DIARY FOR MAY.

1. Mon ... *St. Philip and St. James.*
7. SUN ... *3rd Sunday after Easter.*
14. SUN ... *4th Sunday after Easter.*
15. Mon ... EASTER TERM begins.
17. Wed ... Last day for service for County Court.
19. Frid.... Paper Day Q. B. New Trial Day C. P.
20. Sat. ... Paper Day C. P. New Trial Day Q. B.
21. SUN ... *Rogation.*
22. Mon ... Paper Day Q. B. New Trial Day C. P.
23. Tues ... Paper Day C. P. New Trial Day Q. B.
24. Wed ... Paper Day Q. B. New Trial Day C. P. Queen's [Birthday.
25. Thurs.. Paper Day C. P. *Ascension.*
26. Frid.... New Trial Day Q. B.
27. Sat .... Easter Term ends. Declare for County Court.
28. SUN ... 1*st Sunday after Ascension.*
31. Wed ... Last day for Court of Revision fin. to rev. A. Rl. [and for County Court to revise Tp. Roll.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

The Local Courts' AND MUNICIPAL GAZETTE.

MAY, 1865.

UNAUTHORISED SURVEYS.

It might naturally be supposed, that when a surveyor is appointed by government to survey and establish a concession line, there would be no fear of such a survey, or a title founded thereon, being disturbed or even questioned. The case, however, of *Cooper* v. *Wellbanks*, reported in 14 U. C. C. P. 364, should be a warning to municipalities to be exceedingly careful in matters affecting surveys, as in every other case, to act exactly as directed by any statute that may be passed for their guidance, or in which their duties have been laid down.

It is provided by the Consolidated statutes of Upper Canada, cap. 93, and the Consolidated statutes of Canada, cap. 77. (12 Vic. cap. 35, and 18 Vic. cap. 83) "that where some of the concession lines or parts of concessions were not run in the original survey or have been obliterated, the corporation of any township may adopt a resolution on application of one half the resident landholders to be affected thereby, that it is desirable to place stone or other durable monuments at the front or at the rear, or at the front and rear angles of the lots in any concession or range, or part of a concession or range in their township, and may make application to the Governor, requesting him to cause any line to be surveyed, and marked by permanent stone boundaries under the direction and order of the Commissioner of Crown lands, in the manner prescribed by the act respecting the survey of lands, and that the lines or parts of lines so surveyed and marked shall thereafter be the permanent boundary lines of such concession or parts of concessions to all intents and purposes whatever."

Acting in supposed compliance with these statutes, an application was made to a township municipality in the following form, "we the undersigned freeholders, in the second and third concessions south side Black River, west of Point Travers, in Marysburgh, beg to ask your honourable body to petition government to send a surveyor to establish the concession line according to law, between the second and third concessions, commencing at the township line running towards South Bay, and by complying with this request your petitioners in duty bound will ever pray."

On the receipt of this the corporation, "*resolved*,—That in accordance with the 18 Vic., cap. 83, sec. 8th, and the prayer of the petition of a majority of the householders to be affected thereby, that there be a survey made between the second and third concessions south of Black River, from the township line, Athol, to lot number one in the third concession of Marysburgh."

The corporation subsequently petitioned the Governor to have the survey made, whereupon the Commissioner of Crown lands gave instructions to a surveyer to make the required survey, which he did, and reported the same to the Commissioner.

The question came before the court in an action of ejectment, as to whether the line so laid down by the government surveyor should or should not govern. It was contended for the plaintiff that the survey was under the authority of the Commissioner of Crown lands, and that it was correctly made and was conclusive. It was, on the other hand, proved by the defendant, that over half of the ten persons who signed the application to the corporation for the survey, had no deeds for their lands, and that eleven or twelve freeholders who would be affected by the survey had not signed the application, but of these last, four did not come to the line although they lived in the second concession; and it was there-

fore contended that the survey was unauthorised, because it was not applied for by the resident landholders, but by freeholders who were not described as resident; that half did not apply for it, or profess to apply for it, and that the prayer of it is not in the terms of the statute. It was also contended that the resolution of the corporation was defective in its statements, and did not request that to be done, which the statute authorised to be done, and that the survey was not therefore binding.

The judgment of the court was in favour of the defendant, against the claim of the plaintiff who had acted on the faith of the proceedings taken by the township:—"When a survey of this kind has been performed, the court will presume that every thing which was done had been rightly done, until the contrary shall appear. Here we have before us evidence to show that the application for this survey was made, not by one half the resident landholders to be affected by the survey, but by *ten freeholders*, over half of whom had no deeds for their lands, and that eleven or twelve freeholders, who would be affected by the survey, were not parties to the application. The application itself does not describe the applicants as resident freeholders, and does not allege the want or obliteration of the original concession line, or pray for the placing of monuments at any of the angles of the lots. The resolution of the corporation describes them as a majority of the householders to be affected thereby not as one half of the *resident landholders*, and does not speak of placing stone monuments. In the absence of such an application and such a resolution as the statute requires to authorize an application to the government to cause a survey like the one before us to be made, we think this survey was unauthorized."

FALSE PRETENCES.

(*Continued from page* 52.)

In continuation of this subject, there are other bank note cases that may be added to those noted in last number.

In the year 1851, "The Old Bank, New Port, Monmouthshire," stopped payment. In 1857, a person well knowing this, gave in exchange for the sum of £5 a promissory note of the Old Bank, stating that the note was a good one. He was prosecuted for obtaining £5 by false pretences; and it was held that he was properly convicted of the offence.

In another case on an indictment for obtaining money by falsely pretending that the promissory note of a bank that had stopped payment by reason of bankruptcy, was a good and valuable security for the payment of the amount mentioned in it, and was of that value; it was held not to be necessary to prove the proceedings in bankruptcy. That it was sufficient to prove the time when the bank stopped payment, and that cash could not be obtained for the note on its being presented for payment at the place where it was made payable.

"*Tricks of Trade*," as they are called, come within the grasp of this branch of the criminal law, as will be seen by a selection from adjudged cases which we subjoin. Thus an indictment for false pretences was held to be sustained by evidence that the prisoner had sold to the prosecutor blacking which he asserted to be "Everett's Premium," and which bore a lable nearly, but not precisely, imitating Everett's lables, the said blacking not being Everett's blacking, but a spurious manufacture of his own.

Upon an indictment for a similar offence, it was held that the prisoner could properly be convicted of the charge on the following facts, viz: The prisoner after agreeing with the prosecutor to sell and deliver coal at a certain price, falsely and fraudulently pretended that the quantity which he delivered was eighteen cwt., he knowing it to be fourteen cwt. only, and thereby obtained an additional sum of money from the prosecutor.

There is also a very important case on delivering short weight. An indictment charged the defendant with attempting to obtain money from certain guardians of the poor by falsely pretending to the relieving officer that he had delivered to certain poor persons certain loaves of bread, and that each loaf was of a certain weight. The evidence was, that the defendant had contracted to deliver loaves of the specified weight to any poor persons bringing a ticket from the relieving officer, and that the duty of the defendant was to return these tickets at the end of each week, together with a written statement of the number of loaves delivered by him to the paupers; whereupon he would be credited for that amount in the relieving officer's books, and the money would be paid at the time stipulated, namely at the end of two months from a day named. The defendant having delivered loaves of less than

the specified weight, returned the tickets and obtained credit in account for the loaves so delivered; but, before the time for the payment of the money arrived, the fraud was discovered. It was held that this was a case within the statute against false pretences, because the defendant had been guilty of a fraudulent statement of an antecedent fact, and had not merely sold goods to the prosecutor upon a misrepresentation of weight or quality; and it was held also that although the defendant had only obtained credit on account, and could not therefore be convicted of the complete offence he might be convicted of an attempt to obtain money by having done all that depended on him towards obtaining it.

Mere exaggeration or puffing of goods in the case of a bargain, is not a false pretence within the meaning of the statute; but a wilful misrepresentation of a definite fact with intent to defraud, is a false pretence indictable under the statute: as where a seller represents the quanty of coals to be fourteen cwt, whereas it is only eight, but so packed as to look more; or where the seller by manœuvering continues to pass off tasters of cheese or butter as if extracted from the cheese or firkin offered for sale, whereas it is not; and a false and fraudulent statement to a pawn-broker, that a chain offered as a pledge is silver, is also indictable as a false pretence, if money is thereby obtained. But if the prosecutor, when he parted with his money, knew the representation to be false, the indictment cannot be sustained.

