DIARY FOR NOVEMBER.

1. Friday *All Saints.*
2. Sat. .. Articles, &c., to be left with Secretary Law Society.
3. SUN.. *20th Sunday after Trinity.*
10. SUN.. *21st Sunday after Trinity.*
13. Wed.. Last day for service for County Court.
17. SUN.. *22nd Sunday after Trinity.*
18. Mon .. Michaelmas Term commences.
23. Sat. .. Declare for County Court.
24. SUN.. *23rd Sunday after Trinity.*
27. Wed.. Notices for Chancery re-hearing Term to be served. Appeals from Chancery Chambers.
30. Sat. .. *St. Andrew.*

The Local Courts'
AND
MUNICIPAL GAZETTE.

NOVEMBER, 1867.

THE MARRIAGE LAWS.—No. III.

The articles of capitulation, drawn up at the time of the cession of Canada, lie at the very root of the question we are now approaching. Upon them was based, and in view of them is to be construed, all the subsequent legislation of the Home and the Colonial Governments in regard to the religious privileges of the Roman Catholic clergy and population. It is laid down by Lord Mansfield in the famous case of *Campbell* v. *Hall*, Cowp. 204, "That the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning," p. 208.

Now among the articles of capitulation, relevant to the question in hand, demanded by De Ramsay, in command of the Town of Quebec, and acceded to by Admiral Saunders and General Townshend, on Sept. 18, 1759, is the following:—"That the exercise of the Catholic and Apostolic and Roman religion, shall be maintained, and that safeguards shall be granted to the houses of the clergy and to the monasteries, particularly to his Lordship the Bishop of Quebec, who, animated with zeal for religion and charity for the people of his diocese, desires to reside in it constantly, to exercise freely and with that decency which his character and the sacred offices of the Roman religion require his episcopal authority in the town of Quebec, whenever he shall think proper, until the possession of Canada shall be decided by a treaty between their most Christian and Britannic Majesties." Whereto the response was:—"The free exercise of the Roman religion is granted, likewise safeguards to all religious persons, as well as to the Bishop, who shall be at liberty to come and exercise, freely and with decency the functions of his office, whenever he shall think proper, until the possession of Canada shall have been decided between their Britannic and most Christian Majesties." Art. VI.

It will be observed that this article is to be regarded as merely provisional, and we find very important modifications in the terms granted, when the final articles of capitulation were concluded at Montreal, on September 8th, 1760, between Major-General Amherst and the Marquis de Vaudreuil, Governor of Canada. During the interval, Laval, Bishop of Quebec, had died—a fact which explains the provisions of some of these final articles, which we now proceed to cite, so far as necessary for our purpose:—

"The free exercise of the Catholic apostolic and Roman religion, shall subsist entire, in such manner that all the states and the people of the towns and countries, places and distant ports, shall continue to assemble in the churches and to frequent the sacraments, as heretofore, without being molested in any manner, directly or indirectly; these people shall be obliged by the English Government, to pay their priests the tithes and all the taxes they were used to pay under the Government of His most Christian Majesty.—*Granted as to the free exercise of their religion. The obligation of paying tithes to the priests will depend on the King's pleasure.*" Art. XXVII.

"The Chapter, Priests, Curates and Missionaries, shall continue with an entire liberty, their exercise and function of cures, in the parishes of the towns and countries.—*Granted.*" Art. XXVIII.

"The Grand Vicars, named by the Chapter to administer to the diocese during the vacancy of the Episcopal See, shall have liberty to dwell in the towns or country parishes, as they shall think proper. They shall at all times be free to visit the different parishes of the diocese, with the ordinary ceremonies, and exercise all the jurisdiction they exercised under the French Dominion. They shall enjoy the same rights in case of the death of the future Bishop, of which mention will be made in the following article.—*Granted, except what regards the following article.*" Art. XXIX.

"If by the Treaty of Peace, Canada should remain in the power of His Britannic Majesty, His most Christian Majesty shall continue to name the bishop of the colony, who shall always be of the Roman Communion, and under whose authority the people shall exercise the Roman religion.—*Refused.*" Art. XXX.

"The Bishop shall, in case of need, establish new parishes, and provide for the rebuilding of his cathedral and Episcopal palace, &c., and exercise all the jurisdiction which his predecessor exercised under the French Dominion, save that an oath of fidelity or a promise to do nothing contrary to His Britannic Majesty's service, may be required of him.—*This article is comprised under the foregoing (sous le précédent).*" Art. XXXI.

"The French and Canadians shall continue to be governed according to the custom of Paris, and the laws and usages established for this country, &c. &c.—*They become subjects of the King.*" Art. XLII.

By the Treaty of Paris (Feb. 10th, 1763) Canada was secured to the British Crown, and by article Four of that Treaty the following limited undertaking was entered into on the part of Geo. III.:—"His Britannic Majesty agrees to grant the liberty of the Catholic religion to the inhabitants of Canada: He will consequently give the most precise and most effectual orders that his new Roman Catholic subjects may profess the worship of their religion, according to the rites of the Roman Catholic Church, *as far as the laws of Great Britain permit.*"

The Royal Proclamation of the 7th October, of the same year, contains nothing that particularly affects the question under discussion, and it was moreover revoked and annulled by the first legislative enactment relating to Canada, known as "The Quebec Act." This statute (14 Geo. III. cap. 83, 1774) entitled "An act for making more effectual provision for the government of the Province of Quebec, in North America," in its chief parts is to be found among the Imperial Enactments, collected at the beginning of the Consolidated Statutes of Canada, p. x. At present we refer specially to the 5th section which is of abiding significance, and may be regarded as the very charter which secures and defines the liberties of the Roman Catholic population of this country. It carries out precisely the above-cited provision of the Treaty of Paris, and extends in its scope beyond the concessions of the several articles of capitulation in recognizing and ascertaining the religious rights and privileges of priests and people. "And for the more perfect security and ease of the minds of the inhabitants of the said Province, it is hereby declared, that His Majesty's subjects, professing the religion of the Church of Rome, of and in the said Province of Quebec, may have, hold and enjoy, the free exercise of the religion of the Church of Rome, subject to the King's supremacy, declared and established by an act, made in the first year of the reign of Queen Elizabeth, over all the dominions and countries which then did, or thereafter should belong, to the Imperial Crown of this realm; and that the clergy of the said Church may hold, receive and enjoy their accustomed dues and rights, with respect to such persons only as shall profess the said religion," 14 Geo. III. cap. 83, sec. 5. By sec. 8, all the Canadian subjects, as to their property and possessions and civil rights were explicitly placed, or replaced, as some will have it, under the old French system of laws which obtained before the conquest, therein called the laws of Canada — which system was subject however to displacement when in conflict with their paramount duty of allegiance and subjection to the Crown and Parliament of Great Britain, and subject also to modification by the colonial authorities.

The next Imperial Act (31 Geo. III. cap. 31: 1791; Con. Stats. Can. p. xv.) provides for the separation of the Province of Quebec and the establishment thereout of the Provinces of Upper and Lower Canada, gives the two local legislatures thereby formed, the right to vary or repeal any existing laws, statutes and ordinances; and in sec. 35, specially preserves intact the privileges of the clergy of the Church of Rome, as provided for in the Quebec Act. In the words of Mr. Pitt, the intention of the framers of this act was "to continue the laws then in force in Quebec—unless the assembly of each Province chose to alter them." In Lower Canada this was not done, but in Upper Canada, where the population was composed of English-speaking emigrants, settlers and natives, this right was exercised on the very earliest opportunity. By P. S. U. C. 32 Geo. III. cap. 1: 1792; the Upper Canadian Parliament abolished the authority of the old "Laws of Canada," and declared

that in all matters of controversy relative to property and civil rights, resort should be had to the English Laws, as the rule for the decision of the same. None of the ordinances saved by sec. 4 of this act, related to other than mercantile matters. Sec. 6 provides that "Nothing in this act shall vary or interfere with, or be construed to vary or interfere with any of the subsisting provisions respecting ecclesiastical rights or dues within this Province." See Con. Stats. U. C. cap. 9, preamble.

