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VOL. VII. TORONTO, JUNE, 1861. No. 6.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL 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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CONTENTS.

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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.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—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 to the United States.—*American Railway Review*, September 20th, 1860.

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 30th.*

THE UPPER CANADA LAW JOURNAL for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts and a variety of other important matter, this number contains well written original articles on Municipal Law Reform, responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette May 19th, 1859.*

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May. 16th* 1859.

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.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages a history of the constitution and laws of Canada from the assumption of British authority. Subscription $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto, $4.00 a year cash.

This is one of the best and most successful publications of the day in Canada and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co., King Street East, Toronto.

This is the first number of the Fifth Volume, and the publishers announce that the terms on which the paper has been furnished to subscribers will remain unchanged—viz. $4.00 per annum, if paid before the issue of the March number, and $5.00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; as it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorold Gazette, January* 27, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co. Toronto.—It is conducted by W. D. Ardagh and R. A. Harrison, B. C. L. Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator* October 13th., 1858.

LAW JOURNAL for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford, it *should be taken*, however by every member of the Bar in town as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to peruse its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

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

UPPER CANADA LAW JOURNAL. Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical that it is scarcely necessary for us to do anything more than to acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D. Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised. We have so repeatedly alluded to its merits that the reader will readily excuse any longer mention.—*Whig, May*, 18th 1859.

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 Stockholders 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 themselves as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina 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 UPPER CANADA LAW JOURNAL, &C.

We are indebted to the publishers of this interesting law periodical for the numbers till this date 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 LAW JOURNAL for February, has been lying on our table for some time. As usual it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister's office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

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* 8, 1858.

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."—*Cobourg 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.

DIARY FOR JUNE.

1. Saturday. .. . . Easter Term ends
2. SUNDAY ... .. *1st Sunday after Trinity*
3. Monday . . . Last day for notice of trial County Court.
9. SUNDAY..... *2nd Sunday after Trinity*
11 Tuesday. ..... Quarter Sessions and County Court Sittings in each County
13. Thursday. ... Sittings of Court of Error and Appeal commence
16. SUNDAY .. .. *3rd Sunday after Trinity*
23. SUNDAY ..... *4th Sunday after Trinity*
29. Saturday .... Last day for County Councils finally to revise Assessment Rolls and for apportionment of School moneys by Chief Supt. of Schools Chief Supt to report state of Grammar Schools
30. SUNDAY ..... *5th Sunday after Trinity.*

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses, which are very heavy.

Now that the usefulness of the Journal is so generally admitted it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

TO CORRESPONDENTS—*See last page*

The Upper Canada Law Journal.

JUNE, 1861.

NOTICE.

The proprietors of the Law Journal *have at length determined to take legal proceedings for the recovery of unpaid subscriptions. All accounts amounting to* $20 *and upwards, will be, without further notice, placed in suit on the 1st July next. Subscribers concerned, who desire to avoid law costs, are therefore required to pay their dues before the day indicated, or abide the consequences of neglect.*

ABOLITION OF REGISTRATION OF JUDGMENTS.

By far the most sweeping Act of last session of Parliament is that entitled "An Act to repeal the laws relative to the Registration of Judgments in Upper Canada."

We can scarcely realize the fact that this Act is become law. It is certainly not a law for which there was much, if any, agitation. All of us were more or less familiar with the abuses that had crept into the system of registered judgments, but none expected a measure of redress in the shape of a bill that would effect the entire destruction of the system itself.

We are not in favor of revolutionary measures. We prefer rather to heal than to destroy. Such, it is said, is the great secret of the strength and stability of the British constitution. He would be a poor physician who, instead of endeavoring to remove disease, should intentionally kill his patient. If the system of registered judgments involved any good, we must say the Legislature has been too precipitous in killing the good in order to get rid of its attendant abuses. There are men who drink strong drinks to excess, but is there a sane man who would on that account urge the destruction of all grain and of all vineyards? The true rule is, to remedy the abuse, rather than work the destruction of the thing abused, if good in itself. We at once admit that the law of registered judgments was accompanied of late with much abuse; but we at the same time think that the law itself, if properly regulated, was a good law.

The law of debtor and creditor is in every civilized community an important branch of jurisprudence. "Pay that thou owest" is the natural command of every system of administrative justice. It has its corrolaries. A man's property, both real and personal, should be liable for his debts, and so liable as to be available. Property is purchased with money. Debts are contracted on account of property. Credit is given on the faith of property. Men are measured more by the breadth of their acres than by inclination for honesty. The former is visible—the latter not in general apparent; the former is tangible—the latter uncertain and unreal. That, therefore, which may be the subject matter of the debt, and is often the security, or at least the inducement, for contracting the debt, should be made available for the payment of the debt, and the more available the better in the interest of truth and justice.

It is repugnant to our present ideas of civilization that a man's body should be seized in liquidation of his debts. Besides, the body of a debtor, in a country where slavery is prohibited, is not easily converted into cash—the one thing needed. But these objections do not exist in the way of making a man's chattel property and his lands responsible for his debts.

Owing to feudal and other reasons, land in England has been less available to creditors than goods and chattels. At common law, goods and chattels, and growing profits of lands, were the only property which could be taken in execution by a creditor. The first step in advance was the 13 Ed. I., St. 1 cap. 18, which enabled the sheriff, under certain circumstances, to deliver to the creditor one half of the land of the debtor, until payment of the debt thereout. This was the origin of the writ of "elegit"—a writ which derives its name from the words *Quod elegit sibi executionem fieri de omnibus catallis et medietate terræ.* The proper writ against goods and chattels has always been the well known one of *fieri facias.* Lands in the colonies being more a subject of barter than in England, have been from an early period looked upon in the nature of goods and chattels for the payment of debts. In this colony there is in force not only an English statute of 5 Geo. II. c. 7, which declares that lands and other hereditaments and real estates situate or being within the colony, shall be assets for the satisfaction of debts, but subject to the like reme-

dies, proceedings and processes, in any court of law or equity, for seizing, extending, selling or disposing of the same towards the satisfaction of debts, in like manner as personal estate in the colony is seized, extended, sold and disposed of for the satisfaction of debts. On the back of this there are our own statutes, allowing the sale of lands under writs of *fieri facias*, but subject to regulations providing that personal property shall be exhausted before real property is sacrificed

These statutory regulations would be all that is required, if it were not in the power of debtors, dishonestly inclined, to get rid of their property, real and personal, between judgment and execution. In most cases an interval of more or less duration elapses between the time that judgment is pronounced, and the time that execution against goods can be issued. During this interval it is in the power of the debtor, under circumstances of strong temptation, to put his personal property out of his hands. Even after execution issued, and before levy, were it not for the Statute of Frauds, there would be a similar door to dishonest practices. Under the operation of the Statute of Frauds, so far as the courts of record at all events are concerned, the deposit of the writ in the sheriff's hands effects a *lien* on the personal property until seizure. This, as it is well known, is a very wise provision—one which, with few exceptions, works beneficially—in few instances does harm—in most instances prevents fraud.

In this country it is as easy for a debtor to get rid of his lands as of his goods. The temptation to dishonesty in the one case is as great as in the other; and the opportunity for fraud is, if possible, in the case of lands, more tempting than in the case of goods. Though in England the sheriff is by one and the same writ commanded to seize the whole of the debtor's chattels, and one half of his real property, yet here no writ can be issued against lands until the return of the writ against goods. If the debtor, before judgment, fail to get rid of his lands, it is in his power to do so after judgment, and even while a writ against his personal property is in the hands of the sheriff. Why should there not be the lien on lands from the time of judgment until seizure? Why should not, at least, the writ against goods and lands be at all events joint, so as to bind the lands, if necessary for purposes of execution, from the issue of the first execution—that is, as soon as possible after judgment?

It was at one time supposed that a judgment of a court of record, whether registered or not, operated as a lien upon lands. The doubt was subsequently removed by express legislation. It was by act of parliament declared that unless registered, no judgment should operate as a lien on lands. Now it is declared that no judgment, whether registered or not, shall operate as a lien on lands. Why this great change? Because, it must be said, abuses grew into existence which our legislative physicians were unable or unwilling to heal.

The law was, that a registered judgment should be a lien on lands. To enforce this lien, resort was necessary to the Court of Chancery. The costs of that court were discovered to be so enormous, that the remedy was worse than the disease. Cases are said to have occurred, where the land of an unfortunate debtor, dragged into the Court of Chancery by a confiding creditor, has been, after great delay, involving endless "appointments," and as endless disappointments, sold to pay law costs to a frightful amount, and leaving little or nothing to the creditor who put the court in motion. Literally this was invoking a demon to one's destruction. But if the machinery of the Court of Chancery was found to be such that its cost could not be reduced, and to be too expensive for the purpose intended, why not have substituted a more simple and less expensive machinery? Nobody complained that the existence of the law allowing a registered judgment to operate as a lien on lands was a grievance requiring legislative action, but that the machinery for making that lien available was so costly that it consumed the property it was designed to administer for the benefit of judgment creditors. The abuse undoubtedly did exist. It of late festered to such an extent, that it appears our legislators, in their haste to apply the dissecting knife, have (blindly, we think) destroyed the vitals of the system itself.

But enough, the law of registered judgments is dead, and it only remains for us, without further lament, to bury it.

Let us next, now that the shock is over, calmly contemplate the void created, and while considering the means of its death, weigh the probable consequences of the void in relation to existing laws.

The statute is simply entitled "An Act to repeal the laws relating to the Registration of Judgments in Upper Canada," but enacts among other things, that "no judgment, rule, order or decree for the payment of money of any court of Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein."

The Act is true to its object,—the work of destruction. It leaves not, so far as we can discover, a single judgment clause to tell the fate of its companions. It begins very naturally with the Court of Chancery, and with one stroke of the pen deprives parties of the power to enregister the decrees or orders of that court directing the payment of money so as to bind lands. It next turns its attention to the more humble but not less useful Division Courts, and deprives parties of the power of obtaining certificates of judgment for registration purposes from these courts. It

then deals with the Superior Courts of Common Law and County Courts in like fashion.

Having gone the circuit of the courts, one would fancy that the Act had exhausted itself. Not so, however, keen in the work of destruction, it peers through our statutes for stray sections, and fells them the moment they are discovered. It is found that a section giving power to the Court of Chancery to charge lands was snugly smuggled into the arrest and imprisonment for debt Act, (cap. 24,) and the "innocent" (s. 21) is accordingly slaughtered Two clauses (secs. 12, 27) criminal enough to mention the word "judgment," are discovered in the Act respecting the partition and sale of real estate, (cap. 86,) and are accordingly silenced. Three clauses (secs. 1, 2, 3,) of the Act respecting mortgages of real estate (cap 87) are emasculated for a like offence. Next the Registry Act (cap. 89), the dupe of the courts in this nefarious business, is discovered, and made largely to suffer. Many sections in the heat of the moment are completely obliterated, but on reflection are restored, purged of the obnoxious references to everything in the shape of a registered judgment decree or order. A section (11) of the Act respecting the transfer of real property (cap. 90) actually used the words "shall be bound by judgments," and paid the penalty of death in consequence; but by the omnipotence of Parliament is restored to life, on condition that it shall never again use such words. No more offending clauses could be discovered, but lest any should have escaped destruction we have the declaration that "All other statutes, parts and clauses of statutes, authorizing the registration of judgment decrees and orders for the payment of money in Upper Canada are hereby repealed."

Here one would suppose that the Act quite exhausted would rest and be as silent as the grave. Utterance, however, is subsequently given to two incoherent sections, the construction of which will, we fancy, puzzle the courts as they now puzzle us.

Here they are :—

10. "Nothing in this Act contained shall be taken, read or construed to affect any suit or action on or before the 18th day of May, 1861, pending in any Court in Upper Canada, in which any judgment creditor is a party."

11. "This Act shall take effect on the 1st of September next, and in case of judgments heretofore registered all writs of executions against lands issued before the said first day of September shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue respectively."

We confess we find a difficulty in construing these clauses separately, and a still greater difficulty in construing them collectively. By reading the latter clause we learn that "the Act shall take effect on 1st September next," by which we understand that it is not to take effect before that day. Then what is the meaning of the former clause, "that nothing in this Act contained shall be taken, &c., to affect any suit, &c., on or before 18th May, 1861, pending," &c. Surely if the Act is not to take "*effect*" till 1st Sept., 1861, it can very well "*affect*" suits pending on or before 18th May, 1861! If we were to read the latter clause alone we should say certainly not, but reading the two together we find it difficult to come to any other than an affirmative conclusion. The object designed was probably to prevent the filing of bills in Chancery on judgments after 18th May, 1861, but how far that object is expressed we must leave the courts to decide.

Again: what is the meaning of the latter part of the latter section, which declares that "in cases of judgments heretofore (before 18th May, 1861,) registered, all writs of execution against lands issued before the said first day of September shall have priority according to the respective times of the registration of the judgments on which they have issued or shall issue respectively?" It certainly intends that executions against lands may be issued between 18th May and 1st September, 1861. It certainly intends that some of these executions may be issued on judgments which have been registered. But does it allow judgments to be registered between 18th May and 1st September, 1861? It certainly makes no provision for judgments registered after 18th May, 1861, and from this circumstance it may be argued that the intention is, none shall issue after that day. If this be the correct conclusion what becomes of the first part of the clause which declares that the Act shall take effect "on the 1st September next?" The meaning of this, if it has any meaning at all, must be, that for some purposes the Act shall take effect on 18th of May, but not for all purposes till 1st September, 1861.

These questions of construction suggest themselves to our minds, and we are much mistaken if they do not give trouble to other minds than ours. *Nous verrons.*

ADMISSION AS AN ATTORNEY.

The mode of obtaining admission as an Attorney and Solicitor of the Courts of Law and Equity in Upper Canada, is regulated by Consol. Stat. U. C., cap. 35, as amended by Statute 23 Vic., cap 48, and the Rules of the Law Society, passed in pursuance of the powers conferred on the Society by the former Statute.

Each applicant is expected to be well read in statute and common law, and more especially the statute law of Upper Canada, and is required to undergo an examination in these subjects, in order that his fitness may be tested.

It has been remarked to us, that if the subject of examination were restricted to the statutes regulating the mode

of admission scarce one in one hundred applicants would pass a satisfactory examination.

Now, surely, this should not be so. The first thing necessary is to comply with the terms of these statutes, and in order to do so, a thorough knowledge of their provisions is essential. It is singular that men will leave untouched those statutes and rules, an understanding of which, and a compliance with which, is a condition precedent to all that is expected to follow.

The consequence is, that many have great difficulty in scrambling through at the appointed time, while others, owing to unpardonable neglect, are thrown back from term to term, for no other reason than supreme indifference to the strict injunctions of the Legislature and the Law Society.

In this number two cases will be found reported of interest to those for whom these observations are intended.

Our object is in time to direct the attention of all concerned to what is required of them, in the hope that the number of those who display ignorance where knowledge should prevail may be from term to term made "beautifully less."

We must not be understood as casting any blame upon either of the gentlemen whose respective names head the reported cases to which we refer. Though it was in the power of both, by proper foresight, to have prevented the disappointments which they encountered, yet they were the first of their kind, and now stand as beacons to all who are following in their course.

To use the language of the court in one of the cases, "In view of the possible loss of a term, care should be taken to enter into the contract of service a sufficient number of days before the term to escape the difficulty of not having fourteen clear days between the expiration of the articles and the term that will follow next after;" so we may add, "In view of the possible loss of a term care should be taken to leave with the Secretary of the Law Society all necessary documents at least fourteen days before the term in which applicants intend to seek admission."

LAW SCHOLARSHIPS.

In England the study of the law is very expensive, and in consequence the majority of those called to the bar or admitted as attorneys are the sons of well-to-do parents.

In Canada, though not so expensive as in England, yet in order to be called to the bar or admitted as an attorney considerable expenditure is necessary.

The expense is not in either country simply the actual disbursements for fees to the Inns of Court or Law Society, but rather the cost of living while under apprenticeship.

In Upper Canada, before any person can be admitted an attorney, it is necessary for him, if the graduate of a recognized University, to serve at least three years under articles of clerkship; and if not a graduate, a term of five years' service is required. In addition to this is the cost of keeping terms in Toronto, and other expenses of minor importance.

Very few articled clerks are in receipt of salaries sufficient to support them while serving under articles, and by far the greater proportion are not in receipt of any salary whatever. Payment during service is certainly the exception in Upper Canada, not the rule.

In order, therefore, to enable a young man to prosecute his studies under such circumstances, the aid of his parents or of friends is in general necessary. Some young men of extraordinary energy do manage to struggle through in spite of difficulties, but the effect is in general to discourage the son of the poor man—the young man who is left to depend entirely on his own resources.

Hence it has always been the desire of the philanthropic as much as possible to remove, in the case of really deserving young men bent on professions, the inequalities caused by differences of birth, station, and family connexions. This desire in the several Universities and Colleges has led to the establishment of exhibitions. The same desire has induced particular individuals in various scholastic institutions to establish scholarships. And we are glad to see that a corresponding desire has prompted the Law Society of Upper Canada to institute a system of scholarships, open to the son of every man in Upper Canada, no matter how lowly his station or straitened his circumstances.

The Law Society, during last Easter Term, ordained that there shall be four scholarships awarded annually in Michaelmas Term to students standing on the books of the Society, of the respective annual values of £30, £40, £50 and £60, and open for competition as follows:

£30 scholarship to students under one year.

£40 scholarship to students over one year and under two years.

£50 scholarship to students over two years and under three years.

£60 scholarship to students over three years and under four years.

Each scholarship to be tenable for one year only, but the holders of £30, £40 and £50 scholarships to be eligible for a higher scholarship in the succeeding year.

Any degree entitling to a call in three years to be considered as equivalent to two years on the books.

The establishment of scholarships will not only be an encouragement to the son of the poor man, but an incentive to honorable ambition to all young men emulous of

distinction. The sons of rich and poor will in this respect stand on equal ground—*Palmam qui meruit ferat.*

If the only object of the scholarships were to aid the sons of poor men in Upper Canada in being admitted as attorneys or called to the bar, and so increase the number of those who embrace the law as their profession, we should hesitate to endorse the movement. As it is, the number of those who term after term present themselves as students is calculated to excite apprehension. The profession of the law, like other professions, is governed by well-understood rules of political economy—the law of supply and demand. The moment the supply exceeds the demand the surplus must try some other calling, wherein their exertions to serve their fellow men will be better requited. We cannot help feeling that the supply is beginning to exceed the demand, and would ask parents about to embark their sons in the profession, before doing so, calmly and considerately to weigh their prospects, judged by all the surrounding circumstances.

The fact is that too many young men are now being admitted as students of the Law Society, and this either because of the facilities for admission or because of a blind infatuation as to the prospects in the profession itself—perhaps a combination of both these motives. While offering facilities in a pecuniary point of view to the son of the poor man, we incline to think the society might with advantage to the public and to the profession increase the standard for admission as to subjects of examination and as to the amount of fees payable on admission. We throw out the hint for the consideration of those with whom the power rests of making any necessary amendment or regulation of the kind indicated.

The first examination for scholarships will be during Michaelmas Term next. Owing we presume to the shortness of the time allowed for preparation, the subjects chosen for examination are not either very numerous or very difficult. They are as follow:

For £30 scholarship.

Stephens' Blackstone's Commentaries, vols. 1 and 4.

For £40 scholarship.

Stephens' Blackstone's Commentaries, vol. 2; Smith's Manual of Equity Jurisprudence; and the Real Property Statutes of Upper Canada.

For £50 scholarship.

Stephens on Pleading since Common Law Procedure Act; Smith on Contracts; Story's Equity Jurisprudence; Watkins on Conveyancing.

For £60 scholarship.

Smith's Mercantile Law; Taylor on Evidence; the Public Statutes relating to Upper Canada Pleadings, and Practice of its Courts of Law and Equity; Williams on Real Property; and Dart on Vendors.

Candidates for scholarships are required to send in their names to the Secretary of the Law Society, by the 1st November next.

DAYS FOR JUDGMENTS.

QUEEN'S BENCH.

Monday ..... June 17th, at 10 o'clock.
Saturday ..... June 22nd, at 2 "

COMMON PLEAS.

Monday ..... June 17th, at 2 o'clock.
Saturday ..... June 22nd, at 10 "

STATUTES OF LAST SESSION OF PARLIAMENT.

CHAPTER VI.

An Act to amend chapter eighty nine of the Consolidated Statutes of Canada, respecting the Extradition of Fugitive Felons from the United States of America.

[Assented to 18th May, 1861]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. The first, second and third sections of the eighty ninth chapter of the Consolidated Statutes of Canada, intituled: "An Act respecting the Treaty between Her Majesty and the United States of America, for the apprehension and surrender of certain offenders," are hereby repealed.

2. The following section or paragraph, shall be substituted for the first section hereby repealed, and shall, in lieu thereof, be read as the first section of the said act:

"Upon complaint made under oath, or affirmation, (in cases where affimations can be legally taken instead of oaths) charging any person found within the limits of this province, with having committed, within the jurisdiction of the United States of America, any of the crimes enumerated or provided for by the said Treaty, it shall be lawful for any judge of any of Her Majesty's Superior Courts in this Province, or any Judge of a County Court in Upper Canada, or any Recorder of a city in this province, or any police magistrate, or Stipendiary Magistrate in this province, or any inspector or superintendent of police, empowered to act as a justice of the peace in Lower Canada, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or other officer, and upon the said person being brought before him, under the said warrant, it shall be lawful for such judge or other officer, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of this province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be so accused had been committed herein, it shall be lawful for such judge or other officer to issue his warrant for the commitment of the person so charged, to the proper gaol, there to remain until surrendered according to the stipulation of the said treaty, or until discharged according to law; and the said judge or other officer shall thereupon forthwith transmit or deliver to the governor, a copy of all the testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of such person, pursuant to the said treaty."

