school rates charged on certain lands liable to assessment within the said school section, amounting to £100, by reason of there being no residents on the said lands and no goods and chattels to distrain, the plaintiffs made a return to the clerk of the defendants before the end of the year 1856, of all such lands, and of the uncollected rates thereon, but the defendants have not paid the said sum of money, contrary to the statute, although often requested

2nd count —A similar cause of action for the unpaid rates for 1857

3rd count —For the unpaid rates of 1858.

Plea —To each count, that the plaintiffs did not duly make a return to the clerk before the end of the current year, never indebted, and payment.

The case was tried in November, 1859, at Guelph, before Burns, J. It was proved that the plaintiff's collector for the year 1858, before the close of that year, delivered to one Mitchell, the defendant's clerk, a statement of the school taxes due upon lands of non-residents in school section No 1, of the township of Arthur This statement included the sums due on such lands for the years 1856, 1857, and 1858; shewing due for 1856, $38 65; for 1857, $93.11, and for 1858, $100 77; total, $232 53. This collector swore that he handed Mitchell the return for 1858, and he put in those for 1856 and 1857. Mitchell swore that the only paper he got was one which he produced, which shewed the amounts in arrear for the three years as above stated, and that he never received any return for 1856 or 1857, but he stated that he received some of the non-resident taxes, of which $6 were for 1857, and $33.79 for 1858, and that these sums be paid over on the 16th of May, 1859, to the secretary-treasurer of the plaintiffs.

Then if plaintiffs could recover for the three years, the amount would be $232 53, less $33.79, paid over by Mitchell $192.74—£48 3s. 8d. If the plaintiffs could only recover for the third year, then the amount as shewn above for that year is $100.77, less $33 79=$66 98—£16 14s. 11d. If the plaintiff could recover for 1857 and 1858, on both which years Mitchell received payments, then 1857, $93.11; 1858, $100.77=$193.88, less $39.79=$153.9, or $38 5s. 8½d.

It was objected that no return was proved for 1856 and for 1857, and therefore that plaintiffs could not recover on the first and second counts, that the township council could not be called upon to pay until they received the money, or not until the end of five years, and that the declaration did not disclose any liability.

The learned judge reserved leave to defendant to move for a non-suit on these objections, and took a verdict for the plaintiff for the sum of £48 3s 8d., being the arrearages for the three years, with leave to the defendants also to remove to reduce the verdict by reducing either or both the amounts for 1856 and 1857. If both were ordered to be deducted, then the verdict was to be entered for £19 9s. 5d. (an error apparently arising from the first witness' statement of the amount due for 1858, and should be £16 14s. 11d) on the third count, and a verdict for the defendants to be entered on the first and second counts.

In Michaelmas Term, Lemon obtained a rule *nisi* to enter a non-suit on the leave reserved, or to reduce the verdict to the amount due for the unpaid rates of 1858, or why judgment should not be arrested on the ground that the record showed no liability on the part of the defendants to the plaintiffs.

In the following term Adam Crooks shewed cause He referred to the Consolidated Statutes of Upper Canada, ch. 64, s. 127, under which the plaintiffs claimed a right of action, and contended that the declaration was sufficient if the action would lie at all; and in support of the claim to recover generally, he cited *Hopkins* v. *The Mayor of Swansea*, 4 M. & W. 621, and in error 8 M. & W. 901, and *Addison* v. *The Mayor Aldermen and Burgesses of the Borough of Preston*, 12 C B 108

M. C. Cameron contra, insisted that none of the returns were properly made, for they were not under the hands and seals of the school trustees, and he objected that the declaration should have shewn that there were funds in the hands of the municipality to pay the demand.

DRAPER, C. J —The 127 section of ch. 64, Consolidated Statutes of Upper Canada (16 Vic, ch 185, sec 22), enacts that if the collector appointed by the trustees of any school section be unable to collect that portion of any school rate which has been charged on any parcel of land liable to assessment by reason of there being no person resident thereon, or no goods and chattels to distrain, the trustees shall make a return to the clerk of the municipality before the end of the then current year, of all such parcels of land, and the uncollected rates thereon; and the clerk shall make a return to the county treasurer of all such lands and the arrears of school rates thereon, and such arrears shall be collected and accounted for by such treasurer in the same manner as the arrears of other taxes, and the township, village, town or city, shall make up the deficiency arrising from uncollected rates on lands liable to assessment out of the general funds of the municipality.

Section 27, sub-sec. 15, makes it the duty of the school trustees to make their return before the end of the then current year

By the assessment law, (Consolidated Statutes U C ch 55, sec. 110,) the treasurer of each local municipality is to furnish the treasurer of the county with a correct copy of the collector's roll, so far as the same relates to lands in the municipality, "and also with an account of all arrears remaining due upon lands on account of any rate imposed by school trustees." This seems at variance with the direction contained in ch. 64, sec. 127, quoted above

Sections 123, *et seq*, provide for the sale of lands after taxes have been in arrears for five years, under a warrant from the county treasurer Section 154, provides for the creation in every county of a non-resident land fund to consist of all moneys received by the county treasurer on account of the taxes on non-residents' lands, whether paid to him directly or levied by the sheriff, and by the following sections he is to open an account for each local municipality with such fund; and by section 163, surplus money belonging to such fund are to be ratably apportioned by the county council among the municipalities. Section 158 particularly provides, that every local municipal council on paying over any school or local rate, shall supply out of the general funds of the municipality any deficiency arising from the non-payment of the tax on land.

I think, that taking the 16 Vic, ch. 185, sec. 22, and the 16 Vic, ch. 182, sec. 69, into consideration, it is made the duty of the local municipality to make up and supply any deficiency arising to the school fund which arises from the inability of the collector of school rates to collect the same by reason of there being no resident on such land, or no goods and chattels thereon which can be distrained, and it is equally my opinion that the legislature intended such deficiency should be made up out of the general funds of the municipality immediately after the return made to the clerk of the municipality of what school rates are so in arrear. The provisions of the assessment law remove all doubt, if there was room for any, under the school law

I can see no reason for holding that this return need be under the seal of the corporation of school trustees, it is in effect no more than a statement of what their collector has reported to them.

These statutory provisions are sufficient to establish the legal right of the school trustees to recover the amount of the deficiency so required to be made up The legal liability of the local municipal corporation to pay out of their general funds rests upon the same foundation, and this is strengthened by the 69th section of the 16 Vic., ch. 182, (Consolidated Statutes, U. C, ch 55, sec. 159,) which provides that all sums that may at any time be paid to a municipality out of the non-resident land fund of the county shall form part of the *general funds* of such municipality, which non-resident land fund is in part composed of the unpaid school rates returned by the trustees of the school section to the clerk of the municipality, and by him to the county treasurer But it was assumed by Jervis, C J, in *Addison* v. *The Mayor, &c, of Preston*, that if legal right on one side to receive the money, and legal right on the other to pay it, co-exist, an action of debt will lie, and each count of this declaration sets out in substance the section of the statute upon which the right is founded

I felt some difficulty about the proper construction of the words, "the then current year." It is contended on the part of the defendants, that the return of taxes so uncollected must be made before the end of the year within which they are imposed, or the trustees of the school section cannot claim them from the local municipality I think it quite clear that if this be so, the trustees cannot claim them at all; not from the land owner, or by any process against the land, for no authority is left in them so to collect after the current year; nor yet from the county treasurer, if by