to do so, I cannot see that more could be required in any interrogatories or that any parties could be required to answer further, than that the estate was insufficient to afford such a support as was enjoyed during the lifetime of the testator and such as might reasonably be expected to continue if he were still living. It ought not to be required of executors to state the precise value in pounds, shillings and pence of the estate; but if an interrogatory were put it would be for the parties interrogated to say whether they would answer it or not, and if any attempt were made to punish a refusal as a contempt, the question would then arise whether the interrogatory was proper or not. The plaintiffs might be called by the defendants as witnesses in the cause, and any questions which could be properly be put to them, as such, may be put to them by way of interrogatories before the trial, though the object may be to mitigate the damages. If the defendants desire to inspect any documents in the plaintiff's possession, which may be necessary for their defence, there is a mode provided by the 175th section of the Common Law Procedure Act, by which such inspection may be obtained, and that mode must be adopted; but I cannot see that the defendants can insist on the production and setting out of such documents in any answers to interrogatories. They may as well try to exact the setting out of any mortgages or other securities for money belonging to the estate—a course of proceeding which would be unreasonable, and extremely inconvenient.

Considering that the defendants are as much entitled to go in mitigation of damages in this case, as if it were one for causing the death of a person who was a mere burthen and a nuisance to his family, I am of opinion that the defendants are entitled to propose interrogatories in reference to the estate in general terms, but not descending to particulars, which it would be inconvenient and useless to make known. If it be necessary that the interrogatories should be produced and approved of by the court or a judge before an order is made authorising interrogatories to be put, then I must say that some of those submitted in this case as proper to put to the plaintiffs do not appear to me to be so. The first asks for a copy of the testator's will; and the fourth asks who are the legatees and devisees under the will, and the amounts they will respectively derive under it. If it were expected that the copy of the will would be produced, then the information sought in the fourth interrogatory would be furnished, and that would become wholly unnecessary. The questions may be much more general in their terms, and yet sufficient to elicit all the information essential for the defendants to know, either for the purpose of defence or in mitigation of damages; and I think it may be left to the defendants to re-model the interrogatories, and to apply again before a judge in Chambers for an order on the plaintiffs to answer them: (Osborne v. the London Dock Co., 10 Ex. 698; Thol v. Leak, *Ib.* 704; Whateley v. Crowter, 5 El. & B. 709; Peltey v. Easton, 18 C. B. 643.)

BURNS, J.—In consequence of the Chief Justice having referred the defendants to the court on the subject of proposing interrogatories to the plaintiffs, the defendants have obtained a rule to shew cause why the plaintiffs should not answer interrogatories to be propounded to them.

The question proposed now to be put to the plaintiffs somewhat differ from those previously proposed, and which were discussed in Chambers. The defendants now desire to put the following questions:

1. What is the amount of assets you have realised, over and above all debts and liabilities due under the will of the late Adam Ferrie?

2. State the property you have under your control as executrix and executor of the late Adam Ferrie, not disposed of, and not included in interrogatory number one.

3. Who are the legatees and devisees under the will of the late Adam Ferrie the younger, and what is the amount they will respectively derive thereunder and thereby?

4. Have any of the said legatees or devisees any further or ulterior expectations, reversions or interest, not included in the foregoing interrogatories, and which may be derivable from other real or personal estate in which the said Adam Ferrie had an interest or reversion? If so, set them forth fully, and the value or estimated value thereof.

5. Has the said Mary Woodley Ferrie, or will the child of which she is pregnant, in case one should be born, have any interest, dower, or rights, out of any property whatsoever, in right of the said Adam Ferrie, and not included in the said interrogatories, from any other source whatsoever? If so, set them forth fully.

It does not appear to me that the third and fourth interrogatories are proper questions to put to the plaintiffs in this action. The action is brought upon the statute 10 & 11 Vic., ch. 6, and such action is declared by the statute to be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused in such way, if death had not ensued, as would have entitled the injured party to maintain an action, and recover damages in respect thereof.

The generality of these two interrogatories do not seem to point at such a discovery as would be material to make in this action, which is brought to recover damages for the benefit of a widow

and an unborn child. If it would be material to know who the legatees and devisees under the will of the late Adam Ferrie are, that information must be sought in another way. Whatever knowledge may be acquired from written documents the course is to apply for inspection of the original documents, if they are in the possession of the party.—Scott v. Zygomala (4 El. & B. 484) Herschfeld v. Clarke (11 Ex. 712). These two interrogatories should be disallowed.

I think the first, second, and fifth interrogatories, may however be properly put to the plaintiffs. If the interrogatories are put with a view solely of discovering what the plaintiffs' case is, I agree that the court will disallow the interrogatories; for I think the object of the statute is to enable one party to obtain a discovery of something material to his own case, and not a discovery from his adversary of what his case consists of. If both parties are interested in the same inquiry, on matters which are material to both, then the rule is that either party may put interrogatories of inquiry into such matters.—Whately v. Crowter (5 El. & B. 709). Supposing this action to be well founded upon the statute, then it is a very material matter to inquire into the damages that should be recovered. According to the decision of the case of Blake v. Midland Counties Railway Company, (18 Q.B. 93), nothing but damages for pecuniary loss can be sustained in any action upon this statute. It is therefore a material inquiry to be made on the trial of this action, what was the extent and nature of the business in which the deceased was engaged, and also what was the nature and extent of his assets at the time of his death, so as to form an idea of the pecuniary loss the widow and children may have sustained The plaintiffs themselves will be obliged to give evidence of this description to entitle them to recover damages and it appears to me that it is very important to the defendants, as against the demand for damages, that they should be armed with information as to the state in which the deceased left his affairs: and there certainly is no one who so properly can give that information as the plaintiffs, who are the executors.

It may be material to the defendants to have the information which the answers may give them. I cannot say it is not; and it may be material, then, though the plaintiffs are interested in the same inquiry to support their case, they should give the information sought to the defendants.

I think the defendants entitled to answers to these three interrogatories.

ROBINSON, C. J., retained the opinion expressed by him in Chambers.

A rule was granted, permitting defendants to put the first, second, and fifth interrogatories in a more general form and apply again in Chambers to have them allowed,

CHANCERY.

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

COLLINS v. SWINDLE.

Municipal Corporations.

A member of a municipal corporation agreed with another party to take a contract from the corporation for the execution of certain works in his name, the profits whereof were to be divided between the parties. *Held*, that such a contract was in contravention of the Municipal Act 16 Victoria, chapter 181, and the court refused to enforce the agreement for a partnership; but, the defendant having denied the existence of the partnership, which was established by the evidence, the bill was dismissed with costs.

This was a bill praying for an account of certain partnership dealings alleged to have taken place between the plaintiff and defendant. At the hearing it appeared that the town council of Dundas, of which plaintiff was a member, had advertised for tenders for the execution of certain works, for which it was verbally arranged defendant should tender, and if successful in obtaining the contract that he and the plaintiff should divide the profits; and the defendant having obtained the contract, completed the work, and received payment therefor, he denied all right of the plaintiff to participate in the proceeds thereof, whereupon the present suit was instituted.

The defendant put in his answer, denying the existence of the agreement for a joint interest in the contract; this fact however, was clearly established by the evidence which was taken before the court.

Barrett, for plaintiff, asked for the usual decree for account.

A. Crooks for defendant, contended that the evidence of a partnership was not such as to establish the agreement relied on; but if sufficient, it was illegal, and such as the court would not enforce, the law expressly prohibiting any member of a municipality being interested in any contract with the council.

ESTEN, V. C.—It is contended that such a contract is against public policy, one of the parties being a member of a public body, and the claim being founded on a partnership in a contract which involved a violation of public duty, the court, in order to discourage such transactions and promote the policy of the act which renders such contracts a disqualification, should refuse its aid in enforcing them.

We are of this opinion, and think, therefore, that the bill should be dismissed; but as we do not approve of the defendant's conduct in this matter, and as his answer, indeed, is contradicted by the weight of evidence, we think the decree should be without costs.

SPRAGGE, V. C.—The fact of partnership in the contract with the corporation of Dundas, as well as with *Ridley*, for stone for the bridge appears to be satisfactorily made out in evidence.

The next question is, as to whether this court ought to aid the plaintiff in obtaining the fruits of this contract. He was a member of the town council of Dundas, and moreover a member of the committee of roads and bridges, and was thus an agent of the corporation in entering into the contract in question. Suppposing him to have been sole agent, and to have entered into a contract nominally with a third person, but his being himself the real contractor, there would be a glaring inconsistency in his entering into such contract, but the difference between that and the contract made is a difference in degree only, not in principle.

The contractor in question was in contravention of the statute 16 Vic, ch. 182, section. 35, as well as of the general policy of the law. Whether a member of a municipal corporation entering into such a contract vacates his seat, or it is only disqualified for election, does not seem to me material; the enactment is equally a parliamentary prohibition of such a contract, and I agree with my brother *Esten* that it would be against the rules of this court to lend its aid in such a case.

STRACHAN v. MURNEY.

Practice—Pro Confesso.

