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VOL. IV. TORONTO, NOVEMBER, 1858. No. 11.

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.)

Trinity Term, 22nd Victoria, 1858.

During the Term of Trinity, the following Gentlemen were called to the degree of Barrister-at-Law:—

George Palmer, Esquire.
Robert John Wilson, Esquire.
John McBride, Esquire.
Nicol Kingsmill "
Thomas Wardlaw Taylor, Esq.

On Tuesday, the 31st day of August 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. Clarkson Jones.

Junior Class:

Mr. Thomas Ferguson.
" Martin O'Gara.
" Alexander Robertson.
" Robert Smith.
" Daniel Davis Hobson.
" Frederick Charles Ridley.
" James Macgregor Stevenson.
" George Taylor Denison, Junior.
" William James Scott, Junior.
" Richard Knill Martin.
" William Fuller Alves Boys.
Mr. Hugh McMahon.
" Thomas O'Brien.
" Alexander Rocke Robertson, Jun.
" Robert Fraser.
" George Edwin Duggan.
" George Willits Lount.
" Charles Edward Pegley.
" Michael Sullivan.
" Arthur Henry Sydere.
" Simon Bolivar Newcomb.
" James Fairfield.
Charles Patrick Higgins.

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, Snowball's Trigonometry, Parnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

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

ORDERED.—That the Subjects of the Lectures, for Michaelmas Term, be as follows: Specific Performance—S. H. Strong, Esquire; Agency—J. T. Anderson, Esquire.

ROBERT BALDWIN,
Trinity Term, 22nd Victoria, 1858. *Treasurer.*

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.

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October, 1858.—D. F. M., Bailiff, Orangeville, $4; C. E. E., Toronto, $4; Judge R., Cobourg, $10; C. P. S., Sarnia, $4; C. R., Sarnia, $5; P. A., D. C. C., Nairn, $5; Judge W., Chatham, $10.

DIARY FOR NOVEMBER.

1. Monday... Chancery Hearing Term begins.
7. SUNDAY.. *21st Sunday after Trinity.*
13. Saturday... Chancery Hearing Term ends.
14. SUNDAY... *22d Sunday after Trinity.*
15. Monday ... MICHAELMAS TERM begins. Attorney's annual certificate to be taken out.
21. SUNDAY... *23d Sunday after Trinity.*
27. Saturday... MICHAELMAS TERM ends.
28. SUNDAY.. *1st Sunday in Advent.*

"TO CORRESPONDENTS."—*See Last Page.*

The Upper Canada Law Journal.

NOVEMBER, 1858.

CONTEMPTS OF COURT.

If there is in Upper Canada one institution of which we have more reason to be proud than another, it is our Judiciary. When we witness the debased state to which the bench is reduced in many parts of the neighboring Union, we are thankful that we live in a different atmosphere, and under a different government.

The independence of the bench is essential to the security of society, and it is the duty of every real lover of true liberty to uphold and maintain this palladium. It is not, however, less his duty, when he finds the bench occupied by unworthy judges, to do all in his power to bring about their removal. But this is a step which should not be conceived in rashness, nor executed in blindness;—it is a step which, in Upper Canada, is neither conceived nor attempted to be executed, because there is no need of it.

The position which the barons of old occupied between the king and the people, as between the bench and the public, is now occupied by the bar. It is in the power of the latter, by their conduct towards the bench on the one hand, or the public on the other, to increase or diminish, as the case may be, the usefulness and efficacy of the bench. Nothing so much tends to inspire the respect of the public for the bench, as the good opinion of the bar, and the respectful (but not cringing) conduct of barristers. Nothing more tends to beget the same respect, than the dignified and impartial conduct of the courts towards the bar. Respect must be mutual—confidence must be mutual; and anything which has a tendency to shake either, ought to be carefully avoided.

Courts of Record have, at common law, power summarily to punish for contempts. Editors of newspapers have been more than once so punished for libels on the courts, or acts tending to bring the courts unnecessarily into disrespect. Officers of courts have also, over and over again, been so punished for misconduct of different kinds. Suitors also have been in like manner punished for unbecoming conduct, either in presence of the court, in one of its offices, or elsewhere, in regard to its proceedings. All these powers, as has been said by a learned Judge, appear to be inseparable from a judicial establishment of Record, to result from its structure, and to be inherent in the principles of its existence; for a tribunal administering laws without authority to enforce them, or to protect its proceedings from outrage or disturbance, presents to the mind the idea of an institution impotent, dependent, and frequently useless.

The jurisdiction which a Court of Record exercises with regard to outrages committed or insults offered in the face of the court, extends, as we have said, to all the departments and offices of the court. The Court of Chancery in England has committed for contempt the clerk of a solicitor, who attempted to break open the desk of a clerk in the Register's office. (Burrows, *ex parte*, 8 Ves. 585.) The Court of Chancery in Ireland committed for contempt a suitor who abused and insulted a Master of the court in his own office (*French v. French*, 1 Hogan, 138.) Whatever the jurisdiction is, when a suitor or stranger to the court misconducts himself, it is much stronger when the person who does so is an officer of the court; for instance, an attorney or solicitor. (Hawk, P. C. b. 2, cap 22, sec. 10.) In such a case, instead of imprisoning for contempt, it is apprehended, the court may adopt other modes of punishment; such as depriving the offender of the right to appear before the court, or to act as an attorney or solicitor of the court. Even though the solicitor be also a barrister, as is frequently the case in Upper Canada, it is conceived the court may show its sense of the offence committed, by declining to allow the party to act in either capacity till he purges himself of the contempt.

The jurisdiction of Courts of Record in such cases is, we think, undoubted; but whether it is possessed by the Court of Chancery here, or was on a recent occasion rightly exercised, in the case of *Nichols v. McDonald*, reported elsewhere, is a question with many of the profession. Let us for the present assume that the jurisdiction does exist. Well, there may be a jurisdiction exerciseable in certain cases only, which cannot be applied to other cases, and that jurisdiction in a particular case may be exercised either with too much severity or too much lenity. It certainly does seem very hard that a solicitor who, in the Master's office, in an unguarded moment, uses hasty language towards another solicitor, which language the Master does not hear, should be punished for contempt. It appears to

be more hard when the solicitor offending, upon the attention of the Master being directed to the subject, apologizes to him for any bearing that the insulting conduct may have had towards him. The case is, to say the least of it, of much less enormity than that of *French v. French*, where a suitor abused the Master himself. It is even of less enormity than that of *ex parte Burrows*, where a solicitor's clerk attempted by violence to open a desk in the Register's office. But it must be borne in mind that the punishment in the case under consideration, though partaking of severity, was less severe than that in either of these cases. The solicitor, instead of being imprisoned, was merely called upon to show cause why an attachment should not issue, and upon appearing and admitting the facts was suspended from practice.

To our mind, blame rests somewhere; but we cannot bring ourselves to think that blame rests with the court. When the case was formally brought to the notice of the court, the court could not, we think, refuse to take notice of it. The party really to blame is the solicitor, who, in the worst possible taste, appears to have thrust a private quarrel upon the attention of the Judges. His conduct as a member of the profession towards a brother solicitor who had been guilty of no malpractice, is without palliation. Nor was the latter, in our opinion, free from blame. Had he, when brought before the court, been a little more yielding in his disposition, and acknowledged his error, the court would not, we believe, have been forced to act in a manner so severe as it appears to have done. In any quarrel, it is difficult to say that one party is to blame altogether, and the other not at all: blame in some degree, in almost every case, attaches to each. The case to which we refer, though partaking of a contempt of court in a modified form, was nothing more than a private quarrel Such, it may be said, would have been the case, had the one solicitor struck the other. This would have been likewise a private quarrel, but, beside, an act partaking in a higher degree of the character of a contempt of court. It is necessary to the proper conduct of the business of the courts, that solicitors, when in the courts or its offices, should conduct themselves in a proper and respectful manner. Insulting language is oftentimes as void of propriety as blows or other manifestations of physical force.

RIGHT OF AN ATTORNEY TO COSTS.

Whenever a difficulty in the law presents itself on a subject in hand, reference to the history of the subject often affords light when light is not to be had from any other source.

There is probably no subject in which an attorney is so much interested as that of costs, and probably none of which he knows so little of the history.

By the common law no suitor could *appear* by attorney. The litigant was obliged himself to appear in person, and after appearance might appoint a *responsalis*, (whose office much resembled that of an attorney) to represent him during the subsequent progress of the cause, (*ad lucrandum vel perdendum pro eo.*)

The appointment was made by the party personally in Court, and usually before the Justices of the Common Pleas. It was for the particular action only. After appointment the *responsalis* might proceed as fully and effectually as the principal himself till the suit was determined. The substitute was a mere agent without standing in the Court. He resembled more the Division Court agents of the present day than perhaps any other class who now frequent the the Courts. His compensation was a matter between himself and his employer, of which the Court took no notice. Win or lose, he in all probability contracted for his payment and was paid.

The inconvenience of personal appearance was gradually remedied by several ancient statutes. By the statute of Marlbridge, passed in 1260, (20 Hen. III, cap. 10) it was enacted that every freeman who owed suit to the County tithing, &c., might appoint "*an attorney*" to do suit for him. Then it was enacted by the statute of Westminster, passed in 1275, (3 Ed. I., stat. 1, cap. 42) that in writs of assize &c., the tenant after appearance should not be essoigned but make *his attorney*. In these and other early statutes the word "attorney" occurs as meaning a person acting for or representing another in the same manner that an ordinary agent represents his principal, receiving for his services payment as agreed upon.

The first statute relative to "*attorneys at law*," of which we have any record is that of Westminster the Second, passed in 1285, (13 Ed. I., cap. 10) which enacts that, persons impleaded before Justices at Westminster, or in the King's Bench, or before the Justices assigned to take the assizes, &c., may make *general attorney* "to sue for them in all pleas," "moved *for* or *against* them, &c." Other statutes subsequently passed the cumulative effect of which is that in all actions the plaintiff or defendant may appear by attorney.

Up to this time no provision was made for the compensation of attorneys at law in a manner different from the remuneration of other agents. "Costs" were entirely unknown to the common law. Juries often took the plaintiff's case into consideration, and in addition to an actual demand awarded to him, a further sum to cover his disbursements to the officers of the Courts. But even this was discretionary and as often refused as granted.

At length the Legislature in 1278 passed the statute of Gloucester, (6 Ed. I,) enacting that in certain actions a plaintiff should recover damages, and that wherever he recovered damages he should have the costs of the writ purchased, &c. Subsequent statutes were passed giving plaintiffs costs in other actions named, the cumulative effect of which is to give to plaintiffs costs in almost all actions. If the plaintiff failed in his suit he was amerced to the King *pro falso clamore*, but the *defendant*, so far, was entirely without remedy for the recovery of his costs. He like the plaintiff *before the passing* of the Statute of Gloucester, paid his attorney win or lose, and the payment was a matter between himself and his attorney, of which the Courts did not take notice.

In 1531, by the statute 23 Hen. VIII., cap. 15, sec. 1. costs were given to defendants in certain actions few in number, and so the law continued until 1606, when the statute 4 Jac I., cap. 3, sec. 2 was passed, enacting that "costs are to be allowed to defendants in all actions whatever, in which the plaintiff if he recovered would be entitled to costs, and this either after nonsuit or verdict."

Costs therefore are dependent more or less directly or indirectly, on the statute of Gloucester, which was passed in 1278, seven years *before* the passing of the statute of Westminster the Second, which authorized the appointment of attorneys in suits at law. And these costs though at first only to cover the expense of the writ, in course of time by the ruling of the Courts and otherwise, were extended to whatever *expenses* the party was put to in the prosecution or defence of his suit. The law assumed that litigants continued as before to pay their attorneys, and its object was to reimburse to the parties all moneys so by them *expended*. Every old form of postea establishes this fact; for the award is almost invariably thus: "Therefore it is considered that the plaintiff do recover against the defendant his said debt, &c, and also £ for *his* costs and charges by him about his suit in this behalf *expended*, &c." Such too was in substance the award of costs to defendants when they succeeded.

Bearing these facts in mind, little difficulty will be experienced in accounting for the current of decisions as to costs and of pronouncing when a decision is correct or otherwise.

An attorney who neglects to take out his certificate, or as he is commonly called "an uncertificated attorney," is not entitled to practise, and so is not entitled to charge his client whether plaintiff or defendant any costs. (*Humphreys* v. *Harvey*, 1 Bing. N.C., 62). But if the client has in fact advanced or expended costs he is entitled if he succeeds, whether his attorney is certificated or not, to recover costs. (*Reeder* v. *Bloom* 3 Bing. 9; —— v. *Sexton*, 1 Dowl. P. C., 80.) On the contrary, if he has not paid his attorney anything and is not *liable* to pay him anything, he has no right to recover costs from his opponent. (*Young* v. *Dowlman*, 3 Y. & J., 24.)

Upon the same principle it has been decided, that a pauper who is by statute (11 Hen. VII., cap 12), relieved from all liability to pay costs, is not entitled to recover costs. (*Dooly* v. *The Great Northern Railway Company*, 4 El. & B., 341.) A judgment awarding costs to him by him *expended* when he expended none, would be false in fact and contrary to law. And it would seem that as to this class of cases whether the pauper though not liable to costs, does in fact advance money, he is not entitled to recover from his opponent money so advanced. (*Dooly* v. *The Great Northern Railway Company*, *ubi sup.*) This ruling, it must be confessed, does not appear to square with the doctrine laid down in *Reeder* v. *Bloom*, as to moneys paid to uncertificated attorneys. If money paid to an attorney who has no right to receive is recoverable, there appears to be no reason why money disbursed by a person who is not bound to disburse should not be equally recoverable; there is certainly a distinction, but one which does not justify the difference in practice. The principle test however, that costs are awarded *only* when costs are expended remains untouched.

This was the state of the law when *Jarvis* v. *The Great Western Railway Company*, reported at length in other columns was decided. In that case it appeared that the Great Western Railway Company employ a solicitor to whom they pay an annual salary. It is his duty in consideration of the salary, to prosecute and defend all suits brought for or against the Company, without additional cost to them. He is entitled to ask them for money disbursed, but has no claim upon them for ordinary costs or fees for services performed. This being the case, the Company is sued and succeeds in the suit. Judgment is entered up and the attorney of the Company endeavors to enforce by means of the judgment, payment of ordinary costs including disbursements. The Court of Common Pleas have said to him, you cannot do this: 1. Because the costs are not yours, but your clients: 2. Your clients are not entitled to recover more than what they have expended. 3. Therefore under your judgment you are entitled to disbursements and nothing more.

This reasoning appears to us to be unanswerable. If the first and second propositions be granted, the conclusion must follow. And we think in view of the state of law as above explained by us, they must be granted. It may not be literally true that the Great Western Railway Company do not in any suit expend more than disbursements. The salary which they pay their attorney is a

part of their expenditure, but an expenditure which applies equally to *all* suits. It is impossible to determine *how much of it can be applied to a particular suit. And* if they and their attorney see fit to make an arrangement which renders it impossible to decide whether the Company in each suit expends more than disbursements, it is quite proper that disbursements only should be allowed.

Though the principle be, as between party and party, that none but costs expended are [illegible]; to this principle there may be an exception. The legislature for example may pass an act authorizing the solicitor of the Great Western Railway Company to recover all debts due to the Company, "with costs of suit, &c.," such has been done in England, and in Upper Canada in the case of prosecutions on behalf of the Crown. (See Eng. Stat. 2 & 3, Wm. IV., cap. 120, sec. 101, and Prov. Stat. 20 Vic., cap 2, sec 2.) In such cases, though the prosecutions, &c. be conducted by *salaried* officers, the statutes applicable expressly give costs. (*Attorney General* v. *Shillebeer*, 4 Ex., 606.) But this does not at all disprove the rule, that costs are only recoverable when expended. On the contrary, the statutes create an exception to the rule, which serves the purpose among other things of proving the rule.

In our opinion therefore, although the case of *Attorney General* v. *Shillebeer* was not cited or commented upon in *Jarvis* v. *The Great Western Railway Company*, it does not at all affect the decision in that case. If the Great Western Railway Acts provided for a *salaried* solicitor, and gave to him costs of suit, the cases would be parallel but not otherwise. We have been led into these remarks because we have heard the decision of our Court of Common Pleas doubted by persons who had read, but not read attentively, the case of Attorney General v. Shillebeer.

THE ARRESTS ACT OF LAST SESSION.

It is impossible that any change can be effected in the law without giving rise to numerous questions; some of these may occur to a careful reader on an examination of the new law, others are developed in actual practice.

It appears to us that the practitioner may be materially aided by having his attention directed to questions of the kind; and we therefore continue our notes on the Act of last Session for the abolition of *Imprisonment for Debt:* and here, *par parenthesis*, let us say that the word "abolition" as here used should carry its full signification, for although arrests may yet be made, and parties be yet imprisoned, yet it is not *for debt*, but *for fraud*, or under a state of facts from which fraud may well be inferred. This distinction since the late Act we look upon as perfectly tenable. The Act is truly a statute whereby imprisonment for (mere) debt is abolished.

But to return to the subject in hand.

By the Common Law Procedure Act, an action may be *commenced by* summons or by writ of *capias*. The latter writ may be with us the first step in the commencement of the action; whereas in England the writ of summons is always the first step in a suit.

Under the old procedure of original process, continued by *alias* and *pluries*, the practice to avoid the operation of the Statute of Limitations, is well known. By the 28th section of the Common Law Procedure Act a new proceeding was devised. A summons or capias continued in force for six months only from the day of the date thereof, but might be renewed at any time within the six months, and so from time to time during the currency of the process: and the same clause provided that a writ of summons or capias so renewed "should remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ."

The seventh section of the Act of last Session runs thus: Notwithstanding anything contained in the Common Law Procedure Act, 1856, no writ of capias shall be "renewed," but on the expiration thereof a new order for arrest may be obtained. And the third section provides that the officer to whom the capias may be directed, shall proceed within two calendar months from the date thereof, *but not afterwards*, to arrest the defendant thereupon. The capias now will run only two months as we understand the statute; and regarding the complete change in the law of arrests, and the mode of obtaining process, we can see good reason for the alteration as to the duration of the writ.

As the capias cannot be renewed, we do not see how a second or other writ can have any relation to a previous one, for the purpose of the Statute of Limitations.

The periods of limitation are in some cases short, and in practice it not unfrequently happens that if a second or third process cannot be connected with the first so as to make the date of issuing the original writ the commencement of the action, the action is barred.