DIVORCES IN THE UNITED STATES.

It is almost impossible to conceive a more frightful picture of national depravity, than is pourtrayed in the following notice of a divorce case in one of the Western States. It is taken from a New York paper:—

"The 'easy divorce' business is being brought every day nearer and nearer perfection in the West. In Cincinnati, the other day, a man got a divorce without his wife's knowledge, upon a simple statement in his petition that she represented herself to be 32 years of age, at the time of her marriage, when she was in reality over 40, and that she was 'a common scold.' No papers were ever served upon her, and the necessary legal notice was published in a Price Current, or other paper of that class which no woman ever sees. Her character, too, was faultless, and she had a child 14 months old, and the sole apparant motive of the husband was the desire to marry another woman. In this case the attorney, in person, supplied whatever proof was needed to make out the case, and appears to belong to a class of 'divorce lawyers' who absolutely live by perjury and fraud. We have not as yet begun to see the effect on society of our present divorce laws, or of the moral condition of the legal condition of the legal profession in some of our large cities; but if something be not speedily done by way of reform, the next generation will both see them and feel them. It may not be expedient to make men live with women they do not like, but no society can with impunity suffer men to change their wives as often as they please, and leave their children unprovided for in the arms of those whom they abandon. Any community which, by its legislation, offers scoundrels facilities of this kind for their scoundrelism, deserves to suffer, and all friends of pure manners have the consolation of knowing that it will suffer. No good breed of men or women ever yet grew up in a country in which marriage was lightly dissolved. Men who shine in either war or peace have to be produced in homes, and homes rapidly disappear in regions where husbands can get rid of their wives by paying fifty dollars to a knavish attorney. First the scamps do it, and then the honest men, being used to seeing it done by the scamps, lose their horror of it, and laugh over it, and finally they do it themselves, and the public ceases to look on it as a wrong, and then the children grow up to regard marriage as a simple mode of gratifying a temporary passion, and their mothers as simply the instruments of their physical procreation."

We may all be thankful that such a state of things could not happen in our midst. The indignant remarks which conclude the extract, come too late to be of much service where such a law has once been established, but not too late to act as warning to those who pin their faith upon the libertinism (falsely called freedom) of our neighbours to the south of us.

SELECTIONS.

TRIAL BY JURY.

(*Continued from page* 152.)

A word concerning trial by jury in the British colonies and dependencies. Some of them possess the system, others do not. Those which have it are, generally speaking, the most peaceful and flourishing, but the subject is too lengthy for more than a passing remark, on account of savage races of men being mixed up with the white inhabitants in questions concerning land, &c., as in New Zealand, the Cape of Good Hope, &c. The subject of trial by jury in foreign countries does not admit of detail on account of the limits prescribed to the essay. Neither does this branch of the question affect the arguments concerning the institution in Great Britain. The civil or Roman law, in fact, the institutes of Justinian, to this day, furnish the basis of legislation to continental Europe. In England, the protectorate of the common law has raised an impassable barrier to the invasive spirit of the civil or Roman law. Trial by jury, it is true, does exist in many European nations; but they have at the same time many other laws which take away from its value. In France, for example, the "*loi de suspect*" enables a man to be arrested, imprisoned, or transported, merely at the discretion of the authorities, if they *suspect* he may *intend* to commit any act, which they might not approve of. In Germany, Italy, the United States, &c., the violent agitation which led to the recent wars, produced many acts of lawlessness and oppression. It is useless, in a short essay like this, to allude to trials by jury in such countries. It is to be hoped that if peace continue, the inhabitants of these countries will seek to work out more carefully the principle of trial by jury, which is the "keystone of British liberty." It is true that in Great Britain and

Ireland, when an Act of Parliament suspends the *Habeas Corpus* Act, persons can be detained in prison without being tried and convicted; but this measure is in force for a limited period only, and in the disturbed part of the kingdom mentioned in the Act of suspension. Moreover, the representatives of the people in the House of Commons would never sanction the suspension of the *Habeas Corpus* Act, were it not necessary for the safety of the realm. It may be as well to explain to the general reader, that *habeas corpus* is the name of a writ, by which every person who is imprisoned before trial, &c., may demand to be brought before some competent court, that he may be either convicted or liberated.

Respecting the beneficial influence of trial by jury on the public, as a national institution —politically, socially, morally—the preceding part of our essay sufficiently explains the political branch of this subject. We shall now proceed to the consideration of the beneficial influence of the institution.

I. The beneficial influence of trial by jury on the judges must be evident to every person who has considered the subject in the spirit of a free-born Briton. It is an old proverb "that two heads are better than one." Solomon, the wise man, has written—not once but twice—that "in the multitude of counsellors there is safety." The strain upon the intellectual faculties of the judges if they were to unite the functions of judges and jurors, would be undesirable for many reasons. The value of the division of labour is acknowledged in most pursuits, and it is not improbable that if the minds of judges were continually overtaxed, they would not be able to follow all the facts of the multifarious causes brought before them with the same energy as jurymen, whose minds would be less fatigued. Then again, there is the responsibility. Twelve men who can share it between them, are less troubled by the weight of it than one or two men who have to bear it, especially in very perplexing cases—in which the life, or the character, or the fortune of a fellow-creature, depends upon the issue. In such cases, it is not unlikely that a judge of a severe disposition would be too severe, and that a judge of a mild disposition would be too lenient; thus justice would not be so well meted out. In a jury of twelve men it is to be supposed that there is a greater chance of obtaining men of various positions, which would serve to counteract the tendency to an excess of either undue severity or leniency. "In acting for the public," said a magistrate, "he regretted that the case could not be sent before a jury—for it was always more satisfactory to him to have the opinion of twelve men, than to take the responsibility of deciding himself."

To prove that in certain cases one man is not equal to twelve men to decide a cause—suppose a jury to consist of *one* man? Is it to be imagined that the results would be as satisfactory to the public, as though the jury were to consist, as at present, of twelve men? Would the *one* juryman have in all cases the same clear views of the causes?—would he discriminate with the same accuracy?—would he decide with the same amount of judgment? —would he be able to sift the true from the false with the same nicety—since one mind, instead of twelve minds, would be engaged in weighing the evidence, and, in all probability, would not be competent to take so extended a view of the case, and unravel the complications that might exist? It is to be remembered that some cases are very intricate—not only from the result of circumstances, but from artfulness, or fraudulent designs. In a word, would the public have the same confidence in the soundness of the verdict of this one juryman, as in that of twelve jurymen? If you—I say to the reader—were a plaintiff or defendant in a cause, would you *prefer* your cause to be decided in this manner? If anyone would not prefer one juryman instead of twelve jurors, why should he prefer one judge to act alone, instead of twelve jurymen, with a judge to assist them and the case? The same argument will hold good respecting one or two, or more jurymen or judges, deciding causes, instead of the present number as established by law. It may be said that judges are more able and learned in the law than jurymen; and this leads us to the consideration of the question, whether one or more judges to decide trials would not be preferable to having any jury at all—in fact, to abolish the use of a jury, and allow the judges to adjudicate. It has been argued, judges are learned, and jurymen are often, comparatively, very ignorant, or, at all events, they are inferior to the judges in legal lore. It is preferable, some may say, to rely upon the decisions of men profoundly skilled in the law. Sir John Hawles, who was solicitor-general in the reign of William III., observes in a celebrated work of his:

"Though judges are more able than jurymen, yet jurymen are likely to be less corrupt than judges—especially in all cases where the powers of the prerogative and the rights of the people are in dispute. * * Less dangers will arise from the mistakes of jurymen than from the corruption of judges—besides improper verdicts will seldom occur; since juries will avail themselves of the abilities and learning of the judges, by consulting them on all points of law—and thus, to the advantage of information will be added that of impartiality. * * Had our wise and wary ancestors thought fit to depend so far upon the contingent honesty of judges, they needed not to have been so zealous to continue the usage of juries." "Although we live at present under a benign government," says a modern writer, "and our Crown lawyers—Liberal or Conservative—are pre-eminent for private and public integrity, yet Lord Brougham and Lord Lyndhurst, and other great statesmen, have warned us that it 'may not always be so." *Trial by Jury, the Birthright of the people of England*, p 81