Where after a bill has been ordered to be taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings taken between the plaintiff and defendant, that is not such a case as is contemplated by section 7 of the thirteenth of the orders of 1853, where all further proceedings in the cause may be taken *exparte*

This was a suit for foreclosure of a mortgage, and had been brought to a hearing upon an order to take the bill *pro confesso*, on the 12th of December, 1855, when, in consequence of the necessary affidavits not being produced, the cause was directed to stand over for the purpose of being brought on before the presiding judge in chambers, on the 19th of the same month. Before any further proceeding was taken, however, the defendant arranged with the plaintiffs, paying them the amount of principal and interest then due on the security, together with all costs incurred. That recently a further instalment having become due, the solicitor for the plaintiffs applied to the registrar to draw up a decree of foreclosure in the usual form, but which, under the circumstances above stated, that officer refused to do; whereupon an application was made to the presiding judge (V. C. *Spragge*) in chambers, for an order directing the decree to be drawn up; his honour refused the motion on the ground, that as the defendant had paid all that was due before any decree actually made, it might be reasonably assumed that the defendant considered that the bill was thereby dismissed, which by section 5 of order XXXII., he had a right to call upon the court to do; but gave the plaintiffs liberty to bring on the motion again before the full court, and now on this day.

Roaf, for the plaintiffs, renewed the motion; but

Per Curiam.—Where after an order to take the bill *pro confesso*, and before the decree is drawn up, the defendant intervenes, and is a party to any proceedidgs taken between the plaintiff and defendant, that is not such a case as is contemplated by the orders where all future proceedings may be taken *exparte* in the cause: there can be no doubt the defendant must have notice of this application, whatever may be the result of the motion.

Sherwood v. Freeland.

By order XXX. (1853) the court may proceed without any personal representative of a deceased person where none has been appointed, or, may appoint some person to represent the estate for the purpose of the suit; this does not apply to cases where parties have a substantial or beneficial interest, but applies only to cases of mere formal parties.

This was a foreclosure suit, and had been brought on to be heard *pro confesso:* the mortgagee had made a mortgage of his interest and died; and his mortgagee assigned his interest to the plaintiff, who filed the bill, no personal representative of the original mortgagee being before the court.

Strong for plaintiff, asked for the usual decree of foreclosure referring it to the Master to take an account, suggesting that the court might appoint a person to represent the estate of *Sanderson*, the original mortgagee. The court having taken time to look into the point.

Judgment was now delivered by

Esten, V. C.—In this case one *Sanderson* having a mortgage upon the property in question, made a mortgage of that mortgage to one *Moulson* with a power of sale *Moulson* does not exercise the power of sale, but simply transfers the mortgage to the plaintiff. *Sanderson's* representative, he being dead, seems to have a substantial interest, and is a necessary party to the suit. It was suggested that a person could be appointed to represent his estate, and that he could be made a party in the Master's office. The decree, perhaps, could be framed in such a way as to admit of his being made a party in the Master's office, but we do not think it a case to which the order of court applies, and which seems to be confined to cases of mere formal parties, having no substantial or beneficial interest.

Lazier v. Ranney.

Practice—Foreclosure absolute—Delivering possesion.

The court, after the final order of the foreclosure had been made and acted on by the plaintiff, granted an order for the delivering up possession of the mortgage premises, though not asked for, upon the final order being obtained.

This was a foreclosure suit, in which the final order of foreclosure had sometime previously been obtained, and the mortgagor being in possession of a portion of the mortgage premises had refused to deliver up the property to the morgagee; and was committing waste by felling the timber growing thereon.

Roaf for the plaintiff, now moved upon notice, under the XXXII. of the orders of 1853, that the defendant might be ordered to deliver up possession to the plaintiff of such portion of the estate as the defendant continued to occupy.

McDonald contra, objected that after the final order of foreclosure had been drawn up and acted upon, the suit was out of court, and that no motion could be made in the cause; the words of the order are, that *upon* the final order for foreclosure, &c., possession may be ordered to be delivered up; the proper time, therefore, for the plaintiff to have asked for this direction was when the final order was pronounced: not having done so, the only course left open to him now, is to institute proceedings in ejectment.

The court thought the application within the clear intention and spirit of the order; and that the plaintiff was entitled to the order, together with the costs of the application.

CHAMBERS.

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

Dexter v. Fitzgibbon.

Practice—Awards—Attachment—Action on Award—Judgment.

A party intending to enforce an award by attachment should proceed with reasonable diligence.

The time for moving against an award should be computed from the time the defendant is notified of its having been made, and not from the making of the award. And when it is made under a *rule of reference* the Court on good ground being shown, will not always hold the party to the strict rule, of moving within the next Term.

The fact of a party having been proceeded against by attachment on an award cannot be set up as a bar to an action subsequently commenced on the same award though the Court will sometimes on that ground order the action to be stayed, so that the defendant be released from the attachment.

Final judgment by default, under sec 60 of the Common Law Procedure Act, 1856, may be set aside by a Judge in Chambers, on the defendant's *satisfactorily accounting for the default* and *disclosing a good defence on the merits.*

A defendant after having been discharged from custody as an insolvent debtor by the order of a Judge at Chambers, will not afterwards be allowed to take exceptions to the judgment previously obtained in the same cause, though if the discharge be made on the *consent* of the plaintiff only, it may be different.

(5th August, 1857.)

Hiram Dexter and John Fitzgibbon having been concerned together in a contract for supplying ties for the Northern Railway company, Dexter, in 1852, brought an action in the Common Pleas against Fitzgibbon to recover an alleged demand against him growing out of that transaction.

At the Assizes in Toronto in May, 1852, that action and all other matters in difference were referred to the award of Robert G. Dalton, Esq., Barrister. The submission on behalf of Fitzgibbon was made by his counsel and attorney, Richard Dempsey, Esq., in the ordinary way of such references at the Assizes, *i. e.* by rule of reference.

On 28th June, 1852, Mr. Dalton made his award, by which he determined that Dexter was entitled to recover in the action £40 2s., and on other causes of action £26 12s. 6d.; and he directed that the whole sum (£66 14s. 6d.) should be paid by Fitzgibbon on demand, and also the costs of the reference.

No motion was made against the award, and in Michaelmas Term following Dexter obtained a writ of attachment against Fitzgibbon for not performing the award; under which Fitzgibbon was committed to gaol, where he has ever since remained until a short time ago. He was for a time admitted to the limits, but was recommitted to close custody on 8th July, 1853.

The costs were taxed at £15 10s. 10d. It was well understood that the defendant did not continue so long in custody under the attachment because he was unable to pay the money awarded, but because he had made up his mind, for some alleged reason, not to abide by the award if he could avoid it

In June, 1857, in consequence of the Court of Common Pleas, which granted the attachment, having called the attention of Mr. McNabb, the plaintiff's attorney, to the circumstances of the defendant's long continued imprisonment, and suggested that some effort should be made for putting an end to it by accommodation or otherwise, the plaintiff consented to bring an action upon the award which would give the defendant an opportunity of pleading any thing in bar that he could rely upon as invalidating the award; and having obtained judgment in such action and recorded it, he would consent to the defendant's being discharged as an insolvent debtor without his formal application for that purpose.

The plaintiff's attorney swears that the defendant said something to him about defending the action, and he remarked to the defendant that these would of course delay his discharge from custody; on which the defendant asked (as he thinks) how soon judgment would be obtained if he did not make a defence, and the plaintiff's attorney gave him the information he desired.

The plaintiff's attorney sued out a writ, in an action on the award, on 11th June, 1857, on the back of which was endorsed by mistake, "In the County Court;" but it was plain on the face of the writ that it had been issued from the Queen's Bench, being tested in the name of that Court. and directing appearance to be entered there.

No defence having been made, judgment was obtained by default on 3rd July, 1857, the summons having been specially endorsed; and on 18th July, 1857, the plaintiff's attorney gave this written consent: "The said Hiram Dexter (the plaintiff) having brought an action and recovered judgment upon the award between the parties, I do hereby consent that an order be made discharging the defendant as an insolvent debtor from custody in this case without further affidavit from said defendant."

An order of a Judge was obtained, as it is supposed, though it was not shown, and defendant was discharged according to that consent on 20th July, 1857.

On 24th July, 1857, the defendant made an affidavit that, being a prisoner in close custody between the time of his being served with the summons and the judgment thus obtained, he was unable to procure an appearance to be entered for him for want of means, and from his being a prisoner: that final judgment was entered against him on 3rd July, 1857, for the same cause of action that he was attached upon. And on this affidavit he obtained a Judge's summons to show cause why the final judgment should not be set aside on the merits, and the defendant be allowed to defend on such terms as to costs as may seem proper under the circumstances.

The learned Judge before whom this summons was returnable required from the defendant a special affidavit of merits before he would entertain his application, the plaintiff's attorney insisting that the defendant was attempting by an artful endeavour to evade the condition on which he had got out of custody, for that if he had any intimation that the defendant intended to move against the judgment, he never would have consented to his discharge.

On 28th July, 1857, the defendant filed an affidavit, in which he set forth that the award against him had been obtained against him by fraudulent and corrupt means.

He then gave an account of the transactions between himself and Dexter which gave rise to the action, admitted that he employed Mr Dempsey as his counsel to defend the suit, and gave him instructions, but denied that he ever authorized him to refer the cause to arbitration, and asserted that he directed him not to do so. He swore, further, that he never received notice *from Mr. Dempsey* of the sitting of the arbitrator, that the arbitration was carried on clandestinely and without his knowledge, and that he protested against Mr. Dalton making any award. He swore that the £26 12s. 6d. awarded was an unjust allowance against him; that the award was served on him in *November*, 1852; that he consulted with counsel about setting it aside, and was told that it was too late; that he was served with the summons in this action on 15th June, 1857, but he thought the cause was to be tried in the County Court, (but he entered no appearance there), that he spoke to an attorney, who declined to defend unless he would pay him him a fee of £5, which he had not the means to pay, and being in prison and unable to get any person to act for him he could not enter an appearance in the cause; that if he were allowed to defend, he could prove that the award was surreptitiously obtained, and that if he should fail in his defence he had sufficient property to pay a judgment with all costs; and that he never would have suffered so long an imprisonment on the attachment but in order to force the plaintiff to sue on the award, that he might be able to defend the suit in Court and prove the award a fraud. And he made other statements respecting the merits of the case, as between himself and Dexter, upon their dealings.