3. The following section or paragraph, shall be substituted for the second section hereby repealed, and shall, in lieu thereof, be read as the second section of the said act:

"In every case of complaint as aforesaid, and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which the original warrant may have been granted in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

4. The following section, or paragraph, shall be substituted for the third section hereby repealed, and shall, in lieu thereof, be read as the third section of the said act:

"It shall be lawful for the Governor, upon a requisition made as aforesaid, by the United States, by warrant under his hand and seal, to order the person so committed, to be delivered to the person or persons authorized to receive such person, in the name and on behalf of the said United States, to be tried for the crime of which such person stands accused, and such person shall be delivered up accordingly; and the person or persons, authorized as aforesaid, may hold such person in custody, and take him to the territories of the said United States, pursuant to the said Treaty; and if the person, so accused, escapes out of any custody to which he stands committed, or to which he has been delivered as aforesaid, such person may be retaken in the same manner as any person accused of any crime against the laws of this Province may be retaken upon an escape."

CHAPTER IX.

An Act to abolish the mode of procedure in Criminal cases called Recording Sentence of Death.

[Assented to 18th May, 1861.]

Whereas it is expedient to abolish the mode of procedure in Criminal cases, by which Judgment or Sentence of Death is entered of record in certain cases: Therefore, Her Majesty, &c., enacts as follows:

1. The ninety-first and ninety-second sections of the ninety-ninth chapter of the Consolidated Statutes of Canada are hereby repealed.

CHAPTER XIV.

An Act to abolish the right of Courts of Quarter Sessions and Recorder's Courts to try Treasons and Capital Felonies.

[Assented to 18th May, 1861.]

Her Majesty, &c., enacts as follows:

1. All powers and jurisdictions to try Treasons and Felonies, for conviction whereof the punishment of death is imposed, and which powers and jurisdictions are, by any law or statute whatsoever, granted or confirmed, or which are in any other manner vested in or exercised by any court of Quarter Sessions and Recorders' Court of this Province, are hereby absolutely revoked and determined, and every such law and statute is hereby repealed, so far as it may confer such powers and jurisdictions.

CHAPTER XLI.

An Act to repeal the Laws relating to the Registration of Judgments in Upper Canada.

[Assented to 18th May, 1861.]

Her Majesty, &c., enacts as follows:

1. The sixty-sixth, sixty-seventh and Sixty-eight sections of Chapter twelve of the Consolidated Statutes for Upper Canada, intituled: *An Act respecting the Court of Chancery* are hereby repealed.

2. The one hundred and forty-sixth section of Chapter nineteen of the said Consolidated Statutes, intituled: *An Act respecting the Division Courts*, is hereby repealed.

3. The two hundred and forty-fifth section of Chapter twenty two of the said Consolidated Statutes, intituled; *An Act to regulate the procedure of the Superior Courts of Common Law and of the County Courts*, is hereby repealed.

4. So much of the twenty-first section of Chapter twenty-four of the said Consolidated Statutes, intituled: *An Act respecting arrest and imprisonment for debt, commencing* with the words, "and no writ shall issue" to the end of the section, is hereby repealed.

5. The twelfth and twenty-seventh sections of Chapter eighty-six of the said Consolidated Statutes, intituled: *An Act respecting the partition and sale of Real Estate*, shall be read and construed as if the word "Judgment" were omitted therein.

6. The first and second sections of Chapter eighty seven, of the said Consolidated Statutes, intituled: *An Act respecting Mortgages of Real Estate*, shall be read and construed as if the words "or registered Judgment creditor" were omitted therein; and the third section of the last recited Act shall be read and construed as if the words "or judgment creditor" were omitted therein.

7. The fourth, fifth, seventh, eighth and ninth sub sections of section seventeen, sections eighteen, thirty six, thirty seven, thirty-eight thirty-nine, forty-one, forty-two, forty-seven forty-eight, forty-nine, fifty, fifty-one, fifty-two, fifty-three, fifty-four, fifty-five, fifty-six, fifty-eight, sixty, sixty-one, sixty-two, sixty-three, sixty-four, seventy-one and sub-section four of section seventy-four of Chapter eighty-nine of the said Consolidated Statutes, intituled: *An Act respecting the Registration of Deeds, Wills, Judgments, Decrees in Chancery, and other instruments*, are hereby repealed.

1. The following sections and sub-sections or paragraphs shall be respectively substituted for the repealed sections and sub-sections in the last preceding section of this Act mentioned, and shall respectively, in lieu thereof, be read as the corresponding sections and sub-sections of the said last recited Act, that is to say:

2. In lieu of fifth sub-section of section seventeen: "Decrees of Foreclosure, and all other Decrees affecting any title or interest in land."

3. In lieu of seventh sub-section of section seventeen: "Satisfaction of Mortgages."

4. In lieu of eighteenth section: "Deeds, Conveyances, Powers of Attorney and Wills are to be registered through memorials thereof, and Sheriff's Deeds of Lands sold for taxes, decrees of foreclosure and proceedings in Chancery, or of a County Court on its equity side, through certificates thereof.

5. In lieu of forty-seventh section: "The registry of any instrument, will or decree affecting any lands or tenements registered under this or any former Act, shall, in equity, constitute notice of such deed, conveyance, will or decree, to all persons claiming any interest in such lands or tenements subsequent to such registry."

6. In lieu of fifty third section: "After any Grant from the Crown of lands in Upper Canada, and Letters Patent thereof issued, every deed, devise or other conveyance executed after the First day of January, one thousand eight hundred and fifty-one, whereby the said lands, tenements or hereditaments may be in any wise affected in Law or equity, shall be adjudged fraudulent and void, against any subsequent purchaser or mortgagee for valuable consideration, unless a memorial of such deed, devise or conveyance be registered as by this Act is specified before the registering of the memorial of the deed, devise or conveyance under which such subseqnent purchaser or mortgagee claims, subject nevertheless as to devisees, to the provisions contatned in the forty-sixth section of this Act; but nothing herein contained shall affect the rights of equitable

mortgagees as now recognised in the Court of Chancery in Upper Canada."

7. In lieu of fifty sixth section: "The doctrine of tacking having been found productive of injustice: therefore every deed executed subsequent to the first day of January, one thousand eight hundred and fifty one, a memorial whereof has been or may be duly registered, shall be deemed effectual both in Law and in Equity, according to the priority of the time of registering such memorial; and when no memorial of such deed has been duly registered, then such deeds shall be deemed effectual both at Law and in Equity, according to the priority of time of execution."

8. In lieu of fifty-eighth section: "When any Mortgage has been satisfied, the Registrar or his deputy on receiving from the person entitled to the amount of such Mortgage, or his Attorney, a certificate in the form A. duly proved by the oath of a subscribing witness in the same manner as herein provided for the proof of deeds and other instruments affecting lands."

8. The eleventh section of chapter ninety of the said Consolidated Statutes, intituled: *An Act respecting the transfer of Real Property and the liability of certain interests therein to execution*, is hereby repealed and the following substituted therefor: "Any estate, right title or interest in lands which, under the fifth section of this Act, may be conveyed or assigned by any party, shall be liable to seizure and sale under Execution against such party, in like manner and on like conditions as lands are by law liable to seizure and sale under execution, and the Sheriff selling the same may convey and assign the same to the purchaser in the same manner and with the same effect as the party might himself have done."

9. All other Statutes, parts and clauses of Statutes authorising the Registration of Judgments, Decrees and Orders for the payment of money in Upper Canada, are hereby repealed.

10. No judgment, rule, order or decree for the payment of money of any Court in Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein.

11. Nothing in this Act contained shall be taken, read or construed to affect any suit or action on or before the eighteenth day of May, one thousand eight hundred and sixty-one, pending in any Court in Upper Canada, in which any Judgment Creditor is a party.

12. This Act shall take effect on the first day of September next, and in cases of Judgments heretofore registered all Writs of Execution against lands issued before the said first day of September, shall have priority according to the respective times of the registration of the Judgments on which they have issued or shall issue respectively.

CHAPTER XLV.

An Act to remove all doubts as to the validity of certain Certificates issued by Judges of the County Courts to Insolvents, under the Act of 1856.

[Assented to 18th May, 1861.]

Whereas under the authority of an Act of the Parliament of this Province, passed in the session held in the nineteenth and twentieth years of Her Majesty's reign, intituled: "An Act to extend the provisions of the Insolvent Debtors' Act of Upper Canada, and for the relief of a certain class of persons therein mentioned," many persons obtained from the several judges of the County Courts in Upper Canada the final order and discharge in the said act mentioned; And whereas many of the said persons so discharged, have again entered into business, and on the faith of such orders and discharges being effectual and final, have obtained credit, and therefore it is but right and just that any and all doubt should be removed as to the effect of such orders and discharges: Therefore, Her Majesty, &c., enacts as follows:

1. Each and every order made by any judge of any County Court in Upper Canada, while the said act was in force, which in effect purports to discharge any debtor to whom the same was granted, from his debts contracted up to or before the date of the presentment of his petition under the provisions of the said act,—as also any certificate so granted which on the face of it professes to have been made under the said act and in pursuance of its provisions,—shall be valid and is hereby declared to have the effect of discharging such debtor from all liability for or in respect of any debt mentioned in the schedule of the said debtor, filed on the presentation of the petition upon which such certificate was granted; but this act shall not apply to any certificate which may have been rescinded by any such judge before the passing of this act, or to any certificate to rescind which proceedings had been instituted before the judge who granted the same, on or before the second day of April, in the year of our Lord one thousand eight hundred and sixty one.

SELECTIONS.

THE EXPEDIENCY OF ABOLISHING THE PRACTICE OF OPENING BIDDINGS IN THE COURT OF CHANCERY.

[*Read by* Mr. Serjeant Woolrich *at a General Meeting of the Society for Promoting the Amendment of the Law, on Monday, January 14th*, 1861.]

From very early times, certainly for more than a century, it has been the practice of the Court of Chancery to direct the re-sale of an estate, although an actual purchaser may be in existence. The estate having been sold under the order of the court, this practice is denominated, "opening the biddings." There are undoubtedly instances where a purchase effected through fraud or collusion has been set aside by a court of equity, but it is peculiar to that court to set aside a *bona fide* purchase upon an advance of price (which is the staple of the new bidding), to open the sale after the purchase has been confirmed by the master, or, as at present, after eight days succeeding the judge's certificate. The latitude allowed is considerable, and the discretion absolute. It is immaterial, with regard to the principle, whether the disappointed claimant were present or not at the sale, nor is any advanced sum in particular, as £10, to be considered as conferring any certain right to the privilege, nor even after the eight days, can a purchaser be entirely sure whether some sinister suggestion may not, at least embarrass him with an uncertain litigation, the court having, on the one hand, the unction of keeping faith with purchasers, and on the other, an anxiety to help suitors by shielding them from the remotest chance of collusion. It may be said that these difficulties, which occasionally beset the purchaser in chancery, may have operated to throw a shade over the value of the property offered. By analogy to the case of copyholds, the price of which is calculated with reference to the expected fines and other burthens, it might be supposed that the buyer of a chancery estate would likewise make his tender in conformity with the prospects he might entertain of future disappointment or litigation. Hence on the other hand, the court might have interposed its anomalous jurisdiction in order to protect property from undue depreciation. It must however, be remembered, if any weight be assigned to this argument, that there is always a paper containing a reserved bidding, which remains in the hands of the auctioneer, until the close of the sale of each lot; so that it would seem to be a sufficient protection to produce this reserve without calling in aid the additional power which the courts have so long assumed. The question is, whether there are any claims on behalf of an intending purchaser in the Court of Chancery of a superior character to those of a person who has been disappointed of his wishes at an ordinary auction. There have been three elements in the consideration of this matter—the state of things before the confirmation of the report by the master; the position of vendor and purchaser after that approval; and the condition of the same parties under the

modern usage of allowing biddings to be opened within eight days next after the signature of the judge's certificate of sale.

The first point has been productive of many discussions, the second and third must be viewed within a much narrower circle. Under the first head, a reasonable proposal of augmentation was generally deemed sufficient to warrant the success of the application for a new sale, as in the case of a price wholly inadequate to the value of the estate (*a*) There is no rule as to 5 per cent. or 10 per cent. The discretion of the judge under each peculiar concern is employed. Where a sum of £350 was offered as an addition to £5,300, it was not accepted, being too small, and the judge took occasion to observe that the court does not confine itself to a particular rate per cent., although 10 per cent. is a sort of general rule. (*b*) But £500 added to £12,010 were permitted. (*c*) So £500 on £8,950 (*d*) Under any circumstances, an advance of less than £40 will not be received. (*e*)

A larger sum seems to have been expected from a person present at the sale than from a stranger; (*f*) indeed a struggle was made to hinder a person present at the sale from any interference, as to future views upon the estate. The principle enunciated by Sir John Leach was, that the sales by the court would not in that case have the full benefit of the spirit of competition, and the cases were *Somner* v. *Charlton* (*g*) and *McCulloch* v. *Colbatch* (*h*) and another case, as it seems, before Lord Kenyon. (*i*) But these authorities have not survived in that character, although Lord Eldon was much disposed, using his own words, "To discourage a person present at the sale, and lying by, speculating upon the event, and afterwards coming forward with an advance." (*j*) Yet he gave way, upon being informed that in the only case to the contrary the person seeking to open the bidding was a party to the cause. (*k*) Lord Loughborough had previously sanctioned such an opening, although it was said that the estates had been sold above the value. (*l*) It does not follow, nevertheless, that a chancellor considers himself bound by the decision of another chancellor And the second bidding was allowed, at the instance of a person who had attended the former sale by an agent (*m*) So again, the only doubt was as to the amount of the advance in such a case: and that amount having been increased, the order was made. (*n*) It is no objection that a party interested as a *residuary legate, seeks to have a second sale*; (*o*) still, the right rule is, that the opening of biddings is not so much intended for the purchaser or persons desirous of a fresh sale, as for the owners of the estate, especially creditors, infants, and persons who are not acquainted with the value of property. (*p*)

After the confirmation of the report of the sale by the master it was certainly most unusual to interfere. (*q*) Mere overbidding was not deemed sufficient. (*r*) There was some collusion in Gower's case; (*s*) and, on that ground, the biddings were re-opened, but after the second sale, an advance of £2,000 in order to a third sale was rejected, for this was overbidding alone. This denial, however, as to overbidding, must not be confounded with overbidding alone *before* the confirmation of the report or the certificate. The principle is quite different.

A fault on the part of the purchaser will produce this alteration, as fraud. So fraudulent negligence in another person, an agent, for example, would have the same effect, for it is against conscience that the purchaser should take advantage of such misbehaviour. Yet so precarious were the proceedings of courts of equity, that in cases where Lord Eldon would decline to interfere, Lord Loughborough, even after the confirmation of the report, hesitated simply upon the amount of advance, "They must bid more," said the chancellor. They bid more, and the offer was accepted. (*t*)

Upon one occasion the vendor was in prison, and before the confirmation of the report, he had a promise from two persons that they would instruct their agents to open the biddings, but they failed in their engagement. There was an overbidding of £4,000, the largest sum ever known in that character. Nevertheless, the lords commissioners would not have accepted that sum as an overbidding without more, but they yielded to the circumstance of duress, requiring from him, the vendor, a deposit of the full sum of £4,000. (*u*) Yet, strong as this case appears, Lord Eldon said he never would have made these orders. He disapproved strongly of *Watson* v. *Birch*. There was neither fraudulent conduct in the purchaser, nor fraudulent negligence in any other person. (*v*)

Fraud, therefore, is decisive upon the point. A survey was made of an estate, and by collusion with the tenants (who would pay so much less rent), the value and quality of the estate were underrated. It was then sold for the benefit of *creditors, and fetched £27,500. £80£ were then offered in* advance, the report not having as yet been confirmed, and a second sale took place. The sum of £28,500 was then offered, and the master reported in favour of the bidder. The report was then confirmed, upon which all these facts of collusion and depreciation were revealed, and £2,000 more being tendered, the sale was again opened, it being positively affirmed by the chanceller (Lord Northirgton) that the overbidding alone would not have sufficed. The estate brought £38.000 and £2.000 still in increase being pressed forward, the court declined to interpose after the confirmation of a fresh report.(*w*) Thus the principle of overbidding and fraud were clearly distinguished.

Surprise was scarcely held to be an ingredient upon the discussion of the master's report, nor is it now under the certificate. At all events, where the applicant was present at a sale, and was informed, in common with the rest of the company, by the auctioneer, that any one might come within eight days after the report, but failed to appear, no allegation of surprise was allowed to be entertained, (*x*) and a mistake as to the day of sale will require a *strong* advance.(*y*)

We have said that the certificate of eight days is equivalent to the old confirmation of the report by the master, therefore within that time the biddings will be opened, (*z*) and it is worthy of remark that the modern judges of the Court of Chancery are quite prepared to support the practice which is now under discussion, notwithstanding the force of prior decisions. Very special circumstances might even induce them to yield to an application made at the end of eight days from the certificate of sale. There appears to be some colour for this in a case where the purchaser bought a lot for £2,770, and signed the contract. It was on the 2nd of August. On the 4th the certificate was settled, and was approved on the 9th by the judge. Eight days clear were then allowable for any one to apply for an order to open the biddings. That period having expired during the long vacation, the purchaser required the

(*a*) By Lord Langdale, 17 L. Ch. 486, in *Manners* v. *Furse*.

(*b*) 1 Sim. & Stu., 20, *Gardiner* v. *Edwards*. 2 Madd. Ch. Pr., 656, *Bridges* v *Philips*, M. S.

(*c*) 2 Russ. 606, *Lefroy* v. *Lefroy*. (*d*) 1 M'Cl. 82. *Pearson* v. *Collett*.

(*e*) 4 Madd 460. *Farlow* v. *Weldon* and *Gilbert* v. *Withered* was cited, S. P. Ibid See some Irish cases. £40 at the least, £10 per cent. in advance. Rule refused ex. *Hart.* v *C.* 2 Moll. 510. *Leland* v. *Griffith*. See Ibid. 508, *Aubrey* v. *Denny*. £10 per c-nt. required upon a larger sum, Ibid. 508, *Chester* v. *Gorges*. Costs of former purcha-er to be paid, See several other cases. Dart's Vend. & Purch., 3rd ed. 1 55.

(*f*) Jac. Rep. 526, *Tyndall* v. *Warre*. (*g*) 5 Ves. 655. (*h*) 3 Madd, 314, Ibid.

(*i*) 16 Ves. 140, by Bunyon amicus curiæ, Lord Eldon apparently acc. in *Preston* v. *Barker*. (*j*) 6 Ves. 117 *Rigby* v. *Macnamara*.

(*k*) 2 Jac. and W. 347. *Thornhill* v. *Thornhill*, 1 Ch. P. Coop. 380, *Shallcross* v. *Hibbertson*. (*l*) 5 Ves. 655, *Tait* v. *Ld.* Northwick. (*m*) Ibid.

(*n*) 5 M'Clelland 82. *Pearson* v. *Collett*.

(*o*) G Coop. 95. *Hooper* v. *Godwin*. (*p*) 2 Russ. 606 *Lefroy* v. *Lefroy*.

(*q*) 3 Bro C.C. 475, *Scott* v. *Nesbit*. 1 Ves., jun 2 7, *Pridenux* v. *Prideaux*. 11 Ves. 57, *Morse* v. *Bishop of Durham*. 14 Ves. 151, *Wade* v. *Wilson*. 1 Kay & J. 28.

(*r*) 3 Anstr. 656, *Boyer* v. *Blackwell*. (*s*) 2 Eden. 348.

(*t*) Ves. 86, *Chetham* v. *Grugeon*. (*u*.) 2 Ves jun., 51, *Watson* v. *Birch*.

(*v*) In *Morse* v. *The Bishop of Durham*, 11 Ves. 57.

(*w*) 2 Eden. 348. *Gower* v. *Gower*.

(*x*) 2 Jac. & Walk. 347, *Thornhill* v. *Thornhill*.

(*y*) 1 Ves., jun. 453, Anon.] (*z*) 1 Kay & J., 28, *Bridger* v. *Penfold*.

abstracts of title, and these he got, together with the valuation of the timber on the estate on the 21st of August. The business then proceeded; but on the 29th, a summons was served upon the purchaser, to the effect that if all his costs should be paid, another person having offered, an advanced bidding should be substituted in his room. The Vice-Chancellor stating that the increase of price amounted to £300, granted the prayer, and made the order; whereupon the purchaser appealed. Now, there were some singular facts in this case. The agent for the person who had been so far successful in opening the biddings, had actually declared that he would bid no longer, since the biddings had gone far beyond the value of the property. The land, as valued, was worth £1,400, whereas, £2,270 were offered for it at the sale. Of course, according to the most ordinary rules of common sense, the appeal succeeded; but the L. J. Knight Bruce used these equivocal expressions—"Glad as he would have been to give the applicant relief on a substantial advance of price, he thought it would be dangerous to the general practice of the Court to grant the application. *The case however was not one for costs.*" (*a*) If I read this decision rightly, it holds that an individual who has offered £1,300 more than the value of an estate, and who has, to all intents, been declared the purchaser, and who has duly awaited the time prescribed by law for the ratification of his purchase, may be suddenly invaded by a new claimant, narrowly avoid the consequences of the claim, and be saddled with his own costs of a most righteous appeal. So closely pressed were the counsel against the purchaser, that they first objected to the counting of any part of the vacation in the eight days; and, secondly, they called this a case of great hardship, because the interests of infants were concerned.