If then an action is commenced by capias, and the time of commencement is important, what course should be taken by the practitioner to meet the difficulty that would arise in case the first capias is not executed within two months?

In our opinion there is but one safe course, viz. in every case to commence the action by suing out a summons in the first instance, and where the defendant is to be arrested, the capias to be a proceeding in aid, viz., a capias *after* action commenced, under the fourth section of the Act of last Session. This will not we apprehend be attended with any

inconvenience, as a Judge's order must in every instance be obtained before the writ can be sued out, and the several Deputy Clerks of the Crown are kept supplied with process.

The practice we should be disposed to adopt then would be this: on receiving instructions to apply for an order to hold to bail, let a summons be sued out while the necessary affidavits are being prepared; before being sworn the affidavits to be intitled in the Court and cause; and then if an order is obtained from a Judge to arrest a defendant, the capias to be sued out under the third section of the Act. If our plan is not the best, we shall at least have warned the profession of the difficulty—that a better method of avoiding it may be devised.

One word more. Care should be taken in using the old forms to alter the endorsement as to bail, which will be no longer "bail for £——, *by affidavit*," but instead of the last two words "*by Judge's order*," in all cases.

THE SURROGATE COURTS.

Until the Judges appointed under the 14th section of the Surrogate Courts Act of last Session have framed the necessary Rules and Forms, there will doubtless be much diversity in the forms used, and delay may arise from want of full particulars in the notice to the Surrogate Clerk, required by the 28th section of the Act.

It is not at all probable that these Rules will be out before the latter end of the year; and in the meantime we venture to suggest that the forms used might be something like the following. Take for example the ordinary case of executors applying for probate of a will:—

(*Style of Court to which application made.*)

To the Surrogate Clerk,

You are hereby notified that application has been made to this Court for a grant of the Probate of the Will bearing date, &c., of ——, deceased, who died on the —— day of ——. &c., *having at the time of his death a fixed place of abode at —— in the said County of*——, by —— and —— of, &c., the executors named in said Will.

——, *Registrar.*

The names, places of residence, and additions of the executors, should be stated at length; and the place where the testator had his fixed place of abode at the time of his death should be particularly specified in the application to the Court, as well in the notice from the Registrar of the Court to the Surrogate Clerk.

Should the party have resided out of Upper Canada at the time of his death, or have had no fixed place of abode therein, as the application to the Court must be varied accordingly, so also must the form of notice to the Surrogate Clerk. In such case the grant may be obtained from the Court for any County in which the deceased had real or personal estate, and instead of the words in italics the statement would run thus:—

"Having at the time of his death no fixed place of abode in Upper Canada, but having there real estate (*or as the case may be*) in the said County of——."

The application for grant of administration might be as follows.

(*Style of Court to which application made.*)

To the Surrogate Clerk,

You are hereby notified that application has been made to this Court for a grant of letters of administration of the personal estate and effects of ——, late of ——, (*describing deceased as before*) who died intestate on or about the —— day of —— &c., by A. B. of ——, in the County of ——, &c., widow (*or as the case may be*) of the said deceased.

Registrars of Surrogate Courts must take care that the application to their own Courts is used as a guide in framing notice to the Surrogate Clerk; and such applications ought in all cases to be so worded as to give the necessary particulars, and show that the Court has jurisdiction by fixing the place of abode of the deceased, or showing that he had property in the particular County.

THE ENGLISH PRESS AND HARRISON'S COMMON LAW PROCEDURE ACTS.

In the proper place will be found still another review of this work, taken from the "Solicitors' Journal," an English Law Periodical of note, having a very large circulation.

We cannot forbear referring to it as something of which not only Mr Harrison himself, but the profession generally in Canada must feel justly proud, as we believe, that since the commencement of our legal annals no Canadian law publication has received such an extended and flattering notice in England, and moreover from such eminent authorities.

It will be seen that the writer of the Review, now being referred to, in his first paragraph, gives us to understand that his attention is but rarely attracted by any work published out of England, and that it must have strong claims to merit to procure a place in his columns. He says, "as a general rule, neither Colonial nor Foreign law treatises are reviewed in this journal, for such space in our columns as is available for the purpose of noticing new books, is fully engrossed by authors who register at Stationers Hall. Occasionally, however, we find among books sent to us from abroad, some with peculiar claims upon our consideration, and the one of which we are about to give a short account, appears to fall within this class." And again after speaking of the common practice of hurriedly annotating statutes after the close of a session, and the ephemeral character of such productions, he says of Mr. Harrison's work by way of comparison, "It was not hurriedly put together a few weeks after the statutes passed,

but it is the fruit of a careful consideration of their provisions, and of the effect of the numerous cases decided on their analogous clauses in the English Acts. Mr. Harrison's work is in fact a full practice for the Upper Canadian Courts, including the County Courts of the Colony; and though for our own use we would prefer the form of a continuous exposition of the course of the Courts, after the manner of our own Chitty's Archbold; it is but justice to say that no pains have been spared to make the notes as practical as possible, and that the annotator appears thoroughly to understand his text, and to be remarkably well up in the law of the Mother Country."

This is certainly very flattering to Mr. Harrison, and fully bears out the prediction of the writer, when speaking of the work shortly after its commencement, and before the author had any connection with this journal.

Its first pages gave evidence of the industry and research about to be bestowed on the book, and all must admit that it fully sustained its character throughout. We expressed our fears about the same time, that Mr. Harrison's labors would be without adequate compensation, and in this also we came but too near the truth, yet, we hardly imagined then that this would be in part owing to the fact of his subscriptions remaining unpaid.

What would the editor of the Solicitors' Journal have thought of the liberality of the profession in Canada, as patrons of native talent, if after writing his review he had read the remarks with the same caption as this article in the last number of this journal, by which it appears that some subscribers actually refuse to pay $6 for a work that in England would be considered cheap at three times that sum!

Authors are not very plentiful in Canada, and it can hardly be wondered at when we consider, that a writer before he undertakes a work however useful or necessary it may prove, must first be able to afford to pay for his laurels.

MUNICIPAL GOVERNMENT.

The power of a Municipal Council to interfere with private rights of property without compensation to individuals injured, wherever it exists, is never encouraged. The case of *Shuter v. The City*, for which we are indebted to a Philadelphia contemporary, decided on this point, will be read with interest. The application to municipal corporations of the maxim, "*Sic utere tuo ut alienum non laedas*," under the circumstances stated, appears to have been just, and, so far as our knowledge extends, supported by adjudged cases. On this point we believe there is little difference between the laws of Canada and of the United States.

HISTORICAL SKETCH OF THE CONSTITUTION, LAWS AND LEGAL TRIBUNALS OF CANADA.

(*Continued from p. 235.*)

A Vassal or Seignior of a Fief may grant leases for ever of the whole or any part of his fief *en roture*. The law calls such grants *concessions, ou bail à cens et rentes foncieres non rachetable, annuel et perpétuel.*

These funded annual rents represent the soil or part of the seigniory so granted, and seem attached to it for ever The grantee is called by the lord of the fief his *censitaire*, his tenant. This annual rent and *cens* is in most seigniories one half penny of rent for every arpent or superficial French acre the concession contains, and half a bushel of wheat for every twenty acres, with a penny of yearly *cens* for the whole. Some Seigniors, to induce the settlement of their estates, have conceded their lands at a less annual rent. In the District of Quebec, *a capon*, instead of the half bushel of wheat, was usually paid; and at the first settling of the country many *rotures* were granted, paying annually but one or two sols or half pence of *cens* for an entire farm of ninety acres. It is this *cens* which creates a *roture* or *ignoble* tenure, and is as distinguishing a symbol of it as fealty and homage is of its contrary, a fief.

There is not any positive law to restrain the Seignior from obtaining as much yearly rent as he can from those who wish to settle on his estate. Yet the dict of 1711 gave the Intendant authority to concede for the King's benefit, and at the customary price or rate of the other *roture* farms of the seigniory, such uncultivated woodland farms as the Seignior without just cause refused to accede. This arbitrary power was never carried into effect by positive example. The same edict forbids the Seignior to sell his woodlands for money, or in any other way than annual rents or *cens et redevances annuelles*. Another edict of the same year, 1711, requires that every person who takes a *roture* grant from a Seignior shall settle and build a dwelling house on it, in twelve months from the date of his grant, otherwise the Seignior may re-unite it to his domain. Of this there are many examples under judgments of the Intendant's Court; there are also examples of seigniories being reunited to the King's domain for a similar cause, neglect of settlement.

Corvees or days' labour of the tenant to his lord are not of right or understood as annexed to lands; yet they may be specially covenanted for, as may be any other personal obligation that can be valued in money. Without such agreement the rule of law, under the custom of Paris, *point de servitude sans titre*, would relieve any *censitaire* from whom his lord should exact such servitude. This principle of law holds equally good against the Crown. It was the plenitude of the power of the French Crown, which at will

appropriated the lives and fortunes of his Christian Majesty's subjects, that called out Canadian *corvees* and personal services when required by the Intendant or Governor General. The manner of obtaining *Lettres de Terrier* in France is subjoined.

When a Seignior is desirous of making out a terrar of his estate or fief, it is customary to obtain the King's letters authorizing him to do it. These are called *Lettres de Terrier*. Without obtaining such permission, where the maxim of *no estate without a lord* is admitted, he could only exact acknowledgments from his tenants or *censitaires* at every change of vassalage.

These letters are obtained under the Great Seal, or in the Chancery establishment near the Parliament, where the fief resorts or appeals to in judicial proceedings. The Judges who order the registration of Royal letters ought to appoint a notary or other officer of public character to receive the acts of fealty and homage, of avowal, detail, declaration or acknowledgment, and of all other deeds, renewing the titles and rights of the fief And for that purpose they ought to enjoin the vassals to appear before such officer, to exhibit and communicate their titles, and afterwards make up such acts of fealty and homage, avowal, detail or acknowledgment, as the renewal subjects them to. The Royal letters usually set forth the rights of the person at whose instance they are obtained, the motives for which they are granted, and a power or commission to the Judge to oblige the *censitaires* to fulfil their obligations; the nomination of the notary or commissary who is to make up the land roll, the pains or penalties that may be inflicted or levied upon the tenants for unfaithful declarations, the right of obtaining by compulsory means deeds deposited in public places, the right of attaching in default of fealty and exhibition of titles, the penalties upon officers who refuse communication of titles and deeds demanded of them, the right of ascertaining boundaries and of punishing usurpations, and of attaching for the Crown the inheritance which made parcel of the seigniory.

Louis XIV., in 1658, ordered a general *terrar* of lands held of his domain throughout the kingdom of France, and established an office in the Bailiwick of Paris for that purpose. At the same time, his Majesty suspended the *terrars* of private Seigniors until the general *terrar* was accomplished.

An arret of his Majesty in Council appeared on the 4th January, 1663, for perfecting the royal *terrar*, with rules and regulations for estates held *en fief* and *en roture*.

The *terrar* of the Province of Bordeaux was particularly ordered by an *arret*, in December 1680, by another in August 1682, and by letters patent in August 1752.

The Royal letters must be registered by the Judge (or Parliament) to whom they are addressed. And when so registered, advertisements and publications may then be made in public places, to notify the vassals and tenants of the commission.

The power of granting *Lettres de Terrier* was vested by a law of the Province of Lower Canada, hereafter to be noticed, in the Governor General.

SURROGATE COURTS.—TEMPORARY ORDERS.

The Judges appointed under the 14th section of "the Surrogate Courts Act, 1858," on 31st August last, made the following Temporary Orders:

1st. The forms now in use in the Surrogate Courts shall be used by the Registrars of the said Courts as guides in framing forms under the said Act:

2nd. The fees now payable to Registrars and Officers of the said Surrogate Courts may be demanded and received by Registrars and Officers of the Courts in respect to proceedings under the said Act, in addition to the fees for which they are to account under the said Act;

3rd. The fees to be taken by Attorneys and Barristers respectively, practising in the said Surrogate Courts in respect to business under the said Act or under any Act of the Parliament of Upper Canada, or of this Province, giving powers or jurisdiction to the said Courts or to the Judges thereof, shall be the same as nearly as the nature of the case will allow, as are now payable on suits and proceedings in the County Courts;

4th. The practice upon appeals from the Surrogate Courts to the Court of Chancery, shall be in accordance *mutatis mutandis*, with the practice hitherto prevailing upon application from the Surrogate Courts to the Court of Probate;

These, it is to be understood, are only temporary provisions until a full body of Rules and Forms can be settled, and printed for distribution.

NEW MUNICIPAL MANUAL.

The publishers (Maclear & Co.) have shown to us some of the sheets of this useful work, and we can promise the Municipalities full value for their money. So far as we can judge, the Manual will be in all respects worthy of the reputation which the editor (Mr. Harrison) has acquired for industry and ability in the field of legal literature. The work is, we learn, nearly two-thirds completed, and will be issued, as promised, about the 1st December next, at the ridiculously low price of two dollars per copy Orders should be sent in at once.

RETURNING OFFICERS.

The case of *The Queen ex rel. Totten v. Benn*, decided by his Honor Judge Chewett, and reported in this number, will be read with interest by Returning Officers and others concerned in municipal elections. The judgment is a valu-

able exposition of the law on the duty of Returning Officers, and the liability of candidates and others tampering with the copy of the Collector's roll used for election purposes.

LAW CLUB.

A movement is now on foot among the barristers of Upper Canada to organize a Law Club, which will equally protect the rights of suitors and the dignity and usefulness of the profession. Something of the kind is much needed, and we learn with pleasure that the Attorney-General and other leading members of the profession in town and country have countenanced the movement. It is intended that during the approaching Michaelmas Term a meeting of the profession shall be held, for the purpose of discussing the best mode of effecting the objects in view, and of organization.

DIVISION COURTS.

OFFICERS AND SUITORS.

ANSWERS TO CORRESPONDENTS.

To the Editors of the Law Journal.

PRESTON, 15th October 1858.

GENTLEMEN,—Another question in connection with execution, is with reference to the application of the proceeds of sale made under several executions against the same Defendant, and when such proceeds are not sufficient to satisfy all the claims.

Before, however, proceeding to the question in detail, I deem it necessary for the sake of illustration, to give an instance where four judgments were rendered against one Defendant and executions issued thereon.

IN COURT HELD 7TH MAY, 1858.

Suit No. 540. Entered 20th April—Judgment rendered 7th May—Execution issued 4th August.

IN COURT HELD 10TH JULY, 1858.

Suit No. 660. Entered 14th June—Judgment rendered 17th July—Execution issued 31st July.

Suit No. 675. Entered 18th June—Judgment rendered 10th July—Execution issued 31st July.

Suit No. 676. Entered 18th June—Judgment rendered 10th July—Execution issued 31st July.

Note.—The last two suits being sent by mail were received together, the letters bearing equal dates, were entered as per Rule 8, one after the other, although they had each equal rights to be entered first. On Suit No. 660 Judgment was reserved for a week which accounts for the later date of Judgment.

On the last three suits the executions were handed to the Bailiff at the same time, together with a number of other executions. On Suit No. 540 the execution was handed to the Bailiff four days afterwards, *i. e.* on the 4th August. The Bailiff made a levy upon the Defendant's goods on behalf of the four executions on the 12th August, he advertised accordingly and in due time sold the goods. The proceeds of sale however did not amount to a sum sufficient to pay all four claims, the Bailiff handed the proceeds to the Clerk as required by Rule 12, and it thereupon became the duty of the Clerk to apply such proceeds.

The question now is: By what method is the Clerk to apply such proceeds?

The several Division Court Acts as also the Rules are silent on this subject, which therefore to some parties appears an open question.

There are not less than four methods each of which has its advocates and supporters.

The first method is: To pay No 660, next No. 675, then apply balance on No. 676 and nothing at all on No. 540.

The second method is: First to pay all the costs of the four suits in full, and apply the remainder in the same manner as the whole amount of the proceeds is applied by the first method.

The third method is: To make a ratable and proportional distribution of the whole of the proceeds upon the four suits.

And the fourth method is: First to pay all the costs of the four suits in full, and of the remainder to make a ratable and proportional distribution upon the four suits.

The argument in favor of the first method is: that the oldest execution must be paid first, that although the executions on the three latter suits were issued at the same time, yet that the number of the suit must decide, and that therefore No. 660 is the oldest execution.

The grounds stated for that part of the second method, of first applying the proceeds in satisfaction of the costs on all four suits are: that costs should always first be paid out of proceeds, that since the Bailiff is entitled to receive his fees for enforcing every one of the four executions out of the proceeds, there is no reason why not the Clerk's fees for issuing the executions should also be paid out of such proceeds, and that if it is correct to pay the Bailiff's and the Clerk's fees on the executions, the same reason should apply for the payment of all the costs out of the proceeds. Moreover, that it would be but just to at least pay the costs of the several suits, where the proceeds are not sufficient to pay all claims in full. The other part of the second method is explained above.

The reasons given for the third method are: that a ratable and proportional distribution of the proceeds is the most fair and equitable manner, that although the Division Court Acts and Rules are silent on that subject, yet that these Acts are pervaded by a spirit of equity which would appear to justify the third method, and that moreover since the Legislature, by the 65th Section of the Division Court Act of 1850, has provided for an equitable distribution of proceeds of sale under attachment, a deviation from that method would be arbitrary and contrary to the spirit of the Division Court Acts. That the Bailiff by virtue of the four executions did make a levy, did advertise and sell on behalf of the four Plaintiffs, did charge for the enforcing of the four executions, which charges form part of the costs on each respective suit, and that therefore the proceeds of such sale belong to all the four suits and should be distributed among them ratably and proportionally.

For the fourth method the reasons are given in answer to the second and third.

Besides that which has been mentioned in favor of the methods respectively, there are also arguments advanced against the same.

Against the first method it may be said, that the mere number of a suit should not establish its seniority, that the date of the judgment should have also some effect on the seniority of a suit, that while No. 660 is the first suit in number among the three latter suits, it is the latest in respect to the date of judgment, that if numbers alone establish seniority, No. 540 would have priority, and if the date of the judgment would be the guide, then No. 660 would be the latest suit. Again, if by number alone the priority of a suit is established it would, in a case where two suits against the same Defendant come to the Clerk's Office at the same time, place the Clerk in a position where he might be exposed to the charge of partiality, for having given preference to one plaintiff in entering his suit before that of the other, as in No. 675 and No. 676.

Against an application of proceeds in payment of the costs, first — may be said, that the costs form part and parcel of the suit, and should therefore not be provided for separately. And against a ratable and proportional distribution of proceeds may be replied that there only exists an analogy though no precedent for such a method.