The plaintiff, on his part, filed affidavits shewing that in November, 1852, when the attachment was moved for, the defendant showed cause against it, and on that occasion made the several affidavits which were produced, and in which he does not pretend that the submission to arbitration was without his consent, but clearly admits the contrary, and complains of alleged misconduct of the arbitrators and of want of notice of their meetings.

Mr. J. R. Jones made affidavit that he conducted the arbitration on the part of the plaintiff; that the defendant was present and took an active part in the examination of the witnesses; that he never stated or pretended at the arbitration that the reference had been made without his consent, but, on the contrary, went into the examination and examined the witnesses personally; that he had every opportunity to call witnesses, and did call them; and that he, Mr. Jones, believed that defendant was present in Court when the reference was made, and was assenting thereto.

The plaintiff, Dexter, made an affidavit contradicting what the defendant has sworn to respecting the transactions between them, and stating that the defendant agreed to refer these affairs to arbitration, and had several interviews with him and the attornies on both sides before the arbitrator was named; that defendant proposed one Mitchell as his arbitrator, to which plaintiff objected because he was on bad terms with him; that then, on the defendant's own proposition, it was agreed to leave it to their respective attorneys to choose an arbitrator, and they named Mr. Dalton in presence of the plaintiff and defendant and with their assent; that defendant went with plaintiff to Mr. Dalton and had a day appointed for the first sitting of the arbitrator; that the defendant was present at the arbitration, and cross examined all plaintiff's witnesses and examined his own; and he swore that the sum awarded was justly due by defendant, and stated facts to show that it was so.

ROBINSON, C. J.—The defendant, Fitzgibbon, has been so long a prisoner in gaol under an attachment for non performance of an award which directs the payment of a sum of money not of large amount, that I feel disposed to give him the benefit of any claim he can fairly urge to the interposition of the Court in his favour. But at the same time it must be considered that his remaining in gaol has not been from his inability to pay the sum awarded, which it is evident from his own showing he could have done, but because for some reason he had made up his mind not to abide by the award and not to give way to the attachment. Under these circumstances, his choosing to remain in custody gives him no claim to consideration, unless we can gather from the statements before us that he may have been all the time sincerely under the conviction that the award is unjust and illegal; and even then he was under the same obligation as others are to take his objections at the proper time and in the proper manner.

The award was made on 28th June, 1852. This was after Easter Term was ended, and so the defendant had all the Vacation between that and Trinity Term, and the whole of Trinity Term also, for preparing and moving against the award, if he imagined he had any ground for it.

The first thing that strikes us is that the plaintiff allowed the whole of Trinity Term to elapse without taking, so far as appears, any steps to enforce the award. Why he did so we are not informed It may have been because there was no desire to press, and because it was hoped that the defendant would perform the award without compulsion

Generally speaking when a party intends to proceed by attachment he is expected to do so with reasonable promptness.

If the plaintiff had moved for his attachment in Trinity Term, the defendant would have had no pretence for saying that he had no knowledge of the award having been made, and that on that account he did not move in time to set it aside.

When the defendant first had notice that an award was made and ready to be delivered, does not appear. It was from that date in strictness that the time for moving should be computed. But nothing material can turn upon this point, for if the defendant had not notice of the award in time to move in Trinity Term, and if in consequence he would have been entitled to move against the award in Michaelmas Term, then he ought to have moved in that Term. He swears he wished to move, but was told by his counsel that it was too late. Whether it would have been held by the Court that it was too late, we cannot tell; that would depend upon the facts that should be shown on both sides. And when the submission is by rule of reference, and not under the statute, the Courts, when they see the delay fairly accounted for, are sometimes not so strict in holding the parties to move in the term next after the award, though the general practice requires it.

However, here an attachment being moved for in Michaelmas Term, the defendant showed cause against it, and filed affidavits, from which we can see plainly what it was that he was disposed to complain of in regard to the award And I it is impossible to have any doubt, after reading those affidavits, as well as others which have been filed on the part of the plaintiff upon the application now before me, that the defendant did not then deny that the reference was made with his consent; he admits that it was, but advances some complaint that he had no notice of the arbitrators' meetings, and had not a fair chance of being heard. He urged also what the Court could not go into, namely, that the arbitrator had done him injustice in the award.

On the first point the defendant was bound to bring his complaint before the Court within a proper time, by a distinct motion to set aside the award; and it is not stated that he ever made such an application. If he refrained either from not knowing

what the practice required, or from being advised that he was too late, the plaintiff could not on either ground have been deprived of the benefit of the rule which limits such applications to a certain time And at any rate, whether the defendant really had any ground for moving against the award, or could have believed that he had, is really not now the question.

It seems that the fact of his having been so long in gaol under the attachment lately attracted the attention of the Court of Common Pleas, and in consequence of some suggestion or inquiry made by the plaintiff's attorney, the course was adopted by him of bringing an action upon the award, with a view, as he has explained, of affording the defendant an opportunity of setting up as a defence to the action what he has latterly urged as his reason for not yielding to the attachment, namely, that the submission was not by his authority, and that he is not bound by it.

That would involve the two questions, whether he was not in fact knowingly assenting to the reference, and whether, at any rate, he would not be bound by the act of his attorney, even if he did not authorize it.

If it was by any actual concert or understanding between the plaintiff's attorney and the defendant that this course was taken, it is a pity that such understanding was not reduced to writing, for then neither party could have been suffered to attempt anything inconsistent with it; but what is shown here seems to amount only to this—that the plaintiff's attorney resolved in his own mind that he would bring an action on the award, and that if he got judgment he would be satisfied with it and relieve the party from the attachment.

And so again, when the plaintiff had obtained judgment, he did in fact immediately consent to the defendant's being discharged from custody as an insolvent debtor; but it is not distinctly shown that this was upon any such previous understanding with the defendant as would make us clear in holding that the defendant was precluded by it from attempting to get rid of the judgment.

Of course the defendant would go out of gaol as soon as he was told that he might do so, but if there was any compromise between the parties from which it could be inferred that the defendant, when he accepted his discharge, either expressly or virtually agreed to admit the regularity of the judgment, it is to be considered that no proof of such compromise is given. It only appears that, when the plaintiff got judgment, his attorney directed the gaoler that he might let the defendant go at large. That might be perhaps from a conviction on the part of the plaintiff that he could not properly hold on by the double remedy of attachment and debt on the award at the same time. In practice that has not been admitted; not that it is absolutely unlawful, so that the action could be successfully resisted on that ground, but the Court, upon proper application, would interpose to prevent it; though in the late case of The Queen v. Hemsworth, 3 C. B. 745, the Court of Common Pleas seemed to admit that it might be competent to a party, under some circumstances, to attach a party for not performing an award, and afterwards to proceed to enforce the award by action.

However that may be, if the defendant now were under no agreement to let the action proceed, and desired to oppose it on the ground that he had been proceeded against by attachment and was then actually imprisoned for the contempt, he should have taken the exception upon being served with process, and moved to stay the action or to be discharged from the attachment.

On the whole, I wish it to be understood from what I have said, that the defendant, having been served personally with the summons in this cause, was, for anything that I can see, at liberty to defend himself against the action in any manner that he could, and would now be at liberty to take any exception to the judgment which a defendant under ordinary circumstances might take And, on the other hand, that by the course which he has taken he has waived any exception on the ground of illegality, and confined his application to a request to have the judgment set aside, in order that he may have an opportunity of pleading to the merits.

If it had been shown to me that he had applied to the Court or a Judge *for his discharge from the judgment as an insolvent debtor*, and had obtained his liberty in that way, that ought to be taken to preclude him from disputing the validity of, or from applying on any ground to set aside the judgment; but I do not see that made out in the papers before me, and I must therefore dispose of the summons as I would of any other ordinary summons taken out with a view to be relieved from a judgment by default upon an affidavit of merits, and as a motion for indulgence.

The summons in this case was specially endorsed and with the proper notice, so that, under the Common Law Procedure Act, the judgment by default is final, with a power reserved to the Court or a Judge, under the 60th section, to let in the defendant to defend "upon an action supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits."

I have, then, to consider, in the first place, whether the defendant has satisfactorily accounted for his non-appearance. I cannot say that he has.

From his management in person of this application before me two days ago, I see clearly that he is by no means wanting in intelligence, and the notices endorsed on the summons served so plainly point out what is to be done, and the consequences of not doing it, that the circumstances must be very particular which will account satisfactorily for a defendant doing nothing towards his defence. He being in custody, as this defendant was, may, without explanation, raise the inference that he was destitute, and so could not procure professional assistance; but we are told by the defendant himself that that was not in fact his case; and we must know that when a prisoner, not confined for crime, desires to have an appearance entered for him in a civil suit, or a plea put in, he can be under no real difficulty in doing so when he has the means of paying the few shillings that it would cost. And this defendant, though he was in custody, because he determined not to give way to the attachment, was not at liberty to lie by from 11th June to 3rd July, taking no notice of the writ that had been served upon him, and then come to the Court with a request to be allowed to plead, merely because he was at that time in custody. And if he were at liberty so to act, still the statute says that, besides accounting satisfactorily for his non-appearance, he must disclose a defence upon the merits.