The salutary effect of juries saving judges from the temptations and unpleasant positions which might occur to them if they were allowed to decide all cases without juries, could

be proved in many ways. When judges were removable at the pleasure of the Crown, history records that many judges were not exempt from the human infirmity of preferring their own personal interests to those of justice and of the public. They feared to lose their places. It is far from satisfactory for a judge to decide, in times of great political excitement, in trials for political offences. In the trials of the Fenian conspirators, for instance, what a benefit it was to the judges to have a jury to decide upon the facts of the cases. Trial by jury serves, in a great measure, to protect the judges from the imputation of partiality, and in any case, does not require them to act contrary to the wishes or political bias of the government which appointed them. If they were to have the power to acquit, they might offend the government, or the class to which they socially belong; if they could convict, they might become odious to a large section of the people. It may be said that as a judge is not in the present removable, he has no inducement to act otherwise than with strict impartiality; but he may have sons and daughters, the sons to advance through interest in high quarters, and the daughters to marry in a certain class. There would be high-minded judges to despise all unworthy acts, but the cases of two of the king's justices, Empson and Dudley, together with the infamous conduct of Judge Jeffreys, are warnings not to expose even judges to unnecessary temptations. Some of the judges themselves have given a convincing practical proof of the superiority of trial by jury over that by judges only. "In 1620," relates a writer, "the conduct of Chief Justice Holt and his brethren in the Queen's Bench was called in question by Lady Bridgeman for an alleged illegal act in the course of a suit. These judges were summoned to appear before the House of Lords. They refused. Why? They denied the jurisdiction of the House of Lords, and insisted upon their undoubted rights as Englishmen to a trial by jury of their equals, in case they in anything were accused of having done wrong, and claimed the benefit of being tried according to *the well-known course of the common law.*"* If judges have thought it not prudent to be tried except by a jury, it is certain that other persons ought to think the same.

II. The effects of serving on a jury upon the class from which common jurymen are taken, must be very advantageous to the well-being of a nation.

We suspect that a free constitutional country could not continue to exist in the same state of freedom and order, if the practical education which serving on a jury confers, were withdrawn from so large a portion of its inhabitants. A juryman indirectly gains invaluable knowledge from the duties that he is obliged to perform. He acquires a knowledge of men, manners and things; he learns to make a due discrimination between right and wrong, between truth and falsehood, and is imperceptibly taught to recognise the difference which there is between arbitrary power, and liberty and order. Then again, the distinction which there is between liberty and license is forced upon his notice. On the one hand, he feels himself called upon to shield his fellow-countrymen from wrong and oppression, whether from the government or individuals; on the other hand, he equally sees himself called upon to prevent persons setting order and just dealing at defiance. Hence the juryman, with his mind thus disciplined, is better able to form sound opinions upon political and social matters, and to become a loyal, but free and order-loving member of the community. He instinctively respects the constitution and the laws of his country, because he is aware that he himself has often assisted to support the former and to administer the latter. He may be a reformer, but he has learnt from his past experience as a juryman, that to adopt the legal means is the only proper method of carrying out his views.

In criminal trials especially, the juryman is taught an instructive lesson which may well serve to make him a better man, in case he should need it. He sees the dire consequences of guilt in the miserable criminals brought before him, and a solemn warning is thus given to him, which he cannot reject, if he be a man of ordinary thoughtfulness, that "honesty is the best policy."

The intelligence and general knowledge of a juryman are greatly increased by the nature of the proceedings in a court of justice. The judges and the lawyers are well educated men. The pleadings of the lawyers, and the summing up of the judge in a trial, must certainly convey instruction and teach a lesson on the right use of words, likely to improve an ordinary juryman, and extend the narrower bounds of his thoughts and language.

III. The overwhelming disadvantage to suitors and prisoners, of having their cases tried by judges only, instead of tried by a jury, would be that both the facts of the case and the law would be in the same hands. The meaning of the famous legal maxim, "Fact for the jury, law for the judges," ought to be thoroughly understood by everybody. The office of the judge is to explain the law to the jury, and state his view of the case in his summing up, which must not contain his verdict; but since "all matter of law arises out of matter of fact," so till this point be settled by the jury there is no room for law.* After the verdict has been given by the jury, the judge carries the verdict into effect according to the law of the land, or in other words, pronounces the judgment which the law makes the consequence of the verdict.

The celebrated Blackstone gives the following reasons for the superiority of trial by jury over that by judges only:—

* "Trial by Jury, the Birthright of the People of England," p. 100.

* Chief Justice Vaughan—Bushell's case.

"If the administration by justice were entirely entrusted to the magistracy, a select body of men, and those generally chosen by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. * * In settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. * * * Trial by jury, therefore, preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. It is therefore, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity, if at all impaired by the different value of property, or otherwise deviated from its first institution; to *amend* it wherever it is defective; and, above all, to guard with the most jealous circumspection against the introduction of new and and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty."

If this opinion, given by so eminent a man, does not convince the reader of the value of trial by jury, nothing else can. It may be added, that if a person is not satisfied with the decision of a jury of men whom he can challenge or object to within a reasonable limit before trial, he will not be contented with any legal process that human wisdom can devise. He can move for a new trial (in civil cases), and, if there be sufficient grounds for the proceeding, a new trial will be granted him. In conclusion, I will merely give the words of Lord Camden, as quoted by Earl Russell in his essay on the British Constitution.

"The discretion of a judge is the law of a tyrant; it is always unknown; it differs in different men; it is casual, and depends upon constitution, temper, passion. In the best, it is oftentimes caprice; in the worst, it is every vice and folly to which human nature is liable."

Nor must the security to life which a coroner's jury affords against foul-play and murder be forgotten. Every suspicious case of sudden or of violent death is inquired into. In countries where there are no investigations made in this manner the number of deaths by violence and poisoning is, with few exceptions, much greater than in those which make these inquiries by means of a coroner's jury.

In a country like Great Britain it takes a long time to induce the legislature to amend any time-honoured institution, even if it imperatively requires some judicious alterations to adapt it to the gradual changes which time has brought about in the condition of the community. The present method of summoning jurymen, is one that calls for amendment in some, if not in all localities. If the system of trial by jury is admirably adapted to secure the administration of justice, it must likewise be remembered that even a sound and beneficial system requires to be fairly and properly carried out. If it be not so, it will in time lead many persons to regard it with indifference, if not with dislike. We cannot do better than copy some of the remarks on this subject which appeared in an article, published in a daily newspaper:—

"It is no secret that the system of summoning juries is almost universally found to be objectionable. A tradesman may be taken from his business for a whole day, kept trying some trumpery small debt case in the Lord Mayor's Court, and then presented for his services with the handsome remuneration of eightpence sterling. He may be sent to the Common Law Courts, detained there for hours or days, and receive two shillings. If he happens to be on the special jury list, he certainly gets his guinea for the case he tries. But, as he is summoned only for that particular case, he must dance attendance in the court till it is called in turn, even though he have to wait for a week or longer. If he leaves, even for an hour, the trial may come on in the interval, and he himself fined for his absence. He may be chosen on a coroner's inquest, 'sit' on a body, and get nothing at all for his unpleasant task. As if to render the evil intolerable, the lists from which jurymen are selected, are made out with the most capricious irregularity. One man will be summoned twice or thrice every year; another will escape for ten years or even longer, although he has taken no steps to evade the duty. Now, there are a good many citizens who do not object to take their share of the work, but who grumble at being burdened with double labour, while their neighbours are never called on to perform the task. There are others who considered it such a nuisance that they think almost any means of escape lawful. Now, the wrong might be easily remedied, and its amendment is a mere question of detail. Let the lists be fairly made out and exhausted in rotation, and the willing class of jurymen will have their objections removed, while the reluctant or selfish will have no shadow of excuse for shirking the performance of a necessary duty. We simply take the institution as one which has in practice worked admirably, and proved an efficient bulwark against the encroachments of prerogative and power. Such being its worth, we are bound to see that nothing interferes with its successful working. Bad management, irregularity, and uncertainty have created a dislike to the system, when the fault really lies in the administration alone. The area of selection should be widened, and no room left for the operation of favouritism or neglect. If all citizens who are liable and qualified were to perform their proper share of so important a public duty, the labour would not press unduly on a small number, and there would be less temptation to shirk it."

