## DIARY FOR JUNE.

1. Mon..Paper Day Q. B. New Trial Day C. P. Last day not trial for C. C. Recorder's Court sits.
2. Tues..Paper Day C.P. New Trial Day Q.B.
3. Wed..New Trial Day C. P.
4. Thurs. Re-hearing Term commences.
5. Frid..New Trial Day Q.B.
6. Sat....Easter Term ends.
7. SUN..*Trinity Sunday.*
9. Tues..Quarter Sessions and C. C. sittings in each Co.
11. Thurs. *St. Barnabas.*
14. SUN..*1st Sunday after Trinity.*
20. Sat....Accession of Queen Victoria, 1837.
21. SUN..*2nd Sunday after Trinity.* Longest Day.
24. Wed..*St. John Baptist.* Appeals from Chancery Cham.
28. SUN..*3rd Sunday after Trinity*
29. Mon..*St Peter.*
30. Tues..Half-yearly School Returns to be made.—Dep. Registrar in Chancery to make returns and pay over fees.


# The Local Courts'
AND
# MUNICIPAL GAZETTE.

JUNE, 1868.


## STATUTE BOOK OF ONTARIO.

The Statutes of the first Session of the first Parliament of Ontario have at length been issued—we may perhaps add, distributed, though, it does not appear to be the intention of the Government to supply them to Magistrates and others in the same lavish way that the General Statutes used to be. The tenth Section of the Interpretation Act makes a general provision for the distribution of the printed Statutes, directing copies to be sent to members of the Legislative Assembly in such numbers as may be ordered by resolution of the house or by order in council, and to such of the public departments, administrative bodies and offices, throughout the Dominion, as may be specified by order in Council.

Under the provisions of this Section the Statutes have been, and are to be disposed of as follows:—

One copy is to be sent free to each member of the Senate, and of the Commons of Canada, and four copies to every member of the Legislative Assembly of Ontario. Every official in each County in Ontario and heads of governmental departments are also to have a copy. Magistrates have to buy their copies at the reduced price of fifty cents each, but it is only duly qualified magistrates that are allowed this privilege; and to carry out this arrangement the Clerks of the Peace are to be supplied with copies for this purpose. The trade have to pay one dollar each for the statutes, which they again retail at any advance of twenty-five cents.

We understand the actual cost of the statutes, including binding, has been very small, and that the government will not be losers even at the reduced rate at which magistrates are supplied. Magistrates will therefore think it hard that they have to provide themselves with copies for the use of the public; and with those who often, at much loss of time, ease and money, conscientiously perform their duties, not as a means of thereby obtaining a livelihood or making their office a source of profit, we most heartily sympathise, and it does seem a small thing in economy to make a few dollars out of them.

But there is, we are afraid, another side to the picture, which has, perhaps, caused the government, in its zeal to economise the public money, to take too strong grounds against magistrates as a class. It cannot be denied that there a large number of persons on the commission who are utterly unfit to perform, with credit to themselves or benefit of the public, the duties of their office; and it is equally true that many men, with more ambition than self knowledge, make great exertions to obtain the honor of writing J. P. after their names, and that others look upon the office as a means of "turning an honest penny," instead of doing something more suited to their education and habits.

The existence of these things, however, proves even more than any government ought to be obliged to admit, namely, that there has been some mistake in the system, or mode of carrying it out, whereby these appointments have been made, and not merely that there are black sheep in every flock. But we are wandering from the subject before us. What we should wish to see would be, that every facility should be given to at least those who are really desirous of doing their duty properly for the good of the community.

We do not understand that Municipal Councils are included in those who are to receive copies gratis. If not, we suppose it is on the principle that doing so would be "robbing Peter to pay Paul," at least so long as the members of Councils do not subscribe for price of copies out of their own pockets.

To conclude—it is, in our opinion, wrong, in principle, that there should be any unnecessary restriction upon the widest diffusion

of knowledge as to laws which all are supposed to know as soon as they receive the Royal assent; and that if money has to be raised for public uses, some other means than the profit on the sale of the statutes should be found for that purpose.

The acts which are of special interest have already been referred to by us, and many of them copied at length in a former number.

As to the general appearance of the volume now before us, notwithstanding the warning given in the 13th sec. of the act already referred to, we confess to having been rather startled at the gorgeous display of red and gold which it presents. We might be almost induced to say that the edition had been "got up regardless of expense," were it not that the proverbial economy of our present local administration precludes the possibility of such a thing. A closer examination would lead one to think that the new binding is very good in its way, the material being similar to that used in the less imposing statute books of the Dominion and the Province of Quebec, (which latter is by the way the same in appearance as the old volumes, with the exception of the colour of the label on the back.) We fear, however, that the red colour will be apt to become shabby sooner than the old kind. We should recommend a change in the lettering on the back of the next volume, as that on the present one is too much like that used for cheap editions of city directories and the like.

We regret that the very common difficulty of obtaining a good index has not been overcome in this case. There was a warning given by the most defective index to the Consolidated Statutes. But the compiler of the one before us appears to have forgotten one of the most obvious requisites of an index. This mistake will doubtless be avoided in future.

## DEATH OF MR. HEYDEN.

It is with much regret that we announce the death of Lawrence Heyden Esq., Clerk of the Crown and Plea, Queen's Bench, at his residence on Bloor Street, Toronto, on Saturday last the 20th inst., in the sixty-fifth year of his age.

His health had been failing for some months past, but none expected that his death was so near at hand.

The loss of such an estimable man and efficient officer will be felt by numbers both inside and outside the profession, and it will be long before those who had the pleasure of knowing him will forget his courteous and kindly manner, his uprightness and integrity in the discharge of his duties, and the attentive way in which his duties were performed.

R. G. Dalton, Esq., Barrister, has been appointed to fill the vacancy. We are happy to be able to congratulate the Ontario government on the happy selection they have made, and their promptitude in making it.

Robert M. Boucher, Esq., Judge of the County Court of the County of Peterborough, died on Tuesday, the 30th June last, after an illness of some months. He was comparatively a young man, and was appointed County Judge on 7th April, 1858, under Sir Edmund Head's administration.

## SELECTIONS.

### FIXTURES.

The distinction between this case, *Boyd* v. *Shorrock*, 16 W. R. 102, and *Hutchinson* v. *Kay*, 5 W. R. 341, 23 Beav. 413, appears to us to be rather refined. In the latter there was an assignment of a mill with the engines, &c., and all the machinery, fixtures, and effects, fixed up in and attached and belonging to the mill and it was held that looms, the feet of which rested in cups let into the floor, were not fixtures, so as to pass without registration, on the ground that they were not furniture properly belonging to the mill, but liable to be changed from time to time according to the purpose for which the mill was used, as spinning, weaving, &c. In the former a mill with all the looms and other machinery fixed or moveable was assigned, and it has been held that looms, two of the legs of which were pegged down by ordinary nails driven through holes in the loom-feet into plugs of wood let into the flooring passed as fixtures. The difficulty of removal in this case would have been so slight, and the connection with the building was so little more than nominal, that so far as the element of intention is material, we cannot find any reasoning which would not equally apply to both cases, and it could hardly be doubted that the arrangement of the looms was, and was intended to be as permanent in one case as in the other. In an Irish case, *Re Dawson Tate, & Co.*, reported in last week's number of the *Weekly Reporter*, *Boyd* v. *Shorrock* seems to have been followed. Power looms fastened by iron spikes let into the tiled flooring of the mill being treated as passing under an assignment in similar terms. Perplexing as the decisions in our own courts often are on this subject of fixtures, American judges appear to have found even greater difficulty in dealing with it, and one of them not long ago, in an elaborate judgement, held that as the moveable parts of fixed machinery were conceded to be fixtures, so the rolling stock of a railway, being only capable of travelling along the fixed rails and useless apart from them, must

be treated as sufficiently attached to and connected with the permanent way to pass by a mortgage of the latter against the claims of creditors. We should add that this doctrine is not generally recognized in America.—*Solicitors' Journal.*

## A ROMANCE OF THE LAW.

An extraordinary trial, affecting the character of the most able and rising lawyer in Ireland, has occupied the Court of Common Pleas in Dublin for fifteen days, and terminated in the discharge of the jury because they could not agree. The facts may be briefly stated.

Mr. William Sidney, Q. C., enjoyed a very large practice, and as a leading member of the Irish bar, appeared to be marked for promotion. Even as a junior his practice was the largest ever known in Dublin. It did not appear very distinctly by what means his ample income was dissipated, but the result was that he became deeply indebted and resorted to loans at extravagant usury to meet the claims of his most pressing creditors. The action which produced these strange disclosures was brought by Mr. Harris, a bill discounter in Dublin, against Mr. J. L. Bagot, a magistrate of Galway, and a cousin of Mr. Sidney, on two bills of exchange, one for £200, and the other for £500, as the alleged acceptor. The defence set up by Bagot was, that the bills were not signed by him, but were forgerl ies by Mr. Sidney, who was his friend as wel as relative. Large sums of money were lent, it seems, to Sidney, by Mr. Charles Bagot, a brother of the defendant, and Mr. Hynes, a brother-in-law of Sidney. It is stated that Mr. J. L. Bagot had been inclined to make further advances to him.