I must, then, see what defence is disclosed in the affidavits on which the defendant has moved.

The defendant denies the justice of the award. The case, so far as regards the merits, rested with the arbitrator to dispose of, and unless under very peculiar circumstances and in some extreme case, we have no power to revise his decision on the facts.

We can have no doubt but that Mr. Dalton had every desire to do what was right, and that he was well able to judge on which side the justice of the case lay. We may be assured also that, from his experience in these matters, he knew well what steps were necessary to be taken in order to give the parties a fair opportunity of being heard; and we ought to assume that he did proceed fairly, since no motion was made against the award on the ground of anything wrong in the manner of conducting the arbitration.

There only remains, then, the other question which the defendant now advances; viz., that he was not bound by the reference because he never assented to it.

That would be a good defence against the action; but when we see that what the defendant now swears to in that respect is not only expressly contradicted by affidavits filed on the other side, but is inconsistent with his own affidavits and with the ground which he himself took in 1852 in opposing the attachment, it is impossible to believe that he has truly any such defence to urge.

In an ordinary case, therefore, I should have no hesitation in discharging the summons on the grounds I have just mentioned, but as this defendant has been so long in confinement in consequence of this award, and as the course is unusual of pursuing the two remedies of attachment and action, I will set aside the judgment on payment of costs, provided the defendant will pay into Court, or secure to the satisfaction of the Master, the money due upon the award and the costs for which he is liable under it, and will undertake to plead only such pleas as will traverse the submission or award, or both.

The defendant has sworn that he is able to pay whatever can be recovered against him in the action, and therefore there is no reason to suppose that he will have any difficulty in complying with these conditions.

I appoint this to be done within three weeks.

WESTLAKE v. ABBOTT.

Special Endorsement—Liquidated Demand—Final Judgment by Default.

The Court will set aside a final Judgment by default regularly signed on payment of costs if the Defendant shew merits.

A *final* Judgment by default signed *generally* in a cause in which part of the claim is liquidated and part is not, is irregular and will be set aside with costs though the amount of the Judgment be confined to the liquidated demand.

Judgment by default may be signed for want of a plea, if inconsistent pleas are pleaded without a Judge's order.

(7th November, 1857.)

This was a summons on plaintiff to shew cause why the final judgment signed 30th October last, and all subsequent proceedings should not be set aside with costs for irregularity.

1st. Because defendant had filed and served his pleas before judgment signed, and

2nd. Because the declaration contained a count for unliquidated damages, for breach of an agreement to submit a certain cause to arbitration.

3rd. Because plaintiff signed final judgment upon the arbitration generally for want of a plea, without any order to compute or an assessment of damages, and without entering a nolle prosequi, as to such count.

4th. Because the writ of summons was not specially endorsed, nor any particulars served with the declaration.

5th. And because as the declaration contained a count for unliquidated damages plaintiff was not entitled to sign final judgment without an assessment of damages.

Or why judgment and all subsequent proceedings should not be set aside on the merits, and the defendant admitted to plea.

Or why the interlocutory judgment signed in this cause on 28th October last, should not be set aside on all or any of the grounds mentioned.

Judgment was entered on 30th October, 1857, on the whole cause of action—that plaintiff do recover against defendant the sum of £74 5s. 4d. damages, and £7 3s. 8d. for costs of suit, which amount in all to £81 9s. 0d."

Plaintiff sued defendant in the County Court of Middlesex for goods sold and delivered. The cause was tried and a verdict given for defendant.

Then on plaintiff's application a new trial was granted to him on payment of costs. Plaintiff without paying the costs took his cause down a second time to trial. It was then mutually agreed to refer it to arbitration. The 29th July was appointed for the arbitrators to hear the cause. Plaintiff and his witnesses attended and were heard. The defendant was, as he swears, unavoidably absent in Montreal.

The arbitrators made an award that defendant should pay plaintiff £45 5s. 0d. besides costs of the cause, and of the reference.

The defendant before the arbitrators made their award, revoked the submission, because as he says he found the arbitrators were resolved to proceed ex parte in the absence of himself and his witnesses, and because they would not let him see the evidence which the plaintiff had given.

The defendant in the Term following, moved the Court of Queen's Bench to set aside the award, and obtained a rule *nisi* returnable next Term (Michaelmas).

In the meantime plaintiff sued defendant upon the award in the Queen's Bench. His declaration contained two counts, the first upon the award, and the second *a count in case for revoking* the submission, in which he claimed £80 damages.

Before the plaintiff filed his declaration, the defendant had obtained the rule *nisi* in the Queen's Bench, for setting aside the award.

The declaration was filed on 10th October, 1857. On 19th October, 1857, a Judge's order was made, giving defendant four days' time to plead and leave to plead in bar the application made by him to set aside the award, defendant to take short notice of trial.

On 22nd Oct., 1857, defendant filed pleas to first count—1. That the submission was revoked by him. 2nd. That the arbitrators proceeded illegally to make an award without hearing him. 3rd. That he had moved against the award, and obtained a rule to set it aside. 4th to 2nd count, denying the alleged consideration for submitting. 5th to same count, justifying the revocation on account of the illegal proceedings of the arbitrators.

On 28th October plaintiff signed interlocutory judgment for want of a plea, and on 30th October entered final judgment for £81 9s. 0d. and issued execution thereon, which was in the sheriff's hands.

ROMILSON, C J.—The summons by which this action was commenced was not specially indorsed. The plaintiff signed judgment on the ground that the defendant had pleaded all the pleas, which he did without leave of the Court, other than the leave to plead the single plea mentioned in the Judge's order of 17th October.

Under the 61st sec. of C.L.P.A the plaintiff assuming that he was at liberty to proceed after judgment by default for want of a plea to his declaration, *as* if he had entered judgment *for* want of appearance to a specially endorsed writ, entered final judgment and took out execution. He treated the cause of action mentioned in his declaration, as being *claims* which might have been stated in a specially endorsed summons under the 41st section.

The defendant filed an affidavit of merits.

The defendant having pleaded without leave several pleas, such as he could not *together* without leave, according to the Statute the judgment signed against him by default was regular. But the Court would relieve him almost as a matter of course, on payment of costs; and in such a case as this, I would be disposed to set aside the judgment without costs, for it is inconsistent in the plaintiff to be going on with his action upon the award while the defendant has a rule *nisi* pending for setting it aside, and on grounds which if substantiated, are the plainest and strongest that can be.

But the first question is whether the final judgment and execution are regular. I think they are not. The plaintiff instead of bringing an action upon a plain money demand, such as is contemplated in the 41st and 61st sections of the C.L.P. Act declares on two causes of action quite repugnant to each other; for if the award is valid then the submission could not have been in law revoked. And on the other hand, if he is entitled to damages against defendant for revoking his submission, it is impossible that he can be at the same time entitled to recover upon the award, and yet he has signed final judgment upon the whole declaration.

It is quite clear that the cause of action stated in the second count, is not one which could have been specially endorsed on a summons under the 41st clause, and that being so, final judgment could not be taken on that count under the 61st clause.

It is true that though plaintiff has entered final judgment in his favour on the whole cause of action, yet he may have confined his damages to the sums awarded and interest. And I suppose he has: but yet he has an inconsistent judgment in his favor on two causes of action which could not subsist together; and he has by his judgment entitled himself to the costs of both counts, as if he had a right to final judgment on both, while it is clear he is not; no final judgment on the second count without some other proceedings being taken is allowed under either the 41st or 61st clauses.

I take it that when a plaintiff signs judgment under either of these clauses in a case where the claim put forward by him, is not *wholly* of such a character as brings it within either of these clauses, his judgment must be set aside. Looking at the plaintiff's cause of action as set forth in his declaration, it cannot be said that he has sued upon a liquidated demand, that is, that all his alleged cause of action are of that character, which I consider the 41st clause to mean, and, that being so, I am of opinion that this final judgment and execution must be set aside with costs for irregularity, and the defendant be allowed to plead issuably within one month. This will give time for the application against the award to be disposed of. Nothing could be more absurd than that the plaintiff should go on and recover upon an award while a rule is pending on which the Court may find it necessary to set aside the award.

It may be that the plaintiff will ultimately be found entitled to recover; but there is nothing gained by attempting to proceed in an unreasonable or irregular course with a view to shutting out a defence.

The Victoria Plank Road Company v. Simmons.

Appeal from sessions—13 & 14 Vic., ch. 54.

Quære, whether a party, having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, from a conviction by a justice of the peace, has any right of appeal from the decision of that court.

If such right exists the conviction must be returned to the court above, on entering the appeal.

The appellant, having been convicted by one Robert Bird, a justice of the peace for the county of Hastings, for passing a toll-gate on defendants' road without paying the lawful toll, appealed to the Quarter Sessions, where the case was tried by a jury, and a verdict rendered for respondents, upholding the conviction. The proceedings were removed into this court, by *certiorari*, but the return to the writ set forth only the evidence, and the charge of the chairman of the sessions to the jury.

Jellett for the apellant, *Wallbridge*, Q. C., contra.