It is also related that "judges on the bench, responding to complaints from indignant jurymen, have expressed their opinions very freely on their subject, and their views on the necessary reform point in the direction we have indicated." We admit at once that the judges

are much more competent than we are to form sound opinions respecting the matter; but it occurs to us, that the principle of volunteering which has worked such wonders in raising a national force of volunteers to defend the nation, might be extended to the system of forming juries. As is well known, all men are not gifted alike, some can scarcely arrive at a correct opinion about their own affairs, much less concerning those of other people; others feel themselves almost physically and mentally incompetent satisfactorily to undertake the weighty task of passing a verdict upon disputes and crimes often of the most puzzling nature. There are, on the contrary, men who are clever at this kind of work, and who feel their own powers: very frequently they are not averse to undertake the duty. If an appeal were made to the inhabitants of every district for volunteer jurymen, it is not improbable that many would be found willing to come forward. If after this any deficiency in the requisite number of jurors were to occur, the lists of those liable to serve ought to be exhausted in rotation, and the required number made up. It would be probable, that by these means, a large proportion of willing jurymen who feel themselves mentally able to undertake the duty efficiently, would be secured with advantage to the interests of justice and to those of the community. At the same time, it is to be recommended that jurymen be better paid to recompense them for their loss of time, and divest them of the feeling, too prevalent among them, that they are shut up "in a box, whether they will or not, until they do 'well and truly try' some case or other possessing for them not the slightest earthly interest."

It is a strange anomaly in our laws, that one of the most important duties performed in a trial by jury is so inadequately remunerated. The judge is well paid, the lawyers are highly feed, but the jurors, who do so much, are scantily rewarded for their services. It is true that, a special juryman receives a guinea for the case he tries, but he has to be in attendance until the trial shall take place, and he may have to wait a considerable space of time. The number of judges and of the courts, above all in the metropolis, are insufficient, particularly for special jury cases, and many causes have to wait too long until their turns come. The number of the judges and of the courts that sit have not been augmented to meet the increase of population, and consequently of causes. No persons other than those who have had to endure the hours and even days of weary, profitless waiting connected with a trial, can form a conception of the loss of time it may involve. We are of the opinion that jurymen ought to be properly paid. The payment of jurors is not a modern innovation. We read in Roberts' Southern Counties, that in 1485 (Richard III.), "there is evidence of payment to the jury for their expenses and labour, and for breakfast after they had delivered their verdict." There is a happy medium even in remunerating a jury; our opinion is, that jurymen ought to be paid for the time they really lose. With a stronger staff of judges, and additional courts to sit in, the waiting for the trials to come on in turn would be abridged, and so great a loss of time avoided.* We are not in favour of a uniform rule of payment to members of the same jury. Let each juryman be paid according to his station in life and calling, and in conformity to the scale of payment to witnesses in criminal cases—so much a day for a gentleman and a professional man—so much a day for a tradesman, &c., and so much a day for a mechanic, &c. This would save needless expense, meet the requirements of the case, and arrest the growing dislike of people, who may have pressing affairs of their own which demand their attention, to serve on juries. The time may come when the popular dislike to an ill-paid, forced service, may endanger the stability of the institution. The jury man of 1485, was paid "for his expenses and labour," why should not the juryman of 1866, &c., be paid a reasonable amount for his services.

In reference to the question, as to whether the age at which jurors can claim exemption should be made sixty-five instead of sixty, we hold that men of sixty-five, as they generally possess more experience in worldly matters, and are often in more easy circumstances than younger men, should be made to serve, provided they be properly paid and selected and allowed the requisite refreshments which their time of life demands. Judges are not disqualified at sixty, why should jurymen? but perhaps they ought to be exempted from serving on criminal juries, as the strain upon their nerves, likely to be weakened by age, might injure their health if the responsibility of deciding upon the life or death of a fellow-creature were to be incurred by their verdict. It is to be remembered that a judge does not decide such questions in a jury box.

As to whether unanimity should be required for a verdict, there is much to be said for and against it.† In Scotland, where an ordinary jury is composed of fifteen men, unanimity is not required; but it is to be recollected that in Scotland, trial by jury is not used in many cases in which it is employed in England. Whether from this or other causes, trial by jury is not generally so highly esteemed there as in England. In criminal trials, as the writer has seen, the effects of some of the jury being for a verdict of *not* guilty, and of others of the jury being for a verdict of guilty, has sometimes an unpleasant result. If the majority of a jury bring in a verdict of guilty, and a person is condemned to death, or some severe punishment, doubts are excited in the minds of some

* We had written our Essay and sent it in, before the Government announced that the number of the judges are to be increased. The number of suits which are constantly deferred on account of the lack of judges to hear them, are too numerous for any half-measures to be effective. Some of the judges have also to preside in criminal cases, which creates delays in civil actions; and many suitors are, as it were, forced to avail themselves of county courts to obtain more speedy justice: this militates against trial by jury.

† See next page.

of the community, as to the guilt of the prisoner. "Some of the jury said he is not guilty, why are they not right, and the others who said he is guilty, wrong!" is the argument. In fact, the same individual is pronounced to be guilty and not guilty, by different members of the same tribunal. He cannot be both. Does not the dignity of the law suffer from this indecision in a court of justice. It is very difficult to get men to agree in a unanimous verdict, when the law allows some of them to shelter themselves from moral resposibility, and throw it upon others of a more determined frame of mind; it permits the timid to cast an undue burden upon the conscientious, when either an unpleasant or unpopular duty ought to be performed, in addition to which, if a prisoner is acquitted, and a minority of the jurors are for a verdict of guilty, a needless stigma will remain upon him, perhaps unjustly. Besides, in times of great popular excitement and agitation, the majority of a jury if they convict a popular person may be specially singled out for public execration, insult, probably persecution, because the minority of the jury thought the prisoner *not* guilty. Party spirit would seize hold of the opinion of the minority to justify an accusation against opponents. The good men among the jury thought him not guilty; the base, corrupt ones found him guilty. Such are the arguments likely to be used. Now, if a jury of twelve men must agree either one way or the other, the whole jury is blamed or not, and there is no opportunity of proving the guilt or innocence of any one who has been tried, by citing a division of opinion among the jury. There is unanimity either one way or the other, and the public are spared the doubts and controversies which the other system is capable of giving rise to. We suspect that one of the reasons why our ancestors in England insisted upon unanimity,* was that it made it less easily for those in power, or others, to tamper with the jury. It is easier to find out and bribe seven men than twelve. If none of the drawbacks we have indicated have ever attended a verdict by majority in Scotland, it is to be considered that Scotland has a very small population, and some of the elements of discord are not very strong among them. Transport the scene into Ireland, and the results might be different. Nevertheless, as a verdict by majority does, in its turn, possess its merits, we think it might be adopted in England; not as a matter of compulsion, but of *option*, in civil cases at first, to see how it work. If both sides were agreed, suitors might be allowed it.

A word to those who would evade their duties as jurors. If you, we say to them, dislike to serve on a jury to settle the affairs of your fellow countrymen, you should bear in mind that other people are liable to be called upon to settle your affairs. You cannot say how soon. You might be ill-treated, robbed, run over, injured in some railway or other accident; any one of you might meet with some suspicious death, or die suddenly. Juries would be required to mete out justice in your respective cases. How mean of you to require that of others in public matters which you will not, if you can help it, perform for them. If you are deaf to this appeal, it is almost useless to mention it to you as one of the duties which you have to perform as members of a great nation. We may add, that if the nature of the duties should make you reluctant, it requires no learning to perform the functions of a juror. "It requires no more than a coolness in thinking, and a mind above being carried away by prejudices or feelings. The juror is to remember that it is the jury which is the judge as to the *facts* of the case, not the judge who sits on the bench. It is the duty of a juror to be totally regardless of every consideration but that of strict justice. He should make up his mind to do *what is right*. He is neither to regard the rank in life, nor the wealth of any suitor or prisoner. In a court of justice all men, under these circumstances, sink to an equality. A juror, after he has formed his conscientious opinion, ought not to allow himself to be coerced, or flattered, or persuaded by the talk of others, into a different opinion. He is invested with a solemn trust, and this trust he must preserve with scrupulous care, as consonant with the dearest interests of society."—*Chambers.*

Respecting what classes of men, not now eligible to serve as jurors, should be admitted to serve, it may be observed that great caution is required to prevent men, who have no property, deciding questions which relate to disputes about property, claims, debts, damages, &c. It is simply because having no property of their own to manage, they are not versed in any details concerning such matters.