Mr. Sidney, Q.C., appeared as a witness on the part of the plaintiff to disprove the allegation of the defendant that he had forged the bills. He admitted that he had signed Mr. Bagot's name to them, but asserted it was done with his consent, aud by his authority, and that in like manner he had signed his name to bills to the amount of more than £3000. He stated that in August, 1863, his friends met in his house, where Mr. Bagot, and his brother-in-law, and a solicitor named Bloomfield were present; and that they severally undertook to be bound for him to the extent of from £2,000 to £3,000; that his debts were found by them to amount in the aggregate to upwards of £30,000, but that, nevertheless, they resolved to make an effort to save him.

The next morning, as Sidney confessed, he heard some voices in his brother-in-law's room, and so he, Sidney, Q.C., listened at the keyhole, and heard Mrs. Hynes, his mother-in-law, urge her son to let the creditors "sell him out." Soon afterwards Mr. J. L. Bagot informed Sidney that they could do no more for him, and that a warrant would be that day applied for to apprehend him, as is presumed, on the charge of forgery. Sidney says that hearing these threats, and being intoxicated, he destroyed all the evidence that went to prove Mr. Bagot's authority to put his name to the bills, and he wrote the following letter confessing the forgeries:

(Strictly confidential and private.)

August 19, 1867.

My Dear John,—Coerced now, as I am, to abandon my home and seek shelter in a foreign land, in consequence of my own folly, I deem it but an act of justice towards you, whom I have wronged, to make this unqualified avowal of the wrongs I have committed, more especially when your generosity in proffering me your time and money to rescue me from my difficulties, but which proved unavailing, might after I am gone, afford colorable reasons to the holders of bills professing to bear your signature for supposing that you were liable. Hereon, I therefore now acknowledge and state that the only bills issued by me, and now outstanding which bear yonr genuine signature, are the following, namely, a bill for £700, now in the Hibernian Bank; a bill for £200, dated the 25th July, 1866, and I believe now in the hands of a Mr. Toole; and a bill for £200, dated the 26th July, 1866, and now held by Mr. Charles Bagot. Any others purporting to bear your signature are not genuine, and were not signed by you, or by your authority. Having now set you up, and afforded you the means of defending yourself against any claim which might be made upon you by reason of my bets, I at the same time impose on you the solemn obligation and injunction not to allow a human eye save your own, to peruse the contents of this sad communication. I am sure, now, that I have made the only atonement within my power, and I may rely on your honour as a gentleman to accede to this my last request. If you treat lightly and disregard it, and I learn of it, then I cease to live. Till then I will strive to work for my wronged wife and children. I appeal to your generous sympathy for my sad position to spare me and my innocent family the additional pain of having this avowal of mine made public. Use this document if it be absolutely necessary for your protection; but, before doing so, I implore of you to adopt all means within reach of defending yourself to the last without calling to your aid this document. Before you receive it I shall be far away, and in a foreign and far distant land. Knowing that you are often away from home, and knowing that your letters are sometimes opened in your absence by members of your family, I have directed this to be left at the post office till called for. Now once more I ask you to keep this letter a "dead secret" till you have satisfied yourself that its use is absolutely essential for your own protection; then use it, but not till then. Hoping you will not be inconvenienced by all you have to pay for me. Give your aid to me as far as you can. Now I am a wanderer. Adieu forever. I remain your brokenhearted

Wm. J. Sidney.

P. S.—Should I ever again get the prospect of being successful in life, all will be paid 20*s.* in the pound, even those who were the cause of my ruin.

That a man, much more a Q. C., having notice that he is about to be prosecuted for forgery, should destroy the evidence necessary to prove his innocence, even though under the influence of liquor, could scarcely be expected

to find credence, and followed as it was, immediately by the above letter, it would appear to be as conclusive a case as ever came before a court. But, notwithstanding the production of this letter, Sidney, Q. C., was equal to the emergency. He swore that it was procured from him by intimidation and threats, and that its contents were false. But here again he fell into contradiction. He swore that he posted the letter in Dublin, and immediately left Ireland. But the postmark proved that he had posted it in London, when he was out of reach of threats or intimidation. Mr. Bernard Bagot swore that the entire of this part of Sidney's story was false; that having acknowledged his forgeries to the assembled family party, he did of his accord write the letter which he carried to London and there posted, as the postmark plainly showed. Other contradictions appeared in the course of the protracted trial; but it excites surprise that these were not deemed sufficient, and that any one juryman could be found to entertain such a doubt as to cause disagreement and compel a new trial.—*Law Times.*

## HUSBAND AND WIFE.

(*Wilson and others* v. *Ford and another*, Ex., 16 W. R.) 482.

A married woman cannot, with some few exceptions, contract so as to bind herself personally, but she may always, if authorised, enter into binding contracts, as the agent of another person. A man may therefore be personally liable upon his wife's contracts, if she was authorised to make them, and if he does not support her he is liable for necessaries supplied to her, although he may not have forbidden them altogether. The law in this subject is tolerably clear, but there is frequently a difficulty felt in determining what are "necessaries" is any particular case. "Necessaries" is a relative term, and its meaning always depends upon the circumstances of each case. Where the husband is wealthy many things might probably be considered as necessaries which would be useless luxuries if the parties were in a different rank of life. The same difficulty exists in ascertaining what are necessaries for a married woman, as in cases where goods are supplied to an infant who may render himself liable for necessaries, although not upon any other contract.

*Wilson* v. *Ford* seems rather to have extended the meaning of the word necessaries when a married woman is deserted by her husband. The facts of the case were: a wife being deserted by her husband applied to the plaintiffs, who were solicitors, for advice—(1) as to the best way of procuring her husband's return; (2) as to the enforcing of a verbal promise by him to make a settlement upon her; (3) as to claims of some tradesman for necessaries supplied to her; (4) as to a threat of distress for rent, upon furniture of her husband's, which was in the house occupied by her. On the first question the plaintiffs advised a suit in Divorce Court which was commenced and was terminated by the death of her husband. The costs of the suit were taxed and paid to the plaintiffs by the defendants the husband's executors, but they refuse to pay the plaintiffs' charges for their professional advice and assistance upon the other questions. The Court decided that these matters as well as the costs of the suit were necessaries, and that the plaintiffs were consequently entitled to recover the amount of their claim. This decision is not apparently supported by any express authority upon the point, but it is so entirely consonant to common sense and expediency that it will probably be followed whenever a similar case comes before one of the common law courts.—*Solicitors' Journal.*

## SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

### NOTES OF NEW DECISIONS AND LEADING CASES.

MASTER AND SERVANT—INJURIES SUFFERED BY SERVANT—NEGLIGENCE—SCIENTER—JUDICIAL NOTICE.—In an action by a servant against his master for injuries received while obeying the latter's orders, it must be shown that the injuries did not proceed from plaintiff's own carelessness.

And if the plaintiff's want of skill is relied on for this purpose it must be shewn that the work required skill. And this will not be inferred from averments that defendants knew they had not employed a skilful person to do it, and knew that plaintiff was unskilled and an unfit and improper person.

So it should be shown that the work is dangerous, and

*Semble*—That defendants knew or ought to have known it was so.

The defendants cannot be rendered liable on the ground of negligence by showing that the work was essential to the safety of a ship on which plaintiff was employed by defendants, and that defendants permitted the ship to leave port without its being done, and without having on board a skilled machinist to do it, and that it was outside the scope of plaintiff's employment, and that he was unfit to do it, unless it be also shown that the work was dangerous, and the defendants knew or ought to know that it was so.

The question discussed in what cases it must be averred that plaintiff was ignorant of the danger.

The Court will not take judicial notice that it is a dangerous work to oil machinery.—*Smyly* v. *Glasgow and Londonderry Steam Packet Co.*, 16 W. R. 483.

SURGEON.—There is an implied obligation on a man holding himself out to the community as a surgeon, and practising that profession, that he should possess the ordinary skill in surgery of the profession generally. Where, by improper treatment of an injury by a surgeon, the patient must inevitably have a defective arm, the surgeon is liable to an action, even though the mismanagement or negligence of those having the care of the patient may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been. The liability of the surgeon being established, the showing of such mismanagement or negligence only affects the measure and amount of damages. This case distinguished from those where the contributory negligence on the part of the patient entered into the creation of the cause of action, and not merely supervened upon it, by way of aggravating the damaging results. The plaintiff broke his arm, and called upon the defendant, a professed surgeon, to set it, which he did; but the evidence showed that by the improper manner of dressing the arm and subsequent negligence of the defendant, the plaintiff must necessarily have a defective arm, irrespective of the management of those having the care of the plaintiff. *Held*, that the defendant was not entitled to have the court charge the jury that if the damage or injury to the plaintiff's arm resulted in part from the negligence of those having the care and management of the plaintiff, that the plaintiff could not recover, the court having given a full and satisfactory charge upon every other feature and theory of the defence.—*Wilmot* v. *Howard*, 39 Vermont Rep.

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BILL OF SALE—DESCRIPTION—RESIDENCE AND OCCUPATION—ATTESTING WITNESS—17 & 18 VIC. C. 36, S. 1.—An attesting witness to a bill of sale described himself in his affidavit as of "Hanley, in the County of Stafford, accountant." It appeared that he was clerk to an accountant at Hanley, a place of 40,000 inhabitants, and was permitted by his employer to act at times on his own account, and that letters reached him without more description than that contained in the affidavit.

*Held*, that the description was sufficient.—*Briggs* v. *Boss*, 16 W. R. 480.