An instance of the above description for application of proceeds, it is true, is not of frequent occurrence, but even if it only once takes place it is necessary for a Clerk to know how to proceed in order to act legally; If therefore, Gentlemen, you would be so kind to express your opinion on this subject, the same will be very thankfully received.

In the meantime allow me to remain,

Respectfully yours,

——— Otto Klotz.

[The questions in regard to right of priority of executions from Division Courts, asked by our valued correspondent, Mr. Klotz, seem difficult to answer satisfactorily, as it is not possible under the peculiar circumstances of the case, although such as may very often arise, to point out any mode of proceeding which would at the same time satisfy our ideas of what was the proper practice to pursue, and be in accordance with the "spirit of equity," which Mr. Klotz justly observes, is intended to pervade the administration of the law in Division Courts.

We think that the first mentioned method is the proper one, and is analogous to that by which the Sheriff is obliged to be governed, in respect to writs of execution from the Superior Courts. He must apply the whole proceeds of a sale on the writ first placed in his hands, irrespective of the date of judgment or any other circumstance, until it is fully satisfied, and the debt, costs and his own fee made. It is true that he can hardly be placed in the same position as the Division Court Bailiff, by receiving two or three writs against the same person together, and without any instructions on which to act first, and therefore we think that the Bailiff should be guided by the numbers of the executions, the probability being in favor of judgment having been first rendered in the suit which had the lowest number, and which was undoubtedly first entered; the latter circumstance being of more weight than the former, as we apprehend that the time of giving judgment does not materially affect the question.

We think then, that the execution which should be considered as having been first placed in the Bailiff's hands, should be first satisfied, both as to debt and costs—then the next in the same way and so on; and that nothing should be applied in the way of fees or otherwise on one execution until the previous one is paid off.

We know of no precedent or authority for any of the three last methods. The principle of equal distribution may seem fair and equitable, and might perhaps in some particular instance be the most just that could be adopted, but such an instance is of too rare occurrence to warrant a departure from the general rule of practice.

A short time since our present correspondent, if we remember rightly, discussed the question whether the Clerk should issue execution when due, or wait for instructions from the person entitled to it. We then gave it as our opinion, that he should wait for the instructions, and the point now mooted by Mr. Klotz furnishes an argument in favor of our being right, for if the Clerk did not issue an execution until ordered to do so, the instances would be rare indeed, where two plaintiffs would give instructions at the same moment in cases against the same defendant. In fact it would occur only where done by letters taken from the Post Office at the same time. When this did happen, the Clerk we think ought to be guided by the number of the suits, rather than by the letter first opened, as there would then be less grounds for suspicion of partiality, if in all such instances a rule was followed which could be shown had been acted upon.

We need hardly again say, how gratified we feel in receiving such letters as Mr. Klotz writes and how desirous we are that others should follow his example. We hope to see the time when a uniform practice in all respects will be settled for the Division Courts, and most of the difficulties which officers now often meet with solved.

These difficulties to be obviated must first be known, and should receive as full discussion as possible, so that every one who like Mr. Klotz, contributes his quota of information on the subject, may some day have the satisfaction of knowing that he had assisted in perfecting the laws to the benefit of himself and the community to which he belonged.—*Eds. L. J.*]

THE MAGISTRATES' MANUAL.

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Continued from page 229, Vol. IV.

VI.—Bailing or Committing for Trial.

Duty of Magistrate after hearing.—If the evidence on the part of the prosecution is, in the opinion of the magistrate, insufficient to put the accused on his trial, it is the duty of the magistrate to cause the accused to be forthwith discharged. But if, in his opinion, the evidence is sufficient to put the accused on his trial for an indictable offence, although it do not raise such a strong presumption of guilt as would induce the magistrate to commit the accused for trial without bail, or if the offence be a misdemeanor, then the magistrate shall admit the accused to bail. If, however, the offence be a felony, and the evidence given be such as to raise a strong presumption of guilt, then the magistrate shall commit the accused to the Common Gaol, to be there safely kept until discharged by due course of law.*

Form of Warrant of Committal.—The warrant which ought to be under the hand and seal of the magistrate may be in this form: †

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

To all or any of the Constables, or other Peace Officers, in the (*County* or *United Counties or as the case may be*) of ——— and to the Keeper of the Common Gaol, of the (*County* or *United Counties, or as the case may be*) at ———, in the said (*County, &c.,*) of ——.

Whereas A. B. was this day charged before (*me*) J. S. (*one*) of Her Majesty's Justices of the Peace in and for the said (*County* or *United Counties or as the case may be*) of ——, on the oath of C. D., of ——, (*farmer,*) and others, for that, (*&c., stating shortly the offence*); These are therefore to command you the said Constables or Peace Officers, or any of you, to take the said A. B., and him safely convey to the Common Jail at —— aforesaid, and there deliver him to the Keeper thereof, together with this Precept; And I do hereby command you the said Keeper of the said Common Gaol to receive the said A. B. into your custody in the said Common Gaol, and there safely to keep him until he shall be thence delivered by due course of law.

Given under my Hand and Seal, this —— day of ——, in the year of our Lord ——, at ——, in the (*County, &c.*) of —— aforesaid. [L. S.] J. S.

To what Court accused to be sent.—If the charge against the accused involve a capital offence, or an offence of so serious a nature as in the opinion of the magistrate, to make it expedient to send the case for trial in the highest Court, the commitment should be made to the Assizes of Oyer

* 16 Vic. c. 179, s. 17. † Ib. Sch T. 1.

and Terminer, or general gaol delivery for the County or United Counties in which the offence was committed. But if the charge be cognizable by the Quarter Sessions, (or Recorder's Court in cities) the commitment may be either to the Assizes, Quarter Sessions, (or Recorder's Court if in the city,) and in the latter case it is usual, and the best course to send the accused for trial before that Court, which will be first held after the commitment. For it is considered that a Judge of Assize under his commission for delivering the gaol, is bound to clear it of all persons committed for trial. Therefore it has frequently happened that prisoners have been discharged upon proclamation because the prosecutor and witnesses were bound over in the manner next to be noticed, to appear at the Quarter Sessions or Recorder's Court, to be held subsequently to the Assizes, and were not of course present to answer when they were called at the Assizes. ‡

Binding over the prosecutor and witnesses —Whenever the magistrate determines to commit the accused for trial, it is his duty to bind over the prosecutor to prefer an indictment, and the witnesses to give evidence. This is done by recognizances. Each recognizance should particularly specify the profession, art, mystery or trade of every person entering into it, together with his christian and surname, and the Township or place of his residence, or if his residence be in a City, Town or Borough, should also specify particularly the name of the City, Town or Borough, and when convenient so to do, of the street and number (if any) of the house in which he resides, and whether he is owner or tenant thereof, or lodger therein. ‖ With respect to the sum in which the prosecutor and witnesses are to be bound, this is left entirely to the discretion of the magistrate. It is usual to bind the prosecutor in the sum of £50, to appear and indict as well as give evidence, but if he be a man of considerable property and appear in any degree an unwilling prosecutor, it would be prudent if the case be one of importance, to bind him in a much larger sum to ensure his attendance. It is also usual to bind over each witness in a sum of £10, to appear and give evidence; but where the witness is in good circumstances, more especially if an unwilling witness, it would be expedient to increase the amount to become forfeited, in case of his making default in his recognizance. ¶

Mode of taking recognizance.—On taking recognizances the magistrate, if pressed for time, should enter the names and descriptions of the prosecutor and witnesses in a book kept for the purpose, with a proper heading, shewing the nature of the offence, together with the sums for which the parties are bound. This minute may be signed by the magistrate, leaving the formal record of the recognizance to be made out for signature afterwards. Having so entered the names of the persons to be bound, the magistrate should repeat the following form to the prosecutor:—

"You, A. B., acknowledge to owe to our Sovereign Lady the Queen, the sum of £ —— to be made and levied of your goods and chattels, lands and tenements to the Queen's use, in case you shall make default in the condition of this recognizance, which is that you shall appear at the next assizes and General Gaol Delivery, (*or* the next Quarter Sessions of the Peace," *or* "Recorder's Court," as the case may be) to be holden at ——— in and for the County of ——— and then and there prefer a bill of indictment, and give such evidence as you know against the prisoner, C. D., for the offence of which he is now charged, and not depart without the leave of the Court. Are you content to be bound?"

To which the prosecutor should answer, "I am." It may be observed that if the prosecutor hesitate to become bound upon being required so to do by the magistrate, he may be committed by warrant, of which a form is hereafter given, to gaol until he conform, or until the trial can be had.* So, of a witness who declines to be bound. The form to be used when binding a witness will be much the same as the above.

Form of Recognizance.—The recognizance when afterwards drawn up, may be in the following form:— †

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

Be it remembered, That on the —— day of —— in the year of our Lord ——, C. D. of ——, in the —— of ——, in the (*Township*) of ——, in the said (*County*) of ——, (*farmer,*) (*or* C. D. of No. 2, —— Street, —— in the Town *or* City of —— *Surgeon*, of which said house he is *tenant,*) personally came before me, one of Her Majesty's Justices of the Peace in and for the said (*County or Unitnd Counties, or as the case may be*) of ——, and acknowledged himself to owe to our sovereign Lady the Queen the sum of ——, of good and lawful current money of this Province, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Lady the Queen, Her Heirs and Successors, if he the said C. D. shall fail in the condition endorsed.

Taken and acknowledged the day and year first above mentioned, at —— before me.

J. S.

CONDITION TO PROSECUTE.

The condition of the within (*or* above) written Recognizance is such, that whereas one A. B. was this day charged before me J. S. Justice of the Peace within mentioned, for that (*&c., as in the caption of the depositions;*) if, therefore, he, the said C. D. shall appear at the next Court of Oyer and Terminer *or* General Gaol Delivery, (*or* at the next Court of General or Quarter Sessions of the Peace, or Recorder's Court,) to be holden in and for the (*County or United Counties, or City, &c., or as the case may be*) of ——*, and there prefer or cause to be preferred a Bill of Indictment for the offence aforesaid, against the said A. B. and there also duly prosecute such indictment, then the said Recognizance to be void, or else to stand in full force and virtue.

CONDITION TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form, to the asterisk,* and then thus:*—"And there prefer or cause to be preferred a Bill of Indictment against the said A. B. for the offence aforesaid and duly prosecute such indictment, and give evidence thereon, as well to the Jurors who shall then enquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said Recognizance to be void, or else to stand in full force and virtue."

CONDITION TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk,* and then thus:*— "And there give such evidence as he knoweth upon a Bill of Indictment to be then and there preferred against the said A. B. for the offence aforesaid, as well to the Jurors who shall inquire of the said offence as also to the jurors who shall pass upon the trial of the said A. B. if the said Bill shall be found a True Bill, then the said Recognizance to be void, otherwise to remain in full force and virtue."

‡ Stones Petty Sessions, 280. ¶ Stones Petty Sessions, 281.
‖ 16 Vic. c. 179, s. 12.

* Stones Petty Sessions, 282. † 16 Vic. c. 179, Sch. O. 1.

Notice of Recognizance.—Every person becoming bound in a recognizance is entitled to have a written notice of the recognizance, with the particulars thereof signed by the magistrate, given to him at the time he becomes bound. *

Form of Notice.—The notice of the recognizance may be in this form : †

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

Take notice that you C. D. of ——, are bound in the sum of —— to appear at the next Court of Oyer and Terminer and General Gaol Delivery, (*or* at the next Court of General Quarter Sessions of the Peace, in and for the (*County or United Counties, or as the case may be*) of —— , to be holden at —— in the said (*County &c.*) and then and there (*prosecute and*) give evidence against A. B , and unless you then appear there, (*prosecute*) and give evidence accordingly, the Recognizance entered into by you will be forthwith levied on you.

Dated this —— day of —— one thousand eight hundred and——

J. S.

Commitment of Witness in the event of refusal.—The above mentioned warrant of commitment may be in this form : ‡

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

To all or any of the Constables or other Peace Officers in the said (*County* or *&c.*) of —— , and to the Keeper of the Common Gaol of the said (*County or United Counties, or as the case may be*) at ——, in the said (*County, or as the case may be*) of ——

Whereas A B was lately charged before the under-signed (*or name of Justice of the Peace,* (*one*) of Her Majesty's Justices of the Peace in and for the said (*County,* or *&c.*) of —— , for that (*&c as in Summons to the Witness*), and it having been made to appear to (*me*) upon oath that E. F , of —— , was likely to give material evidence for the prosecution (*I*) duly issued (*my*) Summons to the said E. F., requiring him to be and appear before (*me*) on —— , at —— or before such other Justice or Justices of the Peace as should then be there, to testify what he should know concerning the said charge so made against the said A. B. as aforesaid ; and the said E. F. now appearing before (*me*) or being brought before (*me*) by virtue of a Warrant in that behalf to testify as aforesaid), hath been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a Recognizance conditioned to give evidence against the said A. B., hath now refused so to do ; These are therefore to command you the said Constables or Peace Officers, or any one of you, to take the said E. F. and him safely to convey to the Common Gaol at—— in the (*County, &c.*) aforesaid and there deliver him to the said Keeper thereof, together with this Precept ; and I do hereby command you, the said Keeper of the said Common Gaol to receive the said E. F into your custody in the said Common Gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the mean time the said E. F. shall duly enter into such Recognizance as aforesaid in the sum of —— before some one Justice of the Peace for the said (*County or United Counties, or as the case may be,*) conditioned in the usual form to appear at the next Court of (Oyer and Terminer, *or* General Gaol Delivery, *or* General Quarter Sessions of the Peace), to be holden in and for the said (*County or United Counties, or as the case may be*) of —— and there to give evidence before the Grand Jury upon any Bill of Indictment which may then and there be preferred against the said A. B. for the offence aforesaid, and also to give evidence upon the trial of the said A. B. for the said offence, if a True Bill should be found against him for the same.

Given under my Hand and Seal, this —— day of —— in the year of our Lord ——, at &c. in the (*County &c.*), of —— aforesaid.

[L. S] J. S.

* 16 Vic. c. 179, s. 12. † Ib. Sch. O. 2. ‡ Ib. Sch. P. 1.

Discharge of such Witness —If afterwards, for want of sufficient evidence or other cause, the magistrate before whom the accused shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, that magistrate, or any other magistrate for the same territorial division, may direct the keeper of the common gaol where the witness is in custody to discharge him; and it is the duty of the keeper forthwith to discharge him. *

Form of Order.—The order may be in this form : †

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

To the Keeper of the Common Gaol, at —— , in the (*County*) of —— aforesaid :

Whereas by (*my*) order dated the —— day of —— (*instant*), reciting that A. B was lately before me then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution in that behalf, refused to enter into a Recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such Recognizance as aforesaid ; And whereas for want of sufficient evidence against the said A. B , the said A B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody : These are therefore to order and direct you the said Keeper to discharge the said E F. out of your custody, as to the said commitment, and suffer him to go at large.

Given under my Hand and Seal, this —— day of ——, in the year of Our Lord —— , at —— in the (*County*) *&c*) of —— aforesaid. [L. S.] J. S.

Transmission of Recognizances, &c.—The several recognizances taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any), in every case, should be delivered to the magistrate, or the proper officer of the court in which the trial is to be had, before or at the opening of the court, on the first day of the sitting thereof, or on such other day as the person who is to preside at the court shall appoint. ‡

* 16 Vic. c. 179, s. 12. † Ib. Sch. P. 2. ‡ Ib. s. 12.

U. C. REPORTS.

QUEEN'S BENCH.

Reported by C Robinson, Esq., *Barrister-at-Law.*

TRINITY TERM, 1858.

Boulton and the Town Council of the Town of Peterborough.

By-law—Interest of applicant—Publication.

An owner of real estate which has been assessed is entitled to move against a by-law, though his name does not appear on the roll.

It is sufficient, under 14 & 15 Vic. ch 51, sec 18, that the manner of ascertaining the consent of the electors should be prescribed by a notice attached to the proposed by-law when published, though the act says that it shall be determined *by the by-law.*

The same act directs that a copy of the by-law shall be inserted at least four times in each newspaper printed within the limits of the municipality, but the court refused to quash a by law, under which a large sum had been borrowed, because it had been published three times only in one of two papers

A full copy of the by-law in this case was not published, but at the time of passing a clause was added appointing the day on which it should come into operation, and directing that the debt should be payable within twenty years from that day, while in another clause the debentures were made payable in twenty years from their dates The court, however, held, that whether the provisions of the 14 & 15 Vic , ch. 51, sec 18 sub sec 3, or of the 16 Vic , ch 22 sec. 2, sub-sec 4, were to govern this was an irregularity for which they were not bound to quash.

Armour obtained a rule last Michaelmas Term upon the Town Council of Peterborough, to shew cause why a certain by law

passed by them on the 15th of September 1857, for enabling the said Council to take £30,000 stock in the Port Hope, Lindsay, and Beaverton Railway Company, should not be quashed, wholly or in part, on the following grounds:

1. That it was not made with the consent first had of a majority of the qualified electors of Peterborough.

2. Nor was the manner in which the consent of the majority of the electors should be obtained provided in the by-law.

3. Nor was a public advertisement, containing a copy of such intended by-law, inserted four times in each newspaper printed within the limits of the said town.

4 Nor was a copy of the said by-law advertised at all.

5 That the said by-law, or some material provision thereof, was not published for the information of the rate payers before the final passing thereof, and that the by-law that was published was not a true copy.

6. That the said railway company had no authority to build a portion of the road, to aid in constructing which the by-law was passed.

The by-law, as it was passed on the 15th of September, 1857, recited that it was necessary and expedient that the council should subscribe for and contribute stock in the Port Hope, Lindsay, and Beaverton Railway Company, for the purpose of aiding in the construction of that portion of the said railway between the village of Millbrook and the town of Peterborough, to the extent of £30,000, and that the money that should be required for paying calls upon such stock should be raised by debentures. That the annual value of the whole ratable property of the town according to the assessment returns of 1856, amounted to £14,884 7s. That for the payment of the 30,000 and interest, as therein provided, it would be necessary to raise by special rate upon the whole ratable property of Peterborough in each year, until the whole should be paid off, over and above all other rates, the following sums in each year during the twenty years next following the passing of the by-law—namely, in 1858 the sum of £3,300, and so on through each year, to 1877 inclusive.

It then recited that the annual rate in the pound upon the whole ratable property required as a special rate for the purpose, to be levied in the next twenty years for the payment of the said £30,000 and interest, and for the creation of a sinking fund for the loan, would be as follows: namely, in each year 4s. 5½d. in the pound. And it also recited that the by-law had been approved of by a majority of the duly qualified electors of the municipality at a meeting called and held in conformity with the statute in that behalf.