It may be said "Who talks of destroying jury trial? It may be answered that the tendency of county and of some other courts is to gradually bring it more and more into disuse. We are of the opinion that the legal profession would greatly increase their business, if trial by jury in civil cases was rendered a cheaper and a more expeditious process. How to explain this would be matter enough for a separate essay.

The remarkable union of a learned judge and an independent, impartial jury to decide a cause, has taken away all real grounds for any sneers at them as an ignorant tribunal. Such a tribunal, which has withstood the storms of centuries, is not the issue of the prudence of this or that council or senate, which perfected it in a day or in a year; but it is the production of the various experiences and appliances of the wisest thing in the inferior world, to wit, time, which, as it discovers day by day new inconveniences, so it successfully applies new remedies; "so that (continues Sir Matthew Hale) it is a great adventure to go about to alter it; without very great necessity, and under the utmost demand of safety imaginable."*

* Debate between Lord Campbell and Lord Lyndhurst 1859, Hansard's Parliamentary Debates, vol. 150.

* Prize Essay for Law Amendment Society, by George Overend, Esq.—Eds. L. J.

EVIDENCE OF POLICEMEN.

A contemporary reports the following remarks lately made by Lord Chief Justice Bovill upon the trial of a perjury case at Manchester, the accused being a policeman in the Preston borough force:—"I think it only right to state that even in immaterial matters the police ought to be extremely careful. Whether material or immaterial to the issue, they are in a position of great responsibility, and they ought to be most accurate in every statement that they make, whether it is for or against those whom they prosecute. It is a great misfortune that very often the conduct of cases for the prosecution is left to the police, and I think it right to say publicly, and in presence of the police, that they can never be too careful in any case where there is the slightest doubt, not to say anything which they do not believe to be the fact, but confine themselves strictly and accurately to what they see and know. I also desire to remark publicly that I have known many instances in which the police, in giving their evidence, have not stated that which is in favour of the prisoner; and I wish it to be understood that it is the duty of the police to state in every case not only what they know in favour of the prosecutor, but even to volunteer what they know in favour of the prisoner. That I wish every policemen to most clearly to understaud; and in every instance that has come before me in which the policeman has kept back anything in favour of the prisoner, I have always endeavoured to impress upon those in authority that is a thing to be discouraged, and that policemen, instead of meriting reward for such conduct, place themselves in a position for which they ought to be reprimanded. The police ought to be especially careful in every instance never in any way to depart from the truth, and never to conceal anything in favour of a prisoner."

UTILITY OF LAW LATIN.

A member of the General Assembly of Rhode Island once moved to translate all the Latin phrases in the statute so that the common people could understand them. The exquisite folly of such a measure was by no means obvious to the great body of the Assembly. It was quite as likely to pass as not. A good solid argument against it would probably have carried it through. The late Mr. Opdyke took the ground that it was no advantage to have the people understand the laws. They were not afraid of anything they understood. It was these Latin words they were afraid of.

"Mr. Speaker, there was a man in South Kingstown about twenty years ago a perfect nuisance, and nobody knew how to get rid of him. One day he was hoeing corn and he saw the sheriff coming with a paper, and asked what it was. Now if the sheriff had told him it was a writ, what would he have cared? But he told him it was a *capias ad satisfaciendum*, and the man dropped his hoe and ran, and has not been heard of since."—

Nor has the proposition to translate the Latin words in the statute been since proposed.—*Pittsburgh Legal Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

LEASE—RIGHT TO CUT TIMBER.—The owner of land made several leases of portions thereof, wherein it was stipulated that the lessees should have a right to cut the timber thereon; and they on their parts covenanted to make certain improvements; the defendant accepted a lease in which it was agreed that the lessee should render up all improvements, but the lease did not bind him to make any.

Held, that the lease did not confer a right to cut the timber standing on the demised premises, notwithstanding the same were wild, and in a state of nature.—*Goulin* v. *Caldwell*, 13 Chan. Rep. 498.

TRADE MARKS.—Plaintiffs sold liquid medicine put up in bottles, labelled "Perry Davis's Vegetable Painkiller." Defendant subsequently sold a similar kind of medicine put up in bottles labelled "The Great Home Remedy Kennedy's Painkiller." Plaintiffs claimed the word "Painkiller" alone as their trade mark. It was proved that the medicine of plaintiffs was known and sold in the market by the name of "Painkiller," before the defendant's was introduced, and that the trade would not be deceived by the defendant's labels, although the general public might be deceived. An injunction was granted restraining the use by the defendant of the word "Painkiller" as a trademark, with account of profits and costs.

The right at common law of an alien friend in respect to trade marks, stands on the same ground as that of a subject.—*Davis* v. *Kennedy*, 13 Chan. Rep. 523.

CORPORATION — DISCRETIONARY POWERS — JURISDICTION.—A Company incorporated for the purpose of improving the navigation of the Grand River, is bound to exercise its powers reasonably, so as to avoid doing any unnecessary injury to neighbouring proprietors.

The Court will reluctantly interfere with the Company's discretion where amongst engineers there may be a difference of opinion; but as it

appeared in this case that the damage complained of by the plaintiff might be avoided by certain alterations of the Company's works, suggested by an eminent engineer to whom the matter was referred by the Court, and it being stated on behalf of the Company that these alterations would have been made by the Company if suggested before suit; the Court decreed the making thereof agreeably to the engineer's report.—*Moore* v. *The Grand River Navigation Company*, 13 Chan. Rep. 560.

Liability of Innkeeper.—Where a traveller entered a tavern and placed his valise within the bar, after asking leave of the landlord (defendant), to place it there, and went away without returning to lodge in the house, and, on his return, next day, the valise was missing, without any bad faith on the part of the defendant or his servants:—

Held, that no action lay against the landlord for the loss, and that the delivery was a *dépot volontaire*.—*Holmes* v. *Moore*, L C. Rep. 143. (30th March, 1867.)

Construction of Deed—Boundaries.—In an action *en bornage* to ascertain the boundary line between the contiguous properties of the plaintiff and defendant, which property, formerly one lot, and described as containing between 140 or 150 acres, was afterwards sold in two lots: the plaintiff's, the eastern portion, being described in the deeds as containing "90 acres, more or less:" the defendant's, the western portion, "about fifty acres," but the descriptions in the deeds not agreeing as to the way the line of boundary was to run.

Held, on appeal from the Courts of Lower Canada: 1. That those Courts were wrong in their construction of the deeds and evidence as to the boundaries, the rule being that, if in a deed conveying land the description of the land intended to be conveyed is couched in such ambiguous terms that it is very doubtful what were intended to be the boundaries of the land, and the language of the description equally admits of two different constructions, the one making the quantity conveyed agree with the quantity mentioned in the deed, and the other making the quantity altogether different the former construction must prevail.

2. That the case differed from a conveyance of a certain ascertained piece of land accurately described by its boundaries on all sides, with a statement that it contained so many acres, "or thereabouts," when, if the quantity was inaccurately stated, it did not affect the transaction.—*Herrick* v. *Sixby*, L. C. Rep. 146. (Privy Council, March 8, 1867.)

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Insolvent Act—Discharge of Insolvent—Fraud.—Where a person in business finds himself unable to pay twenty shillings in the pound, it may or may not be his duty to discontinue his trade, according to circumstances; continuing his business may be a fraud, but is not necessarily so.