This event occurred in 1856 Some months afterwards another case arose of equal hardship, if we regard the principle of the subject now under consideration. (*b*) A property had been put up for sale, but the reserved bidding was not reached. Upon this, it was settled that a sale with sealed tenders should be attempted. There were two candidates: one offered £36,500, the other £34,000. On the 8th of February, the chief clerk found in favour of the higher sum. On the 12th, the certificate was signed and approved by the Vice-Chancellor; but on the 11th the day previous, a summons had been taken out by the person who tendered the lowest sum, *i. e.* £34 000, and upon the hearing, he having then proposed to give £38,000 was declared the purchaser. It must be understood that he undertook to replace the stock which had been sold out for the purpose of fulfilling the contract for £36,500. From this decision, the original purchaser appealed. He did not dispute the power of the court to open the biddings, had the sale been carried on by auction, but he said that this was a sale by private contract. In fact an opportunity was afforded for the court to escape from the principle of destroying the good faith of an accomplished contract, by likening it, as it really was, to the matter of a private transaction. Not so was the opinion of the court. They did not even hear the counsel for the new claimant. They dwelt upon the condition of sale, that it was to take place with the sanction of the Vice-Chancellor, and they held that all the incidents of days must apply as in the case of an auction. Of course, there being one day short, there was, in their view, time to disturb the certificate. But Lord J. Knight Bruce, who had, on the former occasion declined to give costs, here said, "I concur with regret, Mr. Barlow's costs of the appeal ought to be provided for;" and they were immediately promised under an arrangement. (*c*) Now it seems rather strange that the Lord Justice who had previously withheld costs from a party who was truly and justly successful, should here have recommended the payment of them to one who was unsuccessful. The judge must have thought it inequitable that a purchaser who by, what was in reality a private contract, had offered more than £30,000 for an estate, should have been suddenly supplanted by a buyer who had deliberately sent, in writing, to the proper authority, the amount which he was prepared to give. It is presumed that the successful appellee in this case might, in his turn, have been deprived of his bargain by the tempting tender of £40,000 by another aspirant. Particular reference was made in *Osborne* v. *Foreman* to a decision of the Vice-Chancellor Wood, then recently delivered by that judge. Lord Justice Turner seemed anxious to avoid a collision between the authorities, or to establish a diversity of opinion between himself and the very eminent person just mentioned. "But," said the Lord Justice "this case, in the opinion of their lordships, turned on different grounds from those in that case." (*d*)

Now that case was *Millican* v. *Vanderplank*; (*e*) that was also a case of private contract, but there were no sealed tenders, and the ground upon which it was sought to be distinguished was, no doubt, because the purchaser had entered upon the property and expended money upon it, and had incurred liabilities in respect of it, not merely at his own instance, but with the approval and acquiescence of all the parties interested. Both vendor and purchaser had so agreed as to prevent their being again placed respectively in their original positions. So far their seems to be a fair distinction. But the Vice-Chancellor laid down the principle rather more broadly. For he said, that—"When the master has approved of a sale by contract in the presence of the parties, no stranger can intervene to prevent the confirmation of the report; nor will the sale be disturbed by the court on the mere ground that a larger price has been offered subsequently, and before such confirmation, unless there be some error or miscarriage in the proceedings, or the contract price be grossly inadequate." These remarks are of a very strong character. They point at a clear distinction between the sale by auction and by private contract, and can hardly be reconciled with the opinions expressed in *Osborne* v. *Foreman*, however ingeniously it was endeavoured upon that occasion to preserve the alliance. The only argument which has been advanced assumes a distinction between a sale with sealed tenders and one by private contract. It is not necessary to discuss the point here, because we pretend to higher ground, the absolute extinction of this equity custom.

Notwithstanding all these cases, you are not to suppose that the tide of judicial opinion has been uniform in favour of the custom. Lord Thurlow declared that he would not open at all after confirmation of the report. (*f*) Mr. Maddock in his chancery practice, asserts on the authority of an anonymous M. S., that "By some judges it has been thought that the permission to open biddings does more harm than good." (*g*) Still it is but fair to say that he adds; "by others, that the right to open biddings should not be so much restrained as it is," (*h*) and he cites Vice-Chancellor Leach as his authority, from an M.S. (*i*) But Lord Eldon, whatever his doubts, which have descended to posterity, may have been, was strong upon this point.

In 1809, his lordship remarked upon the bad effect of opening biddings in general, from the uncertainty attending purchasers in this court. (*j*) Again, in 1820, he said, "I believe that the rule of opening the biddings, which was intended to protect, has frequently been very pernicious to the interests of the suitors in this court, and that their estates have sometimes sold for next to nothing in consequence of it." (*k*)

"For many years," he said again in 1822, "that I have been here, I have heard the practice of opening biddings lamented, and I cannot therefore account for it having continued a rule of the court, except upon a notion which I believe to be

(*a*) 25 L. J Ch. 201. (*b*) *Osborne* v. *Foreman*, 25 L. J. Ch. 340.
(*c*) This case was confirmed by the House of Lords.

(*d*) 25 L J., 341. (*e*) 11 Hare, 136. (*f*) 3 Bro. Ch. c. 475, *Scott* v. *Nesbit*.
(*g*) Vol. 2, p. 655. (*h*) Ibid. (*i*) Vol. 2, p. 655.
(*j*) In *Preston* v. *Barker*, 16 Ves 160.
(*k*) In *Thornhill* v. *Thornhill*, 2 Jac. & W. 243.

well founded, that there is in general more real wisdom in adhering to the old practice than in adopting new rules." (*l*) Here the groundless apprehension of change was exhibited in high relief by the great lawyer. It was in a case indeed, where the appellant was present at the sale, but the observations were general. If it were necessary to make a change he would consult the Master of the rolls and the Vice-Chancellor. Again, in 1822, Lord Eldon said, "During a period of nearly half a century which I have passed in this court, and in which Lord Apsley, Lord Thurlow, the Lords Commissioners, with Lord Loughborough at their head, have presided here, I have heard one and all of them lament, that the practice of opening biddings was ever introdnced. I confess that I have great doubt myself upon the subject; but after a practice so long established, is not for me to disturb it." (*m*) Lord Redesdale likewise observed in his court, "It is a general complaint that estates sold under decrees of the court, go at considerable under-value; the cause of this is the trouble purchasers are put to, in completing their purchases. If greater strictness were preserved in opening the biddings, it would have the effect of producing better sales." (*n*)

Lord Cranworth also made an ominous remark in Barlow v. Osborne,-(*o*) which, had he been quite content with the exising practice, he might have foreborne. "These are all discussions which are proper to be addressed to the Legislature which has the power of altering the law;" (*p*) and again, "it does seem to me most unreasonable that a vendor should, in cases of this kind, when his property is sold under a decree of the court, be protected at both ends, as it were, both before and after the purchase is made. It seems to me to furnish the strongest grounds for thinking that a general order should be issued by the Court of Chancery for the purpose of altering the present practice." (*q*) And in 1817, Macdonald, C. B., thus expressed himself; "If one who has given a fair price and is confirmed purchaser before the master, is liable at the distance of several months, and after he has arranged his affairs upon the faith of the purchase, to have it set aside, upon the mere circumstance of another person offering a larger price, it must necessarily affect all sales under the authority of the court, by deterring purchasers from bidding. It is thereupon, the general interest of the suitors to discourage the opening of biddings unless upon peculiar circumstances in the first sale. As no such circumstances appear in this case, the order cannot be granted." (*r*)

There is another principle not a little important, when we come to investigate the subject. The court will suffer a third sale, if there be found a candidate equal to the mark, (*s*) and upon an application by the same person. (*t*) However, in ordinary cases, the sale will be received. £1,050 were bid, and there was an order to open the biddings upon a deposit of £300. The second sale took place, and £1,338 were bid; but another offer of £160 was made by the same person who had opened the biddings. The Lord Chancellor said he remembered no such application, but as the purchaser did not appear to object, he made the order. (*u*)

I may just mention as matter of legal history, that when a buyer has taken several lots, and as to one of these, the biddings are opened, it is the rule to give him the option of retiring from the remainder. Macdonald, C.B., thought this a reasonable request; (*v*) but the Vice-Chancellor (Leach) upon a subsequent occasion made a distinction between lots purchased before the lots which are the subject of the application and those after. He said, "Where a person became the purchaser of a subsequent lot, in consequence of his being declared the best bidder of a prior lot, it was reasonable that he should have the option of retaining or retiring from the subsequent lot. (*w*) In another case the same Vice-Chancellor required an affidavit from the purchaser "that he had bid for the lot in consequence of having been declared the best bidder for the prior lot." (*x*)

It is obvious that, from the details and observations which have been submitted to the Society, the object intended in these papers is to prepare the way for an Act of Parliament, or, it may be, a rule of the courts, to assimilate the sales directed by the Court of Chancery with other contracts between buyer and seller. It seems better to return to that ordinary commercial dealing which has so long established good faith and right assurance between man and man. Undoubtedly, the equity judges have endeavoured to preserve, as far as possible, the fair balance between buyers and sellers; but of a practice what can be said commentatory, when the great oracles which have the administration of it are by no means agreed as to the propriety of its continuance? No sooner will the Court of Chancery forbear or be restrained from this *method of conducting sales, than the same confidence will arise* in the market of that court which obtains in the great market of the world.

(*l*) In *Tyndale* v. *Warre*, Jac. 528.

(*m*) In *Williams* v. *Attenborough*, Turn. and Russ. 75.

(*n*) 1 Sch. & L. 350. (*o*) 4 Jur. 367. (*p*) Id. 368. (*q*) Id. 369.

(*r*) In *Boyer* v. *Blackwell*, 3 Anstr. 657. (*s*) Bro. Ch. Ca. 475, *Scott* v. *Nesbit*.

(*t*) 8 Beav. 352, *Walwood* v. *Walwood*, see the cases of Colliery Shares, 8 Ves. 502, *Wren* v. *Kirton*. (*u*) 16 Ves. 140, *Preston* v. *Barker*.

(*v*) Anstr., 656, *Boyer* v. *Blackwell*.

(*w*) 1 Sim v. Sim., 396, *Price* v. *Price*.

(*x*) Ibid *Fielder* v. *Fielder* See 4 Madd. 227. *Rigby* v. *Shallcross*, and note (C there. As to timber, see 6 Sim. 380. *Bates* v. *Benner*, 10 per cent. advance; and for other cases, Dart on Vendors, p. 756.

DIVISION COURTS.

TO CORRESPONDENTS.

All communications on the subject of Division Courts, or having any relation to Division Courts, are to be addressed to "The Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "The Editors of the Law Journal, Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 112.)

In appointing or altering divisions, "the limits and extent" of every court division must be ascertained and fixed with precision. This may be done by tracing the outer boundary in each case, or by setting out the towns, townships, or detached parts thereof, intended to be within the division; but whatever mode of description be adopted, the established territorial divisions of the country and the authorized subdivision and description should be followed. Thus a division may be composed of so many townships, or of one or more townships, and so many concessions or lots from another township; and that is the usual method taken for fixing "the limits and extent," and the one evidently contemplated by the Legislature; for if we look at the 121st and 122nd sections of the act, we see at once a difficulty in carrying out their provisions unless the established and recognized divisions are adhered to. The jurors are to be taken from the collectors' rolls for the townships and places wholly or partly within the division, and for this purpose "the collector for each place, wholly or partly within any division, shall furnish the clerk" of the court with a

list of jurors; and, under the consolidated Assessment Act, the number of concession, lot, or other authorized designation of the local division is shown on the roll, in connection with the name of the party assessed. Moreover, in reference to the execution of process from the courts, the lot or *concession*, &c., where a party resides being known, mere inspection of the order appointing court limits should show the court that has cognizance where residence enters into the question of jurisdiction.

Under these considerations it seems that justices would act without authority in separating a county by arbitrary lines, or even by taking physically distinguished boundaries, as a river or creek, unless agreeing with recognized territorial divisions.

Every division, when appointed, is to be numbered—1st, 2nd, 3rd, and so on. There is no clue given in the act as to which should be "*the first*" or *number one* division, but in practice the division including the county town is generally named the first division, and the others follow either in the order of importance or extent, or arbitrarily, as the justices may determine, the numbers being consecutive from number one.

Under the general provisions of law, counties united for judicial and other purposes may be separated, and after the dissolution of the union both counties occupy an independent position, each having its own judicial and municipal establishment.

To meet cases of this kind, and to avoid confusion on the separation of counties, the following provision has been made by the 10th section of the act, viz.:

When a junior county * separates from a senior county or union of counties, the Division Courts of the united counties, which were before the separation wholly within the territorial limits of the junior county, shall continue Division Courts of the junior county, and all proceedings and judgments shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively; and all such Division Courts shall be known as Division Courts of such junior county by the same numbers respectively as they were before, until the justices of the peace of the junior county, in general quarter sessions assembled, appoint the number, limits and extent of the divisions for Division Courts within the limits of such junior county, as provided in the 8th section of this act.

(*To be continued.*)

* In every union of counties, the county in which the court house and gaol are situated is the "senior county," and the other county or counties the "junior county" or "counties" thereof.—*Mun. Act*, sec. 30.

CORRESPONDENCE.

St. Catharines, May 14, 1861.

To the Editors of the Law Journal.

Gentlemen,—Might I trespass on your space by asking you to answer through the *Law Journal* the following?

Is it necessary, in suing on an attorney's bill in the Division Court, to attach to the summons a copy of the bill in detail, in accordance with sec. 74. Division Court Act, or would it be sufficient to state the clause as follows?

To amount of attorney's bill, rendered in detail, on —— day of ——, A. D. ——, in accordance with the statute in such case made and provided $00 00

A bill has to be delivered in detail one month before action brought, and it seems to be unreasonable and troublesome to state the account in full with the summons, when it is not necessary for plaintiff to prove *contents of bill, but only* to prove compliance with the act, and amount of bill rendered.

By answering the above, you will much oblige

Yours truly, D. C.

[It is not necessary to attach to the summons a copy of the bill in detail, in any case where it has been already served on the defendant. The only difference between an attorney's bill and any ordinary account, in this respect, is, that by a special provision of law the former has to be rendered at least a month before being placed in suit, and this irrespective of the court in which the action for its recovery must be brought. We believe our correspondent's form of statement in the case put to be the proper one.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., *Reporter to the Court.*)

In the matter of Frederick Stewart MacGachen, applying to be admitted as an Attorney and Solicitor

Articled clerk—Service—Expiration of Articles less than fourteen days before term.

The time of a clerk articled after the first of July, 1858 must expire fourteen days before the term in which he seeks to be admitted for the affidavit of due service cannot be accepted at a later period though before his examination.

Where M. therefore entered into articles for a year on the 25th of January, 1860, and Hilary term began on the 4th of February, 1861.

Held, that he could not be admitted in that term. Hilary Term, 1861.

Mr. MacGachen, who was called to the bar in England by the society of the Inner Temple on the 8th of June, 1849, entered into articles on the 25th of January, 1860, with a practising attorney in this province, binding him to serve as a clerk for one year, in order that he might, after completing such service, be admitted an attorney, under Consol. Stats. U. C., ch. 35, sec. 2.

These articles expiring on the 25th of January, or rather, perhaps, on the 24th of January, 1861, there were not fourteen days between the time of service being completed and the commencement of Hilary Term, 1861, which began this year on the 4th of February, and it was therefore not in the power of Mr. MacGachen to comply with the third section of the act, which requires that such candidate for admission shall, at least fourteen days next before the first day of the term in which he seeks admission, leave with the secretary of the Law Society his contract of service, and an affidavit of due execution thereof, and of due service thereunder. See also secs. 5, 10, 24.

The society in consequence hesitated to grant him the certificate provided for in the tenth section, and made a special note of the facts in a certificate which they did grant of his having passed an examination as to fitness; and requested the consideration of the court upon the point whether M. MacGachen could be legally admitted.

The certificate stated that fourteen days before the commencement of the term the said articles, with an affidavit by Mr. MacGachen of due service thereunder up to the 19th of January, 1861, were left with the secretary of the Law Society; and that subsequently, but less than fourteen days next before the first day of the term, and after the expiration of the term mentioned in said articles, and before his examination, affidavits of himself and of the attorney to whom he was bound, proving that he had actually served and been employed by such practising attorney during the whole of his term of service, were presented to the convocation.

Read, C., appeared for the Law Society, and *C. S. Patterson*, for the petitioner

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

We think the statute does not authorise the admission during the present term, since Mr. MacGachen could not make and has

not made an affidavit fourteen days before the term of having duly served under his articles, which must be taken to mean that he had completed his service for a year.

If it occurred to the legislature when they were passing the act that by requiring such affidavit to be furnished fourteen days before the term they would in some cases be exposing the candidate for admission to the loss of a term, they might perhaps have provided against that by allowing that affidavit to be filed at any time before he presented himself to be sworn in; but the act does not so provide; it rather affords evidence that the legislature was disposed to guard against this inconvenience, except in cases of persons who had entered into articles before the 1st of July, 1858. See sec. 54.

There is no room for any latitude of construction in regard to this requisition of the statute, as there necessarily must be in some degree with respect to what constitutes service within the meaning of the act. It is quite clear that consistently with the statute, so far as regards the year's service being duly completed, the candidate must be in a situation to make the affidavit fourteen days before the term begins.

It will only be necessary that hereafter, in view of the possible loss of a term, care should be taken to enter into the contract of service a sufficient number of days before the term to escape the difficulty of not leaving fourteen clear days between the expiration of the articles and the term that will follow next after.

HARRISON v. BREGA.

Registrar—Omission of mortgage in certificate—Action therefor—Notice of action and limitation—Consol. Stats. U. C., chaps. 126, 89—Damages—Costs of suit by first Mortgagee.

A registrar being applied to by the plaintiff for a certificate of the registries on a lot, gave one in which he omitted to mention a mortgage for $6.0, prior to that which the plaintiff purchased, supposing it from the certificate, to be a first encumbrance. The first mortgagee obtained a decree for sale, and the plaintiff purchased the land at less than would satisfy the two mortgages, but he soon afterwards sold at a considerable advance so that in the end he would receive all that he had paid for his mortgage. In an action against the registrar for this omission in his certificate, the jury gave $500 damages.

Held, that the registrar was not entitled to notice of action, and that the six months' limitation clause did not apply, for though an officer within the meaning of the act, Consol. Stat. U. C., ch. 126, this was not an act committed, but a negligent omission.

Held, also, that the damages were moderate, the plaintiff having in fact sustained loss to the full amount of the first mortgage.

The plaintiff having been made a party to a suit in chancery on the first mortgage endeavoured to obtain priority, but failed in his defence, and was compelled to pay costs. Whether these costs could be recovered from the registrar was a point raised, but not decided, as it was uncertain whether they were included in the verdict. [H. T., 24 Vic.]

The plaintiff sued defendant, who was registrar for the county of Peel, for damages which he alleged he had sustained from the defendant having given an erroneous certificate as registrar of the state of the title to a certain parcel of land, upon which a mortgage had been given, and which mortgage the plaintiff proposed to purchase, and did purchase, relying upon the accuracy of the registrar's certificate.

The declaration contained two counts, but the first only was relied upon at the trial, and the other was abandoned.

The first count stated in substance that on the 15th day of July, 1857, one Robert Campbell had made a mortgage of certain 175 acres of lot 6, in the second concession south of Dundas street, in the township of Toronto, to James Farrell and his assigns, to secure £600, with interest, which mortgage was registered by defendant on the 15th of July, 1857: that the plaintiff agreed afterwards to purchase the said mortgage from Farrell, for a certain sum of money to be paid for the same, provided it should be found by search at the registry office that this was the first incumbrance upon the land, as Farrell had represented it to be: that on the 1st of September, 1857, the plaintiff required the defendant, as registrar, to search into the title, and to send a certificate, and paid him therefor; and the declaration charged that the defendant did not carefully search, and did not send a true certificate of the state of the title, but neglected his duty in that behalf, and erroneously and untruly certified that the mortgage to Farrell was the first undischarged mortgage or incumbrance created by Campbell on the land, or any part of it, which had been registered in his office: that the plaintiff relying upon this, and having no knowledge to the contrary, bought the mortgage from Farrell, and paid for it the price agreed upon, and took from him an assignment, which was duly registered on the 29th of September, 1857, whereas in truth Campbell, before he gave the mortgage to Farrell, had, on the 21st of August, 1854, made a mortgage on the same land to one James Spurrill, for £150, payable with interest, which mortgage was on the 29th of August, 1854, duly registered by defendant, as registrar, but all mention of it omitted in the certificate given by the defendant to the plaintiff of the state of the title.

The plaintiff then averred that that the debt of Campbell to Spurrill not being paid when due, Spurrill, after the assignment had been registered, filed a bill in Chancery to obtain a sale of the land: that the plaintiff, being made a defendant in that suit, endeavoured to make good his claim to priority as a *bonâ fide* purchaser of the second mortgage for value without notice of the first, but failed in his defence: that the land was ordered to be sold to pay Spurrill's debt, interest, and costs, in the first place, and that when this was done, and the surplus of the proceeds applied towards the satisfaction of the plaintiff's mortgage, interest, and costs, which then amounted to £749 19s., it left a deficiency of £238 19s 11d., and the plaintiff averred that he had thereby lost that amount, and interest from the 12th of October, 1860.