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HUSBAND AND WIFE—NECESSARIES FOR WIFE—LEGAL ADVICE TO HER WHEN DESERTED—LEGAL PROCEEDINGS TO ENFORCE HER RIGHTS.—A wife being deserted by her husband and left unprovided for, legal advice as to her rights and liabilities, and proceedings to enforce her rights, may be "necessaries."—*Wilson and others* v. *Ford and others, executors*, 16 W. R 482.

NEGLIGENCE.—*Held*, that a party is responsible or the negligence of his contractor, where he, himself, retains control over the contractor and over the mode of work. The relationship between them is then similar to that of master and servant.—*Harold* v. *The Corporation of Montreal*, 3 L. C. L. J. 88.

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TELEGRAPH COMPANY.—Telegraph companies, in the absence of any provision of the statute, are not common carriers, and their obligations and liabilities are not to be measured by the same rules, but must be fixed by considerations growing out of the nature of the business in which they are engaged. They do not become insurers against errors in the transmission of messages, except so far as by their rules and regulations, or by contract, they choose to assume that position.

When a person writes a message, under a printed notice requesting the company to send such message according to the conditions of such notice. *Held*, that the printed blank was a general proposition to all persons of the terms and conditions upon which messages would be sent, and that by writing said message and delivering it to the company, the party must be held as accepting the proposition, and that such act becomes a contract upon those terms and conditions.

Where a telegraph company established regulations to the effect that it would not be responsible for errors or delay in the transmission of unrepeated messages; and further, that it would assume no liability for any error or neglect committed by any other company, by whose lines a message might be sent in the course of its destination: *held*, that such regulations were reasonable and binding on those dealing with the company.—*Western Union Telegraph Co.* v. *Carew* 7 Am. Law Reg. 18.

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UNDUE INFLUENCE—GUARDIAN AND WARD.—An infant entitled to real estate was brought up principally in the family of her uncle, from the age of eleven months until her marriage after attaining majority. Previous to her attaining twenty-one the uncle had obtained from her a promise to convey to him one of two lots of land left by her father, the uncle asserting that he had advanced the money to complete the purchase of both lots. After her marriage the niece, feeling herself bound by the promise so given her uncle, conveyed the lot selected by him, which was much more valuable than the other. The money (if any) paid was much less than the value of the lot conveyed. The conveyance was set aside, as having been obtained by undue influence, although six years had elapsed between the execution of the deed and

the institution of the suit impeaching the transaction.—*McGonigal* v. *Storey*, 14 Chan. Rep. 94.

STATUTE OF FRAUDS—SECTION 4—AGREEMENT—SUFFICIENCY OF SIGNATURE.—In order that an agreement may be sufficiently signed to satisfy the provisions of the Statute of Frauds, it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. If therefore a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute and to give authenticity to the whole of the memorandum.

A memorandum, therefore, in which the name of the party sought to be charged occurred several times, but in each case in such a manner as merely to refer to the particular clauses where it was found, which clauses contained mere words of description, and not of promise, was

*Held*, not to be sufficiently signed to satisfy the statute.—*Caton* v. *Caton*, 16 W. R. 1.

COPYRIGHT OF DESIGNS ACT—REGISTRATION OF PATTERN WITHOUT ANY ACCOMPANYING DESCRIPTION.—By the 5th section of the Copyright of Designs Act, 1858 (21 & 22 *Vict. c.* 70) it is enacted that the registration of any pattern or portion of an article of manufacture to which a design is applied instead or in lieu of a copy, drawing, print, specification, or description in writing, shall be as valid and effectual to all intents and purposes as if such copy, &c., had been furnished to the registrar.

When a piece of manufacture with a design impressed upon it is registered without any explanation or addition in writing, and that design consists of several parts not necessarily united in configuration, but capable of being severed into independent integral parts, then the design registered is the entire thing, exactly as it is described in the pattern furnished to the registrar; and such registration is therefore not open to the objection of uncertainty, but is valid according to the above statute.—*Holdsworth* v. *McCrae* 16 W. R. 226.

SPECIFIC PERFORMANCE—WATER POWER.—A vendor agreed that the purchaser should have sufficient water to drive a saw mill and other machinery: in a suit by the vendor against the purchaser the Court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land: the decree to provide for this, with liberty to the parties to apply from time to time.—*Hincks* v. *McKay*.—14 *Chan. Rep.*

VENDOR AND PURCHASER—SHEWING A GOOD TITLE.—A vendor does not shew a good title by producing and furnishing to the purchaser an abstract shewing on the face of it a good title; he does so only when he verifies such abstract. —*Granger* v. *Latham*.—14 *Chan. Rep.*

SURVEY OF TOWNS AND VILLAGES—WORK UPON THE GROUND—PLAN—C. S. U. C. CH. 93, SEC. 35—Under the latter part of sec. 35 of ch. 93 C. S. U. C., the work upon the ground in the original survey of towns and villages, to designate or define any lot, shews its true and unalterable boundaries, and will over-ride any plan of such lot.—*McGregor* v. *Calcutt*.—17 *U. C. C. P.*

LANDLORD AND TENANT—DISTRESS—PURCHASE BY LANDLORD—EXECUTION AGAINST TENANT—INTERPLEADER—C. S. U. C. CH. 45, SEC. 4.—Plaintiff distrained upon his tenant, and at the sale, *with the latter's consent*, purchased portion of the property sold, which he left upon the tenant's premises for a couple of days, when it was removed, partly by his own servant, and partly by the delivery of the tenant to him:

*Held*, reversing the judgment of the County Court, that though the general principle there laid down is correct, that no one can sustain the double character of seller and buyer, yet that where, as in this case, the tenant consents to the purchase by the landlord, the sale can be supported; and therefore, in this case, *Held*, that the property sold passed to the plaintiff, and that he could hold it against defendant's execution issued subsequently to the sale, provided there was an immediate delivery, followed by an actual and continued change of possession under C. S. U. C. ch. 45, sec. 4.—*Woods* v. *Rankin*,—17 *U. C. C. P.*

THE DIGEST OF THE LAW.—We understand that the Law Digest Commissioners have selected the three following gentlemen as the successful competitors in the preparation of Specimen Digests:—Mr. Henry Dunning Maccleod for a specimen digest of the law of Bills of Exchange; Mr. William Richard Fisher for a specimen digest of the law of Mortgage, including Lien; and Mr. John Leybourn Goddard for a specimen digest of the law of 'Incorporeal Rights, including Rights of Way, Water, Light, and other Easements and Servitudes.' We believe that there were more than eighty competitors.—*English paper.*

# ONTARIO REPORTS.

## QUEEN'S BENCH.

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

### COLEMAN v. KERR.

*Assessment—Authority of collector—Form of Roll—C. S. U. C. ch. 55, sec. 89; ch. 54, sec. 174.*

A Board of Schol Trustees in a town passed a resolution stating the sum required for school purposes, of which their treasurer gave notice to the town clerk, verbally or in writing, but not under the corporate seal. The corporation, however, made no objection, and acted upon it as an estimate. *Held*, that though it would have been insufficient on application to compel the town to levy the money, yet an individual rate-payer could not object.

Sec. 24 of the Assessment Act, C. S. U. C. ch. 55, applies to the assessor's roll only, not the collector's.

Defendant was duly appointed collector of the municipality for the years 1865 and 1866. *Held*—following *Newberry* v. *Stephens*, 16 U. C. R. 441, *Chief Superintendent of Schools* v. *Farrell*, 21 U. C. R. 441, and *McBride* v. *Gardham*, 8 C. P. 296—that he had authority in 1866 to distrain for the taxes of 1865 upon the owner of premises duly assessed.

Defendant held two rolls, each headed "Collector's Roll for the Town of Belleville," one being also headed "Town Purposes," the other "School Purposes." In the first, the column headed "Town or Village Rate" contained nothing, but in that headed "Total Taxes, Amount," $40 was inserted. In the other that column had nothing, but $16 was in the column headed "General School Rate." *Held*, insufficient, for there was nothing to shew for what purpose the sum not specified to be for school rate was charged.

*Spry* v. *McKenzie*, 18 U. C. R. 165, distinguished.

The omission to set down the name in full of the person assessed was treated as immaterial.

APPEAL from the County Court of the County of Hastings.

Replevin for chattels taken in a dwelling house, occupied by the plaintiff, in Samson Ward, in the Town of Belleville, on the 2nd of May, 1866.