(*To be continued.*)

CONFESSION OF DEBT BEFORE ACTION BROUGHT.

The 117th section of the Division Court act authorises the clerk or bailiff of a court to take a confession or acknowledgment of debt *before* as well as after a suit commenced, and judgment rendered on the confession will be as binding in one case as in the other, provided the requirements of practice, to prevent such judgments by confession before suit being perverted to fraudulent ends, are complied with. As the saving of time or expense may make it expedient in some cases to obtain a debtor's confession without waiting to sue out a summons we would briefly direct attention to provisions of Rule 31 regulating the practice:—

1st. Every confession or acknowledgment of debt taken before suit commenced must show *therein* or by *statement attached thereto* at the time of taking thereof the particulars of the claim or demand, for which it is given, with the same fulness and certainty that would be required if the claims were sued on in the ordinary method.

Two methods are indicated by which the particulars are to be shown. The former is the better, namely, to show the particulars in and as part of the confession, thus taking the ordinary form of confession as a guide after inserting the sum confessed add, if on a promissory note, "Upon a promissory note for the sum of —— dated the —— day of ——, 18—, made by *me* and payable to the *plaintiff* —— months after date," (describing the note accurately) or if on an open account, say upon the following account, namely. Then insert the account in detail, and so for any debt describing the nature thereof. The conclusion of the confession will be the same as in the ordinary form. If it is found more convenient to attach a statement of claim to the confession, it must be made out and attached at the time of the execution and should be referred to by inserting after the amount in the confession something to the following effect: "The particulars of the claim or demand for which this confession is given is signed by me and hereto attached."

2nd. The application for judgment in every such confession must be made to the judge at a sitting of the court within three calendar months after the same is so taken, or at the sitting next after the expiration of the period named. If not so made the plaintiff or his agent must file with the confession an affidavit that the sum confessed or some and what part thereof remains justly due, otherwise the judge will not grant the application for judgment.

If the defendant be in at all embarrassed circumstances the prudent course for a plaintiff is to apply for judgment with as little delay as possible. The clerk will not of course issue execution upon the judgment entered unless directed by the plaintiff.

3rd. It is important to remember that the application is restricted to a particular court division, namely, that in which the confession was given. The words of the rule are as follows: "And applications for judgment shall be made at a court holden for the division wherein the confession or acknowledgment was taken."

Unless plaintiffs themselves are thoroughly acquainted with the practice it will be advisable to have the confession executed before the clerk, who will always have the necessary forms before him, rather than the bailiff. Moreover in such cases the papers are at once to be placed in the possession of the clerk ready to be presented to the judge at the next sittings of the court.

FRENCH SMALL DEBTS COURTS.

A correspondent of one of the English law periodicals, writing from France, enclosed an "invitation" to attend the "Juge de Paix," which appears to be an equivalent there for the much less courteous County Court summons in England, or the Division Court summons here; he also remarks upon the politeness of the language, so characteristic of the French nation, and wherein, by the way, we might "take a leaf out of their book." The following is the translation which is given of the document:

County Court of the Canton of, &c.,
21st January, 1865.

To Mr. A., resident at ———, at the house of Mr. B.

In the name of His Honor the Judge of the County Court of, &c.

You are invited to attend at the sitting of the Court in the Town Hall, on the 23rd January, 1865, at 10 o'clock, a.m., to be heard upon a question which concerns you, in the matter of a plaint of Mr. C., resident at, &c., for money due on account stated.

It concludes with the signature of the officer, &c., and an *N.B.* to bring the "invitation" with him to Court.

SELECTIONS.

POLICE BLUNDER.

Another police blunder, which almost throws the Shrewsbury escapade into the shade, has just been perpetrated. We learn from the *Manchester Examiner* that on Sunday night a gentleman named Crum, an officer in the army, who had been staying at Scarborough, and who arrived in York on Monday morning, was apprehended at one of the principal hotels in that city, charged with having forged a cheque for £1,500, on a bank in Buxton. One of the inspectors, named Hodson, had a war ant for the apprehension of a man named Temple Morris, and he arrived at a ate hour on Saturday, after which he received information that a gentleman, who, it was supposed, was the offender, had arrived in the town. Inspector Hodson immediately waited upon Captain Crum, and told him that he held a warrant for his apprehension on a charge of forgery. Mr. Crum told the policeman that he was mistaken, and after informing him that he was a nephew to Messrs. Crum, merchants, Moseley-street, Manchester, told him and a policeman who accompanied him that they might search his portmanteau (in which were his regimentals), his card-case, and, as he said, "the whole of his letters," if they liked. However, the local "Dogberrys" declined to do this, and the constable, exhibiting the handcuffs, told him that if he did not go with them by the next train, he would have them applied in a manner that he would not approve. Mr. Crum, acting upon the advice of some gentlemen who were present, but who were unknown to him, consented to go quietly, whereupon he was removed from York to Buxton, and, on being confronted with the bankers in the morning, they immediately stated that the police were mistaken. The gallant officer was released from custody.

It is said that legal proceedings are contemplated. We sincerely trust so.—*Solicitors' Journal.*

A QUAKER JURYMAN.

We have all heard the story of the Quaker who refused to take off his hat in the presence of Charles the Second, but we hardly expected to find in the present day anyone so foolish as to make himself a martyr to the principle involved in that objection. At Hereford Assizes, last week, one of the jurymen on entering the box omitted to take off his hat, and insisted on retaining it after Baron Pigott had requested its removal. The gentleman said that uncovering the head was an honour which he considered due to God only, and stated that members of the Society of Friends were allowed to wear their hats in most of the courts of justice in England. A fine of forty shillings was inflicted on this ill-advised individual, and he was ordered to leave the jury-box, as the judge did not consider him a proper person to sit there.—*Solicitors' Journal.*

The *Pall-mall Gazette* states, but we doubt the accuracy of its information, that "the following little scene is authentic, and might, if necessary, be described with all due particulars of name and place." A prisoner at one of our criminal courts was convicted of an outrageous crime. The judge began to sentence him with the usual sermon, in manner and form following:—Judge: "Prisoner at the bar, you stand convicted of a most abominable crime, one equally brutal and cowardly; you—." Prisoner: "Ow 'much?" Judge: "Eight." Whereupon without more ado the prisoner was removed, and the officer of the court recorded sentence of eight years' penal servitude.—*Solicitors' Journal and Reporter.*

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

MAGISTRATE.—ACTION AGAINST.—REFUSAL TO ACCEPT BAIL.—Where a defendant, a Justice of the Peace, had laid an information before another magistrate against the plaintiff, who was thereupon arrested under the said magistrate's warrant, and on an examination was committed for trial on a further warrant issued by the same magistrate, which turned out to have been illegal or void, and subsequently imprisoned under it, the defendant and the other magistrate having refused to admit him to bail,

Held, in an action of trespass by the plaintiff against the defendant, charging him with the arrest and imprisonment, that in the absence of any evidence that the defendant had directed the officer to take the plaintiff to prison, or had influenced the other magistrate in sending him there, or that the officer was present when the defendant and the other magistrate declined to take bail, and said they would send the plaintiff to prison; or that he even knew that the defendant had said anything about it, *the mere refusal* by the defendant to admit the plaintiff to bail, was not evidence to go to the jury that the defendant authorised the illegal arrest and imprisonment of the plaintiff, and a nonsuit was, therefore ordered to be entered. (*McKinley* v. *Munsie*, 15 U. C. C. P., 230.)

PURCHASE OF PUBLIC ROADS FROM GOVERNMENT BY COUNTY COUNCIL.—The county council of any municipality has power, under Con. Stats. U. C., cap. 54, sec. 226, to contract with the government for the purchase, *at a price beyond* $20,000, of any public works, roads, &c., in Upper Canada, and to issue debentures for the payment thereof in twenty years, without a by-law being passed to authorise the same.

Semble, that if it be thought desirable to pass such a by-law it need not be first submitted to the ratepayers for their assent thereto.

Con. Stats. C., cap. 28, sec. 76, specially authorise the sale to any municipal council by the government of the public roads lying beyond the limits of such municipality. (*In re O'Neill v. Corporation of York and Peel*, 15 U. C. C. P., 249.

MAGISTRATE.—PROPERTY QUALIFICATION—In a penal action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative, and inconclusive, one of the witnesses, in fact, having afterwards recalled his testimony as to the value of a portion of the premises, and placed a higher estimate upon it, while the evidence tendered by the defendant was positive, and based upon tangible data:—

Held, (*A. Wilson J. dissentiente*) that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant." (*Squire qui tam* v. *Wilson*, 15 U. C. C. P., 284.)