The defendant pleaded not guilty, by statutes, Consol Stats. U. C., ch., 126, secs. 9. 10, 11, 20, and ch, 89, secs. 9 to 13 inclusive, and sec. 67.

At the trial at Toronto before *McLean*, J., the plaintiff produced defendant's certificate, as registrar, dated the 23rd of September, 1857, in which there was no mention made of the mortgage to Spurrill, and it was proved that long afterwards, when the plaintiff was informed of that mortgage, and of the intention of Spurrill, to file a bill, his son, who transacted business for him as his attorney, wrote again to the registrar to request another search and certificate, and on the 11th of February, 1859, the defendant sent him another certificate in which also Spurrill's mortgage was omitted.

To both papers the registrar certified at the foot that they were correct to the best of his knowledge and belief.

A few days after the last certificate was received the plaintiff's son saw the mortgage given to Spurrill in the hands of his Solicitor, and wrote again to the defendant stating this; and he then received from him a statement of the registry of Spurrill's mortgage on the 29th of August, 1854, with the remark, "The above was overlooked in consequence of not having been marked in the index.

It was proved at the trial that the plaintiff, when he bought Farrell's mortgage, did not give him the full £600 and interest for it: that Farrell's mortgage contained the usual covenant by Campbell to pay the money, but that Campbell was now insolvent: that when the land was sold by decree of the court of Chancery it brought £760: that the plaintiff afterwards bought it of the gentleman who had bid it off, giving him £25 for his purchase, and paying the price bid himself, and that he soon afterwards disposed of the land for £1 000, of which £600 had been paid, so that the plaintiff would probably at least have received the full amount of the mortgage money, without bringing this action, but he would have paid more for it than he contemplated, and more that he would have had to pay if the defendant had done his duty accurately.

The defendants counsel moved for a nonsuit on the grounds that no notice of action had been given, and that the action should have been brought within six months.

The learned judge reserved leave to move afterwards on these exceptions, and told the jury that the defendant was liable for the damages occasioned by his mistake or omission: that by the sale which took place under the decree in Spurrill's suit, the lands passed into the hands of a stranger, at a price which would have left the plaintiff's debt unsatisfied to the amount of £238 10s., and that the plaintiff having idemnified himself to a great extent, if not fully, by his subsequent purchase of the land from another, and his resale of it an advanced price, was not a matter of which the defendant was entitled to take advantage. He held that the plaintiff was entitled to recover the costs of his defence in the Chancery suit, but desired the jury to give such amount of damages as they might think reasonable upon the evidence.

The jury gave a verdict for the plaintiff, and $500 damages.

M. C. Cameron obtained a rule *nisi* for a nonsuit on the leave reserved; or for a new trial on the law and evidence, for excessive

damages, and for misdirection, contending that unless the plaintiff had sustained damage he was not entitled to recover, and at any rate not for more than his actual damage from the whole transaction, and that the true estimate of damage was the amount by which the two mortgages exceeded the actual value of the land. He contended also that as the mortgage given to Campbell contained a covenant to pay the money, and as Farrell in his assignment to the plaintiff had also covenanted with the plaintiff that the mortgage debt should be punctually paid, it was incorrect to charge the jury that those covenants did not affect the plaintiff's right to recover substantial damages. He objected also that the plaintiff had no claim to recover his costs in Chancery in the foreclosure suit brought by Speers.

Eccles, Q. C., and *R. A. Harrison*, shewed cause. They cited Consol. Stats. U. C., ch. 126, secs. 1, 9, 10, 11, 20; ch 89, secs. 2 to 13 inclusive, sec. 67; Common Law Procedure Act, secs. 3, 4; *McWhirter* v. *Corbett*, 4 U.C.C.P. 203; *Wallace* v. *Smith*, 5 East 115; *Greenway* v. *Hurd*, 4 T. R. 553; *Umphelby* v. *McLean*, 1 B & Al. 42; The *Queen* v. *Kelk*, 1 Q. B. 660; *Davis* v. *Curling*, 8 Q B. 286; *Cargue* v. *The London and Brighton R. W. Co.*, 5 Q. B. 747, 754; *Kennet and Avon Canal Navigation* v. *Great Western R. W. Co.*, 7 Q. B. 824; *March* v. *Port Dover and Otterville Road Co.*, 15 U C Q.B. 138; *Fletcher* v. *Greenwell*, 4 Dowl 166; *Waterhouse* v. *Keen*, 4 B. & C. 200; *Shatwell* v. *Hall*, 10 M. & W. 523; *Palmer* v. *Grand Junction R. W. Co.*, 4 M. & W. 749; *Atkins* v. *Banwell*, 3 East 92; *Henly* v. *The Mayor &c., of Lyme*, 5 Bing. 91, 107; *Gibbs* v. *Trustees of the Liverpool Docks*, 3 H. & N. 164; *Sutton* v. *Clarke*, 6 Taunt. 29; *Gladwell* v. *Stegall*, 5 Bing. N. C. 733.

M. C. Cameron, contra, cited, *White* v. *Clarke*, 11 U C.Q.B. 137; *Smith* v. *Shaw*, 10 B. & C. 277; *Hodge* v. *Earl of Litchfield*, 1 Bing. N. C. 492; *Joule* v. *Taylor*, 7 Ex. 58

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

The first question to be determined by us is whether the defendant, as a registrar, was entitled under the Statute Consol. Stats. U C., ch. 126, sec. 20, to the protection given to justices of the peace and other officers as to notice of action, and the time within which actions should be brought. No doubt the registrar is a public officer, and if, after carrying out or attempting to carry out any powers given to him by the act, he should be charged with malfeasance, we do not at present see how it could be denied that he would be entitled to the protection given by that act, not merely to justices of the peace, but to every other officer fulfilling a public duty. But we think the statute is not to be extended to cases of mere neglect or malfeasance. Secs. 9 and 10 of the act indicate that, we think, plainly.

The case of *Davis* v. *Curling*, 8 Q B. 286, is different in its nature from the present, and does not support the defendant's claim to notice. The court there said that the defendant, a road surveyor, was charged with the positive act of laying gravel upon the road, and they did not consider that his doing so, and allowing it to remain there incumbering the road, could be reasonably regarded as a mere omission of a duty, as negligence or nonfeasance, and nothing else. They thought that the officer must be regarded as having committed a wrong in executing the authority given to him by the act, and so came within the words of the clause, which gives the protection where a person is sued for an act *committed* by him in pursuance of the statute, or under the authority of the statute.

The principal cases which bear upon this question were cited in the argument of this case. We have looked into them all, and in our opinion none of them goes so far as to hold a notice of action necessary in this case, or that the limitation of time for suing applies. Both points in fact turn upon the same question of construction.

We do not think that we can hold that registrars are not officers within the act, but what this registrar is charged with is not an act *committed* in carrying the law into effect according to his erroneous idea of his duty, but a negligent omission to do what he had been called upon to do, by a person who had employed his services in his official situation, and paid him for the duty required of him. The late Chief Justice of the Common Pleas rightly stated the distinction, we think, in *McWhirter* v. *Corbet et al.*, 4 U.C.C.P. 208, when he said that though the sheriff in acting upon a writ of *fieri facias* was fulfilling a duty imposed upon him by the court under the common law, yet it was in a private matter, and that if it was intended to be included in the protection to public officers given by statute 14 & 15 Vic., ch. 54, it wanted explanation, by which he meant that the language of the statute did not make the application sufficiently clear.

As to the unfortunate omission in this case giving a good ground of action to the individual who has suffered damage by it, there can be no doubt we think on that point. A case like this must clearly come within the language used by the Court of Common Pleas in England, in their judgment in the case of *Henly* v. *The Mayor of Lyme*, 5 Bing. 107, 108; and it does not appear to us that there is any legal objection to the amount of damages. The jury were in fact not disposed, it would seem, to bear hard upon the defendant. Their verdict shews that, and they were right, for in the multitude of entries to be made by a registrar there is always a possibility of error The mortgage to Spurrill, it has been stated, escaped observation in the searches made, from the accident that the entry in the index was made in a wrong column, being included in entries of lots on the south side of Dundas street instead of on the north side This might well happen, though it cannot be denied that it was an error which implies negligence, and that the person suffering from it has a claim to be made good.

No doubt it was pressed upon the consideration of the jury, as it reasonably might and naturally would be, that notwithstanding the plaintiff had his incumbrance to pay off, of which he had no knowledge, though he had taken the proper means to ascertain the truth, yet that he was after all in fact no loser by the whole transaction, for that he sold the property at last for an advanced price, which saved him from all loss and did even more than that. If the jury, in view of that circumstance, had given even less damages than they did, we should not have been surprised; but they took a reasonable course in giving the moderate amount which they did, though it was probably more than the defendant under the circumstances expected he would have to pay; and we cannot interfere on the ground that in fact the plaintiff sustained little damage, if any, or in fact he did suffer damage just to the extent of the incumbrance of the first mortgage, in this sense, that but for the defendants mistake his bargain would have been so much more profitable to him than it turned out to be.

As to the defendant's costs in the Chancery suit, we cannot tell that the jury allowed them, but must rather infer that they did not, since they gave little more than half the amount of the first mortgage, which had to be paid out of the proceeds of the sale of the property.

Rule discharged.

IN RE ALLAN, &c.

Articled Clerk—Application for admission as an Attorney.—Requisites.

An applicant for a certificate of fitness prior to admission as an attorney and solicitor of the courts of law and equity in Upper Canada must leave with the secretary of the Law Society, not only the documents mentioned in sub. sec. 4 of sec. 3 of Con. Stat. U. C., cap. 35, but also his own affidavit of due service, at least fourteen days next before the first day of the term in which he intends to seek admission.

Where therefore an applicant neglects to make his affidavit of due service until after the first day of the term in which he sought admission, his application failed.

(E. T. 1861.)

Mr. Allan during the present term made application to be admitted an attorney and solicitor of the different courts of law and equity in Upper Canada.

He left his contract of service, affidavit of execution, and with one exception all other papers necessary under the statute, and rules of the law society prior to admission, with the secretary of the Law Society, at least fourteen days before the first day of term.

The exception was his own affidavit of due service which he did not file until after the commencement of term. The question then arose whether or not this affidavit should not have been filed with the other papers mentioned at least fourteen days before the term as a necessary part of his application to be admitted an attorney and solicitor.

The society, in consequence, instead of granting him the ordinary certificate, gave to him a certificate setting forth the special circumstances, which certificate he presented to the court of Queen's Bench. Whereupon the following judgment was delivered by

McLEAN, J., The affidavit of service of the master is sufficient if the affidavit of the clerk was made and presented at the time of the clerk's application for examination.

The time of such application is not mentioned in the statute and must depend on the rules of the Law Society, and if by those rules the application for examination is considered as made on the first day of term, then Mr. Allan should receive the usual certificate, but if it is considered as made fourteen days before term, then the statute is imperative, and the affidavit of Mr. Allan on the first day of this term is too late.*

REGINA v. THE TRUSTEES OF SCHOOL SECTION NO. 27, IN THE TOWNSHIP OF TYENDINAGA, IN THE COUNTY OF HASTINGS.

School Trustees—Mandamus—Attachment—Practice.

A mandamus *nisi* having been issued to school, trustees to levy the amount of a judgment obtained against them, no return was made and a rule *nisi* for an attachment issued In answer to this rule one trustee swore that he had always been and still was desirous to obey the writ, and had repeatedly asked the others to join him in levying the rate, but that they had refused. Another swore that owing to ill health, with the consent of his co trustees and the local superintendent, he had resigned his office before the writ was granted.

The court, under these circumstances, discharged the rule *nisi* as against these two, on payment of costs of the application, and granted an attachment against the other trustee, who had taken no notice either of the mandamus or rule.

(H. T., 1861.)

On the 18th of October, 1860, a writ of mandamus was issued from this court, directed to these school trustees, commanding them to levy and collect, or cause to be levied and collected, from the freeholders and householders of the school section No. 27, in Tyendinaga, a sum of money sufficient for the payment and satisfaction of two certain judgments recovered against the trustees of the said school section by one John Waterhouse, for the building the school-house for the said school section, or to show cause to the contrary on the first day of Michaelmas Term then next The writ had been ordered in Trinity Term, 1860.

Copies of this writ, it was sworn, personally served on the 23rd of October last, upon William Cross and James Glass, two of the trustees of the said school section, and upon Robert Gillespie, another of the trustees, the original writ of mandamus being shewn to each at the time of service.

In Michaelmas Term 1860, an affidavit was made that on search in the Crown office in Toronto, on the 26th of November, it did not appear that the writ of mandamus had been returned as filed. And the court, upon application of Mr. *Sisson*, the counsel for Waterhouse, ordered a rule to issue upon the trustees to shew cause why an attachment for contempt should not issue against them for not returning the writ.

In answer to this rule, during this term, Cross, one of the trustees, made an affidavit that he had always been and still was willing and desirous to levy the money necessary for satisfying the judgments obtained by Waterhouse, as commanded by the writ of mandamus, and had repeatedly requested Glass and Gillespie the other trustees, or either of them, to unite with him in making a rate for that purpose: that he had done this both before and after the mandamus came to him, but that they had always refused, and that he could not alone impose and levy the necessary rate. He made a return also to the writ, under the corporate seal, referring to his affidavit for his reason for not executing the command of the writ, and his affidavit and return were annexed to the mandamus.

James Glass, another of the trustees, in answer to the rule *nisi* for attachment, filed an affidavit to the effect that, being in very ill health at the time of the election of school trustees in January, 1860, he declined the office, protesting that he could not serve in it on account of the state of his health, but that he was nevertheless chosen: that his ill health continuing, he solicited permission to resign, not being able to discharge any of the duties; and he annexed a letter received from his co-trustees, Cross and Gillespie, dated the 9th of February, 1860, and allowing him to resign for for the reasons given, and another letter from the local superintendent, dated the 14th of March, 1860, consenting to his being released from his duties as school trustee.

Mr. Glass, however, took no notice of the writ of mandamus till he made his affidavit on the 4th of February, 1861, nor Mr. Cross till he made his affidavit on the 9th of February, 1861.

Mr. Gillespie did not appear to have taken any notice of either the mandamus or the rule *nisi* for attachment.

Crombie appeared for the defendant Glass. *O'Hare* for defendant Cross.

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

Both Cross and Glass failed to pay due obedience to the writ by returning to the court the reasons which had prevented their doing what they been directed to do. This may have arisen from their relying on the sufficiency of the reasons, and not being advised of the steps on which it was still incumbent on them to take.

As to them, therefore, we may discharge the rule *nisi* for attachment, on their paying the costs of the application

As to the other defendant, Gillespie, we grant the attachment. We might have ordered a peremptory mandamus, when no return had been made in due time to the first; but an attachment being moved for it is proper to grant it against the member of the corporation (Gillespie) who has been guilty of the contempt of wholly disobeying the mandamus, neither doing the act, nor manifested any readiness to do so, nor assigning any cause for not doing it.

CHAMBERS.

(*Reported by* ROBT. A. HARRISON, Esq., *Barrister-at-Law.*)

HENRY MCDERMOTT v. JOHN STANLEY KEELING.

Ejectment—Appearance of persons other than named in writ—Mortgage.

Held, that a mortgagee out of possession is entitled, under sec 9 of Con. Stats. cap. 27 (the act respecting ejectment), to be admitted to defend an action of ejectment brought against his mortgagor. (April 21, 1861.)

This was an action of ejectment. *Mr. Harrison* obtained a summons calling on the plaintiff, under and pursuant to sec. 9, cap. 2, of Con. Stats. of Upper Canada, to show cause why Alex. Thomas Montgomery should not have leave to appear and defend the action.

By sec. 8, cap. 27, of Con. Stats. of Upper Canada (the act respecting ejectment), it is provided that "the persons named as defendants in the writ, or any of them, may appear within the time appointed;" and by sec. 9 of the same act, that "any other person, not named in the writ, may, by leave of the court or a judge, appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant."

The summons was obtained upon affidavit of Montgomery in which he stated that the action was brought by the plaintiff, claiming title under a deed from Mary Gale, to recover possession of the rear part of lot 6, in the Maitland concession of the township of Goderich; that he (Montgomery) bought the land at sheriff's sale, under an execution against the lands of one William Mathieson, in or about the year 1854; that Mathieson bought the land from said Mary Gale; that there was some defect in the deed from Mary Gale (a married woman) and her husband to Mathieson; that on the 14th February, 1860, he (Montgomery) sold and conveyed the land to defendant Keeling, who went into possession; that defendant executed a mortgage on the land in favor of him (Montgomery), for £1,316, balance of purchase money; that at the time of the sale of the land from Montgomery to defendant, the plaintiff, McDermott, who is an attorney, acted as solicitor for himself (Montgomery) and defendant; that while so acting as such solicitor, he (McDermott) became aware of the defect in the deed from Mary Gale to Mathieson; that subsequent to the mortgage from defendant to Montgomery, plaintiff took and received from defendant a mortgage on the land; that some time after he took the last mentioned mortgage, he obtained from Mary Gale a deed of the land to himself, for the nominal consideration of four dollars, on which deed the action was brought: that he obtained the deed from Mrs. Gale by fraudulent misrepresentation; and that defendant was acting in collusion with plaintiff, in order to cut out his (Montgomery's) mortgage, and so destroy his security on the land.

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* It is by rule of the Law Society expressly declared that "all *applications* for certificates of fitness for admission as attorney or solicitor, shall be by petition in writing, addressed to the Benchers of the Society in convocation, and every such petition, *together with the documents required by*, and fees payable to this society, shall be left with the secretary of the society at Osgoode Hall, *on or before the third Saturday next before the term in which such petition is to be presented.*" Mr. Allan's application, therefore, for admission during the present term failed.

Plaintiff, in reply, filed an affidavit contradicting the assertion that when Montgomery sold the land to Keeling and took back a mortgage, he (plaintiff) acted as solicitor for Montgomery, alleging that he acted for the defendant alone; contradicting the assertion that while acting as solicitor for defendant, he became aware of the defect in the title of Montgomery; alleging that he did not discover the defect until a considerable time after the sale of the land from Montgomery to defendant, and until long after he had advanced to defendant the amount for which defendant gave plaintiff a mortgage; that upon the representation of Montgomery, to the effect that the title was perfectly clear, defendant dispensed with an examination of title; that for the purpose of protecting his own interest, he (plaintiff) procured a deed of the property from Mary Gale; that he never, to his knowledge, saw Mary Gale, or had any communication with, or made any representation to her, directly or indirectly; that immediately on receiving a deed from Mary Gale, he made it his business to see Montgomery, and offered, in order to guard against the accident of his (plaintiff's) death, to execute any document necessary to protect his (Montgomery's) mortgage; and denying collusion between himself and defendant. An affidavit of defendant, and another of Bouchier Eaton, an articled clerk in the office of plaintiff, corroborating the affidavit of plaintiff in different particulars, were also filed.

McBride showed cause, and contended, first, that as Montgomery's affidavit was contradicted by those of plaintiff and defendant, his summons must be discharged; and, secondly, that Montgomery was not sufficiently in possession to be entitled to make the application. On the latter point, he referred to the language of the section, which required an affidavit from applicant "showing that he is in possession of the land either by himself or his tenant;" and cited *Thompson* v. *Tomkinson et al.*, 11 Ex. 442. He also submitted, that a mortgagee out of possession is not entitled to the benefit of the section, as he cannot be said to be in possession either by himself or his tenant.

Harrison, contra, submitted, first, that sec. 9 of Con. Stat. U.C. cap. 35, under which the application was made, is in substance the same as the former act, 11 Geo. II. cap. 19, sec. 13; secondly, that in the construction of the latter act, the word "landlord" was held to extend to all persons, including mortgagees out of possession, claiming title under or in privity with defendant (*Doe dem. Hebblethwaite* v. *Roe*, 3 T. R 783; *Lovelock dem. Norris* v. *Doncaster*, 4 T. R. 122; *Doe dem. Tillyard* v. *Cooper*, 8 T. R. 645; *Doe dem. Pearson* v. *Roe*, 6 Bing. 613); third, that the possession now necessary need not be more actual than that formerly required, but the contrary, the former statute using the word "landlord," while the present act uses the expression "any other person" (*Butler* v. *Meredith*, 11 Ex. 93; *Croft* v. *Lumley*, 4 El & B. 608): fourth, that the court will not try questions of title on affidavit, especially if collusion suggested, but allow applicant to defend where he is really much interested in the result of the suit (*Harrington* v. *Harrington*, 3 U.C. L. J. 30; *Webster* v. *Horsburgh*, 3 U.C. L. J. 32).

DRAPER, C. J.—I think the order should go to allow Montgomery to defend. The defendant may be treated as in possession under Montgomery, and as between *them* a tenant to him. Then the defendant seems to be willing to aid the plaintiff, which will unavoidably be a detriment to Montgomery's interests. The application is plainly that of Montgomery, who appears to be the first mortgagee of defendant, the plaintiff having taken a subsequent mortgage from him.

I therefore grant the order, on payment of costs; Montgomery to appear forthwith, and take short notice of trial if necessary.

Summons absolute.

ROBERT A. LAND v. JASPER T. GILKISON AND HUMPHREY ARTHUR

Ejectment—Writ of injunction refused.

Held, that the Common Law Procedure Act does not authorize the issuing of a writ of injunction in an action of ejectment. The law is now settled. Decisions to the contrary in Upper Canada are no longer to be followed.