Avowry, setting forth that the Corporation of Belleville passed a by-law to levy a tax for municipal purposes for the year 1865, and enacted that a certain sum in the dollar should be levied on the whole ratable property, and thereby also appointed the defendant collector of Ketcheson Ward, in the said town. The 174th section of the Municipal Act was stated, and that this by-law continued in force until after the said time, when, &c.: that—after the assessment roll was finally revised and completed, and all due adjustments and equalizations had been made, and after the Board of School Trustees of the said town had, as a corporation, struck a rate on all the assessable property for common school purposes, and had made a return of the amount thereof to the Clerk of the municipality of Belleville, and after the School Trustees had duly appointed the defendant collector of common school rates for Ketcheson Ward for that year (1865) and after the Clerk of the municipality had made out a collector's roll for Belleville, in which (among other particulars set forth), in a column headed "town rates," the amount with which each party was chargeable, in respect of real and personal property, in respect to the sums ordered to be levied for town purposes, was set down, and after the said Clerk had, opposite to the property of each party named therein chargeable by the assessment, set down in a column named "school rate," the amount with which such party was chargeable in respect to the sum ordered to be collected for common school purposes, and after a similar collector's roll duly certified had been made for the collector of the common school tax of Ketcheson Ward, and the proper sum according to such school rate had been set opposite each parcel of land and the name of each party—the town clerk, within the time required by law, delivered the collector's roll to the defendant, and the common school rate roll was also duly delivered to him. And because the plaintiff was, at the time when the assessments for the said ward and the said town were made, the owner of certain freehold premises situate within Ketcheson ward, and was named and rated in the collector's roll for that ward as owner thereof, for $40, in respect to his assessable real property in that ward, as a town rate, and on the school rate roll in that ward for $16, in respect to the same real property, the plaintiff not being liable to any separate school rate. And defendant further says that one Blacklock was assessed on the said rolls as tenant of the said real property under the plaintiff, and the said sums at the said times, when, &c., were in arrear and unpaid by the plaintiff or Blacklock in respect of the said premises, and Blacklock had removed therefrom and a stranger to the assessment was in possession. And because the plaintiff at the said time when, &c., and for a long time before, was domiciled within the town of Belleville, and the defendant after he had received the said rolls, and while they continued in his hands, he never having been removed from the office of collector by the municipality, nor by the school trustees; and while the by-laws of the municipality and the resolution of the trustees were in full force, and before the return of the rolls, and not being able to make oath before the Treasurer in respect of the sums due by the plaintiff, pursuant to sec. 106 of the Assessment Act, and after the plaintiff and Blacklock had neglected and refused to pay the said sums, and after the defendant had called at least three times on them and demanded those sums, the plaintiff being the person who ought to pay, the defendant took the said goods, then in the plaintiff's possession, for the purpose of levying the said moneys, &c.

The plaintiff joined issue on this avowry, and also pleaded to it that he was not the person who ought to pay the taxes. He also demurred to the avowry, and the defendant demurred to the plea thereto. Both demurrers were decided in the defendant's favour.

Upon the trial of the issue in fact, it was at the close of the plaintiff's case objected:

1. That it was not proved that the school trustees duly struck a rate, or made any requisition, return or request, in accordance with law, on the Clerk or the Town Council of Belleville, to collect a school rate.

2. That the plaintiff and Blacklock were not duly assessed, according to law, as owner and occupant, the collector's roll shewing that they were assessed as freeholder and householder.

3. That it was not proved that the defendant had any authority to collect taxes at the time the seizure was made.

4. That the collector's rolls shew that the plaintiff's name is not set down in full as required by the Statute, and that the amount which is chargeable is not put down on either roll as "Town Rate," or for what purpose the party was assessed.

There were other objections taken both at the trial and on the appeal book, but the foregoing were all that were taken at the trial and relied on at the hearing of the appeal. There was another objection taken on the appeal book, but it did not appear to have been raised in the Court below, and it was not, therefore, argued.

The principal facts in evidence appeared to be as follows: The defendant put in two collector's rolls for 1865—one for the town taxes of the town of Belleville, the other for the school tax. In each of these the property was assessed as No. 43, west of Front Street, and it was proved that it was a stone house of which James Blacklock was entered on the roll as the "Householder," and the plaintiff, by the name of C. L. Coleman, as the "Freeholder." It was proved that each of these rolls was made out by the Town Clerk, and after certifying them he delivered them to the Treasurer, who handed them to the defendant. A By-law was proved, passed by the Town Council in relation to the town tax. The Town Clerk proved that he got notice from the Treasurer of the Board of School Trustees of the rate imposed by them, but he could not say if it was in writing: he got no copy of the resolution under their corporate seal. It was also proved that the school rate was levied by resolution, and not by By-law of the School Trustees; and that Board, by a resolution passed on the 27th of November, 1865, appointed the defendant their collector for 1865. He was collector of the town taxes for Ketcheson and Coleman Wards in 1864, 5, and 6.

There was sufficient proof that the defendant demanded the taxes of the plaintiff, who refused to pay them, insisting on their being collected from Blacklock, who it appeared continued to reside to in Belleville, though he gave up possession of these premises in April, 1865, after which it was sworn that the plaintiff had possession of them. The plaintiff was present when the seizure was made. He admitted that a demand had been mhde on him, and he then refused to pay. At that time the town tax was mentioned as being $40, and the school tax, $16, and it was understood to be for premises formerly occupied by Blacklock.

It was agreed that a verdict should be entered for the defendant, with leave to the plaintiff to move to enter a verdict for himself, the goods being admitted to be equal in value to the taxes claimed. A rule *nisi* in pursuance of the leave reserved having been obtained, and after argument discharged, the plaintiff appealed.

*C. S. Patterson* for the appellant.

*Dougall*, contra.

In addition to the Statutes and authorities referred to in the judgment, *Rex* v. *Welbank*, 4 M. & S. 222, was cited for the appellant; and *Municipality of Whitby* v. *Flint*, 9 C.P. 453; *Wilson* v. *Municipality of Port Hope*, 10 U. C. R. 405; *Fraser* v. *Page*, 18 U. C. R. 327; *Hope* v. *Cumming*, 10 C. P. 118, *Skingley* v. *Surridge*, 11 M. & W. 503; and *Allen* v. *Sharp*, 2 Ex. 352, for the respondent.

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

As to the first objection: the Board of School Trustees apparently intended to act (though we must say, as far as is shewn, with very inadequate attention to the language of the Statute) under the 11th subsection of sec. 79 of the Common School Act, Consol. Stat. U. C., ch. 64, which authorizes them to prepare and lay before the Municipal Council an estimate of the sums they consider requisite for the common school purposes of the year. It is proved that they passed a resolution for this purpose. A book containing it was produced at the trial, but no copy of it is before us. No objection seems to have arisen as to its being sufficient in terms, if a resolution and not a by-law constituted an "estimate" within the Statute. The Treasurer of the School Trustees gave notice of it to the Town Clerk of Belleville, whether in writing or not he could not say, though it certainly was not authenticated by the corporate seal of the Board of School Trustees. This mode of proceeding would, we have little doubt, have been held insufficient on an application for a mandamus to the Town Council to enforce payment, (see *School Trustees* v. *Port Hope*, 4 C. P. 418; *School Trustees* v. *City of Toronto*, 20 U. C. R. 802); but no objection was raised by the town corporation, and their Clerk acted upon the communication made to him as an estimate laid before the Municipality. Under these circumstances, we are of opinion that an individual ratepayer cannot be heard to take the objection.

The second objection is rested upon sec. 24 of the Assessment Act, which declares that when the land is assessed against both owner and occupant the assessor shall, on the roll, add to the name of the owner the word "owner," and to the name of the occupant the word "occupant," and the taxes may be recovered from either. But this is the collector's—not the assessor's—roll. It is made out under sec 89, which requires the *name* of the person assessed, but does not require either the word "owner" or "occupant" to be added thereto. The objection, therefore, has not the foundation on which it was said to be based; and, assuming that the Statute was imperative on the assessor, and not merely directory, it does not extend to the collector's roll.

The third objection attacks the proof of the authority and, it may be said, the authority itself, of the collector to collect the taxes at the time the seizure was made.

This objection seems to concede that the collector had at one time the necessary authority, and the argument in support of it involved that concession, for it was pointed out that the collector was appointed only for the year 1865, and the 104th section of the Assessment Act was expressly referred to for the purpose of showing that he should have returned his roll on the 14th of December, and it was urged that the time was not legally extended; and, moreover, it was strenuously argued that the case of *Newberry* v. *Stephens* (16 U. C. R. 65) was distinguishable, on the ground that there the time had been extended, while here no extension was proved

The difficulty arising from there being two rolls, which, unless blended into one, would not show that both town and school tax were directed to be levied and collected, and from the want of any proof that the Town Clerk was authorized by the Municipal Council to act upon the estimate of the Board of School Trustees, was not presented on this objection for our consideration, although it was admitted during the argument of the defendant's counsel (who evidently rested his case on the theory that the distress was made

under the authority of the School Trustees) that the estimate never was laid before the Town Council. We take the only question which we are to dispose of on this objection to be, whether the defendant had a continuing authority to collect and enforce payment of these taxes when he made the distress.

The facts are, simply, that he was duly appointed collector of the municipality for the year 1865–1866. This, as regards 1865, is conceded, both by the form of the objection and the argument used in support of it, that the time for returning his roll was not extended. He received the two rolls spoken of in 1865, and he held them both in 1866, when he made the distress.

The plaintiff contends that, under these circumstances, as the Statute required him to return his roll on the 14th of December, 1865, he became *functus officiq*, at least as regarded the compulsory powers of enforcing payment.

On the other hand, the defendant relies on the 174th section of the Municipal Act: "The Chamberlain or Treasurer may be paid a salary or percentage, and all officers appointed by a council *shall hold office until removed* by the council."

The case of *Newberry* v. *Stephens* (16 U. C. R. 65), appears to us to be in the defendant's favor, though the Court were not unanimous. But Robinson, C.J., and Burns, J., both held that the collector for 1865, who was again collector for 1866, could in the latter year enforce by distress payment of rates imposed in 1855, though at the time he distrained there was no resolution in force extending the time for him to return his roll. This decision does not appear to be rested either on the ground that the same person was the collector for both years, or that there had been an extension which expired before, and that another extension was made after the distress was made. If the collector was *quoad* the taxes of 1855 *functus officio* on the termination of the first extension, he was without authority when he distrained. The subsequent extension could not have an *ex post facto* operation.