OBSTRUCTING HIGHWAYS.—EVIDENCE OF DEDICATION.—Where the defendant was convicted under an indictment charging him with having obstructed a "highway" on evidence, which as reported to the court, did not show that the alleged highway had been established by a plan filed or signed by the owners of the adjoining lots, or by the general user of the public, it having been used by one or two persons only for a short time, or that any clearly defined portion of land had been marked off and used: but there appeared to have been merely an open space not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, &c., to the rear of the premises; *Held* that there was not sufficient evidence of dedication to support the conviction, which was, therefore, ordered to be quashed. (*The Queen* v. *Ouellette*, 15 U. C. C. P., 260.)

LEASE OF MARKET FEES.—OBSTRUCTION OF MARKET.—TENANT OF CORPORATION.—Where the defendants leased to plaintiff the market fees of wood market established in one of the public highways of the city, covenanting against their own interference, or that of any one by their license, with the collectson of said fees, having upwards of twenty years previously passed a by-law, recognizing with certain restrictions, the right to deposit materials for building purposes on the highways of the city, and subsequently demised certain premises adjoining the market to one M., who obstructed a portion of the same with building materials; in an action by the plaintiff against the defendants on their implied covenant for undisturbed collection of said fees, and charging a wrongful license to M. to obstruct said market: *Held*, that such action was not maintainable; that the by-law was one which the defendants had authority, with a view to public improvement and convenience, to pass,

and that the plaintiff must be taken to have been cognizant of it when he became their tenant; that M. might, without the license of the defendants, have occupied a reasonable portion of the highway, the by-law apparently merely restricting, without expressly conferring, the right of occupation; that the market being fixed on a public highway, which is *primâ facie* for purposes of public travel, the exercise of the rights incident to such market must be subordinate to the primary and principal purposes of the highway; that there was no such implied covenant for quiet enjoyment as the plaintiff asserted, for there could not be in the highway any such absolute and exclusive enjoyment as he claimed was secured to him. (*Reynolds* v. *The Corporation of the City of Toronto*, 15 U. C. C. P., 276.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY.—PAYMENT TO A PARTICULAR CREDITOR.—FRADULENT PREFERENCE.—Where a debtor, on the eve of bankruptcy, hands over to a particular creditor assets which ought to be distributed amongst all his creditors, the question of whether such an act is a "fraudulent preference," is one of fact, and should be left to the jury to decide upon, having regard to all the circumstances of the case.

A spontaneous payment by an insolvent is, *primâ facie*, fraudulent; but the presumption of fraud may be rebutted by showing any circumstances from whence it may be inferred that the debtor had not the intention to defeat the operation of the bankrupt law, but was actuated by a different motive—*e. g.*, by the desire to fulfil a previous undertaking, believed to be peremptory to pay a particular creditor on a particular day. (*Bills* v. *Smith*, 13, W. R., 407.)

GUARANTEE.—A guarantee for the debt or default of a third person must contain the name of the person to whom it is intended to be a guarantee, as well as the name of the person whose debt or default is guaranteed. (*Williams* v. *Lake*, 2 Ell. & Ell., 349.

CONTRACT FOR PURCHASE—RISK—FIRE.—Where a person enters into a binding contract for the purchase of a house, so strict is the rule that property remains at the sole risk of the purchaser, after the contract, that if the house, being previously insured, is burnt down, the contract being silent on the subject, the purchaser has no right to the policy money. (*Poole* v. *Adams*, 12 W. R., 683.)

DISTRESS.—TENDER OF RENT.—Although where a bailiff is authorised to distrain for rent there may be an implied authority in him to receive the rent in the absence of the landlord, yet this implied authority does not extend to the bailiff's man, who happens to be left in possession of the distress. Tender to the bailiff's man *held* a bad tender, the bailiff himself being within a convenient distance, and being authorised to receive the rent. (*Boulton* v. *Reynolds*, 2 Ell. & Ell. 369.

DISTRESS.—MODE OF ENTRY.—A distress made by getting over a fence from an adjoining garden, and so in at the back door, which was on the latch: *Held*, not to have been wrongful. *Eldridge* v. *Stacy*, 15 C. B., N. S., 458.

LANDLORD AND TENANT.—NUISANCE.—Where a landlord lets premises without a nuisance upon them, but the tenant creates one, the landlord is not liable; but if there be a nuisance on the premises when he lets them or relets them, he is liable; and the fact of not terminating a tenancy from year to year is for this purpose equivalent to a reletting. (*Gandy* v. *Jubber*, 12 W. R., 526.

SALE OF LAND.—CONSIDERATION.—Where a sale of real property has been made by an old infirm and ignorant person, without the assistance of proper advice, the sale will be set aside unless the purchaser shows that full value was given. (*Baker* v. *Monk*, M. R.; 12 W. R., 521.

CONTRACT BY WIFE.—The implied authority of a wife living with her husband to bind him by the purchase of necessaries, suitable to his condition of life, is a mere presumption, which may be rebutted; and in the present case it was held that the implied authority of the wife was rebutted by proof that he had forbidden the wife to purchase on credit, saying he would supply her with money or with goods; although such revocation of authority was not made public. *Dissentiente* Byles J., who considered that the private arrangement between the husband and wife could not affect the apparent authority of the wife. Citing *Johnston* v. *Summer* 3 H. & N. 261. (*Jolly* v. *Rees*, C. P.; 10 Jur., N. S., 319.)

UPPER CANADA REPORTS.

COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

BUCHANAN ET AL. v. FRANK.

Sheriff—Poundage.

Held, that under Con. Stats., U. C. ch. 22, sec. 271, a sheriff is not entitled to poundage unless he *actually levies the money* due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt.

[C. P., H. T., 28 Vic.]

T. Ferguson obtained a rule *nisi* on behalf of the sheriff of Middlesex calling on the plaintiff to shew cause why the order made by the Chief Justice of this court on the 7th of February of the present year, whereby it was ordered that the said sheriff should be disallowed all poundage claimed by him for proceeding on the writ of *fieri facias* in this cause, should not be rescinded, on the ground that the sheriff is by law entitled, under the circumstances, to the said poundage, or to some part thereof, and to tax the same against the plaintiff, and on grounds disclosed in affidavits and papers filed.

The affidavits referred to shewed, that the sheriff received an execution against the defendant's goods to levy for debt, interest and costs, $3,465 60; that the sheriff seized of the defendant's goods sufficient to satisfy the amount of the execution; that after such seizure, and without any sale by the sheriff, and without any money having been paid to the sheriff by the defendant, or made by the sheriff, the plaintiffs and defendant arranged the claim between themselves; that the sheriff was requested to render a bill of his fees, which he did, making the total $103 64, of which the poundage constituted $96 64; that the bill was taxed and the poundage was allowed to the sheriff; that the arrangement made with the plaintiffs by the defendant was brought about by the pressure of the seizure which the sheriff had made upon the goods so taken.

Downey shewed cause.—This whole question must be determined by the construction to be placed upon the Con. Stats. U. C. ch. 22 ss. 270, 271. The following cases shew that the sheriff, in such a case as this, is not by that statute entitled to poundage, but only to such remuneration in the stead of poundage as shall be specially awarded to him: *Winters* v. *The Kingston Permanent Building Society*, Chy. Chamb. Rep. 276; 1 U. C. L. J. N. S. 107; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100.

Robert A. Harrison, with him *Ferguson*, supported the rule.

The statute should not be so rigidly construed as it has been: the sheriff should receive his poundage after a levy has been made; and, if necessary, section 271 should be read as applicable only to cases where there are different writs of execution in the hands of different sheriffs, which would be giving effect to the previous law when it is clear no change was intended by the consolidation, and would harmonize the two sections of the statute:

Alchin v. *Wells*, 5 T. R. 470; *Chapman* v. *Bowlby*, 8 M. & W. 249; *Morris et al.* v. *Boulton*, 2 Chamb. Rep. U. C. 60 *Thomas* v. *Cotton*, 12; U. C. Q. B. 148; *Brown* v. *Johnston*, 5 U. C. L. J. 17; *Walker* v. *Fairfield*, 8 U. C. C. P. 75; *Miles* v. *Harris*, 31 L. J. C. P. 361, S. C. 12 C. B. N. S. 550; *Colls* v. *Coates*, 11 A. & E. 826; *Corbett* v. *McKenzie*, 6 U. C. Q. B. 605; *Gates* v. *Crookes*, 3 U. C. R. O. S. 286; *Leeming* v. *Hagerman*, 5 U. C. R. O. S. 38; Watson on Sheriff, 2nd ed. 110; 9 Vic. c. 56, s. 2, 3, Con. Stats. U. C. c. 2.