It then enacted that it should be lawful for the mayor of the town of Peterborough for the time being, and he was thereby authorised and required, for and in the name of the Municipal council, for the sole object and purpose of aiding in and securing the construction of the said portion of the said railway, to subscribe for and take 3000 shares in the capital stock of the said Port Hope, Lindsay, and Beaverton Railway Company, amounting to £30,000.

2. That the mayor might borrow any sum not exceeding £30,000, and bearing intrest at the rate of six per cent., and payable in twenty years from the date of the respective debentures, the interest to be paid half-yearly.

3 That the mayor should cause debentures to be issued for the said loan in sums not less than £100 each, and to be payable either in London or Canada, as the purchaser might require, which debentures should be placed in the hands of the treasurer, and issued by him under the authority of the mayor

4 That the money so raised should be applied in paying for the said stock, and for the purpose of aiding in and securing the construction the said portion of the railway, and not otherwise.

5. That the debentures should all be made payable in twenty years from their respective dates.

6. That for paying the debentures and interest, the special rates imposed by this by-law should be raised and collected upon the whole ratable property of the town of Peterborough in every one of the twenty years, in adition to all other rates, which special rate should be paid to the treasurer for the time being at the same time as other rates collected for the year.

7. That the approval or disapproval of this by-law by the qualified municipal electors of the municipality should be ascertained in *the manner pointed out hereinunder concerning the same.*

And it was enacted, lastly, that this by-law should take effect and come into operation on the 17th day of September, 1857; and *the debt or loan thereby authorised to be enacted should be pay*able within twenty years of the said last-mentioned day.

At the foot of the copy of this by-law, as certified, was this notice:

NOTICE.

"I hereby give notice, pursuant to the statute in that behalf, that the above is a true copy of a by-law which will be taken into consideration by the council of the municipality of the town of Peterborough after the expiration of one month from the first publication thereof in the *Examiner* newspaper, published within the said municipality, such first publication thereof having been made on the 11th day of August, A. D., 1857.

"And I do further give notice, that on Thursday, the 3rd day of September, 1857, at the hour of 10 o'clock in the forenoon, a general meeting of the qualified municipal electors of the said municipality will be held in the town hall, in the said town of Peterborough, for the purpose of considering the said by-law, and approving or disapproving the same.

"(Signed,) J. EDWARDS,

"Clerk of the Municipality of the Town of Peterborough."

"Dated the 10th of August, 1857."

The whole of this (*i.e.* including the notice) was certified by the town clerk under the date of the 20 of September, 1857, to be a true and correct copy of the by-law as passed by the town council of Perterborough on the 15th day of September, 1857.

The applicant, Mr. Boulton, swore that he was a freeholder, and seized in fee of real property in Peterborough, for which he had been assessed, and paid taxes for 1857; that the by-law of which he annexed the certified copy "was not published four times in each of the newspapers published within the municipality of the town of Peterborough," according to the third sub-section of the 18th section of 14 & 15 Vic., ch. 51, *but only the first seven sections thereof*, three times in the Peterborough "*Review*," published within that town, and four times in the "*Examiner*" newspaper, also published in the same town, before it was submitted to the rate-payers for their approval: that no poll was taken to ascertain whether a majority approved of the by-law, but it was merely submitted to a public meeting held under the notice attached to the by-law: that the whole of the by-law was not submitted to the rate-payers according to the 4th sub section of the 2nd section of 16 Vic., ch. 22, but the last clause thereof, as passed by the council, was added thereto by the said council on passing it, without its ever having been published or ordered to be published for the information of the rate-payers: that in his opinion the company had no authority to make a branch railway from Millbrook to Peterborough, not having commenced it within four years, the time limited by their original charter, nor within the further period of four years from November, 1852, to which the time was extended, within which latter period nothing was done towards its commencement, though one was commenced from Port Hope to Lindsay, and is now finished.

There were affidavits filed on shewing cause against this rule, that the name of the applicant was not on the assessment roll of Peterborough for 1856 or 1857, and that no roll had yet been made up for 1858 That the line of railway from Port Hope to Peterborough was laid down and staked out during the winter of 1852 and 1853, and that the work upon the road commenced before July 1853, and about 40,000 cubic yards had been excavated, based on a contract executed on the 24th of May, 1853: that the line from Port Hope to Millbrook was made with all possible despatch under that contract, and was completed before the 1st of November, 1856: that in the fall of 1853 a line was run from Millbrook to Peterborough, being a second survey of that portion, and which line was adopted, and does not vary from the other for the first eight miles from Port Hope towards Peterborough: that £38,000 had been expended before the 3rd of Febuary, 1858, upon that part of the line between Millbrook and Peterborough, upon which the iron had been laid, and which would be ready for use within two weeks; and that £26,000 had been expended on the line between Millbrook and Peterborough in the last two months.

It appeared that a pretended copy of the by-law to the end of the seventh clause, and including the notice at the foot, but without the paragraph or clause which followed that, was published on the 12th of August, 1857, by being put up in the post office, and in five principle hotels in the town: that the *same* was published in the *Examiner* newspaper then printed in Peterborough on the 11th of August, 1857, and three next following weeks: that at the meeting of the ratepayers, held in the town hall on the 3rd of September, 1857, at 10 o'clock, pursuant to the notice, the mayor being in the chair, and the clerk being secretary, the by-law (that is, down to the end of the 7th section) upon a motion made and seconded, was put to the meeting by the mayor, and that a shew of hands being called for, the mayor declared that in his opinion the majority of the meeting was in favour of the approval of the by-law, "which decision was not in any manner appealed from."

This was the result officially entered by the secretary in the minutes of the meeting.

In an affidavit made by Elias Burnham it was sworn that the by-law was unanimously approved of; and the town clerk swore to the same.

It next appeared that at a meeting of the municipal council on the 15th of September, 1857, it was moved and carried that the by-law, entitled, &c., (according to the printed copy published) be amended by adding thereto the following words, &c, (all that now stands in the copy of the by-law, as above given, after the 7th clause.)

The by-law was then amended, and read a third time, and passed.

Eccles, Q. C., and *Hector Cameron* shewed cause.

Christopher Robinson supported the rule.

12 Vic., ch. 81, secs. 155, 177; 14 & 15 Vic. ch. 109, secs. 4, 36; 14 & 15 Vic., ch. 51, sec. 18; 16 Vic., ch. 22; 16 Vic., ch. 49; Bryant and the Municipality of Pitsburg, 13 U. C. R. 347, were referred to in the argument.

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

The applicant being owner of real estate in the town of Peterborough, which has been assessed, though he is not himself on the roll as a resident inhabitant, has a sufficient interest in the matter to entitle him to raise the question of the validity of this by-law.

Then as to the objections raised by him: that has been abandoned which relates to the alleged forfeiture of the charter on account of the work not being commenced in time, and I have no doubt it could not be maintained.

The first of the other objections is, that the consent of the ratepayers had not been obtained, or rather of the qualified electors of the municipality. By this we understand to be meant that the electors were not polled; but that could not be necessary unless some one objected and a poll was demanded. It is declared that the by-law was approved of by those present unanimously, and there is no evidence to the contrary.

2. It is objected that the manner in which the sense of electors was to be taken was not provided for in the by-law. The 18th clause of the statute 14 & 15 Vic., ch. 51, does literally provide that the manner of ascertaining the consent of the electors shall be determined *by the by-law*. But that must receive a reasonable construction. The proposed by-law could not be an actual by-law till after the consent of the rate-payers had been obtained, and it was therefore incorrect to require that the manner of ascertaining such consent must *be determined by the by-law*. When the by-law came afterwards to be passed, all that operation would be over.

We see no more reasonable way of complying with the enactment than that adopted in this case, of printing a notice of the time and place of holding the meeting at the foot of the draft of the proposed by-law, and authenticating that by the signature of the proper officers, so that the draft of the by-law could not be seen by any one without seeing the notice.

3. As to the publication, whatever we might think it right to do where any formality as to notice has been clearly disregarded, and especially if it should appear that there was an object in ommitting such formality, we certainly should not set aside a by-law of this description for a slight and perhaps accidental failure in that respect. The statute 16 Vic., ch. 49, seems designed to give to the municipality the power of aiding this railway company by passing a by-law "in the manner prescribed by, and subject to the provisions of the statute of the same session," ch. 22. We do not see indeed that the by-law now in question was passed for raising money on the credit of the consolidated loan fund, and if it was not, then it may be said that the various provisions of that act (ch. 22) are not applicable to this by-law, and that therefore there remained a necessity for strictly complying with the 18th clause of 14 & 15 Vic., ch. 51. Still we should not quash a by-law of this kind, after it has been acted upon, on the mere ground that in one of the *two* newspapers printed in the town, the copy of the by-law was only published three times instead of four, when in the other paper it was published four times. The legislature have shewn by the later act, 16 Vic., ch. 22, that they deem a publication in one newspaper in the town sufficient; and although it may be that that is not the statute which governs in the case of this by-law, yet we should not be exercising a sound discretion in setting aside for such a cause a by-law under which a large amount of money has probably been borrowed, and already expended.

The last objection is the one most material to be considered; namely, that in fact a complete copy of the by law was not published at all till before the meeting, for that a material clause was added to it at the time of its passing, which never had received the approval of the electors, nor been submitted to them.

The later statute, 16 Vic., ch, 22, is not so strictly expressed in this respect as the 14 & 15 Vic., ch. 51, is. It only requires that the by-law, "or every *material provision* thereof, shall be published," &c.

The earlier statute directs that *a copy of the by-law shall be published*, which no doubt by fair construction means the whole.

Now no doubt the part of this by-law which was added in the council at the time of passing it, had never been submitted to the electors or published.

It provides that the by-law shall take effect on the 17th of September, 1857, two days after its passing, and that the loan to be contracted shall be payable within twenty years of the last mentioned day.

In Bryant and The Municipality of Pittsburg (13 U. C. R. 347) we had an objection of this kind under consideration. But that was a by-law passed under the statute 14 & 15 Vic., ch. 109, sec. 16, which is more stringent in its language than either of the statutes which we are now considering; and the addition made to the by-law, after its approval, was incomparably more material.

In the shape in which this by-law was seen by the electors, it purports to be intended to come into force immediately on its passing, but on what day that would be could not be known, within a few days at least. The providing that it should come into operation *two* days after its passing did really not create a difference that we can suppose could possibly have influenced the decision of any of the electors.

The making the debt payable within twenty years from that day was apparently not consistent with the other provisions of the by-law as published and passed, for that makes each debenture payable in twenty years from its date, and if the debentures were not all issued, or at least dated, soon after the act passed, the periods would not correspond.

The councils should be very careful to comply with the statute in passing such by-laws, for where they are not they place the courts under the painful necessity of creating (as may be in some cases) very great public inconvenience, besides most injurious consequences to individuals, by quashing by-laws upon which large sums of money have been raised, and debentures issued which may be circulating even in foreign countries.

Our authority to quash by-laws, as given by the statute, is where the by-law appears to us to be either wholly or in part illegal. This seems, as we have intimated in other cases, to have reference to what we shall find on the face of the by-law, whereas the objections we have been considering are of another character. We do not doubt our power to quash a by-law where it is shewn to us that it has been passed illegally, as without some notice or other formality required, which appears to be essential to the right of the municipality to pass it. But where we interfere on that ground it is, as we conceive, rather under the jurisdiction vested in us at common law, than under the municipal act. And where that is the case, we have a discretion not to interfere on summary appli-

cation, but leave it to the party complaining, if he pleases, to test the validity of the by-law by resisting its operation, or by bringing an action for any thing done under it, as he may be advised.

And this, we think, is a case in which we should take that course.

Rule discharged.

COMMON PLEAS.

IN BANC.

Reported for the U. C. LAW JOURNAL.

TRINITY TERM, 1858.

Before the Hon C. J. DRAPER, the Hon. MR JUSTICE RICHARDS, and the Hon. MR. JUSTICE HAGARTY.

JARVIS v. THE GREAT WESTERN RAILWAY COMPANY.

Costs—Salaried Agent.

The Defendants engaged the exclusive services of an Attorney, in consideration of a certain annual salary, and under no consideration whatsoever was he to charge them *costs* for such services. The Defendants further stipulated with their Attorney that in *all* cases where costs were directed to be paid to them they should account to the benefit of the Attorney, less such disbursements as should have been paid by them in the prosecution of the proceedings.

Held, that under such an agreement the Company was not entitled to costs beyond the actual and necessary disbursements of the cause

An action on the case had been brought by the plaintiff against the defendants, when a verdict was found for the defendants. On the 23rd July, the defendants taxed their costs. On the taxation it was objected on behalf of the plaintiff that no costs could be allowed the defendants except such costs as they had paid or were legally liable for. The Master overruled the objection, and taxed the costs as between party and party.

On the 31st July the plaintiff obtained a summons from the Chief Justice of the Common Pleas, calling on the defendants to show cause why the Master should not be ordered to revise his taxation.

On the 4th August the summons was heard and discharged with costs, by Mr. Justice McLean.

On the 25th August a Rule Nisi was obtained from this Court for the defendants to show cause why the order of Mr. Justice McLean, and all proceedings had or taken thereunder should not be set aside, and why the Master should not be ordered to revise his taxation of the costs, by disallowing to the defendants all charges save those which the defendants paid or for which they were legally liable to or chargeable with by their Attorney.

Several affidavits were filed on behalf of the plaintiff tending to show the agreement that existed between the defendants and their Attorney as to costs.

Two affidavits were read on the part of the defendants. One the affidavit of their Attorney; the other the affidavit of the Managing Director of the Defendants, which principally went to corroborate the statement contained in the former.

The plaintiff chiefly relied on the statement contained in the affidavit of the Defendants' Attorney, and as the judgment of the Court was to a great extent founded on the admissions contained therein, we extract from the affidavits two of the principal paragraphs which relate to the terms of the agreement that existed between the defendants and their Attorney.

"That the costs against the plaintiff in this cause are mine, that is, such as are disbursements by the defendants, and have not been paid out by me, I shall have when collected to reimburse them, but such costs as have been taxed to me as the attorney's costs in the cause are mine, and are due to me, and will not become the property of the defendants under any circumstances whatever.

"That the engagement I have with the defendants does not in any way affect my right to costs in any cases in which costs may be recoverable by me, but that I am paid a salary in lieu of rendering any bills of costs as against them only.

M. C. Cameron showed cause against the rule, and contended that the defendants were justified in entering into such an agreement as set forth in the affidavits, without in any way destroying their right to receive full costs from the plaintiff.

Adam Wilson, Q C, and *Anderson*, in support of the rule submitted that such an agreement utterly debarred the defendants from recovering costs from the plaintiff beyond the amount for which they themselves were liable to their attorney, namely, actual disbursements and that the statements in the affidavit of the attorney as to the "costs being his," were wholly unsupported by authority, in no case are costs directed to be paid to the attorney. nor is the attorney to be considered otherwise than as the agent of his principal or client. If the principal, as was laid down in *Dooly* v. *The Great Northern Railway Co.*, 4 Ellis & Bl., 341, could not recover costs against the opposite party, his attorney could be in no better position. The language of the judgment obtained by the defendant ought to be conclusive on the question "that the plaintiff take nothing by his said writ, &c., and *that the defendant* (*not* his attorney) do recover against the plaintiff for his costs.

DRAPER, C. J.—If this case had depended merely on the question which was advanced and relied on when I granted the summons originally, viz., whether under the circumstances the defendants were seeking unlawfully to realize a profit by the services of their attorney, I should have no difficulty in saying that the rule should be discharged; and that, after the explanation which took place between Mr. Brydges, the Managing Director of the Great Western Railway Company, and the attorneys for the plaintiff and the defendants, it never ought to have been moved; but the plaintiff's counsel have argued this matter very ably and on higher grounds.

It seems to be settled, that if the client be not liable to pay costs to his attorney, he cannot have judgment to recover those costs against the opposite party.

Thus, if the person acting as attorney for plaintiff or defendant be not duly qualified to practice, either from neglect to take out his certificate, or because of the want of some necessary step to make his admission regularly complete, he will have no right to recover costs against his client, and as a consequence the client, unless he has made advances to carry on the suit, or would in some way sustain prejudice, cannot recover costs from the opposite party. *Reeder* v. *Bloom*, 3 Bing. 9; —— v. *Sexton*, 1 Dowl. P. C. 180; *Young* v. *Dowlman*, 3 Y. & J. 24; *Meekin* v. *Whalley*, 1 Bing. N. C. 59; *Humphrey* v. *Harvey*, 1 Bing. N. C. 62

The proceedings, however, are not irregular *Smith* v. *Wilson*, 1 Dowl. P. C. 645; *Bagley* v. *Thompson*, 2 Dowl. P. C. 655; *Hill* v. *Mills*, 1b. 696; *Hilleary* v. *Hungate*, 3 Dowl. P. C. 56; *Punter* v. *Grantley*, 3 M. & Gr. 295.

So if the plaintiff sues in *forma pauperis* and obtains a verdict, nothing is to be allowed in taxation of costs in respect of fees to the plaintiff's counsel, or by way of remuneration for the services of the plaintiff's attorney; and this is rested on the ground that the plaintiff, under the statute 11 Hy. ch. 12, was not liable to pay them. *Dooly* v. *Great Northern Railway Company*, 4 E. & B. 341.

The Courts have recognized agreements between attorneys and their clients only to charge costs out of pocket under certain circumstances, or not to be paid unless successful, and binding on the attorney and preventing his claiming more from his client; but I have not found in these cases any reference to the effect of such an agreement as to the right of the opposite party in the suit. The nature of the agreement was not that the attorney should bring the action and advance disbursements, and not to be paid on any contingency, or only to be repaid his advances, but that he should not have the claim against his client unless the suit succeeded. If successful, the client would be liable to him; and in that case there would be a right to tax costs against the opposite party. The contract not being prejudicial to the rights of a third party is as between the attorney and client upheld. See *Re Shelton*, 14 M. & W. 806: *Turner* v. *Tennant*, 14 Jur. 429; *Thwaites* v. *Mackerson*, 3 C. & P. 341; *sed vide Drax* v. *Scroupe*, 1 Dowl. P. C. 69; *Inre Masters*, 4 Dowl. P. C. 18. Still it is said, in Bac. Abr. Maintenance, b. 5, "neither can an attorney lawfully carry on a cause for another at his own expense, *with a promise never* to expect a repayment;' and in *Box* v. *Barnaby*, Hob. Repts. it is said, "if an attorney follow a cause to be paid a sum in gross it is champerty."