This Court acted upon *Newberry* v. *Stephens*, or at least in accordance with its principle, in the *Chief Superintendent of Schools* v. *Farrell* (21 U. C. R 441); and the Court of Common Pleas recognized its authority in *McBride* v. *Gardham*, (8 C. P. 296.)

On these authorities, we think this objection untenable.

There remains only the fourth objection. So far as it regards the not setting down the plaintiff's name in full, it was, we think, properly given up on the argument; but strong reliance was placed on the allegation that the two collector's rolls show that the amount which is chargeable against the plaintiff is not put down in either as a "Town Rate," nor is it otherwise shown for what purpose he was assessed.

Each of these rolls is headed "Collector's Roll for the Town of Belleville," and to this heading is added in one roll, "Town Purposes," in which in the column headed "Town or Village Rate" nothing is entered; but in another column headed "Total Taxes. Amount," are inserted the figures "$40."

In the other there are added to the general heading the words "School Purposes," and there is a column headed "General School Rate," in which are added the figures "$16," and in the column headed "Total Taxes. Amount," there is nothing entered. In each roll the names James Blacklock and C. L. Coleman are entered, and the property and the valuations thereof are alike in each.

We are constrained to the conclusion that this objection has not been displaced. Treating the two rolls as constituting in law one collector's roll, this one roll constituted his sole authority in the nature of a warrant to compel payment, and it ought to show the several taxes which constituted the aggregate amount, stated in the manner directed by the 89th section of the Assessment Act. And according to that section the amount with which a party is chargeable in respect to sums ordered to be levied by the Town Council "*shall be*" set down in a column, to be headed "Town Rate," and in a column to be headed "School Rate" shall be set down any school rate. Now, although there is in each of these rolls a column properly headed for a town rate, no amount is set down under this heading in either. In one the sum $40 is set down in the column headed "Total Taxes," in the other the sum $16 is entered in a column headed "General School Rate," and no entry is made as to amount in any other column, so that, blending the two, we have a roll charging in the school rate column $16, and in the total tax column $40, but not showing, except as to the $16, for what purpose the difference is charged. And if we treat them as separate rolls, the roll headed "Town Taxes" has no amount charged except in the column headed "Total Taxes"; and the school purpose roll appears to have been made out by the Town Clerk of his own proper motion—not directed by the Board of School Trustees, if indeed they had any control over him, or authorized by the Town Council, who are not proved to have had the estimate of the Board of School Trustees ever brought under their notice.

In neither way, as appears to us, can this distress be upheld. As regards the town tax we see no reason for a doubt. As to the school tax, we endeavored to find a sufficient ground for upholding it, es levied under a separate roll issued under the authority of the trustees, and distrained for by the defendant as their collector, appointed by resolution, as was stated in evidence But the 12th sub-section of section 79 of the School Act only gives the power of trustees of common school sections in townships to Boards of School Trustees in towns, to levy rates on the parents or guardians of children attending a school under their charge. The facts of this case do not bring it within that provision.

The learned Judge in the County Court seems to have relied on a *dictum* in the judgment in *Spry* v. *McKenzie* (18 U. C. R. 165), to the effect that a bailiff would not be liable as a wrongdoer for executing a warrant legrl on its face, and made to him by public officers who had authority to make such a warrant by Act of Parliament. That was an action of replevin for a horse, under our Statute, which authorises that form of suing wherever trespass or trover would lie, brought against the defendant, who pleaded that a collector of school taxes, under a warrant from the school trustees, had seized the horse and placed it in his hands as an innkeeper. But there was no avowry, only this plea by way of justifica-

tion of the detention. In *Haacke* v. *Marr* (8 C. P. 441), the distinction between such a plea and an avowry is pointed out, and it is held that an avowry must shew a good titie in *omnibus*. That case was not referred to in the Court below, nor was this distinction noticed in the argument before us. But it confirms our opinion that the present avowry cannot be upheld.

We may as well add that no objection was taken to the plea in *Spry* v. *McKenzie*. It did not aver that the collector came to the inn as a guest, which, perhaps, was necessary according to the case of *Smith* v. *Dearlove* (6 C. B. 132).

On the whole, we are of opinion that this appeal must be allowed, and that the Court below should make absolute the rule to enter the verdict for the plaintiff.

The case of *Corbett* v. *Johnston* (11 C. P. 317), is so clearly distinguishable in its facts from the present that we merely mention it in order that it may not be supposed it was overlooked by us, especially as it was relied upon in the Court below.

*Appeal allowed.*

## COMMON PLEAS.

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

### Welsh v. Leahy.

*Common Schools—C. S. U. C., ch. 64, secs. 50, 51, 57 & 91, sub-sec. 2.—Pleading.*

Declaration by a school teacher against defendant as sub-treasurer of school moneys, setting out an order signed by the *local superintendent* of schools in favor of plaintiff upon defendant, as such sub-treasurer, directing him to pay plaintiff $27.80, and charge to account *of county assessment* for 1866, and alleging a refusal by defendant to pay plaintiff in pursuance of such order, with a claim for a mandamus, and £50 damages.

*Held*, on demurrer, declaration bad, as not showing that the check or order was drawn on the order of the school trustees, and in setting out a check void on its face, because drawn upon a fund over which the local superintendent had no control, and in not showing that the sub-treasurer had money in his hands belonging to the school section, or that the county council had made provision to enable him to pay the amount.

The declaration demurred to, in which there were two counts, substantially the same, is sufficiently indicated by the head-note to the case.

*J. A. Boyd*, for the demurrer, cited *Bush* v. *Beaven*, 1 H. & C. 500; *Taylor* v. *Jermyn*, 25 U. C. 86; *Benson* v. *Paul*, 6 E. & B. 273; *Ward* v. *Lowndes*, 1 E. & E. 940, 956; *Reg* v *Mun. Coun. of Bruce*, 11 C. P. 575; *Hastings* v. *Bann. Nav. Co.*, 14 Ir. C. L. R. 534; *Smith* v. *Collingwood*, 19 U. C. 259; C.S. U.C. ch. 64, sec. 27, sub-secs. 9, 22, sec. 96, sub-secs. 1, 2; *Seymour* v. *Maddox*, 16 Q. B. 326; *Haacke* v. *Marr*, 8 C.P. 441; *Worthington* v. *Hulton*, L.R. 1 Q. B. 63.

*T. H. Bull*, contra, cited *Norris* v. *Ir. Land Co.*, 8 E. & B. 512; C. S. U. C. ch. 64, sec. 91, sub-sec. 2, ch. 23, secs. 1–8.

J. Wilson, J., delivered the judgment of the Court.

This declaration has been framed upon the assumption that a duty is cast upon sub-treasurers of school moneys and on county treasurers to pay the local superintendent's order, whether lawful or not, on behalf of a school teacher, in anticipation of the payment of the county school assessor not, and that the order or check, as it is called in the Statute, is lawful without the order of the school trustees.

This, we think, is not the law; for the primary duty is cast upon the municipality of the county to make the necessary provision to enable the county treasurer to pay the amount of such order, and that the cheque of the local superintendent is not lawful unless authorized by the order of the trustees.

In regard to raising the necessary funds for sustaining common schools, the 50th section of the Act respecting Common Schools enacts, that each county council shall cause to be levied yearly upon the several townships of the county such sums of money for the payment of the salaries of legally qualified common school teachers as at least equal the amount of school money apportioned by the chief superintendent of education to the several townships thereof for the year.

The 51st section enacts that the sum actually required to be levied in each county for the salaries of legally qualified teachers shall be collected and paid into the hands of the county treasurer, on or before the fourteenth day of December in each year; but notwithstanding the non-payment of any part thereof to such treasurer in due time, no teacher shall be refused the payment of the sum to which he may be entitled from such year's county school fund, but the county treasurer shall pay the local superintendent's lawful order on behalf of such teacher, in anticipation of the payment of the county school assessment, and the county council shall make the necessary provision to enable the county treasurer to pay the amount of such order.

The 57th section enacts that, if deemed expedient, the county council shall appoint one or more sub-treasurers of school moneys for one or more townships of the county; in which event each such sub-treasurer shall be subject to the same responsibilities and obligations, in respect to the paying and accounting for school moneys.

In enacting these clauses the Legislature took it for granted there would always be money in the hands of the county treasurer, from which he would be able to pay all orders drawn upon him by the local superintendents for the payment of the salaries of teachers, in anticipation of the school fund, in case it were not paid into his hands at the proper time.

The duty of the defendant was not to pay the order out of his own money, but from money of the school fund, if he had it, and if not, then from any money he might have in his hands, from which the county council had authorized him to pay it.

If the treasurer or sub-treasurer has the money and refuses to pay a lawful order of the local superintendent, a mandamus would lie; but if he has not, no duty lies on him, and therefore no mandamus ought to be granted.

The plaintiff, in the second count, on the same statement of facts as on the first count, claims damages against the defendant for not paying the local superintendent's order, and a mandamus. For reasons already given, we think he cannot maintain his claim to damages on the second count, nor to have the mandamus prayed for. Assume for the moment, that the defendant had money of the county school fund in his hands, or other moneys from which he was authorized to pay it; was the order set out a lawful order, which the defendant, as sub-treasurer, was bound to pay?