A. WILSON, J., delivered the judgment of the court.

As the sheriff is not an officer who at the common law is entitled to recover any fees as remuneration for his services, his sole claim to them being based on positive enactment, we must see whether he has clearly made out his right to the amount he demands, for the burden of establishing them is upon him, before we can rescind the present order which disallows this poundage.

The whole legislative provision is contained in the two sections of the C. L. P. A., ch. 22, secs. 270 and 271. Sec. 270 provides that,

"Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage, fees, expenses of execution, and interest upon the amount so recovered from the time of entering the judgment."

Sec. 271 provides that,

"In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed on the writ, and in case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued or any judge thereof in vacation may allow him a reasonable charge for any service rendered in respect thereof in case no special fee be assigned in any table of costs."

Since the case of *Alchin* v. *Wells* it has been settled that after a levy has been made by the sheriff he is entitled to the poundage, although no sale is made, and further proceedings are stayed, in consequence of a compromise between the parties. That decision was made upon the 29 Eliz. c. 4, which provides that the sheriff shall receive his poundage "on the sum he shall levy, extend *and* deliver in execution;" and this "levy," as is said by counsel in *Holmes* v. *Sparkes* (12 C. B.,) may be either actual or constructive;" for the money is considered to have been levied by "the sheriff when he enters upon the possession of the goods, and by the compulsion of the levy the defendant has been compelled to pay the debt:" *Chapman* v. *Bowlby*, 8 M. & W. 249. Until a seizure has been made the sheriff is not entitled to poundage; therefore, when the debt is paid to him without a seizure he cannot claim poundage: in such a case there has been no levy made—*Graham* v. *Grill*, 2 M. & S. 296; *Colls* v. *Coates*, 11 A. & E. 826, either actual or constructive.

A seizure, however, is not properly a levy: it does not become a levy until the goods seized have been turned into money: *Miles* v. *Harris*,

12 C. B. N. S. 558; *Drewe* v. *Lainson*, 11 A. & E. 529.

But this money, as before mentioned, need not be made by a sale of the debtor's goods by the sheriff: he may so make the money, but he need not actually do so: if he bring about a payment or settlement of the debt by reason of the compulsion of his seizure, *he* is held under the statute of Elizabeth to have *levied* the money; and if a statute make no difference between an actual and constructive levying of the money, he will still be entitled to his poundage in that case; but if it do make such a difference, we must of course give effect to the provision, however hard it may bear against the officer, who has practically done all or nearly all the duty, and incurred all or nearly all the responsibility to have earned his compensation.

Now our statute, after providing generally for poundage in every case in section 270, provides that in cases where a part only of the debt has been levied, the sheriff shall be entitled to his poundage on the amount so levied; which was a needless enactment, as this has always been the law; and then it provides, as before stated, that "in case the real or personal estate of the defendant be *seized* or advertised on an execution, *but not sold* by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be *actually* levied on such execution, the sheriff *shall not receive poundage*, &c."

Now this enactment does in our opinion establish a distinction, which before that time did not exist, between an actual and a constructive levy, and makes a special provision for those cases in which a mere seizure is made, but which are not followed by a sale, and where no money is actually levied. When the money is actually levied the sheriff may levy his poundage: when the money is not actually levied the sheriff cannot levy or demand any poundage, although he may have seized, but he shall "receive fees only for the services actually rendered."

In the present case the sheriff seized, but he did not sell; nor did he actually levy any money: we have only, therefore, to declare that he is directly within the special provision we have just referred to, and, in the language of the act, that he "shall not receive poundage."

It is of no practical value to follow this further, and to say that the present reading of the law has probably arisen from an unintentional oversight in the work of consolidating, for we must accept the law as it stands. If it were not an intentional alteration, the legislation will no doubt, if it be thought to be expedient, amend the law.

Most of the decisions in our own courts to which we were referred were made upon the law as it stood before the consolidation, and are therefore inapplicable, as are also all of the English authorities. The other cases to which we were referred, and which have been decided since the consolidation, and when the attention of the court was called to the change which had been made in the law, have ended in the same manner as the present one, adversely to the sheriff, and therefore the rule will be discharged with costs.

Rule discharged with costs.

ELECTION CASES.

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

REG. EX REL. ROLLO v. BEARD.

Municipal Institutions Act—Disqualification of members of council—Time to which disqualification relates—Costs.

Where it was shown that the firm of which defendant was a member dealt in coal and wood, and during the year 1864 supplied large quantities of both coal and wood to the Corporation of the City of Toronto, without any arrangement as to price or terms of payment, sold in the ordinary course of business, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city, he was *held* disqualified as being a person having by himself or partners or partner an interest in contracts with or in behalf of the corporation.

So where it was shown that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the price remained unpaid at the time of the election.

Where it was shown that the price was paid before defendant took his seat, he was still *held* to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals for the trial of such questions at the peril of having to lose the costs necessarily incurred, even if successful. Therefore in a case where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him.

[Common Law Chambers, Feb. 8, 1865.]

The relator complained that George T. Beard, of the city of Toronto, in the county of York, general merchant, had not been duly elected, and had unjustly usurped the office of councilman for the ward of St. James, in the city of Toronto, in the county of York, under the pretence of an election held on Monday and Tuesday, the 2nd and 3rd days of January last, at the Police Court, in the said ward of St. James, in the said city of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, showed the following cause why the election of the said George T. Beard to the said office should be declared invalid and void. That the said George T. Beard was not at the time of the said election qualified to be a councilman and member of the corporation of the said city of Toronto, in this, that before and at the time of the said election he had, by himself, partners or partner, an interest in a contract or contracts, with or on behalf of the corporation.

The statement was sustained by the affidavit of William Hewitt, of the city of Toronto, hardware merchant, wherein he swore that he was a householder entitled to vote at the election of aldermen and councilmen for the ward of St. James, in the said city of Toronto. That as such he voted for aldermen and councilmen for the said ward at the election holden on Monday and Tuesday, the 2nd and 3rd days of January last. That George T. Beard was elected one of the councilmen for said ward at said election. That he did not vote at said election for the said George T. Beard. That the said George T. Beard was not, as deponent was informed and believed, qualified to be elected a councilman and member of the said corporation, in this, that the said George T. Beard had, as deponent was and verily believed, at the time of the election, by himself, his partners or partner, an interest in a contract or contracts with or on behalf of the corporation of the said city. That the said

George T. Beard was before and at the time of the said election a member of the firm of "Joshua G. Beard & Sons," wood and coal merchants and stove manufacturers, in the said city of Toronto. That the said Joshua G. Beard, the senior member of the said firm, is, so far as the deponent could ascertain and verily believed, a lessee of the said corporation of the city of Toronto, under a lease from the said corporation, dated 15th January, A.D. 1849, for the term of 21 years, of Lots Nos. 2 & 3, on the east side of Church street, in said city, of an annual rental of sixty-two pounds, which said lease deponent was informed and verily believed contains the usual covenant to pay rent to the said corporation. That the said J. G. Beard, the senior member of the said firm, is, as far as deponent could ascertain and verily believed, also a lessee of the corporation of the city of Toronto, under a lease from said corporation, dated 13th April, A.D. 1863, for the term of 21 years, of a water lot to the south-east of the City Hall, on Esplanade Street, in the said city, at an annual rental of $146, which said lease, deponent was informed and verily believed, contains the usual covenant to pay rent to the said corporation. That the business of the said co-partnership, of which the said George T. Beard is a member, is, as deponent was informed and believed, carried on upon the parcel of land last described. That the said firm of Joshua G. Beard & Sons had, as deponent was informed and verily believed, before and at the time of the said election, a contract or contracts with the said corporation for the delivery of a large quantity of coal to the New Gaol in and for the said city, and for the use of the St. Lawrence Hall in said city. That the said George T. Beard received, as the deponent was informed and verily believed, on the 13th of January last, since said election, from said corporation, for and on account of the contract or contracts last mentioned, the sum of $1,609 09, shown in the books of the said corporation, as follows:—