The present case is, as to the nature of the agreement, unlike any of the cases that I have seen. As regards the Great Western Railway Company, the attorney has in fact agreed that in consideration of an annual salary he will bring or defend all suits and actions, in which they are parties, without charge to them for his services in any such suits, whether successful or unsuccessful.

He is to deliver no bill of costs to them; to have no right to recover those costs against them, except actual disbursements. In lieu thereof he is to receive and has received this annual salary or gross sum, in discharge of their actual or contingent liability. This contract is strictly limited to remuneration for the attorney's professional services; it is not a contract of indemnity against costs, which parties succeeding in suits with them may recover, but it covers the whole ground of costs between attorney and clients, and also the taxable costs between party and party in cases wherein the railway company are successful. In all such cases the annual salary is a full compensation, and by the agreement is to bar the attorney from further claim against his own client. If the party who sues or is sued by the Company fails in his action or defence, and turns out insolvent, the Company's attorney cannot claim any of the costs of the suit from them, though, according to his statement of the agreement, he is entitled to those costs if he can recover them from the other party. It is further explained and explicitly asserted on the part of the defendants—that they are not benefited in any way whatever by costs being recovered in their behalf; that they are not received by them, nor is the amount applied in reduction or satisfaction of the salary payable to Mr. Irving, but that they belong solely and entirely to him

Such an arrangement is well calculated to stimulate the exertions of the attorney—whose income must increase with every cause in which he succeeds for his clients, if the opposite parties are solvent; while he has the certainty of his salary to remunerate him for his time and labor, if unsuccessful. To be sure in this event, the Company have to pay the opposite party's costs and still to pay the annual salary.

We cannot divide the year's salary ratably among all the suits brought or defended in the course of the year, so as to fix a gross sum paid for each, nor would this be the intention of the parties, because no doubt the salary is designed to cover all professional services, not merely those rendered in suits brought or defeated. Nor do I at present see that an agreement in consideration of an annual salary to advise a client whenever required, to do all his conveyancing or any other similar service, could on any ground be questioned. It can only be doubtful when relating to prosecuting or defending all suits and actions the client may choose to undertake or defend.

It cannot make any difference whether such an arrangement be made by an attorney with a large corporation like these defendants, or with a bank, or a merchant in extensive business, or with a client bringing a single suit.

The principle is the same; and if the dictum in Hobart be law, and it be champerty (or rather maintenance) to follow a cause to be paid a sum in gross, I presume it will not be less maintenance to follow as many causes as a client may think fit to institute for a sum in gross, which an annual salary is.

But it is not necessary to push the argument to that extent. It is not denied that in this case the clients were not liable to their attorney, Mr. Irving, to pay him any bill in respect of the particular services rendered in this cause. If the plaintiff were unable to pay them, Mr. Irving could not recover them from the defendants; and it is unequivocally asserted, that though as between the defendants and their attorney he has been paid for those services, yet the costs which the plaintiff is liable to pay do not belong to the defendants. They neither require them to recoup themselves for what they have paid their attorney, nor yet to enable them to pay him. Their agreement disentitles *them* to claim any right or control over them. Treating them as the attorney's costs, he could maintain no action against his clients for them; and that is made a test by Tindal, C. J., in *Humphreys* v. *Harvey*, 1 Bing. N. C. 62.

The form of judgment shows that in law the costs are treated as belonging to the client; they are adjudged to him; an execution for them must be in his name. The Statutes 23 H. 8, and 4 Jac. 1, give them to defendants. If by his own agreement he has given up all claim to them, ought he to recover them? If what was suggested when the summons was originally moved, namely, that the defendants sought unlawfully to realize a profit out of the professional services of their attorney were true, I suppose the taxation would be prevented, for it would in principle amount to allowing suits to be carried on in the name of an attorney, for the profit of an uncertificated person. But the arrangement is that the defendants are not to get any part of the costs; nor, as costs in the particular suit, to pay them to their attorney. 22 Geo. 2, ch. 46, s. 11; *In re Jackson*, 1 B. & C. 270; *In re Clarke*, 3 D. & R. 260; 8 Moore, 214; *Williamson* v. *Jones*, 5 B. & C. 108.

Upon the best consideration I can give, I think the principle of reimbursement must govern; and as the defendants have made such an arrangement as renders it impossible to apply any part of what they pay their attorney as a payment on account of the costs in this cause, they are only entitled to tax disbursements.

I have abstained from suggesting various abuses that might arise from such an arrangement as that stated in this case, where the attorney was unscrupulous in his proceeding. To multiply suits and to succeed *per fas aut nefas* would be his interest; while if the client were of a litigious character he might be induced to bring or defend actions which he might otherwise let alone. In the present case, I have no doubt all has been done in a spirit of fairness and integrity, and only with a desire to do what was right both as regards the parties to the arrangement and others who might be more or less affected by it. The only imputation of unfairness has been fully and effectually met and repelled.

In my opinion, the rule for a revision of taxation must be absolute; but, under the circumstances, I do not think we should give costs.

Per Cur, rule absolute.

WILLIAMS V. THE SCHOOL TRUSTEES OF SEC. 8, PLYMPTON.

School site—Statute 13 & 14 *Vic., ch.* 48.

Reported by E. C. JONES, Esq., Barrister-at-Law.

Where a meeting was held to change the site of a school house, and arbitrators appointed who met and decided the question, but there decision was not acted upon subsequently another meeting was called, and their decision and proceedings were acted upon and the site changed.

Held that the proceedings were irregular, and that the trustees had not authority to change the site of the school house without the sanction of a special meeting of the freeholders and householders, and that the second meeting had no authority to alter the determinations previously made.

SPECIAL CASE.

The facts of the case sufficiently appear in the judgment of the court given below.

S. Richards, for plaintiff, cited 13 & 14 Vic., ch. 48, sec. 12, sub-sec. 12; also, sec. 11; 16 Vic., ch. 185, sec. 6.

M. C. Cameron, contra, contended that section 11 does not apply to an arbitration for changing the site, and that trustees might go on calling meetings till they have their own way.

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

The material facts of this case are, that the defendants are the school trustees for school section No. 8, in the township of Plympton. That they considered the school house was not in as central a situatian as it ought to be; that it was unfit for school purposes, being old and out of repair, and that the title to the land on which it stood was defective. They, therefore, on the 23rd of January, 1857, called a special school meeting (under 13 & 14 Vic., ch. 48, sec. 12, 12thly) for the selection of a new school site, at which meeting a majority decided against a change. Thereupon the trustees called a second special school meeting to re-consider the question, at which the majority also decided against a change; upon which the trustees stated they would have the question settled by arbitration, under the 11th section of the same act, which provides, "that in case of difference as to the site of a school house between the majority of the trustees of a school section and a majority of the freeholders or householders at a special meeting called for that purpose, each party shall choose one party as arbitrator, and the two arbitrators thus chosen and the local superintendent, or any person appointed by him to act on his behalf, in case of his inability to attend, and a majority of them *shall finally decide the matter*." An arbitrator was accordingly named by the trustees, one by the freeholders or householders, and the local superintendent himself was the third. The site of the present school house is on No. 24. The local superintendent and the arbitrator for the inhabitants decided against selecting a new site. The other (the trustees,) arbitrator was in favour of changing it to No. 23. The trustees being still dissatisfied, applied to

the chief superintendent of schools, and by his advice called another special meeting by the following notice: "Notice is hereby given to the freeholders and householders of school section No. 8, in the township of Plympton, that a public meeting will be held at the residence of James Bryson, on Saturday, the 11th day of April, at 2 o'clock, p. m., for the purpose of a re-consideration of the school site. Dated the 3rd of April, 1857," signed by the three trustees. On the day named, 16 persons assembled at the place named, and the hour having been ascertained by the only two watches there, the meeting was organized, and a resolution passed by a majority of seven authorising the trustees *to select a school site on No.* 23, being in effect the same question which had been submitted to the two previous meetings, and referred to the arbitrators. About a quarter of an hour after this meeting had been dismissed, a number of persons, forming the majority of the resident freeholders and householders of the section, arrived at the place, and finding that the meeting had been held and dismissed, they protested against the proceedings, alleging that the meeting had been held *too soon*, that it was then only two o'clock; but they took no other step. Two of the trustees, the third refusing, selected a site for a school house on No. 23, and took a conveyance thereof, and afterwards called on him to join them in accepting the conveyance and taking steps for erecting a school house, but he declined, alleging that the lot on which it was proposed to erect the school house was encumbered by mortgage. Then the two made a contract to build a school house for £95, and about the 31st October last, applied to the third trustee to join in raising the money, which he also refused, whereupon they made a rate bill to raise the money, and attached thereto a warrant under the corporate seal, the third trustee refusing to sign the warrant. The rate bill was correct, if they were legally empowered under the circumstances to make it out and impose the rate. Upon this warrant the collector for the section seized and sold an ox of the plaintiff's, to levy the portion of the tax imposed on him, whereupon the plaintiff brought this action against the trustees as a corporation.

The following questions were raised:

1st. Whether the trustees have the power to build a new school house and impose and collect a rate to meet the expenses thereof, without previously having the sanction of a special meeting for that purpose.

2nd. Whether the notice calling the special meeting for the 11th of April, 1857, was a notice under which that meeting could legally consider and decide the question of a change of school site.

3rd. Whether this action can be maintained so long as said rate bill and warrant remain unimpeached and in force.

4th. Whether said rate bill and warrant are sufficient in law.

Mr. Richards, who argued for the defendants, referred us to the statute 13 & 14 Vic., ch. 48, sec. 11 and sec. 12, 12thly, as containing the only enactments bearing on the question. The 6th section of 16 Vic., ch. 185, has, however, an important bearing on the matter, and the 12th section, 7thly and 9thly, of the 13 & 14 Vic., the Common School Act of 1850, should also be referred to.

It is quite clear that the trustees of a school have no authority to take steps to change the site of a school house without first calling a special meeting of the freeholders and householders of their section. If the majority at this meeting concur with the trustees, or a majority of them, then the matter can proceed, but if not, then a reference must take place under the 11th section of the act of 1850, and the arbitrators, appointed in conformity with that section, "shall finally decide the matter."

The trustees were therefore regular in callling the first special meeting. The majority then assembled differed from the trustees, and that difference left the trustees without authority to make the change they recommended, but it did not prevent further proceedings. The proper step to have been taken was, to have appointed arbitrators. Instead of this, they (irregularly, as I think,) called a second special meeting to *re-consider* the question. I do not find any authority for this proceeding. The result was, however, the same, and no objection being raised, the trustees on one side and the freeholders and householders on the other, appointed each an arbitrator, who with the local superintendent, gave their decision against the trustees. I am not altogether satisfied, that the arbitrators were properly appointed, because not chosen at the first meeting. But as the 11th section does not, in express terms, require the reference to be made at *the meeting where the* difference arises, but only prescribes that each party, *i.e.*, the majority of the freeholders and householders, and the trustees, or a majority of them, should respectively *name an arbitrator*. It may be held, without violence to the letter of the act, that the arbitration was duly gone into. So far as the result of this case is concerned it is not of so much importance, as if *they had determined* the other way and the trustees had acted on their decision.

Assuming the submissions valid, the statute says the arbitrators are *finally to decide on the matter*. Whether these words are to be construed as meaning that the question of changing the site of the school house shall never be raised again, I am not called upon to decide. I am not, however, inclined at *present to go that* length. But I cannot say I have the slightest doubt, that, after the decision of the arbitrators, the same trustees had no power to refer the same question to another special *meeting of the* freeholders and householders; in other words, to appeal from an award which is to be final, to a meeting of the same character as that which, as one of the parties, made the reference, *and to call a* special meeting to *re-consider* the question, which, so far as a special meeting was concerned, had passed to another tribunal specially appointed to dispose of it, is a proceeding so *plainly absurd that I* am surprised at its being attempted. If the award was valid, the matter for that year at all events, was, in my opinion disposed of.

But if the award is invalid, it is only because *the second special* meeting called to re-consider the determination of the first meeting was irregular and without authority, because in other words, a special meeting having determined the question upon which it was assembled, no other special meeting can re-consider that determination. It must either be acquiesced in, or be submitted to arbitration. The trustees then are in this dilemma. *If the second* special meeting was lawful its determination was lawful also, and as it differed from the opinion of a majority of the trustees, it was referred to arbitration, and the award *finally decides the matter*. If the second special meeting was unlawful, then the third special meeting called within three months "for the purpose of the re-consideration of the school site," (the question *submitted to the* first meeting, and re-considered at the second) must be unlawful also, and then the whole foundation for the imposition of the rate is destroyed. So that the trustees have taken *upon themselves to* change the site of the school house, either contrary to the decision of a majority of the arbitrators, or if that decision is invalid, they have taken the same step without the consent of a *majority of the* freeholders and householders at a meeting lawfully empowered to express that consent. Either way their case fails.

I think, therefore, that the trustees had not authority to change the site of the school house (for that is what the first question should be) without the sanction of a special meeting of the freeholders and householders of the section.

I think, secondly, that the meeting of the 11th of April, 1857, called for the purpose of the re-consideration of the school site, had no authority to alter the determination of that question previously made.

I think the rate bill and warrant do not constitute a defence *for the trustees* in this action. Indeed, this question was not argued before us. The defence was rested on the ground of the validity of the proceedings for changing the site of the school house. The powers of the trustees of a school section are much more limited than those of a board of school trustees of cities, &c. The 12th section, 7thly, seems to require a reference to freeholders and householders of the section to determine in what manner the salaries of teachers, "and all other expenses of the schools," shall be provided for, and only gives the trustees power to impose an additional rate for the deficiency, if any. 8thly authorises the trustees to do what they may judge expedient with regard to the building, repairing, renting, &c., the section school house and other matters, but it is silent as to raising money to do any of these things. And 9thly authorises them to apply to the municipality of the township, or "to employ their own lawful authority as they may judge expedient, for the raising and collecting of all sums *authorised in the manner hereinbefore provided* to be collected from the freeholders and householders of the section by rate." It is not stated in the case, nor was it on the argument, under what

authority the trustees thought they were acting in imposing a rate to raise £95.

The case is also defective in not stating as a fact, one way or the other, whether the meeting of the 11th of April did proceed to buisness before the appointed hour. The court will not draw inferences, or determine facts, on a case submitted as this is. The opinion I have formed rests on the grounds wholly independent of what is alleged as having happened on that occasion.

CHANCERY.

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

(IN BANC.)

Nicholls v. McDonald and Ross.

Master's Office—Solicitor—Contempt of Court—Attachment.

If a solicitor who is also a barrister, while in a master's office, use improper or insulting language toward another solicitor, while acting in the conduct of proceedings under a reference, he will be held guilty of contempt of court, and, upon a certificate of the facts from the master, the court may preclude the offending party from again appearing before the court, or in any of the offices of the several masters of the court.

Upon the making of a suitable apology, and upon payment of costs, the offending party may be again allowed to appear before the court as if such order had not been made. (25th June, 1858.)

This was an application on behalf of the plaintiff, for an order that an attachment might issue against Charles G. Crickmore, the solicitor for the defendant, Angus Peter McDonald, for a contempt of this court in obstructing the proceedings in the office of the Master, at Hamilton, under the decree in this suit, and for insulting the counsel for the plaintiff while prosecuting the said proceedings, on the nineteenth day of May last.

A. McDonald, in support of the application, read the certificate of the Master at Hamilton, which was as follows: "I beg to certify to this honorable court, that on Wednesday, the 19th day of May last, I was proceeding as Master in taking the accounts under a decree of this court, being attended by William Proudfoot, Esq., the counsel for the plaintiff, and Charles G. Crickmore, Esq, the solicitor for the defendant McDonald. That during the enquiry, Mr. Crickmore, as I was informed by Mr. Proudfoot, made a charge against him which I did not happen to hear, as I was at the moment engaged in looking over a paper held by a witness, whom I had recalled for my own satisfaction; but on Mr. Proudfoot appealing to me for protection, and on my asking Mr Crickmore what he said, he promptly admitted that he had used language the effect of which was to charge Mr. Proudfoot with falsehood. I admonished him for such conduct, and declared that, unless an apology were made, I should feel obliged to ask him to leave the office. He immediately apologized to me as an officer of the court, but declined doing so to Mr. Proudfoot, or retracting in any way what he had deliberately said. The apology to myself I considered satisfactory; but Mr. Proudfoot submitted that there should be one to himself, or that I should protect him Feeling in doubt as to what my powers really were, I declined acting at all in the mean time; when Mr. Proudfoot declared that unless he found protection from insult in the Master's office he would not attend it, and immediately left. Since which he has not appeared in it. The reference has been proceeded with in his absence; his client either attending himself or through other counsel. Mr. Proudfoot, at the time, did not point out the course he desired me to take; and on my asking him how he wished me to act, replied he would leave that to myself. Being under the impression that after a satisfactory apology to myself as an officer of the court the quarrel became a private one, and that I should not be called upon to mix myself up with the personal difficulties of practitioners, I for some time declined giving Mr. Proudfoot a certificate of these facts; but on his supplying me with authorities, and particularly with the case of *French* v. *French*, 1 Hogan's Reports, I have arrived at the conclusion that I was bound to give him a certificate to be used before the court, and I have lost no time in furnishing him with this, having first shown Mr. Crickmore the authorities under which I conceived Mr. Proudfoot was entitled to it, and saying to him that if he could furnish me any authorities overruling *French* v. *French*, I should be happy to receive them, and should withhold my certificate until this day for the purpose. He says he has been compelled by domestic affliction to absent himself from home, preventing him from searching for authorities, and has consequently furnished me with none.

Dated at Hamilton, this 14th day of June, A.D. 1858.