The court held that the conviction should have been returned, being the ground-work of the proceeding, and that for want of it the cause was not properly before them, and could not be entertained. They also expressed doubts whether there was any right of appeal to this court, under the circumstances, the defendant having appealed to the Quarter Sessions, under 13 & 14 Vic., ch. 54, and given the bond required by that statute, the condition of which is that the appellant shall "appear at the said sessions and try such appeal, *and abide the judgment of the court thereupon*;" but as the parties had both concurred in bringing the matter up, the appeal was dismissed without costs, and the record was ordered to be remitted to the court of Quarter Sessions.

Duffield v. Great Western Railway Company.

Demurrer—Surplusage—Practice.

An Allegation of damages on a ground in which the Plaintiff is not entitled to recover does not form ground for demurrer to a declaration.

Mere surplusage is not a good ground for demurrer.

(6th October, 1857.)

This action was brought by the plaintiff as administratrix of the late Edmund Duffield, for damages on account of his death, which was occasioned by the Desjardins Canal Bridge accident on the defendant's line of Railway, near Hamilton.

The declaration, after setting out the accident and death of said Duffield, proceeded, "and thereupon the plaintiff, as such administratrix as aforesaid, and for the benefit of the said Ellen Duffield," (plaintiff), "and also for the benefit of Mary Duffield, sister of the said Edmund Duffield, brings her suit," &c.

The defendant demurred to this declaration on the ground that the action was brought on behalf (among others) of Mary Duffield, no damages on her account being recoverable at Law.

Morphy (*H. B.*) applied to have this demurrer struck out as frivolous on the ground,—1st. That even if the claim on behalf of Mary Duffield were not good, yet it was not a cause of demurrer to the *whole* declaration. He cited on this point *Amory* v. *Brodrick*, 1 D & R, 361, 5 B & A, 712, and *Duffield* v. *Scott*, 3 T R. 374. 2d. That a non-compliance with a rule of practice not affecting the substance of the pleading cannot form ground for demurrer. He cited on this point *Vere* v. *Goldsborough*, 1 Bing. N. C. 353-4; *Tyndall* v. *Ullestone*, 3 Dowl. 2; *Darling* v. *Gurney*, 2 Dowl 235. Nor can a mere inaccuracy not affecting the substance of the plea. He cited on this point *Marshall* v. *Thomas*, 4 Moore & S. 98: *Strangham* v. *Buckle*, 1 H. & W. 519; Harrison's C. L. P. Act, p. 199, notes.

Draper, C.J. C.P.—I strongly incline to treat the demurrer as frivolous. If the allegation complained of were omitted, an entirely good cause of action would remain, and *utile per inutile non vitiatur*. It seems to me like claiming damages, on a breach of contract, on several grounds, some of which the plaintiff cannot be allowed to go into. The allegation is surplusage, as it strikes me, and may be wholly rejected and therefore is no ground for demurrer. It is no ground of demurrer to a breach that damages are claimed which plaintiff is not entitled to recover: (*Amory* v. *Brodrick*, 5 B & A 712, and see the cases collected in notes 1 to Saunders Reports, 285 & 6.)

I think the plaintiff on the whole entitled to the order to set aside the demurrer; she may, if she prefers it, take the order to amend her declaration without costs. Order granted.

Mercer v. Voght et al.

Venue—Change thereof—Practice.

In all transitory actions the venue may be changed by either plaintiff or defendant on his showing to the Court or Judge a reasonable ground therefor.

The plaintiff must *amend* his declaration in order to change his venue.

In order to expedite the trial of the cause, when plaintiff swears that otherwise he will probably lose his debt, it may be considered reasonable ground for his changing his venue.

(1st December, 1857.)

The particulars of this case appear in the judgment.

Hagarty, J.—This is an action on a note—plea "non fecit. Venue is laid in Oxford, and Plaintiff moves on affidavit for leave to amend his declaration by changing the venue from Oxford to York and Peel, on the ground that unless he can try the cause at the Winter assizes in the latter counties, he is very likely to lose his debt. He also swears that, from conversations with defendant he believes the plea was pleaded to gain time merely, and that there is no real defence. No affidavits are filed by defendant, but he objects to the proposed change.

The practice is not very explicitly stated in the books. In Chitty's Forms 1856 page 771, it is stated "In a transitory action if the plaintiff having laid the venue in one county afterwards desires to change it to another, he may obtain a Judge's order for leave to amend the declaration by altering the venue accordingly, upon satisfying the Judge that there is reasonable ground for the application.

In Chitty's Archbold, 1856, Vol. 2, 1273 "If the plaintiff from circumstances should afterwards desire to change the venue (in transitory actions) he may obtain leave to amend his declaration upon stating to the Court or Judge any reasonable ground for this application, even after plea pleaded, issue joined, or non-suit." In Bagley's Practice 322 "As the plaintiff has it in his own power to lay his venue in the County in which it is most convenient for him to try it, in the first instance, the amendment will only be allowed under peculiar circumstances, and uniformly upon payment of costs. In *Fife* v. *Bousfield*, 2 Dowl. N. S. 705 (1843) Williams, J. says, "The defendant might have had a good ground for asking the Court to change the venue. But the plaintiff who had his option when he brought his action and had a complete knowledge of all the circumstances connected with it, must shew a reasonable ground for such application. I think that the application is not a matter of course, but that the plaintiff must lay his grounds for it." Most of the older cases are cited in *Crooks* v. *House*, 3 U.C. O.S. 308, where an application by plaintiff to change the venue after his cause having been struck out of the docket at Niagara assizes, and his only reason being that by changing to the Home Assizes he could try his case earlier. The Court refused his application as inconsistent with general practice, unless some very strong grounds were laid for it; *Robertson* v. *Hayne*, 16 C.B. 560; *Turnley* v. *London*, N. W. Ry. Co., 16 C. B. 575, may be noticed.

Our own Rule of Court, 20 Victoriæ No. 19, says, "In all cases the venue may or may not be changed according as it shall appear to the Court or Judge that the cause may be more conveniently and fitly tried in the County in which the cause of action arose, or in that in which the venue has been laid."

On the whole it appears to me that it rests altogether on the case the plaintiff can make out for making the change desired. In this case I think he has shewn sufficient grounds, and I allow the plaintiff to amend the decaration as asked in the summons on payment of costs, and that the venue be changed accordingly.

CORRESPONDENCE.

To the Editors of the Law Journal.

Toronto, January 17, 1858.

Gentlemen,—It is much to be regretted that there is no gentleman in the Profession willing to undertake the task of publishing an edition of the Chancery Orders with notes of decided cases, giving at the same time the Chancery Statutes and other similar information for the use of Chancery practitioners. The monopoly of publishing the Chancery Orders,

seems to rest with the Registrar of the Court, who besides filling up his Reports with such matter, afterwads issues the orders as he pleases and at what price he pleases.

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By inserting this communication in your next number you will add one more to the many obligations under which I, in common with other members of the profession are placed, by your independent and fearless conduct in the exposure of abuses. Yours truly,

LEX.

[We concur with so much of the remarks of our correspondent as refer to the desirability of having the Chancery Orders in a convenient volume, edited by a member of the profession. This much of his letter we publish. The remainder reflecting we think *rather* too severely upon the conduct of a public officer, we decline to publish. Speaking for ourselves, we have never known the officer in question to be otherwise than attentive and obliging. We take this opportunity of thanking him for several copies of the recent Chancery Orders.]—EDS. L. J.

To the Editors of the Law Journal.

BEAMVILLE, Jan. 27th, 1858.

SIRS,—I am called upon in behalf of the Municipal Council of the Township of Clinton, to ask a few questions for your opinion on the fifth and eighth clauses of the Act, 20 Vict., cap. 69, which provides for the disposal of Road Allowances in Upper Canada.

1st.—Does the fifth clause of the said Act authorise the Municipal Councils to convey to the parties the original allowance on the report of the Surveyor without notice and publication, as required in the eighth section.

2nd.—Does the eighth clause require the By-law to be published before being passed, or does it merely require the notices to be published.

An answer to the foregoing questions would oblige the Municipal Council of the Township of Clinton, if you could give the answers in your February number.

I am Sir, your's truly,

ROWLEY KILBORN,
Township Clerk.

[1st. No new road can be opened in *lieu* of an original allowance under the Statute 20 Vic., cap. 69, until the passing of a by-law "stopping up" the original road allowance. This is as much necessary where no compensation is to be paid under sec. 5, as where compensation is to be paid under sec. 4. Every *such* by-law must be published as directed by sec. 8.

[2nd. The By-law, *i. e.* the *whole* By-law is not of necessity required to be published, though we advise this course as being of all others the most simple and effective. When it is not done, a "notice thereof" giving substantially all the information which the by-law contains must be published. The object is to inform all concerned of what is intended to be done.—EDS. L. J.]

To the Editors of the Law Journal.

MESSRS EDITORS,—By the 44th sec. of the 2 Geo. IV. cap. 1, it is enacted that, "*No attorney of this Court (Queen's Bench) being a merchant or in anywise concerned by partnership, public or private, in the purchasing or vending of merchandize, &c. shall be permitted to practise in the said Court, &c.*" Now, suppose an *attorney* is engaged in *manufacturing* goods, buying the raw material and converting it into articles for sale, and afterwards *disposing* of these articles by wholesale or retail,—would such a case come under the Statute above cited? I am anxious to know your opinion; I cannot find any case which has been brought under the notice of the Court similar to the one I put, and as opportunities often occur in which an attorney might turn an honest penny in this way, (although I admit it is decidedly *infra dig.*) should the statute not interfere with him, will you favour your numerous subscribers with your opinion thereanent?