Coal, &c, for Gaol.....	$1,522 84
Coal for St. Lawrence Hall..	80 75
Culvert and gratings	5 50
	$1,609 09

Joshua G. Beard, the senior member of the firm of "Joshua G. Beard & Sons," in answer, made oath,—That he is the lessee from the corporation of the city of Toronto, of Lots Nos. 2 & 3, on the east side of Church Street, in the said city, under a lease from the said corporation to deponent alone, dated the 15th day of January, in the year of our Lord one thousand eight hundred and fifty-nine, at an annual rental of sixty-two pounds, for the term of forty-two years. That the said firm of Joshua G. Beard & Sons has no interest whatever in the said lease or in the property therein contained; but the same is deponent's own private individual property, unconnected in any way with the said firm or the said partnership business. That doponent holds no lease from the said corporation dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, of land to the south-east of the City Hall; but is lessee of the said corporation under a lease from the said corporation to deponent alone, dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, for the term of twenty-one years, of a water lot directly south of the said City Hall, at an annual rental of one hundred and fifty-six dollars. That the business of the said firm of Joshua G. Beard & Sons is carried on upon a lot to the east of the said City Hall, of which deponent is the owner in fee simple, where his coal and wood yard and office are situate, and not upon the said lot contained in the lease last herein mentioned, but a few loads of coal and wood have, by deponent's permission, been landed at the wharf on the said lot. That the said lot of land last mentioned was leased by deponent from the corporation for his own use alone, and without any previous arrangement of any kind with the said firm in connection therewith. That there has never been any agreement, verbal or written, between deponent and the said George T. Beard, or between deponent and any member of the said firm, relating to or in any way connected with the said lot of land last herein mentioned or the lease thereof. That being in bad health, deponent has been unable to attend regularly to business during the last nine months.

Defendant made oath, that is he a member of the firm of Joshua G. Beard & Sons, carrying on business as wood and coal merchants and stove manufacturers in the said city of Toronto. That during the year one thousand eight hundred and sixty-four, the corporation of the city of Toronto purchased from the said firm a large quantity of coal for the use of the New Gaol and of the St. Lawrence Hall, in the said city of Toronto; but that as to all, except ten tons of the said coal, there never was any contract or arrangement whatever, either as to the price, quantity, or terms of payment; but the same was ordered by the chairman of the Gaol board of the said corporation, without any previous notice to the said firm, and furnished by the said firm as they might have been ordered from and furnished by any other coal merchants in the said city. That as to ten tons of the said coal, tenders for that quantity of coal were advertised for by the said corporation, and the said firm having sent in a tender, the same was accepted, and the said firm furnished the said coal in the month of September last. That no terms of payment were ever agreed upon therefor, nor any contract, verbal forwritten, entered into with the said corporation relating thereto, except as aforesaid; but the said tons, as well as all other coal supplied during the said year one thousand eight hundred and sixty-four, were supplied before the first day of December last, and were to be paid for on delivery or demand, and was not paid for in full until the thirteenth day of January last, only because payment was not sooner required. That on the said thirteenth day of January, and before deponent was sworn in or took his seat as a member of the council, which he did on the sixteenth day of the said month of January, the said firm was paid in full for the said coal by the corporation of the year one thousand eight hundred and sixty-four, and he, deponent, had not, when he was so sworn in and took his seat, nor had the said firm, any claim whatever against the said corporation on account thereof, nor had any dispute ever arisen between the said firm or deponent and the said corporation relating to

the said coal. That the sum of five dollars and fifty cents mentioned in the eleventh paragraph of the affidavit of Mr. Hewitt, was a payment for goods ordered by the said corporation from the said firm, in the year one thousand eight hundred and sixty-three, without any contract or agreement whatever, and not paid for before only because such payment was not sooner demanded.—The affidavit of defendant was, in all material parts, corroborated by the affidavit of Charles Shall, book-keeper in the employment of Joshua G. Beard & Sons.

Robert A. Harrison, for the relator, contended that the word "contract," as used in the Con. Stat. U. C. cap. 54, sec. 73, is to receive a liberal interpretation; that it has been held to extend to leases from the corporation (*Reg. ex rel. Stock* v. *Davis*, 3 U. C. L. J. 128; *Reg.* v. *York*, 2 Q.B. 847; *Simpson* v. *Ready*, 12 M. & W. 344; *The Queen* v. *Francis*, 18 Q. B. 526), and to all cases where goods have been supplied to or work done for the corporation, the price of which is unpaid at the time of the election (*Reg. ex rel. Moore* v. *Miller*, 11 U. C. Q B. 465; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 45; *Reg. ex rel. Davis* v. *Carruthers*, 1 U. C. Pr. R. 116), and that where goods have been supplied without price agreed upon, there is, of anything, greater room for holding the case within the Act than if the goods were supplied at fixed prices, for opportunity would otherwise be given to the seller to procure the acceptance of goods not before accepted, or to procure for them, if accepted, greater prices than their real value (*Ib.*)

C. Robinson, Q C., argued that no interest on the part of defendant was shown in the corporation leases, and that as to the supplies of coal and wood, they were not matters of contract so as to work a disqualification. But admitting the latter to be so, he contended that the disqualification related not to the time of the election, but to the time when the relator took his seat. That *Reg. ex rel. Davis* v. *Carruthers* was decided under Stat. 16 Vic. cap. 181, which enacted that "no person having, by himself or partners, any interest or share in any contract with or on behalf of the township, county, village, town, or city in which he shall reside, shall be qualified to be, or be elected, alderman or councilor for the same in any ward therein; whereas the present Act simply provides "that no person having, by himself or his partners, an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of a corporation (sec. 73.) He urged that no person elected becomes a member of the council till acceptance of office (sec. 130); and that when defendant accepted office, in that case his disqualification was removed.

Robert A. Harrison, in reply, pointed out, that by sec. 7 of the Act, the persons qualified to be elected mayors, members of a council, &c., are such residents, &c., as are not disqualified under the Act, and have at the time of the election the requisite property qualification. That there could be no qualification at the time of the election if there were then an existing disqualification, and that an interest in a contract is by the Act expressly declared a disqualification; that by election the party elected became a member of the council *in posse* if not *in esse;* and that reading sec. 73 of the Act by itself, the words "member of the council," were not to receive the narrow construction for which defendant contended, but rather a broad and liberal construction, in unison with the object and spirit of the law, which is to secure independent, honest, and impartial men for the situations of public trust created by the Act. (See *Powell* v. *Bradley*, 11 L. T. N. S. 602.)

HAGARTY, J.—This is a summons in nature of a *quo warranto*, calling on George T. Beard to show by what authority he claims the office of councilman for the ward of St. James, Toronto. The election was held on the 2nd and 3rd of January, and Mr. Beard was then elected. The objection is wholly to his qualification, viz., that before and at the time of election he had, by himself or his partners or partner, an interest in a contract with the city corporation. It is sworn on the part of the relator, that Beard is a member of the firm of J. G. Beard & Sons. That the senior partner, J. G. Beard, is a corporation lessee of land on which the partnership business was carried on. In reply it is sworn that the partnership, as such, had no interest whatever in the leasehold premises; that only a small portion of the premises was occasionally used for landing coal and wood; the business being actually conducted in other premises, and that the defendant Beard had no interest in the lease, and no agreement existed with the lessee respecting same or the rents or covenants.

No doubt a corporation lessee is disqualified, but nothing appears to me in this case in any way to connect defendant with any obligation, interest, or contract under the lease, and this objection, I think, wholly fails. The remaining one is more serious. It appears that defendant's firm dealt in coal and wood, and during the year 1864, supplied large quantities of both coal and wood to the corporation, as defendant swears, without any arrangement as to price or terms of payment; and in ordinary course of business, for a small portion, viz., ten tons, a tender by defendant's firm had been accepted. No written or other contract, except the contract implied by the relation of vendor and purchaser, existed. All the coal was supplied before the 1st of December, and was to be paid for on delivery or demand, and was not paid for in full until the 13th day of January, 1865, only because payment was not sooner required. Defendant swears that on that day, being after his election but before he had taken his seat, the unpaid balance was paid by the corporation in full. It would seem that the payments made to defendant's firm, in January, amounted to over $1,600.