(April. 1861)

This was an action of ejectment. It appeared that defendant Arthur executed a mortgage to the defendant Jaspar T. Gilkison, on certain land in the township of Barton, which mortgage defendant Gilkison subsequently assigned to the plaintiff.

Default having been made in the payment of the mortgage money, this action was brought.

Plaintiff, on an affidavit that the defendant threatened to remove the buildings, dwelling houses and fences off the mortgaged land, applied for a writ of injunction.

Harrison, in support of the application, cited *Robins* v *Porter*, 2 U.C. L. J. 230; *Bell* v. *White*, 3 *Ib* 107; *Fraser* v. *Robins*, *Ib.* 112.

BURNS, J.—It is not now the practice to allow the issue of writs of injunction in actions of ejectment. At one time I held differently; but since *Baylis* v. *Le Gros*, 2 C. B. N. S. 318, I have always refused applications for writs of injunction in actions of ejectment. That case decides that the Common Law Procedure Act does not authorize the issue of the writ in any such action. Most, if not all of my brother judges concur with that decision.

BOULTON v. RUTTAN.

23 Vic. Cap. 42 s. 4.—*Reference for Trial to County Judge—When.*

Held, that under statute 23 Vic., cap. 42, sec. 4. to warrant a judge of the superior courts in referring a cause for trial to a judge of the county court, the writ must not only be issued from, but venue laid in the county to which the reference for trial is required

Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a judge would direct the trial of the issue before a county court judge against the consent of the defendant.

(May 29, 1861.)

O'Brien obtained a summons to shew cause why this case should not be tried before the judge of the county court of Northumberland and Durham. The writ was taken out at Cobourg but the venue laid in Norfolk. The defendant pleaded a special plea, which plaintiff in his affidavit in support of the summons stated was not true.

Beaty shewed cause, filing an affidavit of the defendant. He objected to the summons on the ground that the venue being laid in Norfolk the cause must, could not be referred to a judge of another county; and further, that on the facts and pleadings, as appeared by the papers filed, the cause was not such a one as came within the meaning of the statute.

O'Brien, contra, contended that the statute provided that the cause should be referred to the judge of the county court where action was *commenced*; that the suit was commenced when writ was issued; that the statute in cases of this sort did away with the rule of law as to trying a cause where the venue is laid; that the plea even if true, shewed no defence to the action; and that the cause could be more satisfactorily tried before the judge of county court. He also applied to amend, if necessary, the summons by referring the cause for trial to the county judge of Norfolk, or by changing venue to Northumberland.

RICHARDS, J.—The statute requires that the issue shall be tried by the judge of the county where the action was commenced, "and such action shall be tried there accordingly, and the record shall be made up as in other cases."

I take it for granted that the issue must be tried in the county where the venue is laid, unless it appears from the statute that the legislature intended some other course should be taken. It is doubtless requisite that the issue should be tried in the county court of the county where the action was commenced, but as the venue here is not in that county, it seems to me that the case cannot properly be tried there, whilst the venue is laid in another county.

The plaintiff asks me now to make an order to amend the declaration by changing the venue to the United Counties of Northumberland and Durham, and then to make his summons absolute. It is not desirable at any time to make an order for a different object than that sought in the summons, though it is sometimes done when it is with a view to carry out the same purpose that the summons seeks to accomplish. In this case, however, the only object to be gained is to get down the trial sooner than would be the case if the action were tried in the superior court.

The plaintiff sues on a note which he apparently acquired after it became due. The defendant entertains a strong opinion that the plaintiff is not entitled to recover, and is most anxious to

have the cause tried before a judge of one of the superior courts, and swears that difficult questions of law and fact are likely to arise.

Under these circumstances, without expressly refusing to grant the order because the case can be more satisfactorily tried before a judge of one of the superior courts, I shall refuse to amend the declaration by changing the venue to Northumberland and Durham; and in the view I take of the statute and the rule of law as to trying a cause in the county where the venue is laid, I must refuse to make the order.

As the point is new the summons will be discharged without costs.

Where a defence is one not merely for time, it may be doubtful, particularly if the amount is large, if a judge would direct the trial of the issue before the county judge against the consent of the defendant.

Summons discharged without costs.

ELECTION CASES.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

(Before His Honor A. LOGIE, County Judge of the County of Wentworth.)

THE QUEEN ON THE RELATION OF HENRY LUTZ AGAINST JOHN W. HOPKINS.

Municipal Election—Duty of Returning Officer—Alteration of Vote—Qualification of Voters—Court of Revision—Power to alter Roll—Close of Poll—Tie—Duty of Returning Officer—Scrutiny.

If a Returning Officer upon discovering an error in the entry of a vote has the power to make the necessary correction he must make it promptly, and only in a case where the mistake in making the entry is beyond a doubt.

It is the duty of the Returning Officer at the close of the poll to add up the number of votes given for each candidate, and publicly to declare the state of the poll and if there is a tie or equality of votes to declare his intention to vote, and the name of the candidate for whom he gives his vote.

Quære did the Returning Officer under the circumstances stated in this case properly discharge that duty?

Where the watch of the Returning Officer was used on the first day to open and close the poll, and again to open it on the second day without objection as to its correctness, the time marked by his watch may be properly taken as the correct time at the close of the poll.

If a voter in good time present himself at the poll for the purpose of voting he has a right to have his vote recorded, though by the delay of the opposite party in obstructing his purpose it may be a minute after the hour appointed for the close of the poll when the vote is recorded.

Where a voter had parted with the property in respect to which he voted before the time of the election, held that he had no legal vote.

A Court of Revision has no power by mere motion at the instance of a member of the court, to order any names that they think are omitted or wrongly inserted, to be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try.

Names improperly added to an assessment roll by a Court of Revision will, in the event of a scrutiny at or an election be struck off

A person otherwise duly qualified to vote at a municipal election is not disqualified by the simple fact of a change of residence from one ward to another in the same Township

Quære, as to the distinction between mere "householders" and "tenants," for the purpose of voting at a Municpal election?

[23rd February, 1861.]

The relator in his statement set forth, that defendant had not been duly elected, and unjustly usurped the office of Township Councillor for ward number four of the Township of Saltfleet, in the County of Wentworth, under the pretence of an election held on the seventh day of January, one thousand eight hundred and sixty one, and following days, at Burlington Beach, in the said ward number four, in the Township of Saltfleet, in the said County of Wentworth; and that the relator was duly elected thereto, and ought to have been returned at such election, and declaring that the said relator had an interest in the said election as a candidate, stated the following causes why the election of defendant to the office should be declared invalid and void, and relator only elected thereto.

First. That said election was not completed according to law in this:

1. That the returning officer for the said ward (Wilber W. Waterbury) at the close of the poll for the election of councillor for the said ward number four, did not add up the number of votes set down for the relator and defendant, the respective candidates for councillor for the ward, and publicly declare the same, and in case of an equal number of votes give the casting vote for one of the said candidates so as to decide the election; but on the contrary entered his own name as an elector, and then declared defendant councillor for the said ward, without first adding up the number of votes set down for relator and defendant or either of them.

2. That the last vote, other than that of the said returning officer as set down for the defendant, was so set down after the hour of four of the clock in the afternoon of the eighth day of January last, being the second and last day of the said election.

3. That the said returning officer in his certificate attached to his return of the said election to the clerk of the Municipality of Saltfleet, did not state for what ward or for what year the said John W. Hopkins was elected.

Second. That the defendant was not duly or legally elected or returned as councillor for the said ward in this:

1. That at the instance of the defendant there was illegally and fraudulently entered upon what purports to be the last revised assessment roll for the said ward number four, as electors, the names of seven unqualified persons, namely, Chas. Bates, Robert Fletcher, Ashman P. Coombs, Samuel Bateman, Philip Beal, Geo. Snook, and John Forbes; and that three of the unqualified persons, namely, Robert Fletcher, Ashman Coombs, and Thomas Bateman, tendered their votes at the election for the said ward number four, and that the returning officer set down their names and votes for the defendant, although the votes were duly objected to previous to the same having been entered or given.

2. That the list of qualified electors furnished by the clerk of the said Township to the returning officer contained the names of of several persons who were not rated for ratable real property upon the last revised assessment roll as the same was passed by the Court of Revision, and three of the said parties, namely, the parties last aforesaid, gave their votes for the defendant, and the same were so set down by the returning officer, although duly objected to previous to the same having been entered.

3. That the said returning officer, upon the application of the defendant, erased the vote of one Thomas Armstrong which had been set down in the poll book for the said Henry Lutz, and entered the same for the defendant, although the vote had been so entered for the relator the day previous to the same having been erased, and without application having first been made by the elector to have the same so altered as aforesaid.

4. That the defendant did pay, or caused to be paid, or promised to pay, to one or more of the electors who voted for him at the said election, a consideration or reward for the vote he or they tendered and gave at the said election.

5. That the defendant was appointed by the Municipal Council of the said Township of Saltfleet, an officer or commissioner for expending and paying certain monies belonging to the said Municipality, and that a portion of the monies was still retained by the defendant, and that he was at the time of the said election, and still is liable to the said Municipality, for the payment of the monies.

6. That the defendant can and may claim a remuneration from the said Municipality for his services as such commissioner or officer as last aforesaid.

Third. That the relator should be declared duly elected to the said office of township councillor for the said ward number four in the said Township of Saltfleet, because he had a majority of the legal votes set down for the respective candidates at the said election.

The evidence given was oral, and briefly as follows:

FOR RELATOR.

1. *George Lotteridge.*—Was present at the close of the election on the second day, and was near the returning officer; did not hear him declare there was a tie before he, the returning officer, voted; heard parties say before one Declos voted that it was four o'clock, and that the poll should be closed.

2. *Robert R. Waddell.*—Saw the name of Thomas Armstrong entered as a voter for relator; by the clock in the house it was after four o'clock when Declos voted; immediately afterwards the returning officer, without making any declaration of the state of the poll, wrote his own name and declared defendant elected; on the second day heard the returning officer had changed the vote of Thomas Armstrong: his father died intestate as to lands in

the ward; his name and that of his brother were entered on the assessment roll as owners of the land; the land had been previously sold by a decree of the Court of Chancery under a judgment against him, but no conveyance settled at the time of the election.

8. *Patrick Crawford.*—Was close by the returning officer on the second day of the election and did not hear him declare the state of the poll before voting; several parties declared it was after four o'clock before Declos vo' d.

4. *William Clarkson.*—Did not own the property in respect to which he voted; was not living on the lot at the time he voted; was not tenant to any one of the lot in respect to which he voted.

5. *Robert Fletcher.*—Did not own the property in respect to which he voted; did not lease it from any one; lived with his father; his father professed to own the house; had no share or interest in it.

6. *Matthew Davis.*—Was Township Clerk of Saltfleet in 1860; at a meeting of the Court of Revision in May, 1860, the names of Ashman Coombs, Robert Fletcher, Robert Bateman, and some others, were put upon the assessment roll; produced the original motion moved and seconded for the purpose of adding the names; no application in writing was made by them or any other person to have their names put on the roll; added the names to the roll in accordance with the resolutions.

7. *William Spear.*—Was assessor of the ward in 1860; did not put the names of Coombs, Bateman and Fletcher on the roll, because they were not living in the ward at the time.

8. *Joseph Declos.*—Had sold the property in respect to which he voted about two months previous to the election; was jostled at the poll, and an attempt made to prevent him reaching the poll.

9. *William Ansley.*—Was present at the close of the election; there was a watch on the table from which the returning officer kept time; heard the returning officer say before Declos came that it only wanted a quarter of a minute to four o'clock; afterwards the name of Declos was put down, when the returning officer made the remark looked at the watch and saw the hand just at four o'clock

10. *John Tuif.*—Voted on Government property, paid no rent, lived on Burlington Beach, paid taxes, occupied a house.

11. *John Livingstone.*—Similar evidence in regard to property as that of last witness.

12. *Frederick Cary.*—The same.

13. *Mortimer Cary*—Was at the election at the close of the poll; was there when Declos voted, it was then four o'clock or as near to it as could be, there was noise and confusion.

FOR DEFENDANT.

1. *W. W. Waterbury.*—Was returning officer; recorded Armstrong's vote, his vote was for defendant but by mistake recorded for relator; mistake discovered shortly after; afraid at the time to alter it, next day did so; just before close of poll had a watch in his hand, observed that it wanted 1½ minutes to four o'clock; recorded Declos' vote before four o'clock. At the close of the poll declared a tie, and recorded his vote for defendant; did not previously add up the votes but knew the state of the poll; great noise in the room at the time.

2. *Henry Waterbury.*—Heard the returning officer declare a tie before he voted.

3. *Thomas Armstrong.*—Voted for defendant, heard that vote by mistake recorded for relator, had left polling place at the time.

4. *Alva G. Jones.*—Was a member of the council when the names were added. such additions are often made, the names were put on with the view of making the parties liable to pay taxes.

5. *Horace Coombs.*—Ashworth Coombs, his brother, came to live on the place for which assessed about the last of April or first of May.

6. *James Williamson.*—Know Francis Lewis; he did not own land for which assessed either as freeholder or householder.

7. *William Spera.*—Andrew Murray not a resident of the Township at time of assessment, William McDowell not a resident at time of assessment.

8. *Ebenezer Jones.*—Know McDowell. he lives in Ramellin; know Andrew Murray, he lives in Township of Barton.

9. *Robert Crosthwaite.*—Corroborated last witness.

FOR RELATOR.

1. *John Martin.*—Saw Declos go in to vote; just before he passed was asked what time it was, looked at his watch and found that it was eight minutes past four o'clock.

2. *George Snook, jun.*—Brother owns the house at Burlington Beach, boarded with him; was assessed with his father for property of which afterwards dispossessed.

3 *Henry Pollard.*—Self and father joint tenants of property in respect of which voted.

4. *James Gage.*—Know Michael Connoly, jun., know his father; think there is some arrangement between them by which the son has an interest in the lease.

5. *Hervard Heales.*—Know Samuel Lewis, he lives with me; has a separate part of the house.

6. *Robert Cross hwaite.*—Know the Connolys, father and son; they removed from the ward in the fall; they live in another ward of same Township.

7. *Ashman Coombs.*—Moved to ward number four from ward number one in May last, was assessed in ward number one for a house.

8. *Samuel Bateman.*—Took five acres from Mr. Nash, went to live there on 1st May; did not make application to any one to have name placed on the roll.

9. *Thomas Cross.*—Know James Waddell, John Livingstone, W. Johnston, Robert Brult, Wm Andrews, John Taif and Alexander Brown; they live on Burlington Beach, are all fishermen except Johnston, who is ferryman at the canal, it is a Government ferry.

10. *David McRae.*—Lives on the beach; has a lease from year to year from Mr. Lotteridge.

11. *John McQuaig*, Superintendent of fisheries for Upper Canada.—James Waddell has no lease; same of Livingston, Johnston, Brult, Andrews and Taif. Brown was in treaty for a lease, but transferred his right to one Perry. Did not take leases until after May, 1860. Believe that John Dynes is a freeholder. None of the others are freeholders. Have a mere right of fishing. The beach belongs to the government Benjamin Sherman, Charles Cary, Frederick Cary, and Nehemiah Cary have leases. Zacharia Cary and William Snook have no leases. The leases were all granted in May last.

12. *Mortimer Cary.*—Know James Waddell, John Livingston, Wm. Johnston, Robert Brult, Wm. Andrews, John Taif and Alex. Brown; all lived on the beach at the time of the election.

FOR DEFENDANT.

1. *George Crosthwaite.*—Know James McCroon, a young man living with his father; has no interest in the property.

2. *Wm. Sperc.*—Assessed James McCroon by his request; did not tell me how to assess him, whether as a freeholder or householder.

3. *Ebenezer Jones.*—Know James McCroon; he told me he had no lease, said he meant to get on the assessment roll that he might have a vote.

Sadlier for relator. *Freeman, Q.C.*, for defendant.

LOGIE, Co. J.—The first point to be decided is as to the right of the returning officer to alter the vote of Thomas Armstrong in the poll book. The cases of *Regina ex rel. Mitchell* v. *Rankin et al.*, 2 U. C., Ch. R. 162, and *Regina ex rel Acheson* v. *Donoghue*, 15 U. C. Q. B., 545, do not in my opinion decide that a returning officer cannot under any circumstances change the entry of a vote in the poll book, but they do shew that the returning officer, if he has the power to make the alteration, must make it promptly and in a case where the mistake in making the entry is beyond a doubt.

I do not think this is so clear a case of an erroneous entry as would justify the returning officer in making the change. The returning officer did not discover the error for some time after the vote was given, until Mr. Waddell observed that he had voted for the relator, when a dispute seems to have arisen about the vote and the right of the returning officer upon his own recollection to alter the entry. It is as probable that the returning officer may have been mistaken in his recollection of the vote as that he made a wrong entry of it when it was given. The only evidence given to corroborate the returning officer's evidence is that of Armstrong himself. His conduct at the time was rather equivocal, so as to leave it a matter of doubt for whom he gave his vote.

Although he was present when the entry of the vote was observed by Mr. Waddell he did not apply to have the vote changed or apparently say that it was wrong; but on the contrary appeared to assent to the correctness of the entry of the vote by saying that he supposed it was all right. The law very properly will not permit a returning officer to change the entry of a vote except in a very clear case of a mistake. I do not think this is such a case, and that the vote of Thomas Armstrong must be struck off.

Had the alteration not been made the returning officer could not have voted, as there would not have been a tie, and therefore his vote must also be struck out. It is the duty of the returning officer at the close of the poll to add up the votes given for each candidate and publicly declare the state of the poll, and if there is a tie or equality of votes to declare his intention to vote and the name of the candidate for whom he gives his vote (*Regina ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 39). In this case the returning officer did not add up the votes, but there is evidence that he declared that there was a tie, although few in the room seem to have heard it, nor does it appear that he declared for whom he intended to vote; his vote, however, having already been disposed of, it is not necessary to say whether or not he complied sufficiently with the requirements of the law in the way he made the declaration of the state of the poll and gave his vote.

As to the alleged keeping open the poll after four o'clock on the second day of the election, I could not on the evidence hold that it was after four o'clock when Declos presented himself at the poll to give his vote. The returning officer's watch was used on the first day to open and close the poll, and again to open it on the second day. No objection seems to have been made to its correctness then, and I think the time marked by his watch was properly taken as the correct time at the close of the poll. By his watch it was not quite four o'clock when Declos presented himself at the poll to vote. I think also, that if a voter presents himself at the poll for the purpose of voting he has a right to have his vote recorded, though by the delay of the opposite party in pushing him about and requiring the oath to be taken, in this case it may be a minute after the hour before his vote is recorded

It is admitted that Robert Fletcher and Henry Pollard, who voted for Hopkins, were not householders at the time, and therefore had no votes, their votes must therefore be struck off.

I think that Joseph Declos had no vote, he voted on property which he had sold and conveyed away some months before the election. The statute requires that the voter should be a freeholder or a householder at the time of the election. The 75th section of the Act declares that the electors of the Municipality shall be the male freeholders thereof, &c., *and* who were severally rated, &c. The electors must be freeholders of the Municipality at the time of the election, and also rated upon the last (revised) assessment roll,—both conditions are necessary to give a good vote.

The name of Joseph Declos must therefore be struck out, and the name of George Snook, the younger, for the same reason that he was not a householder at the time of the election.

Michael Connelly, the younger, was not at the time of the election a householder, and his vote should therefore be struck out. I think that William Clarkson had no vote, he was neither proprietor nor tenant of the property for which he was rated, his vote must be struck out.

I consider that the names of Ashman Coombs and Samuel Bateman were informally and wrongfully put upon the assessment roll As the assessment roll is taken as the list of those who are entitled to vote not only at Municipal but also at Parliamentary elections, and as those whose names are upon the roll have *prima facie* a right to vote, it is of great importance to the purity of elections that no tampering with or alterations of the roll should be permitted, except in the way pointed out by the statute. The assessment Act, section sixty, points out the way by which any omission in the roll can be supplied, and the mode pointed out by the statute must be strictly followed. Written notice must be given to the clerk of the municipality, whose duty it is to put up in a public place a list of all appeals. Then when the court sits the several appeals are tried. Everything is required to be done openly and publicly. The Court of Revision have no power by mere motion at the instance of any member of the court to order that any names that they think are omitted or wrongly inserted or assessed, be added or struck out. In order to give them jurisdiction a complaint must be made, and that complaint they are required to try. The County Judge to whom there is an appeal might as well take the roll after it had passed through the Court of Revision and add or strike out names without any complaint made to him as pointed out by the Act, as that the Court of Revision should assume a jurisdiction without a complaint made to them.

I think then that the names of Ashman Coombs and Samuel Bateman, having been irregularly put upon the assessment roll, should be struck out of the poll book.

Michael Connelly the older, whose vote is objected to by the relator on the ground, that at the time of the election he was not a householder in the ward, though a householder in the Municipality (and the case of *Regina ex rel. Totten* v. *Benn*, 4 L. J. U. C., 262, is relied on) had in my opinion a good vote. The case cited was decided upon the construction of the statute 16 Vic. cap. 181, sec. 10, which is very different from the Municipal Act now in force. The act 16 Vic. gave votes to the freeholders and householders of the township or *ward*, who at the time of the election should be resident in such township or *ward*; whereas the present municipal act gives votes to the freeholders and householders of the municipality who were rated on the last revised assessment roll for real property in the municipality. In the interpretation clause of the statute, the word municipality is defined as "any locality the inhabitants of which are incorporated under the act, but it does not mean a police village." A rural ward is not incorporated under the municipal act, the act does not recognize anything less than a township as a corporate body. And again, by sec. 78 of the municipal act it is provided that no elector shall vote in more than one ward, and if intitled to vote in the ward in which he resides, he shall not be entitled to vote in any other ward." That clause being formed apparently to meet the case of a tenant being assessed in one ward but who has afterwards moved into another ward in the same municipality in which he would have no vote because he could not be on the assessment roll of that ward. I hold then, that Michael Connolly, the elder, who removed from the ward in which he was assessed, to another in which he is a house-holder, had a good vote.