A trader, after discovering that his affairs were not in a position to pay twenty shillings in the pound, continued his business, in the hope, which was not shewn to have been absurd or unreasonable to pay all his debts in full and meet all his engagements; and in the course of the business so continued contracted some new debts; but he was unsuccessful, and after a time found it necessary to make an assignment under the Insolvent Act:

Held, that he was not thereby disentitled to his discharge.

On an application for an order of discharge, the insolvent is entitled to read his examination, though taken at the instance of a friendly creditor; and the only question is as the weight to be attached to it.—*Re Robert Holt and John Gray*, 13 Chan. Rep. 560.

Assessment—County Rate.—Where a bill to restrain proceedings for collecting the township assessment of the year, on the ground of objections of form and because of an overcharged assessment of small amount, was filed after it was too late to apply at law to quash the by-law complained of, the Court, under the circumstances, affirmed on re-hearing a decree dismissing the bill with costs.

Quære, whether the township council is at liberty to provide for abatements and losses which may occur in the collection of the county rate in respect of personal property.—*Grier* v. *St. Vincent*, 13 Chan. Rep. 560.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

IN RE SCOTT AND THE CORPORATION OF THE TOWNSHIP OF HARVEY.

By-Law of United Townships—Separation—Application to quash—Practice—Survey.

A by-law was passed by the united townships of Smith and Harvey to levy a certain sum on lands in Harvey, to defray the expense of a re-survey of that township, the union having been dissolved. *Held*, that an application to quash was properly made by a rule calling on the corporation of Harvey, upon a certified copy obtained from the clerk of Smith, the senior township.

The certificate was under the corporate seal of Smith, but there was no seal to the copy of by-law, nor anything but the certificate to shew that it had been sealed. *Held*, sufficient.

The by-law directed the money to be levied "on all lands patented, leased, sold, agreed to be sold, and located as free grants" in the township of Harvey. *Held* bad, following Scott and The Corporation of Peterborough, 25 U. C. R. 463.

[Q. B., T. T., 1866.]

In Hilary term *Robert A Harrison* obtained a rule to quash a by-law of the corporation of the united townships of Smith and Harvey, entitled "A by-law to assess, levy and collect £635 5s. 3d. on all lands liable to taxation in the township of Harvey, to defray the expenses incurred in the re-survey of the same," on various grounds, of which it is only necessary to notice the 3rd, 5th and 6th. The third was that a direction to levy on all lands patented, leased, sold, agreed to be sold, and located as free grants within the township of Harvey, and not from the resident landholders, as mentioned in sec. 6, ch. 93, Consol Stat. U. C., and sec. 58, ch. 77, Consol. Stat. C., or the proprietors, as mentioned in sec. 9 of the first mentioned statute, and sec. 61 of the last mentioned statute, or both, is illegal.

The fifth and sixth objections were: 5. That it is not shewn on the face of the by-law that such a survey as the statute contemplates had been previously made as the statute directs; and, sixth, that the survey referred to in the by-law was not such a survey as the statute contemplates.

The by-law enacted "that the sum of three pence and forty-seven hundredths of a penny shall be assessed, levied and collected on all lands patented, leased, sold, agreed to be sold, and located as free grants, within the said township of Harvey, over and above, and in addition to all other sums levied on said lands, to defray the expenses incurred in the re-survey of the same."

This by-law was proved to have been received from and certified by the township clerk of the township of Smith, being the senior of the two townships, which had formerly been united, and had separated since the passing of the by-law. The affidavits were styled, "In the matter of William Adam Scott and the township of Harvey." The rule called upon the township of Harvey alone; but it had been served upon the clerk of each township. The clerk's certificate attached to the by-law was as follows:

"I hereby certify that the above is a true copy of a by-law passed by the Municipal Council of the united townships of Smith and Harvey, on the 28th day of August, one thousand eight hundred and sixty-four.

CHRISTOPHER BURTON,
Township Clerk."

[Seal of the township]

There was no other evidence of any seal attached to the by-law.

In this term, *Kerr* shewed cause, objecting to the style of the rule and affidavits; that the by-law was not under the seal of the township of Harvey, but of Smith; that there was no evidence that it was sealed. He cited *Buchart and the Municipality of Brant and Carrick*, 6 C. P. 130; *Fletcher and the Municipality of Euphrasia*, 13 U. C. R. 129; *Fisher* v. *The Municipality of Vaughan*, 10 U. C. R. 492; *Hodgson and the Municipal Council of York and Peel*, 13 U. C. R. 268; *Gibson and the Corporation of Huron and Bruce*, 20 U. C. R. 121.

Harrison supported his rule, citing Consol. Stat. U. C., ch. 54, secs. 28, 29, 54, 59, 63; *Baker* v. *The Municipal Council of Paris*, 10 U. C. R. 623.

HAGARTY, J., delivered the judgment of the court.

As to the preliminary objections, when the by-law was passed Smith and Harvey were united townships, Smith being the senior. This was on the 28th of August, 1865; the application to quash was made last February. The applicant's affidavit states that the union was dissolved prior to his application, and he received the copy from the clerk of Smith, as he swears. The copy is certified as being a true copy of a by-law of the council of the united townships, signed by the township clerk, and a seal marked with the words "Municipal Council of Smith," is attached.

No special provision for this particular case is made in the statute. We think the relator could not have taken any other course than he did, obtaining the copy from the clerk of the senior township, there being no other officer to whom he could apply, and no means apparently of getting it certified by the clerk or under the seal of the township of Harvey. Section 195 (providing for the application to quash), need not be so very narrowly construed as Mr. *Kerr* contends. If he be right, there would be no means of impeaching a by-law of a junior township separated, as Harvey was, after the passing of the by-law.

As to the township of Smith being called on to answer the rule, it may be answered that no direct interest appears in that township. The county by-law directs that the united council of Smith and Harvey shall levy the required rate from Harvey, and the operation of the by-law of that body accordingly is confined to Harvey.

Section 59 directs that the by-laws of the union shall continue in force in the several townships until altered or repealed by the respective councils. No affidavits are filed by the defendants to shew that it has been repealed, or to support any objection of alleged delay in the application to qaash.

We think the case of *Baker* v. *The Municipal Council of Paris*, 10 U. C. R. 623 is an authority for holding that the by-law is sufficiently authenticated by the corporate seal. The clerk's certi-

ficate does not mention the seal, but it is placed, as in the case cited, opposite the clerk's signature.

On the merits, it is sufficient for us to refer to the case decided last term, *In re Scott and the Corporation of Peterborough*, quashing the county by-law directing Smith and Harvey to levy these rates 25 U. C. R. 453.

The statutes there and on this application referred to, direct the assessment and levy to be made on a certain class of individuals, viz., the proprietors of the lands in each concession or part of a concession interested. The by-law before us directs the rate to be assessed and collected, not on or from individuals, but "on all lands patented, leased, sold, agreed to be sold, and located as free grants, within said township of Harvey." We think this wide departure from the statute cannot be allowed.

As to the objections to the re-survey of the whole township, instead of each concession or part of a concession, we think the argument against the legality of such a course is of great weight, and probably might be fatal to the by-law if it stood alone.

We found our judgment on the other point and the decided cases, leaving it still open for argument should the point again arise.

Rule absolute.

IN THE MATTER OF SCOTT AND THE CORPORATION OF THE COUNTY OF PETERBOROUGH.

C. S. U. C. ch. 93—Re-survey of Township.

The County Council, under Consol. Stat., U. C., ch. 93, sec. 6, having caused the re-survey of an entire township, and directed a certain sum to be levied for the expenses, by a by-law which had been quashed, by a subsequent by-law directed the collection of a further sum for the purpose, to be levied on the proprietors of land in the township in proportion to the quantity of land held by them respectively in such township. This by-law was quashed, on the grounds, 1. That the statute does not authorise the re-survey of a whole township. 2. That it directs the expense of each concession to be borne by the proprietors of land there.

[Q. B., T. T., 1866.]