The declaration avers that the defendant was sub-treasurer of school moneys for the Township of Douro. He could, as such, only have so much of the county school fund as had been apportioned to the common schools of that township, or an authority to advance other moneys in anticipation of it. The order, to be lawful, ought to have been drawn upon that fund, and drawn in accordance with the 2nd sub-sec. of sec. 91 of the Act. The duty of the local superintendent was to give to any qualified teacher, but to no other, on the order of the trustees of any school section, a cheque upon the county treasurer or sub-treasurer for any sum of money apportioned and due to such section.

The local superintendent cannot give a cheque for the payment of money to a teacher without the order of the trustees of the school section, nor for any money which has not been apportioned and due to such section. But it is not averred in the declaration, nor does it appear on the face of the cheque set out, that it was given on the order of the trustees, nor that it was drawn upon the money due and apportioned to that section. It is in these words: "Douro, January 22nd, 1867. To sub-treasurer school moneys, Douro: Pay to Mr. Michael Welsh, or order, twenty-seven dollars and eighty cents, and charge to account of county assessment for 1866. ROBERT CASEMENT, Local Superintendent Common Schools, Douro. $27.80." We can understand why a cheque should not be given, unless on the order of the trustees. They themselves may have advanced to the teacher his salary from moneys levied by their authority, and may desire to leave the school fund for a subsequent period.

We can see no reason why this order was not drawn properly, both in form and substance, for the chief superintendent has taken great pains to furnish local superintendents with forms and directions in the School Manual. The local superintendent had only authority to draw an order on the sub-treasurer for money apportioned and due the section where the teacher had taught. He did not draw it from money so apportioned, or from any specific money, but directed the sub-treasurer to charge it to the account of county assessment for 1866. The order of the trustees, if any such existed in this case, was his authority for drawing the cheque, and to the form now in use there might be added, "in accordance with the order of the trustees, dated the —— day of ——."

We are, therefore, of opinion that this order, as it is called in the declaration, is not a legal cheque in accordance with the statute, and cannot be enforced; and both counts are bad, in not showing that the cheque was drawn on the order of the trustees, and in setting out a cheque void on its face, because drawn on a fund over which the local superintendent had no control, and bad in not showing that the sub-treasurer had money in his hands belonging to the school section, or that the County Council had made provision to enable him to pay the amount. This disposes of the case, so that we need not allude to the other questions raised on these pleadings.

*Judgment for defendant on demurrer.*

As to the right to mandamus, see *Kendall* v. *King* (17 C.B. 483); *Hall* v. *Taylor* (E. B. & E. 107); *Ward* v. *Lowndes* (1 E. & E. 940–956); *Benson* v. *Paul* (6 E. & E. 273); *Norris* v. *Irish Land Company* (8 E. & B. 512); *Bayle* v. *Beavan* (1 H. & C. 500).

## ENGLISH REPORTS.

### CHANCERY.

STEIN v. RITHERDON.

*Will—Construction—"Estate and effects"—Real estate.*

The word "estate," in a will, is to be construed as passing both real and personal estate, even though the accompanying expressions are more applicable to personal estate only, unless the context absolutely negatives such construction.

*Pogson* v. *Thomas*, 6 Bing. N. C. 337, remarked on.

[V. C. M., Feb. 19, 1868,—16 W. R. 477.]

One of the points which arose in this case was, whether the words "estate and effects" in a will were sufficient to pass a freehold house belonging to the testator, Talbot Ritherdon. The material clause of the will, which was dated June 5, 1866, was the following:—

"I give and bequeath all my household furniture plate linen musical instruments books wine ready money goods and chattels unto my daughter Adelaide Ritherdon for her own use and disposal absolutely and as to all the *rest and residues of my estate and effects* I give and bequeath the same unto Charles Stein and William Sutton and the survivivor of them their or his executors administrators or assigns (and who are hereinafter respectively designated as 'my trustees') upon trust with all convenient speed after my decease to collect get in and receive all debts or other moneys due and owing or otherwise payable to me at the time of my decease and to sell and convert into money any government stocks or shares in public or other companies of which I may die possessed and call in any moneys which at the time of my decease may be out on mortgage at interest or continue the said stocks and shares and mortgage moneys in these their present investments as to my trustees shall in their or his discretion seem most advantageous for the benefit of the said trust estates and upon trust as to all the capital moneys estate and premises which shall respectively come to the hands of my trustees or by virtue of my will to lay out and invest the same in the parliamentary stocks or public funds of Great Britain or at interest on real leaseholds or other security or securities (not being personal nor in Ireland) in their or his names or name with full power from time to time to alter vary transpose and change the same as in their or his discretion shall seem fit. And I declare that my trustees shall stand and be possessed of the interest dividends and annual produce thereof and of such interest and dividends as may be due to me at the time of my decease upon trust, &c"

There was no clause in the will to pass a freehold house in Dover, of which the testator was possessed, unless it was held to pass under the above words.

The heiress at law of the testator contended that the freehold house descended to her, and did not pass by the will.

The trustees of the will filed a bill, praying among other things for a declaration whether the real estate of the testator was devised by the will to the trustees, or was undisposed of and descended to the heiress at law.

*Pearson, Q. C.*, and *Buchanan*, for the plaintiff, cited *Saumarez* v. *Saumarez*, 4 M. and Cr. 331; *O'Toole* v. *Browne*, 3 Ell. & Bl. 572, 2 W. R.

430, to show that the words "estate and effects" include all that a testator has to dispose of: *Stokes* v. *Solomons*, 9 Hare, 75.

*Glasse Q. C.*, and *Begge*, for the defendant, heiress-at-law, cited *Pogson* v. *Thomas*, 3 Bing. N C. 337; *Meads* v. *Wood*, 19 Beav. 215; *Doe d. Spearing* v. *Buckner*, 6 T. R. 610; *Coard* v. *Holderness*, 20 Beav. 147, 3 W. R. 311; *Molyneux* v. *Roe*, 8 D. M. G. 368, 4 W. R. 539, and argued that the general words "estate and effects" might well be qualified, as in this will, by reason of the trusts declared being applicable only to personal estate.

His Honour said there was no doubt the testator had not present to his mind when he made his will that in fact he was owner of any real property in fee simple. Still, as it is important that wills should be construed on broad general principles, the effect of general words such as *estate and effects* ought not to be cut down by the circumstance that accompanying expressions are applicable to personal estate only. No word could be more proper to pass all that a testator possesses than the word "estate," and though no doubt words of limitation ought to be carefully attended to, where the construction was in other respects doubtful, there was no such even balance of authority here as to require such minute criticism. All the authorities were in favour of including the real estate, except *Pogson* v. *Thomas* in the Common Pleas, and that case was only reported as a reference from the Master of the Rolls to the judges. And no grounds were given for the decision in the certificate. That case would not be probably followed at this time, and he should declare that the freehold house of the testator passed under the residuary bequest.

## IRISH REPORTS.

### Bower v. Griffiths.

*Commissioners — Personal liability — Corporation by implication.*

(Continued from page 77.)

George, J., having stated the facts, proceeded:—The question for decision is, whether the defendants are liable, and, if so, in what form? Three modes have been suggested in the arguments, by which it is alleged the plaintiff might assert his claim. First, against the said defendants as a corporation; secondly, against them as Commissioners; and, thirdly, as individuals. If the Commissioners are a corporation it is quite clear that this action will not lie. On that question it is to be observed, on the one hand, that the Act appears undoubtedly to constitute the Commissioners a corporation for the purpose of holding lands: Sections 37 and 47. The act also, while giving the Commissioners power to repair and maintain the streets of Sligo, vests, by the 28th and 29th sections, the necessary materials in the Commissioners and their successors. On the other hand, it is to be observed that the act gives them no corporate name or seal; they are to sue in the name of their clerk or one of their body, and nothing whatever is said as to the method in which they are to be sued, nor is there any means of inferring that they are to be a corporation for general purposes. The 20th section empowers them to make contracts for paving and lighting and other purposes of this act, and these contracts are, by the 23rd section, to be "signed by the Commissioners." These are certainly not corporate acts. These provisions, taken together, appear to me to constitute the commissioners a corporation for taking lands only, and not for the general purposes of their act. The case of the *Conservators of the River Tone* v. *Ash*, cited in the argument, only proves that a corporation for the purpose of holding lands may be created by implication. This distinction is well founded on authority. In Bacon's Adridgment, Tit. Corporation B., it is said, "If the King grants lands to the men or inhabitants of D., *heredibus et successioribus suis* rendering rent; for anything touching these lands this is a corporation, but not to other purposes." The case of *Colquhoun* v. *Nolan* (*ubi sup.*) also clearly decides that perpetual succession conferred upon a body for certain purposes will not constitute them a corporation for all purposes. I think, then, that the Commissioners of Sligo are not a corporation for other purposes than holding lands, and that they may, therefore, be sued as commissioners by their individual names. Now the plaintiff stated himself, and the jury have found, that the Commissioners did not contract in their individual capacity, and, therefore the only mode in which he can reach them is their liability as Commissioners, whether he sues one, or more than one, or all. The plaintiff here has sued only seven out of the entire body, and he has sued them individually; but it was open to them to plead a plea in abatement, and insist upon having the entire twenty-four joined as defendants for I am of opinion that an act done within the scope of the Act at a legally constituted meeting, bound every one of the Commissioners. It is said that these persons protested, but still they were acting even in that as Commissioners; they had been legally appointed, they had attended some of the meetings, and by the 8th and 9th sections of the Act were bound by the majority. The case of *Horsley* v. *Bell* has an important bearing on this case. There none of the commissioners sued had signed all the orders sued upon. They had attended some of the meetings however. The case was heard before two Common Law judges and the Lord Chancellor, and Gould, J., says (1 Bro. C. C. 102): "The law raises an assumpsit to those who have done the meritorious act. It is like a partnership; they who at any time have acted have undertaken a partnership. I should have been of opinion that an action at law would have lain against any one of them, and that he must have sought his remedy against the others." I am of the same opinion in this case. I think the fact of the defendants being acting commissioners bound them to the acts of the majority just as if they had done the acts themselves. The last point I confess has more difficulty for me than the others. It is conceded that the minority could only be bound by an act done within the scope of the authority conferred by the Act of Parliament; and the question arises whether they might legally employ an engineer or other persons to oppose a bill before Parliament interfering with their rights and property. The 20th section empowers the commissioners to make contracts for flagging, cleansing, &c., "or any other matter or necessary thing or things whatsoever, or for any purpose