The votes of Robert R. Waddell and Dr. McKay, given for the relator, must be struck out for the same reason that the vote of Joseph Declos was struck out, namely, that at the time of the election they did not own the properties for which they were respectively assessed. In the case of R. R. Waddell, although the property had not been conveyed at the time of the election, it had been sold by the court of chancery; Waddell was bound to carry out the sale, and he had not, therefore, at the time of the election such a legal or equitable interest in the property as would entitle him to vote.

I think that Howard Heales, Francis G. Lewis, and James McCrone, the younger, were not householders within the meaning of the act, and that their votes should be struck out. And it is admitted that W. McDowell and Andrew Murray had no votes.

The poll, therefore, after deducting the bad votes on both sides would stand thus: for the defendant, forty-seven votes stand recorded in the poll books, from which number the votes of Thomas Armstrong, the Returning Officer, Robert Fletcher, Henry Pollard, Joseph Declos, George Snook, the younger, William Clarkson, Michael Connoly, the younger, Ashman Coombs and Samuel Bateman, in all ten, must be deducted, reducing the number of votes to thirty-seven. And for the relator forty-six votes were recorded, from which seven votes, namely, those of R. R. Waddell, Dr. McKay. Howard Heales, Francis G. Lewis, James McCrone, the younger, W. McDowell, and Andrew Murray, must be deducted, reducing the number of votes given for the relator to thirty-nine and leaving him in a majority of two votes.

My judgment therefore is, that the defendant, John W. Hopkins be removed from the office of councillor for ward number four of the township of Saltfleet, and that the relator, Henry Lutz, having a majority of legal votes, be adjudged entitled to the said office of councillor, and under the circumstances of this case I do order that each party pay his own costs.

On the part of the relator, the votes given by the fishermen at the beach for Hopkins, were objected to on the grounds, that although they were householders, they were not tenants. The

land on which they live being government land, and as they have not paid any or agreed to pay any, and have no lease or license of occupation from the government, it was contended that they had no votes. As it is a matter of some doubt whether or not they have good votes, and I have some difficulty in arriving at a conclusion satisfactory to myself, and as without striking out their votes the relator has a majority of good votes, and is entitled to take his seat as councillor for the ward, I do not consider it necessary that I should decide the matter. I would merely state the view that I took of the matter when evidence was taken as to the nature of their occupation. In the case *Re Charles* v. *Lewis*, 2 U. C. Ch. Rep. 172, Mr. Justice Burns says that the words proprietors and tenants in the end of the clause are used synonymously with freeholder and householder, in the former part of the section, that case was decided upon the construction of 13 and 14 Vic., chap. 109, and although similar words are used in the late municipal act, it would perhaps be going further than the words would warrant were I to hold that in this case they are synonymous, and besides as was decided in the same case, the judge upon a scrutiny of votes is not concluded by the assessment roll, but may go behind it and try whether the votes were properly assessed in the character in which they appear on the roll. I hold then if the fishermen could shew any thing by which their occupation of the beach was with the assent of the Crown expressed or implied, though they had no lease, and did not agree to pay any rent, they might be considered tenants at will to the Crown, which would be sufficient to give them votes. As to what is sufficient to create a tenancy at will, see *Rex* v. *Fillongly*, 1 T. R., 458; *Rex* v. *Collett*, R. & R. C. C., 498; *Rex* v. *Joblin*, R. & R. C. C., 525; *Richardson* v. *Langridge*, 4 Taunt., 128, and *Doe Hall* v. *Waod*, 14 M. & W., 682. Nothing more could be proved with regard to these fishermen than that they had occupied the portion of the beach on which they lived, some of them for many years, without being disturbed in their occupation by the Crown. It is difficult to arrive at the conclusion that such a permissive occupation by the Crown, against whom time would not run and who cannot be charged with laches, would make the parties tenants to the Crown.

(Before his Honor the Judge of the County Court of the County of Essex.)

The Queen on the relation of William Flanagan v. John McMahon.

Municipal Elections—Qualification of Candidate—Innkeeper—Contract with Corporation as Surety for Treasurer of Municipality.

Held, that it is not necessary under the seventy-third clause Consolidated Statutes Upper Canada, chapter fifty-four, to constitute an innkeeper that he should be licensed.

Held, also that where a candidate for councillor was an innkeeper, but sold his interest as such the day on which the election took place, but there was no actual change of possession, he was still an innkeeper within the seventy-third clause, chapter fifty-four, Consolidated Statutes for Upper Canada, and as such disqualified.

Where the defendant was surety for the treasurer for the municipality for 1858, and the same treasurer was re-appointed from year to year during 1859 and 1860, the acceptance of fresh bonds by the municipal corporation for the latter years did not release the sureties as to the bond of 1858, and that it being a *continuing security* was not necessarily released by the acceptance of new bonds.

Held, that to entitle a relator (who was a candidate) to a seat declared vacant, he must have notified the electors that the defendant was disqualified, and the grounds of such disqualification.

(March 2nd, 1861)

The statement of the relator set forth the following causes why defendant's election should be declared void.

1st. That the defendant was an innkeeper at the time of his election.

2nd. That the defendant, at the time of his election, had a contract with the corporation of the township of Rochester, in this that he was one of the bondsmen or sureties for one John Mullins, treasurer of the said township, not discharged or released; and,

3rd. Claimed to have been duly elected, and ought to have been returned as councillor in place of the defendant.

The relator put in affidavits shewing that the defendant had for six years previously kept a tavern in the township of Rochester, and was keeping tavern at the time of the election: that there was no alteration in the conduct or management of the business of the tavern, from the time he commenced to keep a public house up to the time of and since the election; that defendant's family and himself continued to occupy the whole of the house and premises in which he and they had resided for the last six years, being the place where the inn was kept

It was also shewn that the defendant became surety for the treasurer of the municipality of the township of Rochester in the year 1858.

That upon the auditing the treasurer's accounts for the year 1858 there appeared a balance of $542 94 against the treasurer; that since that time the balance in the treasurer's hands has not been paid over or accounted for; that an application was made to the municipality of Rochester for the surrender of treasurer's bonds for 1858, but that the application had been refused, on the ground that the treasurer and his sureties were still liable on the bond, to the municipality; that at a meeting of the council of the township of Rochester on the 16th March instant, the bonds in question were ordered to be delivered up on motion of one of the councillors, seconded by the defendant, and that the reeve was only induced to give the casting vote in favor of the motion through the threats of the bystanders.

No objection was taken to the defendant until half an hour after the polling had commenced, and after eight or nine votes had been polled.

For the defence, the defendant filed an affidavit, stating that he leased the inn formerly kept by him, in the township of Rochester, to one Ellen Mullins, a spinster, in the year 1859, and that she continued to be the lessee of the premises till 5th January last; the agreement being that she was to pay $30 per month, and he was to attend to the business for her, and she was to receive all the profits; that this arrangement was in good faith and carried out; that the licence was issued to Ellen Mullins; that for some time previous to the seventh of January last, the day of the election, he (the defendant) had concluded to sever his connection altogether with the inn, and on that day leased the same to one Mathew Butler, for the period of two years, at the rate of $240 per annum, payable monthly, reserving to himself a room and the kitchen; and it was then also agreed that a proper lease should be drawn up between them; that on the eighth day of January a proper lease was drawn up and executed, (the lease was produced); that the lease was in good faith: that at the time he (the defendant) became security for the treasurer it was understood that he was only to be surety for one year; that new sureties were accepted by the council for the years 1859 and 1860; that he had never heard of any claim or demand having been made, or any dispute having arisen between the council and John Mullins.

Mathew Butler corroborated what the defendant stated as far as the lease to him was concerned. John Mullins, treasurer, swore that when his bonds were executed to the municipality, in 1858, it was understood that his sureties were only responsible for the fulfillment of his duties for the year 1858; that he was re-appointed in the years 1859 and 1860, and gave new sureties each year; that his accounts were audited and accepted.

In another affidavit he (Mullins) showed how the balances against him were accounted for.

In the affidavits filed on the part of the relator it was shewn that Ellen Mullins is a sister-in-law of the defendant (McMahon) and that she was since May last in Detroit, out at service as a house servant.

This fact has not been contradicted by the defendant, and there was no affidavit by Ellen Mullins as to the lease to her.

Macdonell, for relator, contended,

1st. That the restriction of the legislature in excluding the persons named in the seventy-third clause of the Municipal Act, was on grounds of public policy, in this that their vocation gave them considerable influence that might be unduly excited at elections.

2nd. That the disqualification clause must be taken in its most comprehensive sense; and to escape the effect of it, those exercising any calling mentioned in it must show the most absolute and complete abandonment of the calling previous to the election.

3rd. That the existence of the bond given by the treasurer to the municipality, in the year 1858, (of which the defendant was one of the sureties) and its non-annullation by the council previous to the election disqualified the defendant. For that the mere fact

that other bonds were executed or even accepted by the council would not involve the satisfaction of this, and the court cannot presume that a dispute may not arise on the bond given in 1858.

He cited *Reg. ex rel Davis* v. *Carruthers*, 1 U. C. Prac. Rep. 114; *Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44.

Shiel, for the defendant, contended,

1st. That the defendant was not keeper of the inn for more than a year previous to the fifth day of January last, but only attended for lessee; and it being positively sworn to by himself that he did not intend to keep the inn, it must be presumed that he was not the keeper of the inn.

2nd. That the lease made to Butler—though on the eve of the election, even if it was made for the purpose of enabling the defendant to become a candidate—removed the disqualification, if any there was.

3rd. That an actual and continual change of possession was not necessary.

4th. That the defendant remaining at the inn was only as the occupier of a particular part, and that only for a certain period under the lease; and also that the defendant was not an innkeeper when elected a township councillor. (*Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60.

5th. That the re-appointment, by the council of 1859, of Mullins to the office of treasurer, was a discharge and termination of his appointment by the council of 1858, and consequently a discharge of his sureties for any time subsequent.

6th. That the annual appointment of treasurer, coupled with the fact of the acceptance of new sureties, shows that the council only considered the office an annual one, and that the treasurer's sureties were only liable for one year.

7th. That unless there is really existing between the council and the treasurer a claim or demand *bona fide* in dispute, for which the defendant is responsible, his being a surety on the bond is not a disqualification. (*Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. page 44.

8th. That if defendant is disqualified, relator is not entitled to the seat; he (the relator) not having notified the defendant and also the electors, previous to the election, of his (the defendant's) disqualification and the grounds thereof. (*Reg. ex rel. Coleman* v. *O'Hare*, 2 U.C. Prac. R. 18; *Reg. ex rel. Clark* v. *McMullen*, 9 U C. Q B. 467.)

LEGGATT, Co. J.—The first point to be determined in this case is, whether or not the defendant John McMahon was an innkeeper on the seventh day of January last, the day upon which municipal elections were held for 1861. Innkeepers are specially disqualified as members of a municipal council by the 73rd clause of the act relating to municipal institutions; and it is not material, I presume, whether they are licensed innkeepers or not. If the Legislature intended that licensed innkeepers alone should be ineligible, there would have been no need of mentioning them by name among those who are disqualified, as the mere fact of their taking out a license would make them incompetent under the latter part of the same clause. The defendant contends that he has not been an innkeeper since the latter part of 1859, he having then leased the tavern stand to one Ellen Mullins.

The only evidence of this first lease that we have is that of McMahon himself, uncorroborated by the affidavit of any other person. Some evidence is required other than that of the party himself, where the truth of the case does not appear, as it frequently does, in the affidavits filed in answer by the opposite party.

Now, the fact of this lease having been made is contradicted, or rather, circumstances are shown in the affidavits of the relator which are incompatible with such a statement, viz., that Ellen Mullins, the person to whom McMahon alleges he leased the tavern stand, was away in Detroit, out at service as a hired servant, since the month of May last, and that the business of the tavern since it was first opened by McMahon to the present time has been conducted by McMahon personally. The facts in this case, so far as the lease to Mullins is concerned, are very similar to the case of *McKay* v. *Brown*, decided by Judge McKenzie, and reported in 5 U. C. Law Jour. 91. As, in that case, among other things, as in this, there was no actual change of possession, McMahon remained in possession the whole time. The learned judge's remarks, and the cases cited by him, in *McKay* v. *Brown*, relative to change of possession, apply forcibly to this case.

So far, then, as Mullins's lease is concerned, I am of opinion that it was not *bona fide*, and that up to the day of the election McMahon was an innkeeper within the meaning of the statute.

We have next to examine the effect of the lease to Butler. The lease is dated and was executed on the eighth day of January, 1861, and the term is to take effect and be computed from the seventh day of January, or the day before. From the affidavits of McMahon and Butler the tenant, it appears that they had had several conversations together in the month of December last, about leasing the tavern stand;—and here I must remark that McMahon treated his former tenant, if so she was, Ellen Mullins, rather cavalierly, for it does not appear that she was consulted in the matter, or that her former lease was terminated by a notice to quit or otherwise. On the seventh day of January, the day of the election, they, McMahon and Butler, came to an arrangement as to the terms of a lease, and agreed that a formal lease should be drawn up and executed the day after, viz, the eighth day of January, which was done. Although Butler swears that he took possession of the premises on the 7th January, I do not think it was of such a nature as to make the lease binding, because it was not an exclusive possession, the defendant McMahon still remaining to all intents and purposes with his family in the house; and I am of opinion that the lease or agreement was not consummated or perfected until the 8th January, when a written lease was executed.

The lease to Butler may be *bona fide;* but I think I can come to no other conclusion, from all the evidence in the case, than that McMahon had been, for some time previous to the execution of the lease to Butler, sole manager and proprietor of the inn known as the "Belle River Hotel," entertaining travellers and strangers; and that if he ceased to have any connection with the hotel as proprietor or manager, he did not so cease to be connected therewith until the execution of the lease in question to Butler; and that on the 7th January, 1861, the day of the election, he was an innkeeper within the meaning of the statute, and therefore disqualified as a councillor.

As to the second objection taken to the defendant McMahon, viz, that at the time of the election in January last he was security for the treasurer of the municipality of Rochester, having decided that the defendant is disqualified as an innkeeper, it is unnecessary to determine the second objection; nevertheless, since the question has been brought up, I do not hesitate to express an opinion upon it.

In 1858, one John Mullins was appointed treasurer of the municipality of Rochester, and the defendant and one Robinson became his securities, by entering into a bond with the corporation, conditioned that if (among other things) John Mullins should well and truly perform all and singular the duties of treasurer of said municipality for and during his official term, and until he should deliver all the property which he might receive as such treasurer to his successor in said office, and should keep just and true accounts of all property belonging to said municipality that might come into his hands, &c, then to be void; otherwise, to be and remain in full force and virtue, &c. The argument that at the time this bond was signed it was understood by all the parties executing it as sureties that they were only to be held responsible for the due discharge of the treasurer's duties during the year 1858, has no weight. The bond is a sealed instrument, and we must look to the wording of the document itself, and not to anything that may have been understood at the time, for a proper construction of its terms. The bond itself is not limited to 1858, but the parties are bound for the faithful discharge of the duties of the treasurer during the term of his office. He is still treasurer of the municipality, having been reappointed from year to year. The fact of the treasurer giving other securities in the two following years, does not, in my opinion, necessarily release his first sureties. I am inclined to think that the bond signed by McMahon is a continuing security

Assuming, however, that it was confined, in as many words, to the year 1858. At the end of that year the auditors found a balance of $685 85c. against the treasurer. This the defendant

contende, however, was paid during the succeeding year 1859; but at the end of that year a still greater balance was found against the treasurer.

The bond is binding against the sureties until the balance against the treasurer for the year 1858 is accounted for to the municipality, or until they choose to release or surrender it. (See in the matter of arbitration between *The Corporation of Eldon and Daniel Furguson and Israel Furguson*, 6 U C. Law Jour. 207) Of course my decision does not determine this point; but if I am satisfied that there is a claim in good faith subsisting—a matter of contract really to be settled between the municipality and their treasurer, it is sufficient. (See *Reg. ex rel. Bland* v. *Figg*, 6 U. C. Law Jour. 44.) Now I think that at the time of the election there was something to be settled by the treasurer; and that therefore, the treasurer's bond for 1858, not being yet discharged, released or cancelled, the defendant must be held to be disqualified on that ground also.

No stronger evidence of the necessity of such a provision in the statutes, which disqualifies a person as a councillor who has at the time of his election an interest in any contract with or on behalf of the corporation, can be found than this very case. Application had been made to the corporation in 1860, for Mullins's bond for the year 1858, and the council then refused to give them up; but no sooner does McMahon get in, than it is ordered to be delivered up, on a motion seconded by the defendant himself, and carried by the casting vote of the reeve.

Before I can declare the relator elected in the place and stead of the defendant, I must be satisfied that the electors were notified at the commencement of the election that the defendant was disqualified, and the grounds of disqualification especially pointed out to them. No evidence to that effect has been produced on the part of the relator. He did object to the defendant as a candidate, but not till after eight or nine votes had been polled, and he did not then state the grounds of objection. (See *Regina ex rel Dexter* v. *Gowan*, 1 U. C. Prac. R., 104; and *The Queen ex rel. Davis* v. *Carruthers*, Ib. 114.

My judgment is, that a writ do issue declaring that the defendant was disqualified; that there be a new election for the office; and that the defendant do pay the relator's costs.

ASSESSMENT CASES.

In The Matter of the Appeal of the Sisters of Charity of the City of Ottawa.

Assessment—Exemptions.

Held that the Institution of the Sisters of Charity in the City of Ottawa is "a Public Hospital" within the meaning of the assessment Act.

Quære if a "Poor House" or "Alms House" within the meaning of the Act.

Semble even if so the parcels of land assessed in this case could not be deemed "real or personal property" "belonging to or connected with the same" so as to be exempt from taxation. (26 June 1859)

The Corporation known as the Sisters of Charity of the City of Ottawa, appealed under the provisions of the 28th Section of the Assessment Act of 1853, against the decision of the Court of Revision, in the City of Ottawa, declaring that 26 town lots, the property of the said Sisters of Charity, are subject to taxation, whereas the Sisters of Charity contended that the property was exempt, under one or other of the sub-divisions of the sixth Section of the Assessment Law of 1853.

It appeared that the appellants were incorporated by an Act of Parliament, passed in 1849. The preamble of the act runs as follows:

"Whereas an association hath existed for several years in Bytown, in Upper Canada, under the name of *La Communauté des Reverendes Sœurs de la Charité*, and hath established an hospital for the reception, and care, of indigent and infirm sick, of both sexes, and of orphans of both sexes, to whom they impart a Christian Education in conformity with their condition in life, and, whereas the said ladies have, by their Petition, prayed that the Association may be incorporated, and in consideration of the great benefit which must arise from the said Institution, it is expedient to grant their prayer It is, therefore enacted, that Les Reverendes Sœur Elizabeth Bruyere, Elenore Thibodeau, and others therein named, be a body, politic and corporate, in deed and in name of *La Communauté Des Reverendes Sœurs de la Charité*, with power to hold, possess and enjoy lands lying within this Province, not exceeding in yearly value £2,000."

The second Section of Act provides, "that the rents, issues, and profits of all property, real and personal, held by the corporation, shall be appropriated and applied, solely to the maintainance of the members of the corporation, the construction and repair of the buildings requisite for the purposes of the said corporation and to the advancement of education, and the payment of the expenses to be incurred for objects legitimately connected with, or depending on, the purposes aforesaid."

This corporation has a building known as the General Hospital, erected upon an enclosure containing 14 Town lots, and which of course were not assessed. The 26 lots, which were assessed, and against which assessment the Sisters of Charity appealed, are situated upon different streets, and at some distance from the enclosure, upon which the Hospital stands, and are detached even from each other, and not forming one connected area in themselves. It appeared, however, that they are all enclosed and cultivated, and the produce of them used by the members of the corporation.

The sixth section of the Assessment Act* declares that the following property shall be exempt from taxation, viz:—All estate and property belonging to the Crown, or held in trust for any body or tribe of Indians, every place of Worship, every Churchyard, or Burying-ground, the real estate of any University, College, Incorporated Grammer School, or other Seminary of Learning, or real estate held in trust for the same, so long as such real estate is actually used and occupied by it, but not if occupied by others, or unoccupied, every Public School House, Town or City Hall, Court House, Gaol, House of Correction, Lock-up House, or Public Hospital, with the land attached thereto, or on which the same is erected, and the personal property belonging to each of them. Every Public Road and way, or Public Square, and the property belonging to any Township, Village, Town, City, or County, if occupied for the purposes thereof, or unoccupied: the Provincial Penitentiary and the land attacted threreto.

The fourth sub-section,† then declares that every Industrial Farm, Poor-House, Alms-House, House of Industry or Lunatic Asylum, and every house belonging to a Company for the reformation of offenders, and the real and personal property belonging to, or connected with, the same shall be exempt from taxation.