Robert A. Harrison, in Trinity term last, obtained a rule *nisi* to quash by-law No. 281 of the county of Peterborough, passed on the 28th June, 1866, entitled "A by-law to provide for the raising of a sum of money in connection with the re-survey of the township of Harvey"—on these grounds:

1. That the same is a continuation of and dependent on a portion of by-law No. 262 of the said corporation, which has been quashed. 2. That the corporation had no power to pass two concurrent by-laws to defray the expenses of the re-survey of the township of Harvey, nor to pass either of said by-laws for that purpose. 3. That the jurisdiction or power, if any, of said corporation to levy or direct the levy by the township of Harvey of the sum of $218 is not shewn on the face of the by-law, nor that such a survey as the statute contemplates had previously been made. 4. That the survey was not in fact such a survey as the statute contemplates. 5. That the said sum, if leviable at all on the proprietors of lands in said township, should be directly levied on them by a by-law of the county, and not delegated by the county to the township corporation. 6. That if leviable by a general by-law of either corporation, then not only lands patented, but lands sold or agreed to be sold by the Crown should be subject to said levy.

The by-law recited that in addition to the sum of money mentioned in by-law 262, in relation to the expenses incurred in the re-survey of the township of Harvey, a further sum of $218 was necessary to be raised for the purpose of paying the balance in arrear of such expenses: and be it enacted, &c., "that the corporation of the township of Harvey do cause to be levied on the proprietors of lands within the said township of Harvey, in proportion to the quantity of land held by them respectively in the said township, the said sum of $218 for the purpose aforesaid, in the same manner as any other sum required for any other purpose authorized by law, may be levied."

It was proved by affidavit that the by-law 262 above quoted was quashed by rule of this court a few months ago, and the certified copy of that by-law then filed was re-filed by leave of the court on this application. The clause of that by-law which had been quashed was as follows: "And be it further enacted, that the municipality of Smith and Harvey be required, and they are hereby required, to levy and collect from the patented and leased lands of the township of Harvey such a rate as will produce the sum of $2,541 05 to reimburse the expense of the re-survey of the said township of Harvey."

During this term, *C. S. Patterson* shewed cause, citing *Fisher* v. *Municipal Council of Vaughan*, 10 U. C. R. 492.

Robert A. Harrison supported the rule, and cited *Moore* v. *Hynes*, 22 U. C. R. 107; *Scott and the Corporation of Peterborough*, 25 U. C. C. 453.

HAGARTY, J.—After a full consideration of the statutes we have arrived at the conclusion that such a re-survey of an entire township as appears to have taken place here does not fall within the powers given by the legislature.

Section 6 of the Upper Canada Survey Act, ch. 93, says: "Whereas in several of the townships in Upper Canada some of the concession lines, or parts of the concession lines, were not run in the original survey performed under competent authority, and the surveys of some concession lines or parts of concession lines have been obliterated, and owing to the want of such lines the inhabitants of such concessions are subject to serious inconvenience; therefore the county council of the county in which any township in Upper Canada is situate, may, on application of one-half of the resident land-holders in any concession, (or may without such application) make application to the Governor requesting him to cause any such line to be surveyed, and marked, * * *at the cost of the proprietors of the lands in each concession or part of a concession interested.*"

Section 7 directs that "the lines shall be so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey."

Section 9. "The council shall cause to be laid before them an estimate of the sum requisite to defray the expenses to be incurred, in order that the same may be levied on the said proprietors, in proportion to the quantity of land held by them respectively in such concession or part of a concession, in the same manner as any sum

required for any other purpose authorized by law may be levied"

In framing these sections it would certainly seem that no general survey of an entire township was contemplated by the legislature. We should incline to give the most liberal constructions to the words used, so as to meet the possible case of an obliteration of all the concession lines in a township. But the difficulty at once arises, that in the re-surveying of the whole township, as here, the cost of the whole in one sum is required from the land-holders in proportion to the quantity of land in the township respectively held by them, whereas the statute throws the burden of the survey of each concession or part of a concession on them in proportion to the quantity of land held by them respectively in each concession or parts of a concession. The county council can have no right to place the burden otherwise than as the statute seems to direct.

Each concession should bear the cost of its re-survey. This by-law throws it on the township generally. If in concession No. 1 there were fifty land-holders each owning 100 acres, the cost of its survey could be easily apportioned amongst them. If concession No 4 had only thirty land-holders, the same process could be applied. Practically it might be much more costly to run the lines of one than of the other, from the extent of the obliteration.

But if the aggregate cost of both surveys be directed to be levied of all the land-holders in the two concessions according to the quantity of land held by each of them, the burden would not be borne as the law directs. A man owning 100 acres in concession 1 might own 500 in concession 4. The illustration can easily be extended to the case of a re-survey of the township.

Section 7 also seems to point to a survey of a concession only, by providing for leaving each adjacent concession of a depth proportionable to that intended in the original survey. If in one concession or part of a concession, where the line had become obliterated wholly or in part, there was found a deficiency of land in depth, the adjacent concession whose line was still traceable must not suffer diminution. In the re-survey of a whole township this provision would seem not very applicable.

We regret any difficulty that may be caused by the repeated judgments of this court as to these surveys. We have no alternative but to see that the statutes are observed.

We think the by-law must be quashed with costs.

DRAPER, C. J.—I concur in the decision, upon the broad ground that the powers to tax confided to the councils of municipalities can only be exercised in the manner specified by the act, and that where the legislature have seen fit to direct that the expense of a re-survey of each concession shall be borne by the owners of land in that concession, though every concession in that township has been re-surveyed, the expense of each belongs to the land-holders of each, and the whole is not to be levied on all the proprietors of the township.

MORRISON, J., concurred.

Rule absolute.

THE CORPORATION OF THE COUNTY OF PETERBOROUGH v. THE CORPORATION OF THE TOWNSHIP OF SMITH.

Re-survey of townships—Omsd. Stat. U. C, ch. 93—Right of action by the County.

Declaration, that the plaintiffs, pursuant to the statute, applied to the Governor to have the concession lines in the defendants' township re-surveyed, which was ordered accordingly, and the expense paid by the plaintiffs; that the plaintiffs thereupon directed the defendants to levy and collect the money so paid, but although they did levy part they refused to pay the same to the plaintiffs. *Plea*, that the only direction was by the plaintiffs' by-law, which before suit was quashed:

Held, on demurrer, that the declaration was bad for not shewing a by law, as the plaintiffs could proceed only in that way; and that the plea was good.

Quære, whether the money can be levied before the survey has been actually made.

[Q. B., T. T., 1866.]

Declaration—For that the plaintiffs, under the provisions of the statute in that behalf, made application to the Governor, requesting him to cause the concession lines in the township of Harvey, then united with the said township of Smith, and being the junior township of such union, to be re-surveyed under the direction and order of the Commissioner of Crown Lands, in the manner prescribed by the act respecting the survey of land in Upper Canada, and the Governor in council ordered the same to be done accordingly, and the Commissioner of Crown Lands certified that the sum of $2541 05 was payable, and ordered the same to be paid by the county treasurer of the said county of Peterborough to the persons employed in the said services, and the same was paid accordingly by the said treasurer. And the plaintiffs thereupon directed the corporation of the then united townships of Smith and Harvey to levy and collect the said sum so paid by them as aforesaid, and it became and was the duty of the said corporation of the then united townships of Smith and Harvey to levy the same as by law directed, and to pay the same to the plaintiffs. And afterwards the said township of Harvey was separated from the said township of Smith in the manner and form prescribed by law. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs to maintain this action. And although the defendants did levy and collect a large portion of the said sum of money, yet they neglect and refuse to pay the same, or any part thereof, to the plaintiffs. And the plaintiffs say that the said united townships of Smith and Harvey have not, nor have said defendants, levied and paid the said money, as it became and was their duty, and as by law they were required to do.