W. Leggo, Master."

R. Martin, contra, read the affidavit of Alexander McDonell, that he was present in the Master's office on or about the nineteenth day of May last past, being the occasion referred to in the Master's certificate; that one Henry S. Nicholls, a brother of the plaintiff in this cause, was at the time being asked by the said Master, for his own satisfaction, as to the construction of a certain account; that the said Henry S. Nicholls said there were ties charged in the account. The Master told him not to mind the items, but, taking it for granted that the account was right, asked what would be the effect as to the form of such account, or what construction he would put upon it; that is, supposing the account correct, would the defendant be entitled to a certain money item therein contained, or words to that effect. That thereupon William Proudfoot, counsel for the plaintiff, for the purpose of misleading the said Henry S. Nicholls, as deponent believed, or inducing him not to answer the Master's questions, asserted that they (meaning the defendant) in such account were charging for all the ties upon the line; that thereupon Charles G. Crickmore, counsel for the defendant McDonald, alleged and stated that "any person who said there were more ties charged in the account than the sum mentioned in the account I hold in my hand, says what is not the case." That said last mentioned account contained a number of items, which were allowed by the Master and taken from the account, as to which the Master was asking for explanation That to the best of deponent's knowledge, remembrance and belief, no other expression in any way offensive was used by the said counsel for defendant up to the time when the Master asked what had been said; that he (deponent) did not hear the explanation given by the said Charles G. Crickmore, as he had occasion to and did leave the room. He further swore, that the statement of the plaintiff, and also of the said Henry S. Nicholls, was to the best of his knowledge and belief untrue, and that the said interruption of the counsel for the plaintiff was calculated in its effect to prevent the said Henry S. Nicholls from properly answering the questions put to him by the said Master.

The affidavit of Mr. Crickmore himself was also read, in which he swore, that during the investigation of the accounts in this cause, the Master, for his own satisfaction, was asking from one Henry S. Nicholls his opinion as to a certain account, when William Proudfoot, counsel for the plaintiff, stated that they (meaning the defendants) were charging for all the ties in such account, or to that effect. That upon hearing such statement, and knowing it to be untrue, he thought it his duty to contradict it, which he did by alleging that any person who stated there was any charge for ties in the account referred to, other than the first item, which was expressly excepted, "stated that which was untrue, or that which was not the case." He also swore that he, the Master, as he was informed, did not hear the statement, although sitting at the same table and within a few feet of the place he occupied; that the Master, at Proudfoot's request, demanded an explanation or protection, or something to that effect; that in obedience thereto he (deponent) repeated the expression, so far as he could remember the same, and which was to the best of his recollection in the words above mentioned. He also swore that on such occasion he did not use the word "falsehood," but only the expressions above-mentioned; that he used no threats or violence of any kind on such occasion, nor did he in any way obstruct the proceedings in the Master's office.

On 5th July, the court having taken the whole matter into consideration, an entry was made of the following order:

"Upon motion made unto this court on Tuesday, the twenty-ninth day of June last, by Mr. McDonald, of counsel for the said plaintiff, it was prayed that an attachment might issue against the said Charles Gould Crickmore, for a contempt of this court, in obstructing the proceedings of the Master's office, at Hamilton, and for insulting William Proudfoot, Esq., the counsel for the plaintiff, while prosecuting the said proceedings under the decree in this cause, on the nineteenth day of May last past. Whereupon and upon hearing read the certificate of the Master, at Hamilton, filed in support of the said application, and the affidavit of the

said Charles Gould Crickmore and Alexander McDonell in opposition thereto, and upon hearing what was alleged by counsel for both parties, this court was pleased to direct that the said application should stand adjourned until this day, for judgment to be pronounced therein; and the said application coming on this day for judgment, this court doth declare that, under the circumstances set forth in the said certificate and affidavits, that the said Charles Gould Crickmore was guilty of a contempt of this court, in having used improper and insulting language to the said William Proudfoot, while acting in the conduct of the proceedings under the reference directed by the said decree, and by reason thereof this court doth see fit to order and doth accordingly order and direct that the said Charles Gould Crickmore be and he is hereby precluded from again appearing before this court, or in the offices of the several Masters of this court, until this court make other order to the contrary."

This order continued in force until 14th September last, when the court made an entry of the following:

"Upon motion this day made unto this court by Mr. Brough, counsel for the said Charles Gould Crickmore, and it appearing that the said Charles Gould Crickmore has written and placed in the hands of the Registrar of this court a letter addressed to William Proudfoot, Esq., solicitor for the above named John Hiram Nicholls, apologizing for the language used by him in the office of the Master of this court, at Hamilton; and the said Charles Gould Crickmore also appearing in court and openly retracting the language so used, and expressing his regret for having made use of the same, this court doth see fit and doth order and direct that the order of this court bearing date the fifth day of July last, excluding the said Charles Gould Crickmore from appearing before this court, or in the office of any of the Masters thereof, be and the same is hereby set aside and discharged. And it is ordered that the said Charles Gould Crickmore do immediately upon the service upon him of this order pay to the said John Hiram Nicholls, or the person serving the same, the sum of five pounds, as and for the costs incidental to the application of the said fifth day of July last."

(Reported by THOMAS HODGINS, Esq., LL. B., Barrister-at-Law.)

NICHOLS v. McDONALD.

Practice—Appeal from Master's Report—Evidence.

The Master's Report is *prima facie* evidence of what it contains, unless appealed from. No motion founded on such report can be entertained while the appeal is unheard. But *quere* in regard to such matters as do not enter into the appeal. (12th Oct. 1858.)

C. G. Crickmore, for defendant, moved for an order for payment out of Court of the difference between the amount found by the Master at Hamilton to be due to the plaintiff, and the money impounded in Court; also to dissolve the injunction so far as it involved the lands mentioned in the pleadings; and to restrain proceedings on an execution in a suit directed by the Court to be brought on a note made by one Brown, and one Macdonell to Defendant. There were $24,000 in Court, and the Master had found $9,000 due the plaintiff. The Master's report was before the Court, and was evidence of the amounts so stated. The execution was in the Sheriff's hands, and the property was advertised for immediate sale.

Proudfoot, contra. The plaintiff has appealed from the Master's report, and it can not be held to be evidence. This motion cannot be granted until the appeal is decided, as it turns entirely on the Master's report. The appeal was that the Master had taken no account of the lands, stock, or partnership funds, but had merely charged money drawn from the Great Western Railway Company.

ESTEN, V.C., delivered the judgment of the Court. The report of the Master if not objected to, is *prima facie* evidence that it is right; but being appealed against, a motion founded upon it is informal. I cannot therefore dispose of this application without disposing of the appeal, and that is not now before me. As to whether the lands, were partnership property or not, that cannot be heard except on further directions. I cannot therefore entertain the first portion of the motion in regard to the payment of money out of Court or the dissolution of the injunction; and in regard to the execution, that also ought to be refused; but in consequence of its being in the Sheriff's hands, and the property being advertised for sale, I will grant an order for the stay of execution on payment of the money into Court.

LEONARD v. BLACK.

Confession—Payment of money into Court—Evidence—Judgment Creditors.

A confession was given to secure a second set of sureties of a County Treasurer, but on an arbitration, it was found that defalcations had occurred under a former bond, a surety in which was also in the second. The evidence was conflicting as to whether the protection was for one set or for all. On a motion to retain moneys in the Sheriff's hands, which had been made on the confession, it was ordered that the whole amount be paid into Court, and that the subsequent judgment creditors should wait.

(12th Oct., 1858.)

The defendant was formerly Treasurer of the County of Elgin, and had, on his appointment, executed a bond to the County for the due performance of the duties of his office. The County Council, a year or two afterwards required securities to a larger amount, and a second bond was executed—one of the sureties of the first bond being also in the second. Defalcations being suspected and acknowledged, the defendant gave a confession to the sureties on the second bond for £3,000, to protect them from any loss. The accounts of the Treasurer were referred to arbitration, and it was found that the defalcations occurred under the first bond; and an affidavit had been put in that the confession was intended to secure the sureties to both bonds. The Sheriff had made £1,000.

Blake, on behalf of the plaintiff, a subsequent execution creditor, moved that the Sheriff be directed to retain the money until the hearing of the cause; and read the affidavits of the defendant, and of the surety who negotiated the confession, that no mention was made of the first bond, and that the confession was given to secure the sureties to the second bond.

Roaf, contra. The motion should be refused on grounds stated in the first affidavit—that the confession was given to secure the sureties on both bonds. Where there is a jurisdiction at law, this Court should not be applied to; and if this confession was given to secure a debt which was found not to exist, application should be made to the proper Court to set it aside. The confession was expressly given to secure against defalcation generally, and it would be hard if the party who was surety under both bonds was to be secured under one, which carried no responsibility, and not under the other which bore all. There were also some judgment creditors after the confession, and before the execution of the plaintiff.

Blake, in reply. There is no evidence to show that the confession was to secure the first bond. The party who negociated the matter was in the second bond, and acted only for his co-sureties. The weight of evidence went strongly to show that the protection was for the second bond. The surety under both bonds acknowledged that the first bond was not thought of at the time. The amount of the intermediate execution is £100, and the order of the Court might go for the balance of the money in the Sheriff's hands.

ESTEN, V.C., delivered the judgment of the Court. It appears to me that when the defendant was applied to for the confession, it was unknown as to which bond the defalcations had occurred; and though it may appear that the confession was given to secure those under the second, against such defalcations, the impression at the time seems to have been that it was for all. The question however is left in great doubt by the affidavits, and it would be scarcely wise in the Court to allow the money to go beyond its control. Though it is moved that the money remain in the Sheriff's hands, we may exercise a discretion, and order the money into Court; and as the amount due the judgment creditors is small, and as the case will shortly be decided, I will grant an order directing the Sheriff to pay the whole amount into Court.

BAKER v. WILSON.

Illegitimacy—Conflicting evidence—Issue at Law.

Where the evidence of a marriage is conflicting, the Court will give the option of obtaining more satisfactory evidence, or direct an issue, or dismiss the bill.

In this cause the bill was filed by the infant of John Baker deceased, setting out the following facts:—Baker was seized of 13 acres of land in Bayham, on which he borrowed £50 from one Jones, and gave him a deed and took back a bond for re-conveyance, on payment of the sum advanced. After Baker died, the defendants, Wilson and Collins, took out administration. Wilson

and Collins as administrators borrowed from the father of the defendant £53, and paid off Jones' claim for £50. They took from him a conveyance of the land, and afterwards without any authority they sold the land to one Miller for £200 (stated to be much less than its value) The bill charged fraud by administrators, and notice of such fraud to Miller when he purchased. Miller ejected the plaintiff from off the premises. The Bill prayed that the conveyance made by Wilson and Collins be declared void and cancelled, or if Miller had not notice, that he may be declared a Mortgagee, and be ordered to convey to plaintiff on payment of sum advanced That Wilson and Collins be declared trustees for plaintiff and ordered to convey the land to plaintiff; also an account prayed for. To this the defendants answered: that plaintiff is illegitimate; that the sale was *bona fide* and without fraud; and that the administrators had power to sell to Miller.

Doyle, for plaintiff.

Fitzgerald, for Defendant.

Esten, V.C.—The only evidence impeaching the legitimacy of the plaintiff is Wayne's and his wife's, and as to their evidence it seems of doubtful credibility; on the other hand the only direct evidence of the marriage is the mother's, which cannot perhaps be more relied on. Other witnesses, apparently respectable, say that Baker treated her as his wife. Upon the whole perhaps further inquiry, and in the form of an issue would be desirable, that it may be offered to the plaintiff, and if it is declined the Bill I think should be dismissed with costs exclusive of the evidence; which for the most part is irrelevant, and of which each party should pay his own costs, except of that relating to the legitimacy, of which the defendants would have their costs.

Spragge, V.C. I do not think that upon the present evidence we can decree for the plaintiff. The marrjage of the plaintiff's father with the mortgagor is not proved by direct evidence, except that of the mother hereelf, and that is open to some suspicion; and if Elizabeth Wayne is to be believed the whole tale of the marriage is a sheer fabrication, and the certificate of marriage a forgery. It is a suspicious circumstance that the marriage certificate is not produced, nor accounted for except by saying that it was placed in the hands of Mr. John Wilson, a Barrister of London, and he is not called to say whether such was the case. The names of the officiating clergyman, and of persons present are given, but none of them are produced, nor is the existence of such persons shewn. On the other hand, and on the concurrent testimony of several witnesses called by the plaintiff, her mother was the reported and acknowledged wife of John Baker from the time of her alleged marriage until his death. It is clear that they lived together during the whole of that period, and there seems no reason to doubt that the plaintiff is their child. But Wayne and his wife depose to reported declarations by each of the two that they were not married; to the efforts of the woman to induce Baker to marry her and Baker's refusal, and Mrs. Wayne gives a circumstantial account of the forgery of a marriage certificate by the woman. I cannot but think that the value of their evidence is diminished by the circumstance they relate of their going to live with Baker and his reputed wife immediately after their new marriage; for according to their own account Wayne and his newly married wife went to live with a man and his kept mistress knowing at the time that she was so. Either that their own standard of morality and decency was very low, or what they now say in regard to thei being married is untrue. Besides they are not spoken of as persons of good repute, though their credit as witnesses is not regularly impeached.

But there is the evidence of Ault unimpeached, and he says that the plaintiff's mother told him that she was not married. I observe however that throughout his evidence he speaks of her as Mrs. Baker, and says that she was reported in the neighbourhood to be Baker's wife. I should not think it safe upon his evidence alone to decree against the marriage, but I think we are not in a position as the evidence stands to discard altogether the testimony of Mr. and Mrs. Wayne, and it is certainly strange that the direct evidence of a marriage solemnized in 1842, should be altogether lost. This marriage, if any took place, must have been under the Statute 11 George IV. cap. 36, which among other things requires an annual return to be made to the Clerk of the Peace by the Clergyman authorized by that Act to solemnize marriage, of the marriages by them solemnized during the preceding year, giving the names of the parties married, dates, names of witnesses, and other particulars. It may help to a solution of the question of marriage or no marriage to search and ascertain whether any returns were made for the year 1842 by the person named by the plaintiff's mother, as having married her to Baker, and if so whether hers is among them. It may be also well to ascertain whether such person as she names took out a certificate at the Quarter Sessions as required by the Statute, or from the religious denomination to which he belonged, as afterwards authorized by tatute.

I think upon the whole that the course indicated by my brother Esten is the proper one. If however the alleged certificate can be produced and proved to be genuine, or a return can be found of the alleged marriage under the provisions of the Statute I have referred to, I should be disposed to admit it without putting the plaintiff to the expense of an action, on the trial of an issue.

(IN CHAMBERS.)

Harn v. Harn.

Writ ne exeat Provincia—Alimony.

Issue of Writ *ne exeat Provincia* under 20 Victoria chap. 58 sec. 3 in suit for Alimony. Amount of Bail.

(24th Oct. 1857.)

The Bill was filed 24th October, 1857, for alimony, and prayed for a Writ *ne exeat Provincia* to issue. Defendant was possessed of £225 invested in stock, and in receipt of a salary of £100 a-year. This was the first application under the Act.

Blake, (on day of filing the Bill), applied for the issue of the Writ on an affidavit of plaintiff verifying the facts stated in the Bill, and showing the amount of defendant's property, and his intention of leaving the Province

Spragge, V.C., granted the Writ, but considered it advisable to limit the amount to £200.

[*Note by the Reporter.*—Since this case, a larger sum is allowed to be mentioned in the Writ, in proportion to the defendant's means.]

Slater v. Fiskin.

Vesting Order under 20 Victoria chap. 56 sec. 8.

To obtain vesting order under the Act 20 Vic chap 56 sec. 8, it must be shown that all the parties to be affected can be bound *Qu* If it is compulsory on a purchaser under a decree of the Court to take a vesting order instead of a conveyance. (6th October, 1858.)

This was an application on behalf of *A. Macdonald*, the solicitor having carriage of the decree for sale, to compel the purchaser to accept a vesting order under the statute of 1857. No information was adduced as to the whereabouts of the parties to be affected.

Hodgins, for the purchaser opposed the motion. The property sold had been devised under the additional explanatory term "personal property," by one Wallingford to his wife for life, then to his sister's children, share and share alike. To make a vesting order effectual in protecting the title it must be shown that all the parties having any estate or interest in the property are in being, and will be bound thereby. Besides, a purchaser cannot be compelled under the Act to accept a vesting order.

Esten, V.C.—The vesting order has, under the Act, the same power as a conveyance between the parties. But before such an order can be made, it must be clearly shown that all the parties to be affected can be bound. Here, for all we know, some or all of the children may be dead, and if so the title would be imperfect or no estate at all would be conveyed. A great deal may be said on the point, and at present I am strongly inclined to think, that a purchaser is not bound to take a vesting order.

Shuter v. the City.

From the "Philadelphia Legal Intelligencer"

A municipal corporation owning and using property for public purposes, are subject to the rule *sic utere tuo ut alienum non lædas.*

The city is liable for damage to a well from the erection of a gas reservoir.

Sharswood, P. J.—The plaintiff recovered damages from the city of Philadelphia on account of the destruction of a well of water by a large reservoir of the new gas works. It is urged that the construction of the gas works was within the corporate

powers of the defendants, and if all due skill and care was exerted in building the reservoir they are not responsible on the principle settled in *Green* v. *The Borough of Reading*, 9 Watts, 382; and the *Mayor* v. *Randolph*, 4 W. & S., 514. We think the case before us is clearly distinguishable from either of these cases. The owner of land holds it subject to the known right of the public to make and vacate roads, to grade or alter grade of streets. A man's property may be seriously injured by vacating a street, on the line of which he has built his house, or by altering its grade, so that he is mounted on a bank or sunk into a hollow, or by damming him round so that either by spring or rain water his lot is converted into a standing pond.

Yet all this has not actually taken his property for public use, and the injury is without wrong, for he held subject to that public right. He must apply a remedy himself. He must conform the grade of his lot to the public regulations. But it does not follow that because a municipal corporation has a right to become the owner of an adjoining lot for some public purpose, that they have a right to erect a nuisance on it. If they build a lock-up or a station-house, they cannot dig a privy, however skiltully they may do it, and however convenient it may be, if the result is that the filth of it is discharged on their neighbors. The municipal corporation owning and occupying property for public purposes is as much subject as a private citizen to the usual rule, *sic utere tuo ut alienam non lædas*. The city is as much bound as an individual owner of a lot, to find an outlet for the water on it, without encroaching on his neighbor. If they can build a gas reservoir discharged from this liability they may dig a cesspool or poudrette pit any where. If it it actually impossible to make such a reservoir water tight, the only result is that they must pay the damage or become themselves owners of all the property within the reach of the influence of the nuisance.

Rule discharged and judgment for plaintiff.

ELECTION CASES.

(BEFORE HIS HONOR JUDGE CHEWETT OF THE COUNTY OF ESSEX.)

THE QUEEN ON THE RELATION OF WILLIAM TOTTEN AGAINST THOMAS BENN AND PATRICK MCMAHON, RETURNING OFFICER.

The mere entry of a person's name on the Assessor's and Collector's Roll with F. or H. set opposite, does not entitle such person to vote. Besides being properly rated on the Roll, a person to be entitled to vote must be in *fact* a freeholder or a householder, and also living in the ward at the time of election. A returning officer accepting a vote which he knows to be bad in order to create an apparent equality of votes, so as to give a casting vote, may be rendered liable to costs.