I think I am bound to hold that a claim against the corporation for the price of goods sold, work and labour, &c, comes clearly within the words of the statute disqualifying any person having, by himself or his partners or partner, an interest in any contract with or on behalf of the corporation. I think this point has been expressly decided before now. The case of *Carruthers* 1 U. C. Pr. R., which was for work done, is hardly distinguishable. I do not, however, see how there can be any doubt on this question. The object of the Act was to keep from the council board any person having any interest in procuring the corporation funds to be applied in satisfying any claims he might have against them for payment. The vendor of goods, as a general rule, has a marked interest in obtaining prompt

payment, &c., and very many cases arise in which it is all-important to the public interest that perfectly unbiassed councillors should decide on the amount when the price is not fixed; on the acceptance or rejection of inferior goods or imperfect workmanship; or claims for services of doubtful existence or utility.

The word "contract" is of wide significance, and I think clearly embraces a case like the present. But Mr. Robinson, for the defendant, argues with much force and ingenuity, that even if defendant were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council, viz., on the 13th of January, a day prior to the earliest lawful assembling of the new council. He points out that, in the earlier Acts, the words are that "no disqualified person shall be elected," &c. The last Act governing this case is Con. Stat. U. C. cap. 54, sec. 73, which differs from the preceding Acts, that no disqualified person "shall be qualified to be a member of the council of the corporation;" and the argument is, that this points not to the time of election, but to becoming a member, or, in other words, taking a seat in the new council. And Mr. Robinson urges here, that Mr. Beard wholly ceased to be a contractor, or to have any claims, before the new council had any legal right to meet or act as such. But the last statute says, in sec. 70. "the persons qualified to be elected mayors, members, &c., are such residents of the county within which, &c., as are not disqualified under this Act, and have, at the time of their election, property,"&c. Then, the disqualifying clause, sec. 73, declares, amongst other disqualifying clauses, "that no person having, by himself or his partners, any interest in any contract, &c., shall be qualified to be a member." First, we have a declaration that the persons qualified to be elected are those not disqualified under the Act. Next, we have a list of the disqualifications which prevent persons becoming members of the council. I feel no doubt whatever that it is at the time of the election that the disqualification or disqualifications of the candidate is to be considered. He is then either a qualified or a disqualified person for the suffrages of the electors. I should hold the same opinion if I had nothing but the 73rd section to guide me. To refer the qualification to the time when the person elected might actually take his seat at the council board, would be, in my judgment, wholly at variance with the spirit of the Act of Parliament, and fatal to the usefulness of this very wholesome provision as to disqualifications.

In the present case we may possibly regret the result from a conviction of the apparent good faith of the whole proceeding. We may be satisfied that the disqualification was wholly accidental, and that Mr. Beard might as readily have settled with the corporation and removed the objections before the election as after. But all rule must not be infringed; the election must be set aside, and a new election had.

I unwillingly feel compelled to make defendant pay costs. But I think I cannot weaken the effect of this wholesome provision by discouraging parties from bringing a case of disqualification under notice at the peril of having to lose the costs necessarily incurred. The defendant might have disclaimed, and saved further expenses. He must be unseated, with costs.

Order accordingly.*

THE QUEEN ON THE RELATION OF BUGG v. SMITH.

Con. Stat. U. C. cap. 54, sec. 73—Insurance agent—Not disqualified to be member of City Corporation.

An agent of an insurance company paid by salary or commission, who both before and since the last municipal election in the City of Toronto had, on behalf of his company, effected insurances on several public buildings, the property of the Corporation of the City of Toronto, and on several common school buildings within the city, and who at the time of the election had himself rented two tenements of his own to the Board of School Trustees for common school purposes, *held* not to be "a person having by himself or his partner an interest in any contract with or on behalf of the Corporation," and so not disqualified under s. 73, of Con. Stat. U. C. cap. 54, to be and become an alderman for a ward within the city at the last municipal election.

[Common Law Chambers, Feb. 11, 1865.]

The relator complained that James E. Smith, of the City of Toronto, in the County of York aforesaid, one of the United Counties of York and Peel, merchant and insurance agent, had not been duly elected and had unjustly usurped the office of Alderman for the Ward of St. John, in the said City of Toronto, under the pretence of an election held on Monday and Tuesday, the second and third days of January, in the year of our Lord one thousand eight hundred and sixty-five, in and for the Ward of St. John in the said City of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, shewed the following causes why the election of the said James E. Smith to the said office should be declared invalid and void.

1st. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with the corporation of the City of Toronto, effected with the said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, all of which were subsisting at the time of the said election and still are subsisting contracts; and the said James E. Smith as such agent of said insurance company being paid by such company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

2nd. That the said James E. Smith, since said election, had become disqualified to hold the said office in this, that he has an interest in contracts with the corporation of the City of Toronto, effected since said election with said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

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* As to costs, see *Reg. ex rel. Charles* v. *Lewis*, 2 U. C. Cham. R. 177, Burns, J.; *Reg. ex rel Hawke* v. *Hall*, 2 U. C. Cham. R. 187, Sullivan, J.; *Reg. ex rel. Dillon* v. *McNeill*, 5 U. C. C. P. 137, Macaulay, C. J.

3rd. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with or on behalf of the corporation of the City of Toronto, effected with or on behalf of the said corporation, or the school trustees of the said City of Toronto, by him, the said James E. Smith, as agent of the Imperial Insurance Company for the insurance against loss by fire of certain schoolhouses and appurtenances in the said City of Toronto, all of which contracts were subsisting at the time of the said election and still are subsisting contracts, the premiums therefor being paid directly or indirectly by the corporation of the said City of Toronto; and the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

4th. That the said James E Smith at the time of the said election was disqualified in this, that he at the time of the said election had an interest by himself or his partner or partners in a contract or contracts with or on behalf of the corporation of the said City of Toronto, or the school Trustees of the said City of Toronto for the leasing or renting by him the said James E. Smith, his partners or partner, of two houses on Centre Street in the said City of Toronto, used as schoolhouses in said city, the rent therefor being paid directly or indirectly by the corporation of the said City of Toronto, and the said contract or contracts being subsisting at the time of the said election and still subsisting.

The relator made affidavit that he is a resident freeholder in the City of Toronto, having real estate sufficient to entitle him to become an alderman of the council of the corporation of the said city. That he was a candidate for the office of alderman for the Ward of St. John, in the said City of Toronto, at the last municipal election, holden in and for the said ward in said city on Monday and Tuesday, the second and third day of January last past. That Robert Moodie, of the said City of Toronto, innkeeper, and James E. Smith, of the said City of Toronto, merchant and insurance agent, were also candidates at said election in and for the said office of aldermen in and for the said ward. That according to law the said ward was and is entitled to be represented in the council of the said city by two aldermen and two councilmen. That at the close of the said election the votes for aldermen in said ward stood as follows:

Robert Moodie	635
James E. Smith	563
John Bugg	388

That the said Robert Moodie and James E. Smith were thereupon declared duly elected as aldermen for the said ward, and have since accepted the said office. That the said James E. Smith was before and at the time of the said election a member of the firm of J. E. Smith & Co., wholesale dealers in the said City of Toronto. That the said James E. Smith was before and at the time of the said election, and still is an agent for the Imperial Insurance Company for the purpose of accepting risks for and on behalf and in the name of the said company against fire, on houses and other tenements. That the said Jas. E. Smith was also, as deponent was informed and verily believed, before and at the time of the said election the owner by himself, his partners or partner, of two houses situate on Centre Street in the said city before and at the time of the said election, rented for school purposes in said city as hereinafter mentioned. That the said James E. Smith was, as deponent was informed and verily believed before and at the time of the said election, and still is paid for his services as agent of the said insurance company, by salary or commission, in proportion to the number of risks secured by him for valuable consideration in that behalf for said insurance company or otherwise, to the effect last mentioned. That the said Jas. E. Smith acting as agent for the said insurance company, has induced the said corporation to insure against loss by fire with said insurance company the following public buildings and personal property of the corporation of the said city, for the amounts and at the rates and for the premiums undermentioned:

	Amount.	Rate.	Premium.
Crystal Palace	$8,000	at 20s	$80 00
House of Refuge	4.000	at 12s. 6d.	25 00
New Gaol	6,000	at 12s. 6d.	37 50
St. Lawrence Hall and Arcade	8,000	at 12s. 6d.	50 00
Furniture in City Hall	2,500	at 15s	18 75
	$28,500		$211 25

That all the said insurances had been, as deponent was informed and verily believed, effected by the said James E. Smith with the said corporation during the months of November, December and January last past; and that as deponent was informed and verily believed, receipts for premiums paid were, at the times of payment of premiums, given by the said James E. Smith to the said corporation. That the said James E. Smith, acting as agent for the said insurance company, induced the said corporation, or the board of school trustees for the City of Toronto, to insure against loss by fire with him, the said James E. Smith, on behalf of the said insurance company, the following common schoolhouses in said city for the amounts and for the premiums undermentioned:

	Amount.	Premium.
Palace Street School, Givens Street School, Additional Building of Louisa Street School	$6,900	$58 75
George Street School	2,000	12 50
	$8,900	$71 25

That policies for said insurances last mentioned were, as deponent was informed and verily believed, issued by the said James E. Smith to the said school trustees, or to the said corporation, before the said election, and were subsisting at the time of the said election and are still subsisting. That the amount of such premiums last mentioned, together with other expenditure incidental to the common schools aforesaid, are as deponent was informed and verily believed, directly or indirectly, paid to the said James E. Smith by the said corporation of the said City of Toronto. That the houses mentioned in paragraph ten of his affidavit are situate on Lot No. 41, on the west side of Centre Street, in the said

City of Toronto. That the said lot last mentioned, according to the books of the Registrar of deeds in and for the said City of Toronto, is (subject to a mortgage thereon for the sum of £300) the property of the said James E. Smith. That the rental paid for the use of said houses on said lot last mentioned is $140 per annum, being in deponent's opinion much more than the fair value thereof; and that said rent was, as deponent was informed and verily believed, directly or indirectly, paid by the said corporation of the said City of Toronto.

Robert A. Harrison, for the relator, moved, upon reading the statement and affidavits filed in support of the same, together with the recognizance of the relator and his sureties therein named, and the same being allowed as sufficient for an order for a writ of summons to issue calling upon the said James E. Smith to shew by what authority he, the said James E. Smith, now exercises or enjoys the office of alderman for the Ward of St. Johns in the City of Toronto. Mr. Harrison submitted that the defendant was in law disqualified as having an interest in the existence or continuance of contracts with or on behalf of the corporation, and so within the letter and the spirit of sec. 73 of Con. Stat. U. C. cap. 54. He contended that the evil contemplated being evident and the words used general. The act should be construed so as to extend to all cases that come within the mischief, and argued that this case was one clearly within the mischief of the act. He referred to *Towsey* v. *White*, 5 B. & C. 125, 131; *Reg. ex rel. Armor* v. *Coste*, 8 U. C. L. J. 290.

HAGARTY, J., having taken time to consider, held that Jas. E. Smith was not, upon the facts stated, to be deemed "a person having by himself or his partner an interest in any contract with or on behalf of the corporation," within the meaning of the statute, and so refused the order.

Order refused.

INSOLVENCY CASES.

Before the County Judge of the County of Elgin.

IN RE JOHN CAMPBELL.

Election of assignee—Appointment of agent.

HUGHES, Co. J., declined at a meeting of creditors to elect an assignee, to take the advice of a person not appearing to be duly authorised in writing by his principals, and said, moreover, that this authority should be filed of record.

DIVISION COURTS.

In the First Division Court of the County of Elgin.

PUTNAM v. PRICE.

Interpleader—Priority of attaching and non-attaching creditors—Two executions placed in bailiff's hands at the same moment.

Where the claimant's judgment was recovered long before the attachment issued, and an execution thereon issued and placed in the hands of the bailiff at the same moment as the execution on the judgment of the plaintiff, the attaching creditor: *Held*, 1st, that the attaching creditor was not, by reason of his attachment, entitled to priority; 2nd, that it is to be presumed that the execution oldest in date came to the hands of the bailiff first, and the maxim, "*qui prior est in tempore potior est in jure*," applies.

The claimant recovered judgment and obtained execution against the goods of the defendant some months before the defendant absconded. The execution was returned *nulla bona*. Defendant then absconded; and the plaintiff sued out an attachment, and caused property to be seized under it; and, recovering judgment in his attachment suit, sued out execution for the sale of the goods attached. In the meantime the claimant issued an alias execution upon his prior judgment, which was placed by the clerk in the hands of the bailiff at the same moment as the execution of the attaching creditor—the clerk placing both executions on the desk before the bailiff, who picked up the plaintiff's (the non-attaching creditor) first, and marked it "first." Mr. Nichol claimed the proceeds of the sale of defendant's goods in satisfaction of his judgment and execution, and contended that as the executions were both handed to or placed in the custody and power of the bailiff at the same instant, it mattered not which he picked up or marked "first;" that his execution was oldest in date, and was first in time, for the clerk ought to have handed that to the bailiff first, as it was first in point of time; and referred to the secs. 69 and 204 of Con. Stat. on Division Courts; *Bank of British North America* v. *Jarvis*, 1 U. C. Q. B. 182; *Drake* v. *Parlee*, 1 U. C. L. J. 177; *Ex parte McDonald*, 1 U. C. L. J. 77, and insisted that he was entitled to the proceeds of the sale of the goods, as the attaching creditor gained no priority by reason of his attachment.

On the other hand, it was contended that the attaching creditor had a right against all claimants to the proceeds of the sale of the property attached, excepting against those who attached within one month, and cited secs. 203, 204, 206 & 207 of Division Courts Act.

HUGHES, Co J.—The case of *ex parte McDonald*, 1 U. C. L. J. 77, is very similar to this, excepting in one respect, and affords, if the decision is correct, a precedent against Mr. Nichol's claim. The facts of that case were dissimilar in this, that the claimants, *i. e.*, the execution creditors, who had not attached in that case, obtained judgment and execution *before* the attaching creditor; they obtained judgment and execution after the attachment, and before the attaching creditor obtained execution. In this case the execution of the claimant and of the plaintiff came to the custody of the bailiff at the same moment.

The first statute of Upper Canada, which authorized the attaching the property of absconding debtors, was 2 Wm. IV. cap. 5, and under it the sheriff was required to attach and seize, &c., all the estate, &c., of the absconding debtor; and from the moment he seized, the estate was *in custodia legis*. The sheriff acquired a special or qualified property in the estate, and the former owner no longer retained the power of disposing of it (*Gamble et al.* v. *Jarvis*, 5 U. C., R. O. S. 275, per Robinson, C. J.); and unless the debtor returned and put in bail to the action, or caused the claim of the attaching creditor to be discharged within three months, all his estate, real and personal, or so much of it as might be necessary, was held liable for the payment, benefit and satisfaction of the claim of the plaintiff. The Court of King's Bench, in *Gamble* v. *Jarvis*,

held that the goods, &c., were not to be looked upon as taken for mere safe keeping for the benefit of all the creditors, and as remaining in the hands of the sheriff, subject to the first execution that might come against them; but that the attaching creditor had in effect a lien upon the property attached, which was to continue (unless he could be shewn to have forfeited or abandoned it), and he held priority over all others.

It is to be remarked that in that first statute no provision whatever was made for ratably dividing the proceeds of any sale of the estate attached, in cases where several attachments might be issued against the same absconding debtor, where there was not enough estate to pay all claims; nor for the cases of those plaintiffs who might have commenced suits against and served process upon the debtor before he absconded, and before the issuing of the attachment. These things were provided for by the enactments of the amended act 5 Wm. IV. cap. 5, ss. 4 & 6, and before the passing of the second statute the questions which came up for decision in *Gamble* v. *Jarvis* arose; and it was held as contrary to the principle of the common law that goods *in custodia legis* should be seized in execution, they having already been seized for the benefit of another plaintiff, who had not forfeited his lien to them. Goods attached by foreign attachment, issued from the Lord Mayor's Court of the city of London—a proceeding bearing analogy to our Absconding Debtors Act—are held not to be subject to be taken in execution in another suit. "The owner of the goods has lost for the time his power of disposing of them, and his creditor can have no greater right of disposing of them than himself."

It was also held that the attachment was in the nature of a distress, to compel the absconding debtor's appearance, and that it was "impossible to exclude the case from the operation of the principle that goods taken as a distress are exempt from execution." The question of priority was excluded from consideration by the amended act I have named, and subsequently by the act 19 Vic., cap., 43, sec. 53, and now by 21st sec. of Con. Stat. of U. C., p. 293, in so far as the Courts of Record are concerned; but it has been long an open and much debated question in the division courts. The proceedings by attach was never in use in the Courts of Requests.