Your obedient servant,

January 14, 1858. ENQUIRER.

[The clause to which our correspondent refers is repealed by the recent Statute 20 Vic. cap. 63; but is re-enacted by sec. 22 of that Statute. According to our view of the law the case of the attorney mentioned by our correspondent comes within the letter as well as the spirit of the Act. "Enquirer" is referred for further information to our editorial columns.—[EDS. L. J.]

MONTHLY REPERTORY.

CHANCERY.

V. C. W. HANSON *v.* REECE. *November* 9, 10.

Solicitor—Lien of Solicitor—Set-off.

A cheque is deposited in pursuance of an agreement with a solicitor, to be applied in payment of the amount to be recovered by his client, A., in an action against B., the party depositing the cheque. The action is proceeded with, and judgment entered up for the amount subsequently ascertained by arbitration to be due to A. B. has a cross claim against A., which he is unable to plead in defence to the action brought against him. In proceedings taken under the bankruptcy of A., which happens subsequently to the award, B. is allowed to prove his debt against A.'s estate as a set-off.

Held, that the solicitor with whom the cheque had been deposited did not thereby lose his lien for costs, and a bill to recover from him the whole amount of the cheque was dismissed.

M. R. KNIGHT *v.* BOWYER. *May* 1, 2, 4, 5, 6, *June* 8.

Annuity—Memorial—Salicitor's purchase—Champerty—Limitations—Notice.

A memorial of an annuity subject to income tax is not defective for not noticing a proviso in the deed that any future reduction of income tax shall enure to the benefit of the grantor.

An objection to a purchase, as being by a solicitor from his client, cannot be taken by a third party.

It is not necessarily champerty to buy an encumbrance which is the subject of a suit in equity.

Notice that the persons in possession of land pay the rents to some person other than the owner, is notice of the instrument under which they are so paid.

COMMON LAW.

Q. B. ELDER v. BEAUMONT *Nov.* 6, 11.

Bankruptcy—Equitable plea of proof in bankruptcy—Effect of splitting a debt.

A creditor of a bankrupt may prove for a part of his debt, and give credit to the estate for another part, for which he is secured by a policy; and a covenant by the bankrupt to pay the premiums on the policy as they become due, is a subsisting covenant to pay the premiums as they become due, after the debtor has been declared a bankrupt and received his certificate.

Q. B. ENGLAND v. BLACKWELL. *Nov* 20.

Practice—Bill of sale—Residence of attesting witness.

By 17 & 18 Vic. cap. 36, the attesting witness to a bill of sale is to give his residence and occupation. *Held*, that looking at the purport of the Act, it is complied with by the witness giving as his residence, the place where he carries on his business, and where he is to be found during the working hours of the day.

Q. B. HEMEKY v. EARL AND OTHERS. *Nov.* 9, 10.

Right of unpaid vendor to stop in transitu—Recision of contract—Acceptance by vendee.

Where goods have been sent off by an unpaid vendor, and delivered on the premises of the vendee, but against his will, the vendor is not entitled to have back his goods, the vendee becoming a bankrupt, unless he demand them before the transitus has determined and unless before the vendee becomes bankrupt there has been a mutual recision of the contract.

EX. LEE v. COOK. *Nov.* 18.

Distress—Second distress—Removal of goods by party distrained upon after sale.

A bean stack upon the plaintiff's land, was distrained for a rate due at the plaintiff and sold by auction. The plaintiff prevented its removal by the purchaser, and himself took down and removed the beans and the purchase money was never paid.—*Held*, that a second distress was regular.

Q. B. NORRIS v. IRISH LAND COMPANY. *Nov.* 17.

17 & 18 *Vic. ch.* 125. *sec.* 68—*Mandamus—Public duty under Royal Charter—Personal interest of plaintiff.*

This Court will grant a writ of Mandamus to enforce the fulfilment of a duty in which the plaintiff is personally interested where such duty is not in the nature of a mere personal contract—therefore where a company incorporated by Royal Charter, and bound by their deed of settlement to keep a registor of shareholders, and to enter in such register the names of the representatives of deceased shareholder, had refused so to do; *Held*, that this Court had power to grant a writ of Mandamus to compel such registration, being a matter in which the plaintiff and the public are both interested.

C. C. R. REGINA v. ELLEN JOHNSON.

Evidence—Larceny—Proof of intestacy and property in ordinary—Absence of evidence as to majority of articles specified—Effect of evidence of intestacy in support of an indictment for larceny when the property is laid in the ordinary.

When a count for larceny charges the stealing of a great number of things, a general verdict of Guilty will be supported by evidence that any one of the things mentioned has been stolen, notwithstanding there is no evidence as to the rest.

Where a prisoner was found guilty upon a count charging her with stealing a number of articles alleged to be the property of the ordinary and there was evidence that some of the articles had belonged to an intestate, and that they had been seen and missed after her death, but as to the majority of the things no evidence was given *Held* that as there was evidence as to some of the things that they were stolen after the death, the property in them was properly laid in the ordinary, and the conviction right.

REVIEW OF BOOKS.

THE LOWER CANADA JURIST. John Lovell, Montreal. $4 per annum.

We welcome the commencement of the second volume of this publication. The promises made when it was first announced, have been more than performed. The intention was to issue in a year twelve parts of twenty-eight pages each, or in all three hundred and thirty-six pages. This has been done, and more too, for the first volume contains no less than three hundred and seventy-six pages, or forty pages more than promised. The first number of volume II., now before us, contains in part the report of a very interesting and important case recently decided in appeal, (*Wilcox* v. *Wilcox.*) In a historical point of view, it is of value to Upper, as much as Lower Canadians. One and the chief question decided is that neither by the conquest, nor by the proclamation of 1763, nor by the Quebec Act of 1774, (14 Geo. III. cap. 83,) was the law England as regards civil rights, introduced into Canada. The judgment of the Court which displays great historical research and knowledge of constitutional law, was read by Sir L. H. Lafontaine, Baronet. In this judgment Justices Duval and Caron concurred, and from it Justice Alwyn dissented. The judgment of the latter is not yet published. We shall when we receive it give it more than ordinary consideration. The question involved is one which was previously before the Courts of Lower Canada, in a case of *Stuart* v. *Bowman* reported in 2 & 3 L. C. Reports. Then, as now, there was some difference of opinion. The truth is that no judgment can be delivered which will satisfy the minds of all men. Opinions pro and con have been given by Attorney General Yorke, Solicitor General De Grey, Attorney General Thurlow, Solicitor General Wederburne, Attorney General Maseres, Chief Justice Hay, and others of the Judges and Crown Law officers of England and Canada. The preponderance of authority favors the opinion expressed by Sir. L. H. Lafontaine.—[Jun'r ED. L. J.]

THE RULES, ORDERS AND REGULATIONS AS TO PRACTICE AND PLEADING IN THE COURTS OF QUEEN'S BENCH AND COMMON PLEAS, FOR UPPER CANADA; Under the Common Law Procedure Act, 1856, with Notes Practical and Explanatory. By Robert A. Harrison, Esq., B.C.L., Barrister at Law. Maclear & Co., Toronto. Price $1.50.

In this work Mr. Harrison has given the profession a large amount of information, well and conveniently arranged.

The great body of the rules are taken from the English Rules. Many of them have been long in force in Upper Canada. All have received judicial explanation both in England and in this country, and the Reports disclose a host of cases, upon their construction and application.

In this view it was obviously important to trace out the origin of our present rules, and to collect and properly distribute the numerous cases on each. This it has been an object with the author to accomplish, and he has done the work well. Not only are all the cases of importance found in the Reports brought under view, but many cases decided in our own Courts on the Common Law Procedure Act are not contained in the authorized Reports, which are carefully collected and noted in the work.

Long before Mr. Harrison was in any way connected with the writer, in the conduct of the *Law Journal*, the Editors felt bound to notice favourably "parts" of his Common Law Procedure Act, and the writer can see no good reason for withholding an opinion which he believes the Judges and the Profession entertain, viz:—that Mr. Harrison has displayed immense industry as well as ability and legal acumen in the various legal works he has produced. His chief work, the Common Law Procedure Act, would do credit to any legal writer. The present work is carefully written, and contains

the pith of all the decided cases bearing upon the new rules. Its value to the practitioner cannot be over estimated. The mechanical execution fully equals the English works.—[Sen'r Ed. L. J.]

COUNTY COURT RULES. The Rules, Orders and Regulations as to Practice and Pleading in the County Courts, with Notes Practical and Explanatory. By Robert A. Harrison, Esq., B.C.L., Barrister at Law. Maclear & Co., Toronto. Price $1.

This is another of Mr. Harrison's timely productions. He has acted with much judgment in preparing a separate work for the County Courts.

The County Courts—creatures of the Statute law have a jurisdiction and procedure, in many respects peculiar, and the notes on the Superior Courts Rules applied to the County Court Rules, would in many instances be calculated to lead the practitioner astray—at all events would require to be carefully considered before being acted on. The labor of doing this, the author has saved to the practitioners and officers of the County Courts, for he has carefully read all his former notes, "the result was that parts were expunged, other parts modified, and additions made in several places so as to adapt his matter to its altered subject."