The relation set forth that Totten having a majority of votes in his favor on the first day, the returning officer, Patrick McMahon, improperly took the vote of John Ternan, who was not an elector in the Fourth Rural Ward of Maidstone; and whose name had been erased from the collector's certified copy of the collector's roll, but which had been re-inserted by Benn, one of the candidates, thereby reducing Totten's majority to one. Another vote having been rendered in favor of Benn, the Returning officer then gave his vote on this pretended equality of votes and declared Benn duly elected.

The event of the election was thus made to turn on the vote of John Ternan as was sworn to in the relation, and not denied in the defendant's statement on affidavit or otherwise.

Upon the state of facts disclosed in the affidavits on both sides, it is argued by the relator that though John Ternan's name was on the Assessment and Collector's roll, and also on the certified copy of the Collector's roll, (inserted in the latter by Benn himself as a householder, by the letter H. being put opposite his name in all the documents) yet in truth the affidavits shewed conclusively that Ternan was neither a householder nor a resident in the Fourth Rural Ward. That the documents were only *prima facia* evidence of his right to vote. And that upon its being shown that Ternan's name was placed there either by accident, mistake, or fraud, that it should be struck off, which would leave the majority in favor of Totten—there being no equality of votes requiring the Returning officer's casting vote which should be struck off, and that Totten should take the place of Benn as the councillor for the Fourth Ward.

For the defendants it was contended that John Ternan's name being on the assessment roll, collector's roll, and certified copy of the same, with H. on them for householder is the absolute criterion to go by of Ternan's being both a householder and resident in the Fourth Rural Ward. And that the certified copy of the collector's roll is the Returning officer's sole guide at the election no matter whether he knows it is wrong by the assessor's or collector's fault, or has been tampered with or falsified by the candidate Benn or not. And also that it must govern if the election is disputed, unless fraud is shewn in the insertion of the name in question on which the event of the election turned.

Judgment given by CHEWETT, Judge of County Court, Essex.

The certified and verified copy of the collector's roll is the ordinary guide for the returning officer to go by, and is to facilitate the election, as far as it goes, the statute being directory. (*Reg. ex rel. Ritson* v *Perry et al*, 1. U.C.R. Prac. 240; *Reg. ex rel. Charles* v. *Lewis & McMahon*, 2 U.C Ch. R. 171; 1 U C.L. J., 70.) And in this case if the copy as transmitted by the collector (through Benn as then councillor) had been received by the Returning officer without alteration, after having been certified and verified, the name of Ternan would not have appeared upon it with the letter H. as a householder, (whether it was really on the assessment and collection rolls or not, in that shape) and the Returning officer would not have been required to receive Ternan's vote, unless he had presented himself for that purpose, having a right to vote. But Ternan's name having been surreptitiously inserted by Benn, the candidate who had no right to meddle with the copy of the roll in that way—though entrusted with it, to hand to the collector. And the Returning officer being told by others and by Benn himself, that he, though unauthorized, had so inserted and entered it in the certified copy of the collector's roll, not as a correction at the instance of the collector, nor at the instance of the returning officer, both of whom could have done it themselves, *i.e.* the first as collector if he had left it out or struck it out by mistake, and the returning officer also if he *ascertained* that it was *rightfully* on the collection roll, and had been left out of the copy by mistake or design, could have received his vote, and in that way corrected the error, though perhaps he might have no right to enter his name on the copy of the roll as a correction, and could not have authorized Benn to do it. It does not, however, appear that the Returning Officer did ascertain that Ternan's name was on the collector's roll, or that he was informed on any proper and reliable inquiry that Ternan's name being on the collector's roll had been left out or was struck out of the Returning Officer's copy by mistake or design. The Returning Officer then knew, if he did not before know, that the copy must have been certified and verified without Ternan's name, and in that shape sent him through Benn, and from the statements of Benn when the objection to Ternan's vote was made he was then made aware that the verified copy of the roll had been *falsified* by Benn for his own purposes; and he was not to know, and did not know otherwise than that it was a name in addition to those sent him by the collector on the copy of the roll, whether the collector had left it out under misapprehension or otherwise; and it does not appear that the Returning officer took the pains to procure the copy of the roll for himself of the collector, or that he swore to it, in the shape it was either before or after the objection was taken to Ternan's vote.

If he, Ternan, had a right to vote and his name was on the collector's roll, and was left out of the certified copy for the returning officer, he could have taken his vote. But if he had no right to vote, and he knew it, the Returning officer could neither himself insert it, nor allow any one else to do so for him, and particularly not a candidate-nor use it when told by Benn the candidate that he had inserted it, as that would be the same as if the Returning officer had improperly inserted it himself, and the using it under such circumstances made the Returning officer a party to the improper alteration, and was equivalent to the Returning officer's altering the copy of the roll *after he had received it*, as he by so doing made *it his own act* when told of it by Benn after the poll was opened, and still persisted in receiving Ternan's vote at the close of the first day's polling—though he previously refused

it saying it was put on the copy of the roll improperly. Had he put the oath properly required to Ternan, and he had sworn he was a *resident*, it might have justified the taking of his vote and freed the returning officer from the risk of costs in this proceeding under the circumstances. But even if the name of Ternan was on the collector's roll, as H. for householder, and had been so previously on the assessment roll, and had been by the collector left on or put on the copy of the collector's roll for the returning officer, and so sent to the returning officer for the purposes of election. I *think* these documents are only prima facie evidence of the party's right to vote, and when it is made out that the name on which the event of the election turned (Ternan's in this case, as is admitted by both parties) got there in the first instance, by some accident, misrepresentation, or some misapprehension of the assessors on the assessment roll, and was so transferred to the Collectors Roll and copy, it is competent for the Judge to strike it out, if Ternan had no right to vote, and that though fraud would no doubt destroy the vote as well as accident, mistake, misrepresentation or misapprehension, it by no means requires absolute fraud to be proved for that purpose.

All the authorities shew that this course has been followed as to striking off voters for want of qualification, although apparently placed in the first instance on all the Rolls, viz: the Assessment Roll, Collector's Roll, and copy of the same documents. In this case I think it is quite clear that John Ternan was neither a Householder, nor a Resident, (it is not pretended that he was a Freeholder) within the Fourth Ward of the Township of Maidstone, and whether his name got there by accident or fraud is not material. Vide *Reg. ex rel. Wallis* v. *Bostwick*, 2 U.C.L.J. 164. It is certain he ought not to have been inserted as a resident, and I think not as a householder, and it must have got in the first instance on the assessment roll through either accident, mistake or misapprehension, and there is strong ground for believing that it was put there through misrepresentation or fraud—for which see James Devlin's affidavit as to his belief that the assessor must have known that Ternan was not a Freeholder nor a Householder, and he, Devlin, says he knows he was not a resident—particularly as there is no affidavit put in by the assessor to explain how he came, if he did so, to enter the name in the shape it was entered without the proper enquiry or authority. (Stat. 16 Vic. ch. 181, sec. 18.)

And Ternan's own affidavit says he was only *told* he was a *resident* householder, by others, when he must have known he was neither, at all events the simplest mind would know that he was not a resident in the Fourth Ward, but in the Fifth with his father.

If Ternan had occupied, *i. e.* lived, in this small log house (but) hewn or unhewn, permanently as his ordinary place of abode, domicile or residence, even though it was barely habitable, it probably would not or could not have been examined into, whether it had a very perfect roof, floor, door, or windows, or even chimney, provided Ternan was satisfied with it, as his residence or home, and it being in the fourth Ward, I should have held without hesitation, in that case, that he was a resident householder.

See distinction between owner and occupant—16 Vic. ch. 181, sec. 10. A *Resident owner* as a *Freeholder* may vote without living in his house, but a householder must reside in the house, as a housekeeper or occupant.

As to the Returning Officer, Patrick McMahon, had it not been for what occurred at the polling—by Benn's telling him that he had put in Ternan's name in the certified and verified copy of Collector's Roll, sent him through Benn by the Collector—and the name had appeared on it without objection, or without his being informed how it came there, he might perhaps have been held excused. But as it is, he made what Benn did (wrongfully and corruptly) his own act, by adopting it after Benn said he had himself inserted it. And after the copy had been delivered to him and after first refusing Ternan's vote, on that account, he does not state in his affidavit, that he took it then because it was on the Collector's Roll and ought to be on the Copy, he, Ternan, having a right to vote, and that he had first ascertained the fact by due enquiry. He evidently lent himself to give Benn the majority by receiving Ternan's vote, under the circumstances to make a pretended equality of votes, and then added his own vote to complete Benn's majority, showing that sort of improper conduct and partiality, which must subject him to the payment of costs, as well as Benn. Vide *Reg ex rel. Dundas* v. *Niles*, 1 Cham. Rep. 198, and 1 U. C. L. J. 48–49.

He puts in affidavits in which he says the collector *gave* him the copy of the Roll, and that Ternan's *name was on it*—when delivered to him, and that no *name* was placed on it *after* it came into his hands, *avoiding stating* the facts that Benn brought it to him, that Ternan's name appeared first *crossed* out, and then reinserted in a different handwriting—that on objection at the polling Benn *told him* he had inserted it himself, which must have taken place *after* the Collector handed it to Benn, and before Benn delivered it to McMahon the Returning Officer—which is the grossest evasion of the truth, though seemingly true, and shews also that he *willingly* lent himself to the fraud to serve Benn.

And Benn's own affidavit is an evasion of the same kind. Had the Returning Officer *really* been in doubt as to whether Ternan was a resident householder, and wished to act impartially and fairly, and did not know what to do when objected to by the candidate as voter, he should have tendered the proper oaths to Ternan, 3 U. C. L. J. 90—*Reg. ex rel Gordanier* v. *Perry and Hayman*, but it is probable it was well understood how it was, at the time Ternan finally voted, as his present affidavit avoids this point, by saying he was so informed by others. The collector, Moran's two affidavits shew how Ternan's name was on the Collector's Roll and copy of it, and that he struck it out, before sending it by Benn to the Returning officer, without Ternan's name on it; corroborating the fact that Benn must have inserted it before the Returning Officer received it, before the opening of the poll, and of which insertion he was informed by Benn before he received Ternan's vote which is confirmed by other affidavits.

John Benn knew Ternan worked on the lot before the Council met for correcting rolls, and that he worked there before and after that time. He does not say he worked there at the time of the election, or that he then had a house on it of logs, or that it was otherwise habitable, or that he resided *on* the lot or in the partly furnished log erection, or in the fourth Ward, but apparently he went in the affidavit as far as he could, and if the facts are really more favorable, it is to be presumed that as he worked there, he would have stated it if he knew it to be so.

The subjecting the Returning Officer to costs, is not because that Ternan's name might not have been on the original collector's roll, but because he was so willing to lend himself to Benn's purposes, that he would not take the trouble or ordinary precaution to ascertain how the facts really were; and a though Benn told him that he, Benn, put Ternan's name in the Returning Officer's copy of the Collector's Roll, still he preferred taking Ternan's vote, and adding his own vote to make a majority, in favor of Benn, though objected to, and at first refused by himself, without even enquiring as to Ternan's qualifications as a resident, or a householder, by oath, or otherwise, by which he would have avoided costs or the risk of costs—as Ternan could not have sworn to his qualification further than he has done in his affidavit here.

Therefore striking off Ternan's vote, and the Returning Officer's vote I adjudge that Totten should have been declared elected, and that Benn was not duly elected, and that Totten do take Benn's place as Councillor for the fourth rural Ward of Maidstone, and that Benn be forejudged and excluded, &c., and that he do not interfere with the said office. And that Benn, and McMahon, the Returning officer, pay the costs of the Relator, incurred in the proceedings in the premises.

GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

LONDON, October 24th, 1858.

GENTLEMEN,—I have been consulted as to the steps which will be necessary after 1st December next to effect the separation of a junior township from a Union of Townships, and upon reference to section 28 of the New Municipal Act, find

hese words,—"When a junior township of an incorporated Union of Townships has one hundred freeholders and householders on the assessment roll as last finally revised, and passed, such Township shall upon the first day of January then next, thereafter become separated from the Union.' What I want to know from you gentlemen is, whether in your opinion any proclamation or other act of the Executive Government is necessary in aid of this section? I cannot see that there is, but would feel more confident if I had your opinion.

A SUBSCRIBER.

[The Assessment rolls of each municipality are required to be finally revised before the 1st day of June in every year. (16 Vic., cap. 182, sec. 30). When a junior Township of an incorporated Union of Townships, has in any year according to the assessment roll so revised, one hundred resident householders and freeholders, "such Township *shall* upon the first day of January next thereafter, *become* separated from the Union." Nothing can be to our minds more clear. When a certain event takes place it is declared that a certain other event contingent thereon *shall* also take place. In our opinion, when according to the assessment roll as last finally revised and passed, a Township of a Union is found to contain the requisite population; the separation takes place on 1st of January next thereafter, *by operation of law*, and therefore that no proclamation is necessary.—EDS. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. CORBY v. HILL. *May* 25.

Private way—Obstruction—Right of Action.

If A. having the use of a private way, is injured by an obstruction placed in it by B., it is no answer in an action by A. against B. for the damage incurred, that the obstruction was placed there with the consent of the owner of the land.

Per WILSES, J., the declaration must avow that the defendant knew that the plaintiff was likely to use the road.

C. P. METCALF ET AL v. THE L. & B. & S. C. R. Co. *May* 24.

Carriers—Felony by Carriers' servants—Evidence of.

In support of the affirmation of an issue, whether or not there had been felony by the servants of a Railway Company, it was shewn that a box containing jewellery was given into the custody of one of the Company's servants at one of their stations, and delivered by one of the Company's servants at its place of destination, where on being opened it was found that the jewellery had been abstracted

Held, no evidence to go to a jury.

Q. B. PRESTON v. PEEKE. *May* 22.

Evidence admissable to explain, not to contradict record—General verdict.

In an action for an illegal distress the tenant recovered a general verdict against the broker, and it was so entered upon the record. In an action brought by the broker against his employer, to indemnify him for his costs and expenses in the former action.

Held, that evidence might be given to explain the record in the former action, and to show that the substantial damages were in fact given upon one of the counts of the declaration.

Q. B. BIDDULPH v. LEES, ET AL.

Will of lands—Default of issue—Shifting clause.

A testator devised real estate to his nephew A. for life, with remainder to trustees to preserve contingent uses, with remainder to the first and other sons of A. in tail male and for default of such issue with similar remainders to his nephews B., C., & D. for their respective lives, and their first and other sons in tail male respectively, and for default of such issue with similar remainders to his sisters X. and Y. A shifting clause provided that if any of the daughters of his nephews should become a nun the uses limited to such daughter should cease, and the person next in reversion to take according to the aforesaid limitations, should hold the estates as he would have been entitled to hold them in case the person so becoming a nun had been dead without issue of her body.

Held, that the shifting clause cut down the limitations to the daughters of the nephews into estates tail.

C. P. METCALF ET AL v. THE L. & B. & S. C. R. Co. *May* 26.

Bailment to carriers—Joint bailment of separate property.

Goods, some of which belong to A. and some to B are delivered by C. on behalf of A. and B. to common carriers to be carried from one place to another. The goods being lost, an action against the carriers for the loss is properly brought by A. and B. jointly.

EX. HOGG v. WARD. *May* 26.

Constable—Power to arrest on charge of felony — Reasonableness of charge.

A police constable is not justified in arresting without a warrant a person charged with felony by another, unless the charge be reasonable.

Quære, as to whether the question of the reasonableness of the charge ought to be decided by the judge or the jury.

Q. B. BRITISH EMPIRE SHIPPING Co. v. SOAMES ET AL.

Lien of shipwright for repairs—Dock hire during detainer.

A shipwright has a lien upon a ship for repairs, but he is not justified in detaining the vessel to enforce payment of dock hire accrued due after the repairs are completed where there is no special contract to that effect.

EX. BULHAM v. MEARS. *May* 28.

Practice—Commission to examine witnesses abroad— Direction in order as to place and time of examination.

An order for a commission to examine witnesses upon interrogatories in the United States of America, directed that the interrogatories should be exhibited to the witnesses in the City of Schenectady in the State of New York, and ordered that the commission should be returned in England on or before the 1st of March, 1848.

Held, that the order was sufficiently specific as to the place where, and the time when, the commission was to be executed.

EX. PRICE v. PRICE ET AL. *May* 22, 24.

Will—Revocation.

A will was written on one sheet of paper with two leaves and four pages, and was executed in this form: "and in witness thereof I have to this my last will and testament, contained in four pages, set my hand and seal, that is to say to the first three pages thereof I have set my hand, and to the last page have set my hand and seal, this, &c.," and was signed and sealed by Charles Price, the testator; the attestation stated the instrument to be "signed, sealed, and published," and the testator in order to revoke it tore off the seal, tearing off with the seal the letters "ral," being the final letters of the word "funeral."

Held, that this was a sufficient tearing within the 7 William IV. and 1 Vict. chap. 26, sec. 20; and that the act having been done *animo revocandi*, the will was thereby revoked.

EX. BARTON v. GAINER. *June* 4.

Ineffectual transfer of railway debentures—Right to retain the documents.

A. wishing to give the defendant certain railway debentures, handed them over to her but the gift was ineffectual, the necessary formalities not having been complied with.

Held, that the defendant nevertheless had a right to retain the documents against the personal representatives of the deceased.

EX. BARNETT v. ALLEN. *May* 29.

Slander—Words actionable without special damage.

It is not actionable to call a man a "blackleg," for the meaning of the word is for the Court, and it does not impute an indictable offence. (Per POLLOCK, C.B., and WATSON, B.)

It is actionable to call a man a "blackleg" if the persons who hear it understand it to impute an indictable offence. (Per MARTIN and BRAMWELL, B.B.)

Q. B. SMITH v. SMITH. *May* 28.

Joint and several promissory note—Several liability.

Where A., B. and C. make a joint and several promissory note to Z. and A., an action by Z. and A. is maintained against B. on his several liability on the note, and a plea that the note was joint, and that A. is liable to contribution is bad.

Q. B. DE POTHONIER v. DE MATTOS. *May* 28.

Equitable replication—Assignment of freight — Action by assignees. —Release by and payment to assignor after notice in fraud of assignee

In an action on a charter party for freight the defendant pleaded several pleas of discharge by and of payment to the plaintiff.