Armstrong, Co. J.—In approaching this case, it is, in the first place, necessary to see and determine what the corporation called the Sisters of Charity really is. The Assessors and the Court of Revision for the City of Ottawa, contend that it is a Public Hospital, as named in the second sub-division, of the 6th Section of the Assessment Act, and nothing more, and that the lots of land in question are not attached thereto, within the meaning of the statute, and, consequently, not exempt from taxation, while the Sisters of Charity contend, that the lands being occupied and cultivated by them, and the produce used in the establishment, they are, therefore, entitled to be exempt on the ground, that the Institution is not only an Hospital, but also a Seminary of Learning. They maintain that the Institution is also an Alms House or Poor House, within the meaning of the 4th sub-Division of the sixth Section of the Assessment Act.

After giving the matter all the consideration and attention in my power, I have arrived at the conclusion that the Institution is neither more nor less than a Public Hospital under the ordinary and popular sense of the term; for the Petition, on which the act of incorporation is passed, sets forth, that the Association under the name of *La Communaute des Reverendes Sœurs de la Charite* had established an Hospital, for the reception and care of indigent and infirm sick of both sexes, and of Orphans of both sexes, to whom they imparted a christian education, in conformity with their condition in life. The Sisters of Charity only pray to be enabled to do as a corporation, those things which they were doing as an Association: that is granted to them, and nothing more. The second section of the act of incorporation, in directing how the rents and profits of their real and personal property are to be

* Section 9 of Consolidated Statutes, U. C., cap. 35.

† Sub-sec. 9 of sec. 9, cap. 55.

appropriated, says that, they shall be expended solely in maintaining the members of the corporation, the construction and repairs of the necessary buildings, and the advancement of education and other objects legitimately connected with and depending upon the purposes of the Institution.

It is too much to say, that because the Institution imparts a Christian education to the inmates of the Hospital, as they state in the Petition, upon which the act of incorporation is passed, therefore they are a seminary of learning, within the meaning of the term, as used in the Assessment Act. The fact of educating the sick and infirm inmates of the Hospital and their orphans, cannot give the Institution the character of a seminary of learning —such education is merely incident to the general purposes of the establishment.

Then, can the Institution be called a Poor-House or Alms-House, such as are mentioned in the statute? That it is in some degree a Poor-House and an Alms-House too, must be admitted, for the poor are, to a certain extent, sustained in it, and no doubt alms are also distributed by the ladies who superintend the affairs of the corporation. But then, I cannot bring myself to the conclusion that it is entitled to the distinctive character of either a Poor-House or an Alms-House, such as the Assessment law exempts from taxation, but even supposing the establishment to be a Poor-House or Alms-House, still the lots of land in question are not connected with it, for the words "belong to," used with the words "connected with," at the conclusion of the fourth sub-division of the sixth section of the Assessment Act, must be construed to apply to the personal property, and the words "connected with," *to the real property, or perhaps the word* "or" may be read "and"—but in no other case can the lots in question be considered connected with the establishment.

The Legislature, in using the terms they do in exempting certain buildings, places of worship, Gaols, Court-Houses, and the like, and then exempting the real and personal property of certain institutions, must have had in view, the nature, object, and purposes of those buildings and institutions. Land as land, they did not imagine necessary for places of worship, Gaols or Court-Houses. Whereas, to a University, College, Incorporated Grammar School, or other seminary of learning, they contemplated lands, to a considerable extent, to be necessary either as a source of revenue or for the more immediate purposes of the institutions, for their lands, wherever situated, if actually used and occupied by them, are exempt from taxation. But, in regard to a Public Hospital, they declare that it is only the real estate, or land attached thereto, or on which the same is erected, which shall be exempt.

One may reasonably infer that the Legislature contemplated, also, that lands, to some extent, might be necessary for the immediate purposes of a University, such as, for botanical gardens for the advancement of scien for places of amusement for students and the like, and that lands might not, at all times, be found directly attached to such establishments. Therefore they exempt the lands of such institutions, wherever situated, if they be used and occupied by them. Had the Legislature taken the same view in regard to a Public Hospital, I presume they would have used the same terms in exempting its real estate. They may have considered that no more land is required for the purposes of an Hospital than sufficient space around the building for air and exercise for the inmates and members of the establishment. I am perfectly aware that the word "attached," as used in the statute, may mean more than being geographically joined to the Hospital, but then had the Legislature intended that lands merely used and occupied by the Hospital, as the lots in question are, should be exempt from taxation, I cannot understand why they should use the words "erected upon or attached thereto," with reference to a Public Hospital, and not make use of any such expression with regard to the lands of a University, College or Incorporated Grammar School.

The Legislature uses the same word "attached," in regard to the Penitentiary; the statute exempts from taxation the Penitentiary and the land attached thereto, which certainly means the land immediately connected with that institution.

The words "real estate" and "land" are used indiscrimately in the several clauses of the Assessment Act, but no stress can be laid on the fact. The term "Real Estate" and the word "land," are but one and the same thing by the express provisions of the statute.

Institutions such as the one mentioned and superintended by the Sisters of Charity of the City of Ottawa, are undoubtedly worthy of the most generous consideration, from the municipal authorities, and indeed the most liberal and extended construction should be given to any law or statute passed for the benefit of their establishment, but the city corporation owe a deep responsibility to their constituents, and are bound to see that all property within the city is fairly and equally taxed, unless the same be exempt by law. *Unless Parliament* come to the relief of the Sisters of Charity, I am unable to give any other construction to the Assessment Laws, with reference to this particular case, than that held by the Court of Revision.

I am very sorry that the matter could not have been referred to some authority, having more ample means to guide to a correct conclusion than I have had, for I must confess I am not free from doubts as to the correctness of the conclusion at which I have arrived.

The decision of the Court of Revision is confirmed, and the appellants to pay the costs.

COUNTY COURT CASES.

ABBOTT v. SKINNER ET AL.

Arbitration and award—Action—Pleading—Sufficiency of award.

Held in an action of assumpsit upon an award that the general issue of nunquam indebitatus puts in issue the submission to arbitration, the enlargement of the time, and the making of an award according to the terms of the submission.

Held also, that the award sued upon in this cause was not warranted by the submission, and that in making it the arbitrators had exceeded their authority.

(April 25, 1861)

This was an action of assumpsit upon an award. The plaintiff declared against the defendant for and upon a certain award in writing, made the 24th March, 1860, by David Ford Jones, Isaac Briggs and Robert Brough, by virtue of a certain submission made by the plaintiff and defendants to the award of the said arbitrators of and concerning all matters in dispute then pending between them; and upon and by virtue of which said reference the said arbitrators did award, amongst other things, that the defendants should pay to the plaintiff one-fifth of all expenses that might by him, the plaintiff, be necessarily incurred after the first day of October, 1860, for the mutual benefit of the plaintiff and defendants, in renewing or repairing the water wheel, flume, bulk-head, gates, dams, or any other expenses that might be incurred for the mutual benefit of the plaintiff and defendants; that the plaintiff should have the right to say what repairs should be done, and that the plaintiff should render to the defendants monthly accounts, properly vouched for, of the expense of such repairs incurred as aforesaid, and that within one month from the time of rendering such account, the defendants should pay one-fifth of the amount thereof; and that the arbitrators, by their said award, further awarded that, should it be deemed necessary for the mutual benefit of the plaintiff and defendants to put in a new wheel, flume and bulk-head, or any of them, before the first day of October, 1860, then that the defendants should pay one fifth of the expenses incurred, upon an account of the same being rendered to the defendants and vouched for as was before stated in the said award, as hereinbefore stated for their proportion. With averments that it was deemed necessary for the mutual benefits of the plaintiff and defendants to put in a new wheel, flume and bulk-head before the first day of October, 1860, and that the plaintiff proceeded to put in a new wheel, flume and bulk-head, as by the said award he might do, and that, in accordance with said award, a monthly account of the expenses for the same, as far as they were incurred during the month of August, 1860, properly vouched for, amounting to the sum of $893 94 in the whole, was duly rendered by the plaintiff to the defendants, and that thereupon the defendants, by virtue of the award, became liable to pay to the plaintiff, in one month from the time of rendering such account, one-fifth of the amount thereof, to wit, the sum of $178 79, yet that the defendants have not paid the same.

Pleas—Never indebted; 2nd: That no monthly account has was rendered properly vouched for.

The cause was tried at Kingston, before Judge Mackenzie, at the last March sittings of the Court, when a verdict was taken by

consent for the plaintiff for $160 with leave reserved to the defendants to move in term to enter a nonsuit on three objections taken at the trial.

Articles of submission, dated 24th March, 1860, were put in at the trial, the material parts of which submission and award appear in the judgment of the court.

G. L. Mowat, in April term, obtained a rule first calling upon the plaintiff to show cause why the verdict should *not be set aside*, and a nonsuit entered pursuant to leave reserved at the trial upon the grounds,

First, That assumpsit will not lie, as the submission and award are under seal.

Second, That the submission does not support the award in reference to the present cause of action as set out in the declaration, in this, that the submission gives the arbitrators power to direct that a lease should be made between the parties to define the conditions and stipulations of the lease, and to set forth in the lease what each party would be bound to do in the use and occupation of the premises, therefore that no cause of action like the present can arise out of the award itself, without the interposition of a lease.

Third, That no action, if any, should be upon a lease made in pursuance of the award, the submission itself not authorizing the making of an award to order work like that on which the present action is brought, though it may authorize an award directing such a stipulation to be inserted in a lease.

Britton shewed cause. He contended among other things that the defendants could not avail themselves of the points taken in the rule under the plea of Nunquam Indebitati, and even if they could, he contended that the award was well warranted by the submission.

G. L. Mowat, supported the rule.

The following authorities were cited, Russell on Awards, 502, 523, 535. *Hodgson* v. *Township of Whitby*, 17 U. C. Q. B. 230, Chitty's precedents, 254.

The counsel for the defendant abandoned the first point mentioned in the rule at the argument.

MACKENZIE, Co. J.—The general issue of Nunquam Indebitatus pleaded by the defendants, in my opinion, puts in issue the submission to arbitration the enlargement of the time, and the making of an award according to the submission, in other words an award within the terms of the submission mentioned in the declaration is requisite to sustain the present action under that plea. I refer to the case of *Hodgson* v. *The Municipality of Whitby* 17 U. C. Q B. R., 230, and to Bullen & Leake's Precedents, 288, note (*a*) in support of this view of the law.

As the learned counsel for the defendant has abandoned the first point taken in the rule, there is in reality but one question for the Court to decide. Have the arbitrators exceeded their authority in ordering the defendants to pay one-fifth of the expenses incurred by the plaintiff in the putting in of the new wheel, flume and bulk-head, as mentioned in the declaration, directly, without the interposition of a lease? To arrive at a correct understanding of the matter, each portions of the submision as relate to the subject matter of the present action must be examined.

It is recited in the submission. "Whereas disputes have arisen between the parties, as to the amount of rent the defendants shall pay to the plaintiff for the time they have occupied (a part of certain premises in the village of Gananoque) and to their right to receive from the plaintiff a lease of the premises they the defendants so occupied, and as to the terms of the said lease, it is desirable to refer the same to arbitration as after mentioned. And whereas it is desirable and has been mutually agreed between the parties to submit to the decision and arbitratement of the said arbitrators all other matters in dispute between them, it is hereby agreed that they, the said arbitrators, shall decide by whom the costs which have been incurred in the Court of Chancery and Division Court shall be paid. They shall also further determine the claim of the plaintiff with a contra account of defendant now pending in the Division Court; and shall also award what amount, if any, shall be paid by the plaintiff to the defendants in pursuance of their bill of items hereunto attached; the foregoing, together with the first named matter of dispute, as to a lease, being all matters in dispute between them" After a clause in the submission, agreeing to refer the matters in dispute to David Ford Jones, Isaac Briggs and Robert Brough, or any two of them, follows the agreement bearing principally on the present action; that is to say:—"And it is hereby further agreed that the said arbitrators or any two of them, may, if they think proper, by their said award, direct that the occupation, by the defendants, *of the premises shall*, at some short period thereafter, cease and determine, and that the same shall be delivered up by the defendants to the plaintiff in good order and condition, or that the plaintiff shall execute and deliver to the defendants or the survivor of them, etc., a lease of a part of the said premises, and they, or any two of them, shall, by their said award, direct who is to prepare the said lease, and within what time it is to be executed and delivered; what rent shall be reserved thereby, and the time of payment of the same, and the duration of the said lease (not to exceed, however, thirteen years), also what part of the said premises, including the use of the water wheel by the said contemplated lessees, and manner the same may be used; and such other regulations and stipulations as they, or any two of them, may think proper so as to prevent disputes afterwards arising as to the parts of the premises the lessees are to occupy, and the manner of using the water wheel and the machinery of the parties respectively, and what other covenants or stipulations they, or any two of them, may think proper, and also what shall otherwise be done by either of the parties respecting the matters in difference."

Mr. Britton has argued the case for the plaintiff with much point and intelligence in favor of the integrity of the award. He has contended that the words, "what shall otherwise be done by either party respecting the matters in difference,' are sufficiently comprehensive to embrace the groundwork of the present action as set out in the award, and its immediate subject-matter as disclosed in the declaration. The matters which were referred to the arbitrators were the matters in dispute between the parties at the time of the submission, which are specified with clearness and precision in the submission itself. It is declared in the submission that the matters in dispute are about the payment of certain costs incurred in the Court of Chancery, and not in the Division Court, a claim pending in the Division Court, and about a certain bill of items attached to the submission 'together with the first named matter of dispute as to a lease, being all matters in dispute between the said parties." The first named matters of dispute, as to a lease, are particularized in the submission as follows: "Whereas the defendants entered into possession of part of said premises under the plaintiff, and have put up certain machinery thereon, which has been worked by the water wheel on said premises, under the promise, as they allege, of obtaining from the said plaintiff a lease of part of the said premises and privileges for thirteen years, from the first day of October, 1857. And, whereas disputes have arisen between the parties as to the amount of rent the defendants should pay to the plaintiff for the time they have so occupied a part of the said premises, and to their right to receive from the plaintiff a lease of the premises they have so occupied, for the period of thirteen years, and as to the terms of the said lease." It certainly does not appear by the submission that there was any dispute between the parties in reference to the repairing or renewing of the water-wheel, flume and bulk-head, or as to the proportion of the expenses to be paid by each party for putting in a new wheel, flume and bulk-head, independent of the dispute about the lease and the terms of it. The dispute between the parties, over and above the costs in Chancery and Division Court and the account and bill of items, is restricted to the amount of rent to be paid by the defendants to the plaintiff for the time they had occupied the premises, their right to receive from the plaintiff a lease of the premises for 13 years, and the terms of the lease. The submission then gives the arbitrators power to direct who is to prepare the lease—within what time it shall be executed, what rent shall be reserved—its duration—what part of the premises should be demised to the defendants, including the use of the water-wheel, and the extent of that use, and the manner in which it might be used, and such other regulations and stipulations as the arbitrators should think proper, so as to prevent disputes afterwards arising.

As the matter of putting in a new wheel, flume and bulk-head, and the proportion of the expenses which should be paid by each party in the event of their being put in, was not referred to the arbitrators by the submission as a substantive dispute, over and above the dispute concerning the giving of the lease and the terms of it, they had no right to make a substantive order in their award, touching the same, or touching the work for which the present action is brought; or to give any independent directions out of the lease concerning the proportion of the expenses to be paid by each of the parties, as they have done according to the award set out in the declaration.

The submission does not support the award in respect of the presentation set forth in the declaration. The interposition of a lease is necessary before the defendants can become liable on a cause of action, like the present under the submission. The arbitrators according to the submission, I apprehend, could direct and order a clause or stipulation to be inserted in a lease to be made in pursuance of their award the alleged cause of action disclosed in the declaration, but they had no authority so far as I can see to order or direct it out of the lease, as a matter independent of, and besides the lease, as they have done according to the award declared upon. The submission contemplated that in the event of the arbitrators, ordering a lease to be executed between the parties in pursuance of the submission, that they should order and direct covenants, stipulations and regulations to be inserted and which would cover every matter in difference, and every matter which *might become a source of dispute between the parties, thereafter* during their joint occupation of the premises so as to prevent disputes afterwards arising between them as to the occupation of the premises and the manner of using and regulating the water-wheel, and the machinery during the term. Instead of directing such covenants, stipulations and regulations to be inserted in a lease, the arbitrators have by their award, as set out in the declaration, assumed the right to authorize the plaintiff if he thought proper so to do to put in a new wheel, flume and bulk-head, and o order the defendants to pay one-fifth of the expenses which might be incurred, in putting in the same independent of any lease and beside it.

The award set out in the declaration, is not warranted, in my opinion, by the submission produced at the trial. Under that submission, an action like the present cannot be maintained without the interposition of a lease made and executed in pursuance of an award founded on a submission. The rule for entering a nonsuit, therefor, must be made absolute.

Per Cur.—Rule absolute to enter a nonsuit.

GENERAL CORRESPONDENCE.

Contract—Decision—Sufficiency.

To the Editors of the Law Journal.

GENTLEMEN,—Will you oblige me with your opinion, in the next number of the *Law Journal*, on the following questions:

A. sells B. a pair of horses for $200, and takes a chattel mortgage to secure the amount. Before the mortgage becomes due, A. takes back the horses, with B.'s consent. There is nothing said about cancelling the mortgage. A. advertises the horses, and sells them by auction to C. for $117. A. ther sues B. for $83, *being the balance of the consideration.*

It is not shown that B. had attempted to sell or dispose of the horses, or to remove them out of the county, nor that default had been made in payment.

1. A. having taken back the horses before the mortgage became due, could this be considered as satisfaction; or would A. have the same remedy under the mortgage as if the time for payment had expired, and default been made?

2. The contract being by specialty, could its terms be so varied, by parol, as to give A. the right to sell the horses before default had been made in payment by B, and to proceed for the balance?

Your obedient servant, S. P. Y.

Sarnia, 16th May, 1861.

[*No satisfactory opinion can be given on a case so bald as* that above stated. Everything depends upon the nature, form and contents of the chattel mortgage, and the intention of the parties when the horses were taken by A. from B. We have no copy of the former before us; the latter is a question of fact, to be submitted to the decision of a jury. A jury might find either that the contract was rescinded, or that there was a re-sale of the horses. If the latter, then a further question would be, whether they were re-sold at the original price of $200, or, in the absence of all stipulation as to price, *at a quantum meruit*; if *a quantum meruit*, then whether they were not worth more than $117, the price paid for them by C. to A, on a sale by public auction. It is certainly a rule at law that a contract under seal can only be discharged by an instrument *of equal force and validity; but now that it is open to a party* sued in a court of law to plead an equitable defence, we apprehend no practical difficulty would be found in defending an action at law on the chattel mortgage.—EDS. L. J.]

Attorney and clerk—Sufficiency of service.

London, C. W., 29th April, 1861.

To the Editors of the Law Journal.

SIRS,—In consequence of an article in a late number of your valuable journal, several discussions have arisen in regard to the service of students under articles.

I therefore request that you will give your opinion on the following question:

Is the service of an articled clerk, serving with an attorney to whom he is not articled, good? Or in other words, A. and B. are practising attornies, residing in the same place. A. has two articled clerks, but not sufficient practice to keep both employed. One of A.'s clerks, wishing to get a more extensive knowledge of the practice, serves, with A.'s consent, in the office of B., who has already as many clerks as the law allows. Is this service good, and will an affidavit of the facts be sufficient proof of his service under articles?

An answer in your next issue will greatly oblige

Yours, &c., A STUDENT.

[Our opinion upon the facts stated by our correspondent, is decidedly against the sufficiency of the service. We refer to *Ex parte Hill*, 7 T. R. 456; and *Ex parte Bruton*, 23 L. J. Q. B. 290.—EDS. L. J.]

Interpleader—Security for costs.

Picton, 27th May, 1861.

To the Editors of the Law Journal.

GENTLEMEN,—An answer to the following question in your next issue will much oblige.

Has the judge power, under sec. 8 of Con. Stats. cap. 30, to order an execution creditor to give security for costs, upon an affidavit of the claimant stating that he believes the execution creditor (who resides in the county) is insolvent?

Yours truly, A Subscriber.

[The claimant, who is made a defendant under an interpleader rule or order, stands in the same position as any other defendant, and is entitled to security for costs, as in other cases (2 Archbold's Prac. 9 Edn. p. 1314); but mere insolvency is not in any case a sufficient ground for security for costs (*Ib.* 1329). We have known at least one learned judge of the Court of Common Pleas, to refuse to order security for costs, under a state of circumstances precisely similar to that stated by our correspondent.—Eds. L. J.]

Tariff of Costs—Fees to Clerks and Deputy Clerks of Crown.

To the Editors of the Law Journal.

London, May 7th, 1861.

Gentlemen,—May I trouble you for an opinion upon the following matters, which would be very interesting to many of your readers in this county:

There has been a new appointment of Deputy Clerk of the Crown and Pleas here, and the difference in the fees now and those formerly demanded by that officer, has given rise to a good deal of dissatisfaction and uncertainty; for instance, formerly five shillings was the fee upon a Certificate of Judgment, no matter when it was issued—one week or three years after the judgment was entered; now, in the latter case seven shillings and sixpence would be charged, as the present Clerk holds he is entitled to two shillings and sixpence for a search; even though he is handed a Præcipe containing all the particulars of the Judgment. Again, there is now a charge of fourpence made for filing every Præcipe, including a Præcipe for the Certificate; also a separate charge made for filing any document or paper and the affidavit of execution or service attached to it; also a fee of sixpence for every search in the Appearance books, which was never heretofore charged in this county.