The origin of each rule is carefully traced out—the decisions serving to explain it given, and every pains taken to make the notes full and reliable guides to officers and practitioners. A table is prefixed to the work, exhibiting at a glance the connection between the Superior Courts and County Courts' Rules. This like the rest of Mr. Harrison's works, evinces labor and ability well directed.

There is an excellent Index to matter, and the mechanical execution is "first class."—[Sen'r Ed., L. J.]

THE UPPER CANADA LAW DIRECTORY 1858. J. Rordans, Law Stationer, Toronto.

We are glad to see this very useful publication make its appearance again. It is very evident that another year's experience has not been lost upon its industrious compiler. We can hardly imagine that any law office would be without a copy, the information it gives is so various and useful to the practitioner. To Clerks and officers of the different Courts also, and in fact to all men of business it can hardly be said to be less necessary as a book of reference. It contains an almanac showing the Terms—Sittings of Courts—days for making various services, &c. &c.; the Act to amend the law for admission af Attorneys, and rule of Law Society there-under; the Judiciary—a list of Barristers and Attorneys in Upper Canada, and their Toronto Agents; County and Judicial officers in different Municipalities; Commissioners for taking affidavits; Coroners, &c.; also Tables showing the time for taking different steps in an action at Common Law in the Superior and County Courts, and in a suit in Chancery; tables of distribution of Estates, of Intestates in Upper and Lower Canada, &c.

These are some of the principal matters, and we consider their enumeration makes any recommendation of the work almost unnecessary on our part.

Not the least interesting feature in the publication this year to us is, "a sketch of the growth and present importance of the Legal Profession in Upper Canada," by way of a preface. It is succinct and well written, and will we doubt not be read with much interest by very many who have not had time or opportunity to make themselves acquainted by research with the details of our professional history. We cannot forbear, even at the risk of its being supposed to be out of place here, giving an extract from the "sketch" in which the writer views the Profession as a necessary element of civilized society. We feel satisfied that every mind capable of reasoning, will agree in the truth and force of his remarks. He says:—"The profession of the law though generally more carped at than either that of divinity or of medicine, is in its sphere as useful as either to the well-being of modern society. It has always been found that when a people become numerous, all having wants of various kinds to be supplied, it is the interest of the whole community and of each member of it, to have a division of labour. If any man in the social state were to be his own lawyer, his own doctor, and his own clothier, it does not require much discrimination to see that his estate, his life, and his comfort, would be all less effectually served, than if he were himself to apply his attention to some one calling, and when necessary summon the assistance of others more skilful than himself in other callings.

"Those who view society as organised in modern times, and see in it numberless conflicting interests warring with each other, and yet all claiming its protection, must acknowledge the necessity of a vast accumulation of law and of trained intelligence to interpret and apply it. The theorist who thinking that the principles of justice being few are easily understood, and can be easily administered, finds himself opposed to the experience of ages. The number of adjudicated points in the law of England is estimated at one million and a-half, and are contained as may be supposed, in libraries of no trifling dimensions. To study these points, and the laws out of which they arise and upon which they depend must be the vocation of a distinct profession. To make the profession equal to the knowledge and ability required of it, there must be peculiar learning, the offspring of previous preparation."—[Sen'r Ed. L. J.]

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APPOINTMENTS TO OFFICE, &C.

JUDGES.

GEORGE S. JARVIS, of Cornwall, Esquire, to be Judge of the Surrogate Court, for the United Counties of Stormont, Dundas, and Glengary.—(Gazetted 23rd Jan. 1858.)

CLERKS OF THE PEACE.

ROBERT LEES, of Ottawa, Esquire, to be Clerk of the Peace, for the County of Carleton, in the room of F. C. Powell, resigned.—(Gazetted Jan. 9 1858.)

JACOB FARRAND PRINGLE, of Cornwall, Esquire, to be Clerk of the Peace for the United Counties of Stormont, Dundas and Glengary,—in the room of James Pringle, Esquire, resigned.—(Gazetted Jan 23 1858.)

CHARLES ALEXANDER WELLER, of Peterboro', Esquire, to be Clerk of the Peace, for the United Counties of Peterboro' and Victoria,—in the room of Geo. O. D'Olier, Esquire, deceased.—(Gazetted Jan 23, 1858.)

CLERKS OF COUNTY COURTS.

JAMES FRASER, of Ottawa, Esquire, to be Clerk of the County Court, and Registrar of the Surrogate Court, for the County of Carleton,—in the room of Henry J. Friel, Esquire, resigned.—(Gazetted 23 Jan. 1858.)

REGISTRARS OF SURROGATE COURTS.

ROBERTSON McDONELL, of Cornwall, Esquire, to be Registrar, of the Surrogate Court, for the United Counties of Stormont, Dundas and Glengarry, in the room of Alexander McLean, Esquire, resigned.—(Gazetted Jan. 30, 1858.)

NOTARIES PUBLIC.

HENRY WILLIAM JONES, of Cobourg, Gentleman, and JAMES MACLENNAN of Hamilton, Esquire Barrister and Attorney at Law, to be Notaries Public of Upper Canada.—(Gazetted January 30, 1858.)

CORONERS.

GABRIEL BALFOUR, and HENRY LEMON, Esquires, to be Associate Coroners for the County of Brant.—(Gazetted Jan. 23, 1858.)

WILLIAM JACKSON, and NATHAN BICKNELL, M.D., Esquires, to be Associate Coroners, for the United Counties of Frontenac, Lennox, and Addington.—(Gazetted Jan. 23, 1858.)

RETURNING OFFICERS.

JOHN FINLAYSON, Esquire, M.D., to be Returning Officer, for the Village Elora, under the Act 20 Vict. cap 107.—(Gazetted Jan 9, 1857.)

TO CORRESPONDENTS.

LEX, ROWLEY KILBORN, and ENQUIRER.—See "Correspondence"

PAUL DENN, J. T., A CLERK OF A DIVISION COURT.—See "Division Courts."

ALIQUIS.—We agree with you. You may proceed.

T. H.—A conviction when once returned to Sessions cannot afterwards be superseded by a more formal one.—See Chaney v. Payne, 1 Q. B. 712; Selwood v. Mount, 1 Q. B. 726.

D. O. No. 13. (13 *and* 14 *Vic., Cap.* 5.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 18th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT, IN COUNCIL, has been pleased, under the authority vested in him, to order that Unwrought Stone, now charged with a duty of fifteen *per centum, ad valorem*, as a non-enumerated article, be placed in he list of Goods paying a duty of two and a half *per centum, ad valorem*, from and after this date, and shall be rated accordingly.

By Command,
R. S. M. BOUCHETTE,
11—3 in. *Commissioner of Customs.*

D. O. No. 14, (16 *Viot. Cap.* 85.)

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT.

Toronto, 13th October, 1857.

NOTICE is hereby given, that HIS EXCELLENCY THE ADMINISTRATOR OF THE GOVERNMENT IN COUNCIL, has been pleased, by an Interpretative Order, bearing date the 10th of October, instant, to direct that Lithographic Printing Presses, Printing Ink, and Implements of all kinds, be admitted to entry free of duty, in accordance with the terms of the Act 18 Vic. Cap. 5, exempting Printing Presses, Materials, and Implements of all kinds from duty.

By Command,
October 20th, 1857. R. S. M. BOUCHETTE,
11—3 in. *Commissioner of Customs.*

CROWN LAND DEPARTMENT.

TORONTO, Oct. 13th, 1857.

NOTICE is hereby given that the Lands in the Township of Rolph in the County of Renfrew, U. C., will be open for sale on and after the 11th next month, on application to the Resident Agent, William Harris, Esq., at Admaston near Renfrew.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. Harris.

ANDREW RUSSELL,
11—6 in. Asst. Commissioner.

CROWN LAND DEPARTMENT.

TORONTO, 21st Oct. 1857.

NOTICE is hereby given that the Lands in the Township of Barrie in the County of Frontenac, U.C., will be open for Sale on and after the 17th of next month, on application to the Resident Agent, Allan McPherson, Esq., at Kingston.

For list of Lots, and the conditions of Sale, see the Canada Gazette, or apply to Mr. McPherson.

ANDREW RUSSELL,
11—6 in. Asst. Commissioner.

NOTICE.

PROVINCIAL SECRETARY'S OFFICE,
14th January, 1858.

TO MASTERS OR OWNERS OF STEAM VESSELS.

NOTICE IS HEREBY GIVEN, That on and after the opening of Navigation in the Spring of the present year, a strict compliance with the requirements of the several Acts relating to the inspection of Steam Vessels will be insisted on, and all penalties for any infraction thereof rigidly enforced.

By Command,
E. A. MEREDITH,
Asst. Secretary.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Town and Township of Niagara, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds, to the Funds thereof, in compliance with the 48th Section of the said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the said Society as "The Niagara Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the City of Hamilton, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof, in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture.

Therefore I, the Minister of Agriculture, hereby give notice of the formation of of the said Society as "The Hamilton Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture and Statistics,
Toronto, dated this 18th day of January, 1858.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the City of Kingston, in Upper Canada, by signing a declaration in the form of Schedule A, annexed to the Act 20 Vic. cap. 32, and have subscribed a sum exceeding Ten Pounds to the Funds thereof in compliance with the 48th Section of said Act, and have sent a Duplicate of said declaration written and signed as by law required to the Minister of Agriculture:

Therefore, I, the Minister of Agriculture, hereby give notice of the said Society as "The City of Kingston Agricultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agr.

Bureau of Agriculture & Statistics.
27th January: 1858.