or purposes in execution of this Act." But on the other hand it is said that the 132nd section enumerates all the purposes to which the rates may be applied, and adds that they are to be applied to "no other use, intent, or purpose whatsoever." Now the purposes to which the rates are applicable include the general words, "and for carrying the purposes of this Act relating thereto into execution." It might be said that these words are large enough to enable the Commissioner to charge the expenses by opposing the bill upon the rates, but it is not necessary to decide that here, as the plaintiff does not seek to charge the rates, but goes against the commissioner individually, and it appears to me that they were empowered to make this contract under the general words of the 20th section, nor does there appear to be anything immoral or improper in the expenditure which would take it out of the general purposes of the act. The cases of *Reg.* v. *Town Council of Dublin*, and *Bright* v. *North* (*ubi supra*) appear to establish this. I am of opinion, therefore, upon the whole case, that the plaintiff is entitled to succeed in this action.

FITZGERALD, J.—This action is brought against seven persons, members of the body of Town Commission of Sligo; they are sued, however, not as commissioners, but individually, and by name, for work and labour done at their request. It appears to me that the plaintiff, in order to succeed here, is bound to establish three propositions. First, that the commissioners are not a corporation; secondly, assuming that to be proved, that the contract in question was one within the scope of the duties of this body; and, thirdly, that, at a meeting duly convened, the Commissioners present, or a majority of them, had not only authority to act for the corporation or *quasi*-corporate body, as the case may be, but that in addition they had authority, by contracts then entered into, to impose on the absent members of the body or the present dissenting minority a personal, individual, and pecuniary liability, and that liability without any limits whatever as to amount or duration of time. My opinion on the third proposition is so strong that it is almost unnecessary to say anything on the other two purposes, but I may say my impression is, that the Sligo Commissioners are a corporation by implication. We find in the Act the capacity for endless duration and continuance of identity; both personal and real property vests in them and their successors; the members have no personal interest in that property, and their successors hold it and are bound to administer it *quâ* successors. I will only add that in *Colquhoun* v. *Nolan* (*ubi supra*), cited as an authority for the opposite view, the Lord Chief Baron actually describes the Sligo corporation, when he gives an example of a body which could be a corporation: "Where a charter invests a body with certain rights and contemplates the discharge of that body of certain duties, which purposes cannot be carried into effect unless the body are a corporation, there the law would hold them to be a corporation, whatever the words might be, and even if the absence of express terms of incorporation, and in this respect there is no difference in a a body incorporated by Act of Parliament." As to the next question, I think it clear beyond doubt that the Commissioners could not employ one shilling of the town rates to pay the plaintiff. By the 132nd section the purposes are enumerated for which the rates are applicable, and it includes "and for no other purpose." Here we have a statutable provision in the strongest terms, containing both affirmative and negative clauses, which makes it clear to me that this contract was utterly beyond their powers. When we recollect the enormous expenses which attend parliamentary litigation, it seems reasonable to suppose that they have no power to burden the rates or absent individuals with such costly experiments. Upon these questions, however, I express no determination, but rest my judgment on the third and last.

I confess I have great difficulty in understanding this last proposition. It is contended that under section 9 the majority at a duly constituted meeting had power to bind personally and individually every person absent or dissenting. Well, that would be a very hard case, but if the statute says so, we must give effect to it. It is said that the hardship exists here only because the defendants have not pleaded in abatement and joined the rest of the Commissioners; but this is assuming the whole question to be proved, namely, that there was a joint contract made. But in my mind the statute says no such thing. By section 9 it is enacted "and all the orders and proceedings of such the major part of such Commissioners present at such their several meetings, shall have the same force and effect as if the same were made or done by all such Commissioners for the time being." The plain meaning of this section is that the majority binds the minority as Commissioners, and binds all the Commissioners as a body, that after the majority have determined and voted for a measure, the body or its successors shall never afterwards be in a position to say that Act was not binding upon the Town and Harbour Commissioners of Sligo. Something has been said of the hardship of the plaintiff's case. I can see no hardship whatsoever. The plaintiff himself says he did not act on the individual responsibility of the defendants. Either he has a statutable contract with the Commissioners or he has not. If he has not the persons who actually employed him are liable. The case of *Horsley* v. *Bell* (*ubi sup.*) has been misinterpreted. If the plaintiff here had sued the persons who actually employed him, although Commissioners, the case would apply. That case merely decides that persons actually making a contract are personally liable although Commissioners, and cannot shelter themselves behind the rates, but it does not follow that persons who never made the contract, nay, who actually protested against it, are liable for acts done by others. Cases were cited to us where members of public companies and club committees were bound by acts of their fellows. These are questions of agency and stand on a distinct footing. I never heard it contended that Town Commissioners were each the agent of the other to bind him even where he disapproves and protests.

O'BRIEN, J.—I agree with my brother Fitzgerald, both in his conclusion, and in the reasons by which he has arrived at that conclusion. I cannot understand how the Commissioners are to be regarded as a corporation for acquiring not only real but personal property, (sections 28 and 29) and not be a corporation for other pur-

poses. On the second question, the case of *Bright* v. *North* has been quoted, but it really does not touch this case. There the corporation was formed to protect the banks of a river. The bill which they opposed sought for power to break down those banks. It was rightly held that opposition to such a bill was as much within their power as opposition to men who were actually digging away the bank with spades. The real meaning of the 9th section, which has been referred to us, binding the minority, appears to me very clear. It was intended as a preparation for the 10th, which enacts that any order of the Commissioner should not be revoked unless at a special meeting 14 days afterwards, and at which a greater number of Commissioners attend than at the former meeting. Is it to be said that a section merely providing that the majority shall determine any question submitted to the meeting, is to be held to bind absent men who knew nothing of these proceedings. I asked several times how is a Commissioner to get rid of this terrible responsibility. It appears he is elected for life, and can only get rid of his office by remaining away 18 months. In *Horsley* v. *Bell*, all the meetings were not, it is true, attended by all the defendants, nor were all the orders signed by all. But the meetings and the orders were all parts of one entire plan, of which all had approved, and therefore one was held to satisfy the other's acts as his agent. In *Horsley* v. *Bell* the liability was a common law liability entirely independent of statute, but here there can be no question of agency when the principal distinctly protests.

WHITESIDE, C. J., concurred with the majority.

Rule discharged.

## CORRESPONDENCE.

### *Insolvent Act—Effect of discharge.*

TO THE EDITORS OF THE LAW JOURNAL.

There is a subject which I have dwelt on very much in studying the act; it is this:—The act as to voluntary assignments does not state what effect the discharge shall have, either as regards the person or property; and I have often thought it was intended to enable the insolvent to stop costs, by assigning all he has, and by letting the creditors at their meeting dispose of it, and, if there is no reason for any misconduct, to withhold a discharge, that the judge grants simply a discharge as to that estate and those debts, so far as that property only is concerned, or annexes a condition or suspends it for a time, and that no further actions can be brought or proceeded with to recover either out of the property then assigned or out of other acquired property, but that the other acquired property may be administered either in the Insolvent Court or in Chancery. I see it has been done in England in both Courts. I merely refer to this, and hope to see an article on the subject from the able editors of the *Law Journal*, as no subject is more discussed by the profession in the country than it.

I am, yours truly,

D.

### *Insolvent Acts—Assignees, &c.*

TO THE EDITORS OF THE CANADA LAW JOURNAL.