As to the first charge of seven shillings and sixpence for a Certificate of Judgment, it seems to me the Clerk is obliged to furnish the Certificate for five shillings, and of course a correct one; now he could not possibly furnish a correct one from memory, after a lapse of time, so that to perform his duty he is compelled to refer to his books, and the search he charges two shillings and sixpence for is entirely for his own benefit, and to save himself from the consequences of any error he might otherwise make.

Your obedient Servant,

Bona Fides.

[1. The Clerk is not, we think, bound to issue a certificate as to a judgment more than three years old upon a mere memorandum of amount furnished by plaintiff's attorney. A search therefore is necessary, and if "exceeding four terms," according to the Tariff the fee is 2s. 6d. Both the Masters of the superior courts of common law at Toronto are of this opinion. Such also is the opinion of more than one learned judge in Toronto. The question however is not now we apprehend of much consequence. The passing of the act abolishing the registration of judgments has rendered it of little account.

2. Though a præcipe is necessary for a writ, we never heard of one being necessary for a certificate of judgment. When filed for a writ we apprehend the Clerk is entitled to charge for it as for any "other proceeding," 4d. The old tariff read "all writs not special, except writs of execution, *including filing præcipe*, &c., 3s. The present tariff reads, "every writ, 2s. 6d.; "filing every affidavit, writ or other proceeding, 4d." The masters in Toronto are of the same opinion as ourselves on this point.

3. The right to charge for filing an affidavit and for each paper annexed and made part of it as a separate filing, is in our minds more doubtful but sanctioned by both the masters in Toronto.

4. As to searches the tariff is express. "*Every* search, if not more than two terms, 6d."—Eds. L. J.]

MONTHLY REPERTORY.

COMMON LAW.

C. P. Barber v. Lamb. *April* 30.

Plea, that judgment had been given in respect of the same cause of action in a foreign court—Demurrer to plea.

Where the plea to a declaration for money had and received, was that the plaintiff had impleaded the defendant for the identical causes of action as then sued for, and recovered from, and been paid by, the defendant the sum of £45 and costs, in the Supreme Court of Constantinople, established under 6 & 7 Vic., ch. 94.

Held, on demurrer to the plea, that a good answer was disclosed by it.

Ex. Lees v. Smith *May* 8.

Prochein Amy—Security for costs.

Without special circumstances, the Court will not allow an insolvent to sue as *prochein amy* to an infant.

B. C. Jardine v. Smith et al. *April* 30.

County Court—Verdict of Jury—Duty of Judge to receive it.

The plaintiffs brought an action in the County Court, to recover £6 10s 0d. for wine supplied. At the trial he was non-suited, but at the next Court, having brought a fresh action, he obtained a verdict. A new trial was granted, and the jury were discharged without being able to agree upon a verdict. The action was tried a fourth time, when the jury returned their verdict as follows: "In the absence of any order in writing for the wine, we find a verdict for the plaintiff." The judge refused to receive the verdict, and ordered the jury to retire and re-consider it. They said they had considered all the evidence; that their unanimous opinion was, that there should be a verdict for the plaintiff; and that it was of no use their retiring. The judge refused to receive their verdict, and discharged the jury.

Held, that a rule *nisi* might be granted calling upon the judge, the registrar, and the defendants, to show cause why the verdict should not be received and entered upon the minutes; why judgment should not be given for the plaintiff; and why execution should not issue thereupon.

C. P. BROWN v. LYMONS ET AL. *April* 23.

Agreement for service and hiring for twelve months certain, the same to continue until three months' notice by either party—Construction of

Where the plaintiff was engaged as a commercial traveller for twelve months certain, at a salary of £150 per annum, and to continue as the same from time to time, until three months notice be given by either party to determine service.

Held, that the traveller could be discharged by a three months notice, expiring at the end of the year.

C. P. AMANN v. DAMUN. *May* 22.

Slander—Privileged communication—Interest of the party so making it.

Where the plaintiff, who was a clerk to a firm, was in the habit for business purposes, of going to the defendant's house, and after one of his visits the defendant missed a box from a room into which the plaintiff went, upon which he went to one of the plaintiff's employers and told him that the plaintiff must have taken the box, as no one else had been in the room.

Held, that this was a privileged communication, and that the words were such as might reasonably be spoken to protect the interest of the party so making them, and that the circumstances were not such from which malice might be inferred.

Ex. HORTON v. MCMURTRY. *April* 23.

Master and servant—Dismissal—Pleading over.

To an action for wrongful dismissal, one of the pleas was that the plaintiff did not serve faithfully.

Held, that after verdict the plea amounted to an allegation of misconduct, and was not a mere traverse of the service alleged in the declaration. The plaintiff, who managed a lard business for his master, the defendant, bought bladders from A. for B., and bought them again from B. for his master. The judge told the jury that, as far as it was a matter of law, the plaintiff had no authority to make the contract with A.

Held, that there was no misdirection.

Ex. BEATSON v. SKENE. *June* 2.

Slander—Privileged communication—Evidence.

A document in the custody of the head of a government department, suppressed by him on the ground of public policy at a trial to which he was supœnaed, is a privileged communication.

But *semble*, that where the objection is made according to his instructions by a subordinate, the judge has discretion to overrule the objection.

By MARTIN, B.—That where the judge is satisfied that no harm will ensue to the public service, he may compel the head of a department to produce a document.

Ex. C. *May* 13.

F. H. COLLINS, *by* H. COLLINS *his next friend* v. BROOK.

Prochein amy—Infant—Attorney—Action for money had and received.

An attorney who, as attorney for the plaintiff in an action by an infant suing by *prochein amy*, has received the damages and costs recovered from the defendant in such action, is liable to the infant in an action for money had and received.

Judgment of Exchequer affirmed.

C. P. KEENE v. BEARD. *April* 30, *May* 1.

Banker's cheques—Chose in action—Liability of endorser.

Where a cheque on a banker was drawn, payable to A. or bearer, and afterwards endorsed by A.,

Held, that the holder could recover in an action against A.

Q. B. PHILIPS v. WHITSED. *May* 1.

Demurrer—Distress for rent—Replevin—Avowry—Plea in bar—Separate holdings—Joint distress.

In an action of replevin for taking goods as a distress for rent in a dwelling house, and garden produce in a garden, and corn and manure in a close, defendant averred that as to the taking the said goods in the said dwelling house, and the said garden produce in the said garden, he took the same for the rent of the said house and garden then in arrear; and as to the taking the corn and manure in the close, he took that for rent then in arrear for the said close. The plaintiff pleaded in bar, that the defendant did not make a separate and distinct distress in and upon the said dwelling house and garden, for and in respect of the said rent due for the said dwelling house and garden, and also a separate and distinct distress in and upon the close, in respect of rent due for and in respect of the said close, but, on the contrary, made and took a joint distress as for and in respect of the several arrears of rent in and upon the said dwelling house and garden, and also in and upon the said close.

This plea was held bad on demurrer.

Q. B. *May* 17.

POTTS v. THE PORT CARLISLE DOCK AND RAILWAY COMPANY.

Master and servant—Injury to servant—Liability of master.

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to shew that the machine was defectively constructed, but there must also be evidence that the master employed incompetent persons to construct the machine.

Q. B. SCHLUMBERGER AND ANOTHER v. LISTER. *May* 7.

Equitable defence—Replication—Rejoinder—Bill in equity—Common Law Procedure Act.

A Court of law will not allow an equitable defence to be set up under the Common Law Procedure Act 1854, where the defendant has filed a bill raising the same question in a Court of Equity.

Q. B. EX PARTE ARTHUR THOMAS. *May* 28.

Attorney—Solicitor—Articled Clerk—Discretion of the Court.

The Law Society have been in the habit, latterly, of examining articled clerks in the term in which their articles expire, even though they expire on a day subsequent to that on which the examination is held.

T. entered into articles of clerkship, which expired two days after the last day of term. On an application to the Court for a rule directing the examiners to admit T. to be examined, on the ground that the attorney to whom he was articled was compelled by ill health to take a partner at once, and was desirous of taking T. into partnership. The Court directed T. to be examined *de bene esse*.

Ex. SWINFEN v. LORD CHELMSFORD. *June* 9.

Counsel—Authority of—Negligence—Responsibility to client—Compromise by, without authority—Special damage—Pleading—Allegations of fraud where action maintained without.

An action will not lie against counsel acting honestly within the scope of his authority, although he pursue a mistaken course.

A barrister, retained by the plaintiff in an issue directed out of Chancery, to try the validity of a will under which the plaintiff in the issue claimed as devisee, without the authority of his client, but honestly believing that he was acting in the best way for her advantage, entered into a compromise with the counsel for the defendant, the heir at law, by which it was agreed that a juror should be withdrawn; that the estate should be conveyed in fee to the heir at law; and that an annuity should be settled on his client, the devisee. His client afterwards was put to costs in opposing an application for an attachment for disobedience to a

rule of court, founded on the compromise, and in proceedings to set aside the compromise, which were successful. In the former proceedings no costs were allowed; in the latter, costs were awarded the devisee.

Held, that no action was maintainable against the barrister for having compromised without authority—first, because, as regards the withdrawal of a juror, that was an act within his authority as counsel, and having been done honestly, although it might be mistakenly, he was not liable; and secondly, as regards the agreement to convey the estate, and accept an annuity, although that was beyond his authority under the retainer, yet, if actionable at all, it could only be so if damage ensued; but the damage alleged or shewn being the liability to costs in the proceedings for an attachment, and to set aside the compromise, that was no ground of damage, since the courts in which these proceedings were taken had adjudicated upon the costs.

Quære, whether, if damage was shewn, the action would lie?

If a declaration alleges a fraudulent breach of duty, and the circumstances are such that an action will lie for mere breach of duty without fraud, the allegations of fraud may be treated as surplusage, and the action maintained notwithstanding proof of fraud fails.

CHANCERY.

M.R. BOCK v. GORRISEN. *March* 16, *April* 23.

Principal and agent—Foreign principal—Agent in London—Purchase of securities—Lien—General balance.

Where a mercantile firm in London is employed by principals abroad as their agents to buy and sell securities in the London market, the London firm are entitled to a lien upon any securities which come into their possession as such agents, for their general balance in account with such principals.

A mercantile house in Hamburgh instructed a firm in London, with whom they had dealings, to buy for them £10,000 3 per cent Mexican bonds at a certain price. The London firm bought the bonds and drew bills on the Hamburgh house for the amount of their account in respect of this transaction, which bills were duly honored and paid at maturity. Before the bonds were handed over to the Hamburgh house, the London firm stopped payment

Held, that the London firm were entitled to a lien on the bonds so remaining in their possession for the general balance due to them in account with the Hamburgh house.

V.C.W. RE CLINTON. *June* 2.

Practice—Investment—Paying of dividends.

Upon an investment of money paid into courts in respect of lands taken by a Railway company. Ordered that payment of the dividend might be made to the trustees "or either of them."

V.C.S. FOWLER v. ROBERTS. *May* 30.

Practice—Injunction—Garnishee orders—Common Law Procedure Act—Administration Decree.

Where, before an administration decree, the creditor of a deceased person had obtained judgment against the deceased's executrix, and a garnishee order nisi against a debtor to the estate, the court, after decree, refused to stay proceedings on the garnishee order.

M.R. NEVILL v. BODDAM. *May* 5, 7.

Will—Construction—Survivors—Period to which survivorship referred.

A testator by his will gave certain sums of stock to, and in trust for, and equally to be divided between his three grand-daughters and his grandson. By a codicil thereto, he revoked the bequests thereby made to or in favour of his three grand-daughters, and in lieu thereof, he directed his trustees to pay the dividends of each of their shares to them for their separate use during their respective lives; and in case any of his said grand daughters, should die without issue, he directed that the share of them so dying should accrue and survive to the survivors of all his said grandchildren including the grandson, in equal shares, the shares of the daughters to be subject to the same terms and conditions as the original share thereof, thereby given to or in trust for them. The grandson and two of the grand daughters died, leaving the third grand-daughter their survivor. She afterwards died without issue.

Held, that the word "survivor" referred to the period of each share falling in, and that on the death of the last grandchild without issue, there being no survivor at that period, her share was undisposed of, and fell into the residue.

REVIEWS.

THE NORTH BRITISH REVIEW, for May, opens with an article upon "The present movement in the Church of England." The numerous papers which have appeared upon this subject, partake of the established character of the respective periodicals for which they were written; the reader of the *North British*, therefore, from the heading alone, can form a pretty correct idea of the nature of the article to which we have referred. The unhappy events now occurring in America, in turn, give an especial interest to a review of the writings of Alexis de Tocqueville, whose work upon Democracy in America has obtained a reputation rarely granted to productions upon similar subjects written in the early years of their authors. We next have a paper upon the poetry of Robert Browning, a writer whose merit is little appreciated in England, but whose depth of thought and feeling places him near to Tennyson in the scale of poets. Bishop Hurd and his Cotemporaries is followed by a concise statistical article on Railway Accidents. This is again succeeded by one of the numerous reviews which Motley's United Netherlands has called forth. A new edition of the Theory of Vision, by Bishop Berkeley, gives the reader a well written article upon the idealism of that author, calling to mind the days when that which is styled "sensationalism" and "idealism" by turns ruled the world of philosophy. But more pleasingly does it remind us of the kindness of heart which marked the man, as distinguished for his learning as for purity of life and benevolence of purpose. "American Cecession" is the heading of a paper upon the important occurrences on this continent, useful to the reader as being the opinion of a writer who treats of those occurrences at a distance, and with the ability expected from such a source.

THE LONDON QUARTERLY, for April (New York: Leonard Scott & Co.), is received. The first article, headed "The Pearls and Mock Pearls of History," is from the pen of an able writer. It contains more truth than poetry. It exposes the romance of history from the earliest time. The writer tears off the disguise of truth from many a falsehood that has hitherto been accredited as truth itself. The duty is an unpleasant one, but is unflinchingly performed. The second article, headed "Euphuism," brings to light the dramatic works of John Lilly, in his day a singular man, but at present little known. Euphuism is a by-word for literary affectation, and derives its origin from the word "Euphues," the name of a book written by Lilly, recently reprinted in London. The third article is concerning the late Lord Dundonald. The fourth, "Spiritual Destitution in the Metropolis," abounds with valuable statistics. The remaining articles—"German, Flemish and Dutch Art," "African Discovery," "Lord Stanhope's Life of Pitt," "Indian Currency, Finance and Legislation," and "Iron Manufacture"—no doubt will well repay those who have time or inclination to give them a careful perusal. We have not had at our disposal the time necessary to read these articles, but observe that several of them receive great praise from many of our cotemporaries.

THE EDINBURGH REVIEW, for April, is also received, from Leonard Scott & Co. It contains, as usual, some very able and deeply interesting papers. That "On the Essays and Reviews" is especially deserving of attention. This work, rendered famous by an attempt to crush it, is candidly reviewed. Its history is faithfully traced out, and its merits and demerits are also fairly exposed. It is shown that its entire importance has arisen from the onslaught made upon it by persons in high places, and by the wild condemnation of its contents by men who never opened its pages. To some it is infidel—to others too Rationalistic—to others Gospel truth itself. It is famous or infamous, according to the particular religious tenets of the reviewer. Men differ more widely upon theological points, than upon any other subjects of thought. Little (very little) throws the so-called religious world into a wild ferment. Hence it is that we have religious panics about—positively nothing; and hence the excitement about the Essays and Reviews. Were it not that such stupendous efforts were made to crush the volume, it would in all probability have fallen from the press still-born, or at all events powerless for good or bad. The contrary is now the case, and the actual consequence cannot be foretold by any one not gifted with powers of divination. The probability is, that the excitement will die away, and be succeeded by a dead calm. In "Dixon's Personal History of Lord Bacon," we have a surfeit as to this "wisest and meanest of men." Dixon, the author, labors hard to save the memory of his subject from reproach; but his labor is vain. As the problem of the union of high intellectual powers with acts of moral baseness is still attractive to the student of human nature, this review and the book reviewed will no doubt have many readers. "The Election of President Lincoln, and its Consequences," is a paper of the times, and must find many readers on this continent. The remaining papers in this number are, "The Republic of Andorre," "Political Diaries," "Eton College," "Remains of Alexis de Tocqueville," "Autobiography and Letters of Mrs. Piozzi," "The Fables of Fabrius," and "Forbes' Iceland."

THE LAW MAGAZINE AND LAW REVIEW (Butterworth's; 7 Fleet-street, London) is received. This well known and valued quarterly keeps pace in the legal world with all that transpires in the outer world. It is conscious of all that calls for the attention of its lay cotemporaries the *Edinburgh, North British, Quarterly* and *Westminster*, and occasionally reviews, through "legal specs," subjects which engage the attention of the secular periodicals. Very naturally, therefore, we find in the number before us an article headed "The Essays and Reviews, considered in relation to the legal liabilities of the writers." We also find an article on Lord Bacon, at the same time as we find a corresponding article in the *Edinburgh*. But of all the papers in the number before us, that of the most direct interest to us is the one on "The case of Anderson, the fugitive slave," from the pen of Tapping, the author of the standard work on Mandamus. The object of the writer is to prove that the Court of Queen's Bench in England, when, on the motion of Mr. Edwin James, it authorized the issue of a writ of *habeas corpus* to Canada to bring up the body of Anderson, exceeded its jurisdiction; and this we think he has established in a most able manner. Many of the views of the writer coincide with those previously expressed by us in the *Upper Canada Law Journal*; and it is no small satisfaction to us to find our views upheld by so good an authority on prerogative writs as Mr. Tapping, the author of a work which is *the* authority, at home and in Canada, on writs of mandamus. Our satisfaction is still more increased by finding that the Editors of the *Law Magazine* have seen fit to transcribe the whole of our paper on the Anderson case. In our next issue we intend, with the permission of our valued cotemporary, to make use of the article to which we have referred. We fancy that the precedent set by the English Court of Queen's Bench will never be followed by an English court of justice. It is, according to the universal opinion of all men whose opinion is worth having, bad law,—which means that it is not law at all.

BLACKWOOD'S MAGAZINE, for May, has a paper upon "The Ministry and the Budget." The particular purpose of the criticism is to show errors in the financial propositions of the minister of the Exchequer. Whether this purpose is accomplished or not will depend, as does the success of most political articles, upon the opinions of the reader. Portions of one or two continued stories fill up the number, which concludes with an extended notice of the Life of William Pitt. The high place which this statesman holds in the history of England, will render interesting every line written of one of the most remarkable men of his age.

THE ECLECTIC MAGAZINE, for June, is embellished with a tri-portrait engraving of Jackson, Webster and Clay, three very eminent men in the history of the United States. The present number of this magazine is filled with the usual quantity of matter of the varied and entertaining character which always adorns its pages. Made up of selections from the best current periodicals, the reader here meets the choicest thoughts of the most able writers, and thus reviews at a glance many of the finest papers of the literature of the day.

THE UNITED STATES INSURANCE GAZETTE, for May, is as successful as ever, in information given upon its peculiar subjects.

APPOINTMENTS TO OFFICE, &c.

SHERIFFS.

RICHARD CARNEY, Esquire, to be Sheriff of the Provisional District of Algoma. (Gazetted, April 27, 1861).

CLERKS OF COUNTY COURTS.

JOHN HARVEY GOODSON, of Brantford Esquire, to be Clerk of the County Court of the County of Brant. (Gazetted, April 27, 1861.)

CLERKS OF THE PEACE.

JOHN D. ARMOUR, of Cobourg, Esq., barrister-at law, to be Clerk of the Peace of the United Counties of Northumberland and Durham, in the room and stead of Thomas Ward Esquire, deceased. (Gazetted, May 11, 1861.)

JOHN McPHERSON HAMILTON, of Kingston, Esquire, barrister-at-law, to be Clerk of the Peace and County Attorney, of the Provisional District of Algoma. (Gazetted May 11, 1861.)

NOTARIES PUBLIC.

MAITLAND McCARTHY, of Orangeville, Esquire, Attorney-at-law, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861)

ISAAC PEMBERTON WILSON, of Thorold, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861.)

ALEXANDER McNAB, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861.)

DUNCAN SHADE GOODING, of Goderich, Esquire, attorney at-law, to be a Notary Public in Upper Canada. (Gazetted April 27, 1861)

WILLIAM WILLIAMSON, of Toronto, Esquire, to be a Notory Public in Upper Canada. Gazetted April 27, 1861)

FREDERIC STEWART MACGACHEN, of Toronto, Esquire, barrister-at-law, to be a Notary Public in Upper Canada. (Gazetted May 11, 1861.)

GEORGE R. VANNORMAN, of Brantford, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada.—(Gazetted May 18, 1861.)

PETER A. EGLESON, the younger, of Ottawa, Esquire, to be a Notary Public in Upper Canada.—(Gazetted May 25, 1861)

CORONERS.

JAMES N. McRAE, Esquire, M.D., to be an Associate Coroner for the United Counties of Northumberland and Durham. (Gazetted May 11, 1861.)

JAMES HAY SIVEWRIGHT, Esquire, M.D., to be an Associate Coroner for the County of Kent. (Gazetted May 18, 1861)

EDWIN GOODMAN, Esquire, M.D., and MICHAEL Y. KEATING, Esquire, to be Associate Coroners for the County of Lincoln. (Gazetted May 25, 1861.)

ARTHUR ARDAGH, Esquire, M.D., M.R.C.S.L., to be an Associate Coroner for the County of Simcoe. (Gazetted May 25, 1861.)

TO CORRESPONDENTS.

"D. C."—Under "Division Courts."

"S. P. Y."—"A STUDENT"—"A SUBSCRIBER"—"BONA FIDE"—Under "General Correspondence."