Held, good answers by way of equitable replication under sec. 83 of the C. L. P. Act, 1854, to the discharge and payment that they were made after an assignment of the ship and freight to S. and notice thereof to the defendant and in fraud of S. the real plaintiff.

Q. B. JURY v. BARKER. *May* 28.

Promissory note—Added Words.

A promissory note, in addition to the ordinary form, contained the words "as per memorandum of agreement." The agreement was shown to be unconditional.

Held, that the note was a good negotiable note.

EX. RE ALFRED COX AND JOSEPH HOPGOOD. *June* 7.

Arbitration—Agreement to refer future disputes—Power of Judge to appoint arbitrator.

Semble. The Court or a Judge has no power to appoint an arbitrator under a clause in an agreement to refer all matters in dispute to arbitration, when there is no suit or arbitration actually pending.

C. P. CESARINI v. RONZANI. *June* 9.

Practice—Motion to Court after refusal at Chambers—Affidavit.

When a Judge at Chambers declines to make any order, the party dissatisfied, in moving the Court afterwards for the same purpose, is not confined to the same affidavits; but may use fresh ones, supplying any omissions which may have occasioned the refusal at Chambers; although on a motion to the Court to reverse or rescind an order made at Chambers, the party moving is confined to the same materials.

Q. B. HAIGH v. GUARDIAN OF NORTH BEVERLEY UNION.

Corporation—Contract not under Seal.

Where the corporation of the guardians of a Union employed by resolution an accountant to investigate their books and accounts, which had become wrong in consequence of the embezzlement of their clerk.

Held, that the accountant could recover for work done under the resolution, although it was not under seal.

CHANCERY.

V. C. K. GRAY v. DOWMAN. *May* 24.

Husband and Wife—Separate estate—Mortgage—Exoneration of husband's estate—Suretyship of husband—Parol evidence.

Where a married woman borows money for the use of another person, and her husband joins with her in giving a security on her separate estate, and covenants to pay the money borrowed; he is a surety for her, and her estate is liable to exonerate him in case he is called upon to pay.

Where a married woman mortgages her separate estate, her husband being a party to the deed, and thereby covenants to pay the money, parol evidence is admissible to show the true nature of the transaction.

REVIEW.

THE COMMON LAW PROCEDURE ACT, 1856; THE COUNTY COURTS PROCEDURE ACT, 1856; AND THE NEW RULES OF COURTS. With Notes of all decided Cases directly explaining or otherwise elucidating the Statues and Rules; together with an APPENDIX containing the Common Law Procedure Acts of 1857. By Robert A. Harrison, Esq., Barrister-at-Law, Toronto: Maclear & Co. 1858.

As a general rule, neither colonial nor foreign law treatises are reviewed in this journal, for such space in our columns as is available for the purpose of noticing new works is fully engrossed by authors who register at Stationers-hall. Occasionally, however, we find among books sent to us from abroad some with peculiar claims upon our consideration, and the one of which we are about to give a short account appears to fall within this class; because it explains a system of practice now in force in one of the most important of our colonies, which was avowedly taken from our own successful Common Law Procedure Acts of 1852 and 1854.

Mr. Harrison's title page is so comprehensive that little further explanation of the nature and contents of his work is required. The book is of that class so well known in this country—a statute running its meandering course at the top of the page, with practical notes at the bottom. Such productions are extremely numerous, for they are a species of adventure attractive alike to the publisher and the writer. If issued sufficiently early after the close of a session, an annotated edition of a statute is sure to sell, whatever may be its amount of merit; and the commentor must be dull indeed, who cannot find something to say to please himself when no one can contradict him till what he has said is forgotten.

But though Mr. Harrison's work is in outward appearance little more than several of such statutes "with notes" bound up together, it is when closely examined by no means of an ephemeral character. It was not hurriedly put together a few weeks after the statutes passed, but it is the fruit of a careful consideration of their provisions, and of the effect of the numerous cases decided upon them, or upon the analogous clauses in the English Acts Mr. Harrison's work is, in fact, a full "Practice" for the Upper Canadian Courts, including the county courts of the colony; and, though for our own use we should prefer the form of a continuous exposition of the course of the Courts, after the manner of our own "Chitty's Archbold," it is but justice to say, that no pains has been spared to make the notes as full and practical as possible, and that the annotator appears thoroughly to understand his text, and to be remarkably well up in the law of the mother country. We were prepossessed in favour of the author by his preface, containing some just remarks upon the proper use to be made of *cases*, which show that he has thought much more upon the subject than many of our own writers, who string together decision after decision, and point with triumph to the undigested heap.

"No case," says Mr. Harrison, "whether early or late, should, if possible, be viewed otherwise than as controlled by

some governing principle. In matters of practice, certain principles may be discovered which are of intrinsic value as the key-notes of a great variety of cases. When it is laid down in general terms, that he who endeavours to upset an opponent upon some ground of irregularity must be strictly regular himself, we have before us a principle applicable to every case of irregularity. When we are informed that the law favours the liberty of the subject, we reasonably conclude that, in a proceeding to restrain the subject of that liberty, there must be no irregularity. When the Court sets aside an arrest, because the affidavit to hold to bail does not state that the debt is 'due,' we know that it is set aside, not merely because there is an authority in point, but because that authority is consistent with reason, and accords with the general principle that the liberty of the subject is to be favoured. The Court, in effect, decides that the affidavit omits to make out a good case for depriving the subject of his liberty."

In the above remarks we thoroughly agree; and they are equally true whether we have to do with English or colonial practice. And in connection with this classification of cases we may take occasion to observe, that in our opinion a great boon would be conferred on practitioners who throng "judges' chambers" either in London or Toronto, by compiling for their use a manual of *Principles* of practice (of which many could be deduced out of the chaos of decisions, some on the existing and others on the ancient practice, by a clear-headed lawyer, such as Mr. Harrison,) copiously illustrated by examples of the way in which they are applied in the ordinary proceedings which are there carried on. Such canons would be numerically small and easily recollected, while they would supply the place of fresh decisions upon chamber practice, which, now that special demurrers are no more, seldom find their way into the reports. To take as an example, the rule referred to in the above extract with regard to irregularity. Many gordian knots would be loosed by the strict adherence to this principle, one phase of which is embodied in the General Rules of Practice issued in Hilary Term, 1853, for English Courts; and also (as we learn from Mr. Harrison)—and in the very same terms—in those issued in 1856 by the Canadian authorites (see pp. 640, 641).

Most of the canons or principles on which our own system of practice is built, are equally apparent in that for Canada, carefully adapted as it has been from the Imperial model. The discrepancies are generally such as are rendered needful by the different localities in which the two systems are to be worked. To enlarge upon these would make a greater demand than would be justifiable on the patience of our readers, nor would such a comparison tend much to their edification. What would the dignified and upright Masters of our Courts say to that provision by which their Canadian brethren (whose official appellation is that of deputy-clerks of the Crown and Pleas) are made liable to pay out of their own pockets the costs of revising their taxation of costs, and of the application for such reviewal, in all cases where, "in the opinion of the Court or judge, on the affidavits and hearing the parties, the deputy-clerks have been guilty of gross negligence, or of willfully taking fees or charges for services, or disbursements, larger or other than those sanctioned by the rules and practice of the Court." It is true, that with regard to the corrupt taking of fees and emoluments, our Masters are under the general provision against such misconduct contained in the 1 Vict. c. 30, by which those officers were established on their present footing; but the clause in the Canadian Common Law Procedure Act above referred to, seems aimed at a state of things which could scarcely exist in the mother country, and for which there is assuredly no need for direct legislation; while its appearance is (as Mr. Harrison observes) "to some extent evidence that the vils of hasty and ill-judged taxations by deputy-clerks have not been unknown to the courts" of Upper Canada.—*Solicitors' Journal, London, England.*

THE GREAT REPUBLIC MONTHLY.—This is the name of a new illustrated magazine announced by Messrs. Oaksmith & Co., 112 & 114 William Street, New York. It is to be issued in the place of "Emerson's Magazine and Putnam's Monthly." The range of articles promised is a wide one, covering among other grounds, Essays, Sketches, Humorous Tales, Stories, Historical Incidents, Reviews, Critiques, Biographies, Scientific Articles, Travels, Table Talk, Dramas, Poems, Ballads, Stanzas, Sonnets, Music, Correspondence, Gossip, &c., &c. It is to be profusely illustrated. The names of several distinguished authors and popular writers are given as contributors. Each number is to contain an original piece of music composed expressly for the work. There will be two volumes a year of about 700 royal octavo pages each, commencing in January and July, and ending in June and December respectively, making six numbers to each volume, and twelve numbers to each year. Subscriptions may commence at any time. The terms are as follows:—

Single copies, 25c.; Subscription, 1 copy one year, sent by mail, $3; Clubs, 2 copies, one year, $5; Clubs, 3 copies, one year, $7; Clubs, 4 copies, one year, $9; Clubs, 5 copies, one year, $10. And all additional copies, over five, at the rate of $2 each, if sent to the same Club. Clubs may be formed at different Post-Offices. All subscriptions must be paid in advance. Premium Subscriptions, entitling the subscribers to the magazine for one year, and to their choice of either of the publishers two well known great steel engravings, entitled "The Last Supper," and "The City of the Great King" Four Dollars.

Canadian subscribers are required to remit 36 cents each, in addition to subscription to prepay postage to the time.

The first number it is expected will be issued on or about 1st December next.

APPOINTMENTS TO OFFICE, &C.

COUNTY CROWN ATTORNEY.

HUGH RICHARDSON, Esquire, Barrister-at-Law, to be County Attorney for the County of Oxford.—(Gazetted, October 2, 1858.)

SURROGATE CLERK.

CHARLES FITZGIBBON, of the City of Toronto, Esquire, Barrister-at-Law, to be Surrogate Clerk under the Statute 22 Vic. cap 93.—(Gazetted October 9, 1858.

QUEEN'S COUNSEL.

SECKER BROUGH, of Osgoode Hall, Esquire, Barrister-at-Law, to be a Queen's Counsel for that part of this Province called Upper Canada.—(Gazetted, October 2, 1858.)

CORONERS.

JOHN LIZARS LIZARS, Esquire Associate Coroner for the United Counties of Huron and Bruce.—(Gazetted October 2, 1858.)

DAVID TUCKER, Esquire M.D., Associate Coroner for the County of Ontario.—(Gazetted, October 2, 1858.)

WILLIAM SCOTT, Esquire, Surgeon, Associate Coroner for the United Counties of Huron and Bruce.

JAMES M. SMITH, Esquire, M.D., Associate Coroner for the County of Kent.—(Gazetted, October 9, 1858.)

RICHARD CORRIGAN, Esquire, Associate Coroner, County of Hastings.

GEORGE SOUTHWICK, Esquire, M.D., Associate Coroner, County of Elgin.

CHARLES LEWIS, Esquire, Associate Coroner, County of Oxford.—(Gazetted, October 23, 1858.)

NOTARIES PUBLIC.

WILLIAM AIRD ROSS, of the City of Ottawa, Attorney-at-Law, to be a Notary Public in Upper Canada.—(Gazetted October 2, 1858.)

WILLIAM MCNAIRN SHAW, of Perth, Esquire, Barrister-at Law, to be a Notary Public in Upper Canada

MARCELLUS CROMBIE of the City of Toronto, Attorney-at-Law, to be a Notary Public in Upper Canada.

JOHN HUTCHISON ESTEN, of Newmarket, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, October 23, 1858.)

RETURNING OFFICER.

DONALD ROSS McPHERSON, Esquire, to be Returning Officer for the Village of Embro.—(Gazetted, October, 2, 1858.)

TO CORRESPONDENTS.

OTTO KLOTZ.—Under "Division Courts."

A SUBSCRIBER.—Under "General Correspondence."

J. R. C., Rochester, N.Y.—Will answer you by mail.

A. STUDENT.—You are right.

NOTICE.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Village of Elora, in the County of Wellington, in Upper Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. 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 formation of the said Society as the "Elora Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 10th March, 1858.

WHEREAS Twenty-five persons, and more, have organized and formed themselves into a Horticultural Society for the Parishes of St. Joachim, Ste. Anne and St Fereol, in the County of Montmorency, in Lower Canada, by signing a declaration in the form of Schedule A annexed to the Act 20 Vict. Cap. 32, and have subscribed a sum of not less than 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 formation of the said Society as "The St. Joachim Horticultural Society," in accordance with the provisions of the said Act.

P. M. VANKOUGHNET,
Minister of Agriculture, &c.

Bureau of Agriculture & Statistics,
Toronto, 9th March, 1858.

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 o. 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.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, 11*th June* 1858.

HIS Excellency the Governor General in Council, having had under consideration on the 22nd ultimo, the Departmental Circular of the Customs Department, dated 29th April 1853, by which importers of goods, in every case, are allowed to deduct the discount actually made for cash, or that which, according to the custom of Trade, is allowed for cash, has been pleased to rescind the same, and to direct that no such deductions be allowed hereafter, and that the duties be collected upon the amount of the invoice without regard to such discount; And notice is hereby given that such Order applies to goods then in bond, as well as goods imported since the passng of the Order in question.

By Command, R. S. M. BOUCHETTE,
Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons and more have formed themselves into a Horticultural Society, in the County of Hastings, 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 dnd signed as by law required, to the Minister of Agriculture.

Therefore, I, the Minister of Agriculture, hereby give notice of the formation of the said Society as "The Belleville 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 8th day of Feb., 1858.

INSPECTOR GENERAL'S OFFICE.

CUSTOMS DEPARTMENT,

Toronto, October 30, 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 direct an order that, in lieu of the Tolls now charged on the passage of the following articles through the Ottawa Canals, the Tolls hereinafter stated shall be hereafter collected, viz:

IRON ORE, passing through all or any portion of the Ottawa Canals, to be charged with a toll of *Three Pence* per ton, which being paid shall pass the same free through the Welland Canal.

RAIL-ROAD IRON, to be charged *One Shilling* per ton, including Lachine Section, St. Ann's Lock and Ordinance Canals, and having paid such toll, to be entitled to pass free through the Welland Canal, and if having previously paid tolls through the Chambly Canal, such last mentioned tolls to be refunded at the Canal Office at Montreal.

The toll on BARREL STAVES to be *Eight Pence* on the Ordnance Canals, and *Four Pence* on the St. Ann's Lock and Lachine Section, making the total toll per thousand, to and from Kingston and Montreal, the same as by the St. Lawrence route, viz: *One Shilling* per thousand.

By command,
R. S. M. BOUCHETTE
Commissioner of Customs.

NOTICE.

WHEREAS Twenty-five Persons, and more have organized and formed themselves into a Horticultural Society for the Village of Fergus, in the County of Wellington in Upper Canada, by signing a declaration in the form in Schedule A, annexed to the Act 20 Vic., cap. 32, and have subscribe 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 the said Society, as "The Fergus 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 8th day of Feb., 1858.

OPINIONS OF THE PRESS.

U. C. Law Journal, August, 1858: Toronto Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Odonary Star, August 11th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student, and carefully read, and referred to, by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August 12th*, 1858.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette*.

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law, Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy:—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order and will be found worth a careful perusal. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada" is continued from the July number; it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors, and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to them elves as in paying that amount as a year's subscription to the *Law Journal*. The reporting this case, "Rochan v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

The *Law Journal* of Canada will compare favorably with any similar work either in Great Britain or the United States, and it is to be hoped that it will receive a patronage commensurate with its deserts. ROBERT A. HARRISON, one of the Editors, is a gentleman who has earned an enviable position in the profession, and who has reflected credit upon the Province by his numerous valuable additions to the Legal Literature of the British Empire. In the *Jurist*, London, England, of July 3rd we notice an extended and highly complimentary notice of Mr. HARRISON'S last work, which is pronounced as useful to the English as the Canadian Lawyer. It would be surprising indeed, if in the hands of such a gentleman, and his able assistant, A. D. S. Ardagh, Esq., the *Law Journal* did not merit a large share of public favor and support.—*Port Hope Guide August.*

THE UPPER CANADA LAW JOURNAL, &c.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (vol. 4) commencing with January last. Its pages have been looked over by us with much interest. It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importance to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz. that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July 6*, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July 7*, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution Laws and Legal Tribunals of Canada," are well worthy of a careful perusal. This work should be found in the office of every merchant and trader in the Province, being in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.—June 3*, 1858,

The Upper Canada Law Journal. Toronto: Maclear & Co. A very useful and excellent periodical.—*Goderich Times*, August 13, 1858.

The Upper Canada Law Journal and Local Courts Gazette, for June. Toronto.—Maclear & Co., Publishers; Messrs. ARDAGH and HARRISON, Editors.

This is a most excellent publication. The present number contains very able original articles on the following topics—"The work of Legislation," "Consolidation of the Laws of Upper Canada," and "Law Reforms of the Session—General Review (continued). The reports of important cases tried in the Local Courts, are full and very interesting. Altogether this magazine is conducted with much ability, and it richly deserves to be widely patronized.—*Thorold Gazette.—June 9*, 1858.

THE UPPER CANADA LAW JOURNAL for May is full of interesting articles—instructive alike to the profession and the general public. The editorials as usual evince the sound knowledge and legal experience of the writers under whose management the journal is now published,—and the opening one, on the "Power of a Colonial Parliament to Imprison for Contempt," embraces an amount of interesting record from opinions of high authorities, upon which the author is led to conclude that the power to commit for contempt cannot justly be exercised by the Provincial Parliament. The other principal articles are—"Remuneration to Witnesses in Criminal Cases," "Law Reforms of the Session—General Review;" "University of Toronto—Law Faculty;" "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," &c. An original essay on the latter subject is to be commenced in the next issue, and continued monthly till completed, and it is promised that the aim of the writer will be to narrate—not to discuss. His materials are, we are informed, the best that can be had, consisting of several French and English, Manuscripts now out of print. To this may be added all the information that can be from *Edits, Arrets*, and *Ordonnances* of the French Government and of the Province of Quebec together with the *Ordonnances* and Acts of Parliament of the Provinces of Upper and Lower Canada. No pains are to be spared, either in research or compilation, that can be made tributary to the object of the writer. The period embraced will be nearly three centuries—that is from the settlement of Canada by the French to the present day. This is a subject so fruitful in details of a most interesting character, that if the promises referred to are carried out—(as we have every reason to expect they will from the deservedly high reputation of the editors)—the *Law Journal* will considerably increase its popularity as a reliable record. —*Colonist May, 14th*, 1858.

This is a very useful monthly, containing reports of important law cases, 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*.

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 tudied 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 Adv.*

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 "Magistrate'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 his 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*.