GENTLEMEN,—Your correspondent "Quinte," in the April number of the *Local Courts' Gazette*, addressed to you a long letter in reference to a communication of mine to your paper, on the subject of the conduct of official assignees and the working of the insolvent laws. Other urgent business has prevented me from replying to it, as I conceive it should be answered. "Quiute," from some cause or other, takes umbrage at my remarkes on assignees. Since I wrote my letter, and since his in answer, another correspondent of yours, signing himself "Union," has corroborated my remarks on assignees in your May number of the Journal. I regret to say that I fear all I have said about assignees is too true. I will mention one instance that has lately come to my knowledge. An assignee in the County of York lately undertook to get a young man in the county a discharge under the insolvent laws. Having some acquaintance with the young man, I asked him, from curiosity, what this assignee agreed to do the work for. He says $78! Now, here is an assignee, not a lawyer remember, actually taking a sum larger than even a lawyer would charge, for what? Not certainly for acting for creditors, as the man has no estate, but for drawing papers, notices, attendances before the judge, drawing final order, &c. *Ex uno disce omnes.* I am well aware that assignees have to give security, as "Quinte" says, but I am complaining of the way assignees act. Assignees in too many cases in Canada are merely broken down tradesmen themselves, and people are beginning to think the whole bankrupt law machinery is a humbug. "Quinte" says the present insolvent law of 1864 is not a bungled affair, and he gets rather witty, if not irate, at me for calling it *bungled*. The fact alone, of the necessity of passing an act in 1865 to define the meaning of the act of 1864, is an answer to "Quinte." But taking the two acts together, there are still many doubtful clauses and meanings in them. Some half a dozen cases have arisen already on the construction of certain sections, and there will be dozens

more before the acts are understood. What I mean to say is, that the two acts are not plain, are not comprehensive, are not guarded enough. I believe it is quite possible to add greatly to their legal virtues. Some clauses might be left out or consolidated, others should be added. I believe all the suggestions in my former letter right, and particularly mention that relating to personal notice of the final discharge, which I think should be given to each creditor on the application for the final order. I quite agree with many of "Quinte's" cases about the power to remove assignees, and I dare say that the case of *Re Mew* v. *Thorne*, 31 L. J. N. S., is law. We don't disagree about that, but I believe the judge might very well have the power to add conditions to the final discharge. I understand "Quinte" to say that I am wrong in stating that the "*final order*" does not discharge from any debt not included in the insolvent's schedule. He cites several cases to which I will presently refer. Yet at the end of his letter one would think he actually agreed with me on the point. This part of his letter is so *uncertain* that I shall take it that he disputes my position, for he pretends to say that the cases he quotes, "decided that a final order granted under the English acts, similar to our then bankrupt and insolvent acts, could be set up as a defence to any debt *not included in the schedule.*" I will refer to his quoted cases and prove the reverse in a moment. But before doing so I will draw attention to the wording of our own act. In the beginning of our act (sec. 2) we find it is required that the insolvent shall file and "swear to a schedule containing the names and residences of all his creditors and the amount due to each." In sub-sec. 6 of sec. 2 again we read of this schedule "of all his creditors." Again, sub-sec. 3 of sec. 9 are these words: "The consent in writing, &c., absolutely frees and discharges from all liabilities whatsover (except what are hereinafter specially excepted) existing against him and proveable against his estate, *which are mentioned and set forth in the statement of his affairs* annexed to the deed of assignment," &c. Now this is the only effect of the final order. Our act thus requires the insolvent to give in all his debts, but if he does not, the penalty is his liability to pay the omitted debts, notwithstanding his final order of discharge.

Then again to return to "Quinte's" assertions against my law. With respect to the question of whether a debt *not included in the insolvent's schedule is barred or not*, I am referred by "Quinte" to several cases. I am more concerned about this part of his letter than any other, for I have ventured an opinion in a former article that my position is correct. Very much to my delight I find that the *very cases* to which I am referred by this learned Belleville gentleman actually support my opinion and disprove his. It is seldom one sees a legal disputant cite authorities to prove his case against himself.

*Philips* v. *Peckford*, 14 Jurist, 272, is one of his cases, and which is referred to in his next case, *Stephen* v. *Green*, 11 U. C. Q. B. 457. In *Phillips* v. *Pickford* it is held by the court, "that the final order for protection under 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96, is only a bar to actions brought in respect of debts mentioned in the schedule, and to make a plea of such final order a good plea in bar it must allege not only that the debt *accrued before the filing of the petition* but that it was *named* in the *schedule*. In this case, *Jacobs* v. *Hyde*, 2 Exch. 508, is alluded to and distinguished. Now our bankrupt act and old insolvent law, in speaking of the discharge of the insolvent, always alludes to the list of creditors named in his schedule. *Stephens* v. *Green* is against "Quinte," also *Greenwood* v. *Farrell*, 17 U. C. Q. B. 490. This case, however, turned not upon the point in dispute between us, but upon the case of a man giving a note after his petition or assignment in bankruptcy, and before the final order; and it was held that such a debt was not discharged by the final order. The case militates against "Quinte." It is true Mr. Justice Burns says in his judgment, "In bankruptcy the effect of the certificate is to bar not only debts due and owing at the time of the commission issuing, but also all debts proveable under the commission up to the time of granting the final order." But the decisions in England are under acts worded differently from our bankrupt act. The present act is also different from the law in force in 1843 in Canada, and we must always in considering cases look at the words of the act in force. The policy of our act seems to relate to debts named in the filed schedule of creditors. "Quinte" also refers to *Booth* v. *Coldman*, 1 El. & El. Reports, 414. This case does not support his position, nor does it turn on the

point in issue between us, but in its spirit is against him. His other case of *Franklin* v. *Beesley*, in 1st El. & El. Reports, is expressly against him, shewing that the debt to be discharged must be included in the schedule. In this last case, *Leonard* v. *Baker*, 15 M. & W., 202, is referred to (and "Quinte" had better see it), which supports my position. His last case in 8 Jurist is also against him. I observe that there has been a case just decided in the Queen's Bench, *McKay et al.* v. *Goodson*, reported in No. 5 of Vol. 27 of the Queen's Bench Reports, in which Mr. Justice Morrison, holds, that to enable an insolvent to ask for a discharge, if arrested for a debt due prior to his assignment in bankruptcy, he must clearly show that the debt was included in his schedule filed with his assignment. His words are, "Upon an application of this nature it is the duty of the applicant to show specifically that the creditor's debt appears on the schedule."

Now I end this article by saying, "Quinte" has attacked my article to very little purpose, and has caused me to look into cases thoroughly confirming me in my view, that "a debt due from an insolvent before his assignment, to be barred, must be included in his schedule, else the liability remains."

I think, moreover, every lawyer in Canada will agree with me in the opinion, that the insolvent laws of Canada require to be read over a great many times before we can get a proper knowledge of the true meaning of them and that it is difficult to understand some clauses at all. I also venture to say that my remarks as to assignees will be assented to, by the legal profession throughout Ontario.

SCARBORO'.

Toronto, June 22, 1868.

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### *Bill Stamps.*

TO THE EDITORS OF THE CANADA LAW JOURNAL.

GENTLEMEN,—Is a promissory note, draft or Bill of Exchange for an amount less than $25 liable to duty under part 1, Dominion Statutes, 31 Vict. Cap. II. Some of the profession here hold that it is. By inserting this short letter in your next issue and giving your opinion on the subject you will oblige

Yours, &c.,

A STUDENT.

Goderich, June 3rd, 1868.

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### A FASTIDIOUS JUDGE.

We take this from a newspaper:

"At the last sitting of the Tunbridge County Court, the judge, Mr. J. J. Lonsdale, made the following observations:—In consequence of several parties having business in the court coming in their working apparel, he wished to state that all persons who came to that court, which was the Queen's court, should be properly dressed, and not in their working clothes, and had they any claim for expenses he should disallow them. He considered the court had dwindled down in this respect as bad as the old court of conscience. Of course, if parties had no better clothes to put on they were to be pitied, but generally speaking persons when they went out on the slighest occasion put on their best clothes. Very frequently people came to the County Court just as if they had been fetched out of the street to a police court. It was very disrespectful to himself, and very annoying to a well-dressed person to sit beside a miller or a baker who was in his working clothes. He certainly should be very strict in this matter in future, and should most decidedly disallow any person expenses who came to the court dressed in a manner which he considered was disrespectful both to himself and the court."

It is difficult to believe that Mr. Lonsdale was in earnest when he decreed that nobody should come into his presence unless clothed in his "Sunday best." A baker hot from the bake-house, a miller fresh from the mill, is not a pleasant neighbour in a crowded court; still less so is a chimney sweep; but courts of justice are for all classes and all callings, and the well-dressed and fastidious must submit to an occasional dusting of their coats, or offending of their noses, in return for the advantage they derive from the existence of tribunals which secure to them possession of the good things with which a happier lot has blessed them. Certainly a judge travels out of his proper province when prescribing how suitors and witnesses shall be clothed, and to refuse costs to a man because he wears a dirty coat is a stretch of power which would invite grave censure were it not so utterly ludicrous. We trust Mr. Lonsdale will reconsider his hasty resolution, and we are sure that no judge will follow his example.—*Law Times.*

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One or two curious decisions have been lately given by magistrates in England as to what constitutes cruelty to animals. Some months ago a bench of Glocestershire justices held that to cause great agony to a dog by pouring spirits of turpentine upon the roots of its tail, did not amount to "cruelly torturing" within the statutory provision thereto relating. We do not expect to have statutes particularly well interpreted by county J. P.s, but we own to being considerably surprised at a conclusion recently arrived at by Mr. Trafford, stipendary magistrate at Salford, who determined that several men who engaged in a "pig hunt," the fun of which appears to have consisted in peppering the carcase of an unfortunate pig with small shot until its hide was riddled like a cullender, in order to make it run, were not guilty of cruelty to the pig. Since neither of these acts was held to amount to cruelly torturing, it would be curious to know what would.—*Exchange.*