The case of *Gamble* v *Jarvis* goes therefore to show an analogy between the U. C. Stat, 2 Wm. IV. c. 5, and our D. C. Acts, that in the absence of any express provision giving priority of claim to a person circumstanced as Mr. Nichol is, the seizure of goods under the attachment was obviously intended for the purpose, not of enforcing the mere appearance of the debtor, for that would be of no use in a court which has no power of issuing process against the person, or of detaining a debtor, nor of taking bail to the action, as the superior courts may do in cases of attachments against absconding debtors, but for "*securing*" out of the debtor's estate the debt and costs of the attaching creditor. The form of the attachment is given at page 180 of the Con. Stat. of Upper Canada, commanding the officer to attach seize, take, and safely keep, all the personal estate end effects of the absconding, removing, or concealed debtor, &c, liable, &c, within, &c., or a sufficient portion thereof, to secure A. B. (the creditor) for the sum of (i. e. the sum sworn to be due) together with the costs of his suit thereupon, and to return this warrant with what you shall have taken thereupon, to the clerk of the division court forthwith, &c.; and section 208 provides that the property when seized is to be forthwith handed over to the custody and possession of the clerk of the court, who is to take the same into his charge and keeping, &c.; and then in case the debtor, before judgment recovered, executes and tenders to the creditor who sues out the attachment, a bond, with sureties binding the obligors in the event of the case being proved and judgment recovered, to pay the claim, "or the value of the property attatched," or produce the property when required to satisfy the judgment, the clerk is to supersede the attachment. (See sec. 209).

By the 210th section of the D. C. Act, if within one month from the seizure, the debtor does not appear and give the bond, execution may issue so soon as judgment has been obtained upon the claim, and the property attached, or sufficient of it, to satisfy the judgment and costs, may be sold for the satisfaction thereof, or in case of perishable property having been sold, enough of the proceeds may be applied to satisfy the judgment and costs.

But whatever conclusion I might arrive at under *Gamble* v. *Jarvis*, I am nevertheless bound by the later cases of *Francis* v. *Brown*, 11 U. C. Q. B. 558; 1 U. C. L. J. 225; *Fisher* v. *Sculley*, 3 U. C. L. J. 89, and which appears to me to over-rule *Gamble* v. *Jarvis*, to decide that a creditor in the Division Court, who obtains the first judgment and execution, gains the prior satisfaction, and that the attachment does not deprive him of his legal priority of execution; for in this respect I can see no difference between a creditor having a judgment and execution in a Court of Record, and a creditor having a judgment and execution, in the same circumstances in the Division Court In the case of an attaching creditor, and a non-attaching creditor, both must proceed to judgment and execution, and as said by Mr. Justice Burns, "I apprehend the rule *qui prior est in tempore, potior est in jure*, as respects the execution, must prevail, and no lien or priority is gained merely by means of an attachment."

I therefore decide that the claimant's execution is entitled to priority. Because if a sheriff under similar circumstances may on a *fi fa.* from a court of record seize upon the goods in the hands of the clerk of the Division Court, and claim priority over the Division Court creditor, who has attached them before he obtains execution, there certainly can be no reason why a judgment creditor in similar circumstances in the same court may not occupy the same position.

The other point in question is as to which execution is entitled to priority as having reached the bailiff's hands first. They reached the possession of the bailiff at the same instant, in the same way as they would had they been both sent to him by mail; they were both in his custody and power at the same instant. I must therefore hold that the one oldest in date reached his hands first, and that that must prevail (for his marking the one or the other as first could not alter the fact); the rule *prior est in tempore potior est in jure* must also apply here.

CORRESPONDENCE.

Assessment Act—Liability of goods to distress for taxes—What goods.

To the Editors of the Law Journal.

Gentlemen,—A. occupied B.'s town lot, paying for the use of it simply the taxes. In August last, A. (after having the lot assessed in his name) removed, carrying with him everything moveable thereon.

Now, the collector says he has no authority to seize A.'s property in other parts of the municipality, because the removal took place before he received the roll. Can he seize?

An answer in your April number, if possible, will oblige

Several Readers.

Collingwood, March 23, 1865.

[In case any person neglects to pay his taxes for fourteen days after demand, the collector is empowered to levy the same with costs by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession, wherever the same may be found within the county within which the local municipality lies. The fact of removal from the lot assessed, before or after the receipt of the roll by the collector, does not in any manner, so far as we understand the act, affect the right of the collector to distrain, so long as the goods and chattels liable to distress are within the county, and in the possession of the person who ought to pay the taxes at the time of the distress.—Eds. L. J.]

To the Editors of the Local Courts Gazette

Fees on return of executions—Forfeited fees—Returns of.

Gentlemen,—You will much oblige a subscriber by answering the following questions relative to *fees* to be paid to bailiffs on return of executions. Perhaps some of the clerks in the different counties would state the course they pursue in regard to the same.

1st. The 141st section states that all executions shall be returned by the bailiff within thirty days from the day the said execution issues to him.

2nd. The 52nd section requires that all fees on executions shall be deposited with the clerk before same issues to bailiff; and the 53rd section states if executions be not returned within the time mentioned, then he (the bailiff) shall forfeit *all* or *part* of his fees.

Now, for instance, if the bailiff returns an execution *nulla bona*, he is not, by statute, allowed to charge any fees; but should he return *fi fa.*, after the return day thereof, *money made*, it is the duty of the clerk to make him forfeit his fees on said execution, and to take charge of same and make return of same to County Attorney. Now, the question arises, are the clerks still bound to make returns of those forfeited fees? If so, can they still charge for those returns? I admit those fees so forfeited belong to the Fee Fund, and should be paid over; but since returns to the Fee Fund are done away with, what is the duty of the clerks? Surely not to keep the money!

I should like very much to know if this section is enforced in the different counties in Upper Canada. It is a good rule, and is a check upon bailiffs.

I remain, yours, &c.

Clerk 2nd D. C., Lincoln.

[We commend the above letter to the notice of Division Court Clerks throughout the country, and will willingly open our columns for the information sought. The subject is an important one, and will bear discussion; but, as at present advised, we concur in our correspondent's views. It is clear, whether paid for or not, that the service required by the statute should be performed. After hearing from other officers, we may find occasion to return again to the matter.—Eds. *L. C. G.*]

REVIEWS.

The Trade Review: Montreal, published by W. B. Cardier & Co. every Friday.

We take great pleasure in recommending this weekly publication to the patronage of the public. The articles which appear in it on subjects of Political Economy are well written and well worthy of extended circulation. The more popular the publication becomes, so long as at present conducted, the better will it be for our people. The information it contains is such as not to be found in any other Canadian publication, and such as is calculated for the well being of the country in a commercial point of view.

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Andrew Jones	Tp. North Dumfries.
Christopher Ephraim Lee	Barrie.
R. J. Earl	Chatham.
H. N. Boxer	Montreal.
Michael Marrion	Lime Lake.

APPOINTMENTS TO OFFICE.

POLICE MAGISTRATE.

JAMES WEYMS, Esquire, to be Police Magistrate, Town of Brantford. (Gazetted April 22, 1865.)

NOTARIES PUBLIC.

DAVID SMART, of Port Hope, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

EDWARD TAYLOR DARTNELL, of L'Orignal, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DANIEL SHUFF, of McGillivray, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DUNCAN C. MACDONELL, of Whitby, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

WILLIAM TORRANCE HAYS, of Goderich, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

JOHN EDWIN FAREWELL, of Oshawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DONALD SUTHERLAND, of Thamesford, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 22, 1865.)

GEORGE PALMER, of Guelph, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 22, 1865.)

CORONERS.

THOMAS JOHN YORK, Esquire, M.D., Associate Coroner, County of Wellington. (Gazetted April 1, 1865.)

ALEXANDER JAMES McMASTER, Esquire, M.D., Associate Coroner, United Counties of York and Peel. (Gazetted April 1, 1865.)

CHARLES TAIT SCOTT, Esquire, Associate Coroner, United Counties of Huron and Bruce. (Gazetted April 1, 1865.)

GEORGE WILSON, Esquire, M.D., and DAVID HOWARD HARRISON, Esquire, M.D., Associate Coroners, County of Perth. (Gazetted April 22, 1865.)

JOHN CASCADEN, Esquire, M. D., Associate Coroner, County of Elgin. (Gazetted April 22, 1865.)

EDWARD HORNIBROOK, Esquire, Associate Coroner, County of Perth. (Gazetted April 22, 1865.)

TO CORRESPONDENTS.

"SEVERAL READERS"—"CLERK 2ND D. C. LINCOLN"—under "Correspondence."

"A SUBSCRIBER."—Too late for this number, will appear in next.