OPINIONS OF THE PRESS.

This is a very useful monthly, containing reports of important law causes, and general information connected with the administration of justice in Upper Canada. Although more particularly intended for the profession, yet every man of business may learn much from it that may be of real advantage to him. It has hitherto been published in Barrie, but will henceforth be in Toronto. We rejoice to see that Robert A. Harrison, Esq., B. C. L., is to be connected with the journal. He is a young gentleman that has already highly distinguished himself in his profession, and with literary talents of no ordinary kind, he will prove to be of great advantage to the Law Journal.—*Brampton Times.*

We are pleased to notice that this able monthly is, for the future, to be edited and published in Toronto, and that Robert A. Harrison, Esq., B.C.L., is become a joint Editor. His accession to the editorial staff must prove to the profession to whom he is now so well known as the author of so many works in general use, no small gain. With Mr. Harrison is associated W. D. Ardagh, Esq., who has for some time been favorably known as an Editor of the *Journal*. Notwithstanding the public caution of the *Journal* in Barrie, it has under the management of the Hon. James Patton acquired a very wide and extended circulation. Now that it is to be published in Toronto, it is reasonable to expect that its circulation will be increased. It is a paper which should be in the hands of every Judge, Lawyer, Coroner, Magistrate, Clerk and Bailiff in Upper Canada. We hope, however, that the conductors will see fit to widen the list of their exchanges and so increase the circle of their usefulness.

It is a great mistake to suppose that Judges, Lawyers, Division Court Clerks, or Bailiffs are the sole persons interested in the administration of justice. The public at large have a deep interest in, and feel a lively sympathy with the sentiments of a writer who propounds measures of law reform calculated to advance the public good. No discussion however well attended upon subjects of legal interest, can be satisfactorily carried on by the lay press.

The public require to be informed not only as to the existence of an abuse which needs a remedy, but as to the nature of the remedy required. For such information the more proper and more prudent course is to turn to the columns of a newspaper conducted by men whose whole lives and training peculiarly befit them for the expression of sound views. The number of the *Journal* before us which is that for August is replete with legal lore. The Editorial Department bears marked evidence of knowledge and ability.—*Toronto Times.*

Upper Canada Law Journal, edited by Messrs. Ardagh and Harrison. The office of publication of the above excellent journal has been removed to Toronto. The *Journal* contains a variety of legal decisions and information interesting to solicitors, conveyancers, insurance agents, division court clerks and municipal officers, which cannot be obtained elsewhere. —*Stratford Examiner.*

We subjoin an article from the *Law Journal*, a legal periodical—indeed the only one published in Uppper Canada—shewing the immense progress of the Division Courts.

This periodical, which is now published in Toronto, is conducted with much ability and is very useful to all having business in the Superior and Division Courts.—*Advance.*

We have received the last three numbers of this able legal serial although from various causes we have laid them on one side. Neglect has not been the cause of this apparent indifference, but the very contrary. We wished for learned leisure to do them justice; and we have been favored with the assistance of a friend, abler than ourselves to give an opinion on the merits of a purely professional Journal. From him we understand that the *Journal* is mainly edited by R. A. Harrison, Esq., B. C. L., Barrister-at-law, a gentleman whose name is a sufficient guarantee of its value and ability. He is well known as the joint compiler of Robinson's and Harrison's Digest, a work whose merits are familiarly known to all Canadian lawyers. His more recent work on the "Common Law and County Courts' Procedure Acts" will doubtless add to his professional reputation.

The November number of the *Law Journal* contains some forcible observations on the present unsatisfactory condition of the Law of Dower. The remarks on the liability of Bank Shareholders are also deserving of attention.—*Cobourg Star.*

The extensive usefulness of this Journal is not appreciated as generality as were desirable. It is not, as many conceive, useful alone to the lawyer and the Student. Men of business, bankers, the community will derive the greatest benefit from the perusal of its pages. In a country such as ours where almost every individual we meet is either a plaintiff or defendant, it is a duty which a man owes to himself to learn something of the operation of the laws by which we abide and are governed. For this the Law Journal is of incalculable service. To our young men we would especially recommend its careful and attentive study; and we undertake to warrant that after a few months they will obtain more business and legal knowledge than they could otherwise acquire from as many years study of the largest black letter tomes. The Law Journal is presided over by Mr Harrison, of the Attorney General's Department—a gentleman of varied and extensive erudition; and who has thus far given evidence of a high order of ability which must rapidly command for him a foremost position in his profession. We wish the Law Journal every success. —*Catholic Citizen.*

Somewhere it has been said that to know a people thoroughly, it is necessary to study their laws—to ascertain how life and property are protected. This ably conducted Journal tells us how the laws enacted by government are administered in Upper Canada. It tells us—what everybody knows—that law is expensive, and it adds that cheap justice is a curse, the expense of the law being the price of liberty. Both assertions are certainly truisms, yet a litigious and quarrelsome spirit is not invariably the result of that combativeness which belongs to such men as those who, under any circumstances, and at whatever cost, will assert their rights. It is not our purpose to review the *Journal*, but to praise it; seeing that praise is deserved. The articles are well written, the reports of cases are interesting, and the general information is such, that the *Journal* ought not only to be read, but studied by the members of the bar, the magistracy, the learned professions generally, and by the merchant.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

We have to return our thanks to the conductors (or publishers, we do not know which,) of this valuable publication for the present January number, together with an ample index for, and list of cases reported and cited in the second volume of these reports for the year 1856.

The ability with which this highly important and useful periodical is conducted by W. D. Ardagh and Robert A. Harrison, B. C. L., Esquires, Barristers at Law, reflects the greatest credit upon these gentlemen, and shews that the esteem in which they are held by their professional confreres and the public, is deservedly merited and nothing more than they are entitled to. We have much pleasure in earnestly recommending the members of the bar for this section of the Province to support the Upper Canada Law Journal, by their subscriptions.—taking leave to assure them that it is well worthy of it, and that they will find it a valuable acquisition to their libraries as a legal work of reference and high authority. It is printed and published by Messrs. Maclear, Thomas & Co., of 16 King Street East, Toronto, and the typographical portion is very creditable to that firm.—*Quebec Mercury.*

The Upper Canada Law Journal, and Local Courts Gazette, is a publication of which the legal profession of the Province need not be ashamed. The *Journal* has greatly improved since the removal of the office of publication to Toronto. It is edited with ability by W. D. Ardagh, and R. A. Harrison, B. C. L., Barristers-at Law. The January number, which is the first of the fourth volume, appears in a considerably enlarged form. The fourth volume will contain at least one-third more reading matter than its predecessor. A very important question, "Shall we have a Bankruptcy Law?" is discussed at length in a well written editorial in the January issue, to which we shall refer on a future occasion. "License of Counsel," is an original article which probes barristers in many tender spots. The *Law Journal's* circulation should not be confined entirely to the legal profession—the Merchant, and general business man would find it a very useful work. The price is $4 a year in advance, or $5 otherwise. Now is the time to send in orders.—*Port Hope Guide.*

In its first number of the fourth volume this interesting and valuable publication comes to us highly improved in appearance, with a much wider range of editorial matter than formerly. The *Journal* has entered upon a broader career of utility, grappling with the higher branches of Law, and lending the strength of a full, fresh intelligence, to the consideration of some very grave wants in our civil code. The necessity of an equable and efficient "Bankruptcy Law" is discussed in an able article, instinct with astute and profound thought, coupled with much clear, subtle, legal discrimination.

It is the intention of the Proprietors to institute in the pages of the *Journal* a "Magistrat 's Manual:"—provided that that body meet the project in the proper spirit, and contribute an adequate subscription list to warrant the undertaking. To prosecute this contemplation, could not fail to be productive of incalculable advantage, as well to the community as to the Magistracy. We sincerely hope that this latter body will bestow a generous patronage, where so laudable an effort is made for their advantage.

The *Law Journal* is presided over by W. D. Ardagh, and R. A. Harrison, B. C. L., Barristers-at-Law. It is a periodical that can proudly compare with any legal publication on this Continent. We wish it every success. —*Catholic Citizen.*

This Journal which is published monthly, appears this week much improved in size, appearance and matter. It was formerly published in Barrie, but has for some numbers back been published in Toronto and has acquired aid in the editorial staff by the addition of Mr. Harrison, who is well known in the profession from his numerous publications on legal subjects. Under the management of Mr. Ardagh and Mr. Harrison, this Journal promises fair to become an important publication, not merely to the legal profession, but to other important classes of the community, as particular attention is given to Municipal affairs, County Courts and Division Courts; Magistrates' duties also receive a considerable share of consideration. It will contain original treatises and essays on law subjects, written expressly for the *Journal*, besides reports from the Superior Courts of Common Law and the Court of Chancery. Proper selections will also be made from English periodicals. To the profession the reports from Chambers of decisions under the Common Law Procedure Acts, and the general practice, are of particular interest. These the *Journal* supplies, being formerly reported by Mr. F. Moore Benson, and latterly by Mr. C. E. English, M. A. We would advise all municipal officers, Division Courts officers, Magistrates, and particularly the profession, to patronize this publication, as it cannot be sustained without their aid. The subscription is only $4 a year in advance.—*Leader.*

The January number of this valuable Journal has come to hand, and is as usual replete with legal decisions, articles on commercial law, &c., &c. We republish from this number, an able article on the subject of a Bankrupt Law for Canada.—*Canadian Merchants' Magazine.*