The defendants were allowed to demur and plead to this declaration, as follows:

Demurrer, on the grounds:—1. That the said first count does not shew any facts from which a duty would arise as against the defendants to levy, collect, or to pay over to the plaintiffs the money therein claimed, or any part thereof. 2. That the duty, if any, was upon the corporation of the united townships of Smith and Harvey, and not the defendants. 3. That the said count does not shew how the defendants were directed to levy and collect the said moneys from the persons liable by law to pay the same for the purposes in the first count mentioned. 4. That it is not alleged that the said defendants or the said united townships were directed to levy, or did levy, said moneys from the resident land-

holders and proprietors in said townships, or either of them. 5. That it is not alleged or shewn, that any by-law was passed by the plaintiffs directing the levy or collection of said moneys according to law.

Plea.—That the alleged direction to the said corporations of the townships of Smith and Harvey, to levy and collect the moneys in said count mentioned, was contained in a certain by-law of the plaintiffs (the corporation of the county of Peterborough), passed on the 24th of June, 1865, and not otherwise, and that so much of the said by-law as directed the said levy and collection was afterwards, and before the commencement of this suit, by the judgment of the Court of Queen's Bench at Toronto, having jurisdiction in the premises, in due course of law ordered to be quashed and set aside as illegal, which said judgment or order is still in full force, and is no way annulled or vacated.

The plaintiffs demurred to this plea, on the grounds that the said direction of the plaintiffs to the corporation of the townships of Smith and Harvey was not by law required to be given by by-law, and therefore the allegation that the said by-law was quashed forms no answer to the said count; that the levy and collection of the said moneys can only legally be made under a by-law of the defendants, and not under a by-law of the plaintiffs.

Hector Cameron, for the plaintiffs, cited *Roach* v. *Municipal Council of Humilton*, 8 U. C. R. 229.

Robert A. Harrison, contra, cited *Mellish* v. *Town Council of Brantford*, 2 C. P. 35.

HAGARTY, J., delivered the judgment of the court.

It is not easy to see with much certainty how the legislature contemplated the collection of the cost of a survey of this description. Section 9 of the Upper Canada Survey Act, ch. 93, directs that the county council shall cause to be laid before them an estimate of the sum requisite to defray the expenses of survey, &c., "in order that the same may be levied on the said proprietors, in proportion to the quantity of land held by them respectively in such concession or part of a concession, in the same manner as any sum required for any other purposes authorized by law may be levied."

Section 75 of the Assessment Act (Consol. Stat. U. C., ch. 55) declares, "When a sum is to be levied for county purposes, *or by the county for the purposes of a particular locality*, the council of the county shall ascertain, and by by-law direct, what portions of such sum shall be levied in each township, town or village, in such county or locality;" and section 76 directs the county clerk to certify yearly to the township clerk "the yearly amount which has been so directed to be levied therein for the then current year, for county purposes, or for the purposes of any such locality," and the township clerk shall calculate and insert the same in the collectors' roll for that year. Section 187 of the Municipal Act (Consol. Stat. U. C., ch 54), says "The powers of the council shall be exercised by by-law when not otherwise authorized or provided for."

The nearest approach to the case before us would be in the words, to be levied by the county *for the purposes of a particular locality*. This must be done by by-law.

The plaintiffs' declaration is therefore met by the plea, that the direction by them to levy the amount was by by-law and not otherwise, and that the said by-law was quashed before the bringing of this suit.

The plea seems to us to be a good bar. Even if the plaintiffs could require the amount to be levied otherwise than by by-law, still the plea avers, and it is admitted by the demurrer, that the only requirement or direction to levy was in fact by the quashed by-law, and not otherwise; so that the groundwork for the alleged duty is taken away.

As we arrived at the conclusion that the plaintiffs must proceed by by-law, whether they call on the township to make the levy at attempt so to do by their own direct power, if any such power exist, it does not seem necessary to discuss the various points suggested by the demurrer.

It will always be more advisable to discuss the true effect of the statutes whenever the plaintiffs may pass any by-law to direct the payment or levying of this money.

The court can then examine the proposed course of proceeding, and decide on its validity.

Very great difficulties present themselves to the enforcement of this claim, from the loose and uncertain language of the statutes.

This court has decided this term on one of the objections taken, viz, whether a survey of an entire township, and not of a concession or part of a concession, is a survey contemplated by the act, against the validity of such a proceeding.

There is no statement whatever in the declaration that the survey has been made. No objection was urged by the defendants on that ground, and the statute is not very clear as to whether the proprietors of the land can be called on or not before the work is done. If it can be demanded in advance (a matter on which we give no opinion), there would be even a stronger reason for all the statutable formalities of a by-law being required.

We think the defendants are entitled to judgment. We hold the count bad as not shewing a by-law, and also on the ground that the re-survey of the whole township, and the manner of levying the expense, is illegal. We also hold the plea good.

Judgment for defendants.

ENGLISH REPORTS.

BWLCH Y PLWM LEAD MINING COMPANY (LIMITED) *v.* BAYNES.

Contract — Fraud — Repudiation — Joint-Stock Company — Shareholder — Liability for calls.

To an action for calls, a plea showing that the defendant was induced to take the shares by the fraud of the plaintiffs, and that on discovering the fraud, and before he had receiveed any benefit from the shares, he promptly repudiated the shares, is a good plea at law.

[Ex. 15 W. R. 1108.]

Declaration for calls due upon shares held by the defendant in the plaintiffs company.

Plea, that the defendant was induced to become the holder of the shares by the fraud of the plain-

tiffs; and had never, after notice of the fraud, recognized any rights or liability in him and had never received and would not receive any benefit whatever from the shares; and within a reasonable time after notice of the fraud, and before he had received any benefit for or in respect of the shares, he had repudiated and disclaimed the shares, and all title thereto, and all liability in respect thereof, and gave notice of his repudiation and disclaimer to the plaintiffs.

Demurrer and joinder.

Morgan Lloyd, in support of the demurrer — The plea does not show enough to constitute a defence as long as the defendant continues a shareholder, and on the register as such. This plea does not show that he has ceased to be a shareholder or has caused his name to be removed from the register: *Deposit and General Life Assurance Company* v. *Ayscough*, 4 W. R. 617, 6 E. & B. 761. And the later cases in equity clearly showed that under such circumstances as the record discloses the person whose name is on the register is liable to contribute as a shareholder: *Duranty's case*, 7 W. R. 70. 26 Beav. 268; *Central Railway Company of Venezuela Kisch*, 15 W. R. 821; 2 L. R. H. L. 99; *Oakes and Peeks case*, 15 W. R. 397, 3 L. R. Eq. 576.

R. E. Turner, contra—The sole question is whether this is a good plea at law as between these parties. We have nothing to do with any supposed equitable rights of creditors, or with what might happen in case of the winding up of the company. The plea shows that the contract sued upon was voidable for fraud, and that the defendant avoided it. The case of the *Deposit and General Life Assurance Company* v. *Ayscough* is really in my favour. The plea in that case was held bad on the precise ground that it wanted the allegations which this plea contains.

M. Lloyd replied. *Cur. adv. vult.*

BRAMWELL, B., now delivered the judgment of the Court.* The question in this case, as Mr. Turner in his excellent argument said, arises in a common law action in a Common law Court, and is to be decided on common law consideration. The plaintiffs case is founded on contract. There is no duty on the defendant except what he has undertaken, and whether he is an original allottee or whether he is a transferee who has been accepted by the plaintiffs as a shareholder, the case is the same. If the defendant is liable, it is because he has undertaken the duties of a shareholder in consideration of the plaintiffs giving him the benefit of one. Now it is a rule that a contract is voidable at the option of the person who has entered into it, if he has entered into it through the fraud of the other party, and has repudiated it on the discovery of the fraud. This includes giving up all benefit from it, and restoring the other party to the same condition as before as far as possible. Now the plea alleges all these facts, fraud, prompt repudiation, and restitution, as far as possible. It must be good therefore at common law, and so we hold. Cases in equity under the winding-up Acts have been cited on them; we express no opinion save that they do not govern this case. It may be this defendant is liable under the winding-up Acts, or that he can otherwise in equity be made liable to creditors. No question of that sort arises here; there is no replication, legal or equitable, that the plaintiffs are living as trustees for creditors or anyone else. There may be no creditors, and the action may be brought (we are far from saying it is) merely to indemnify those who have committed the fraud the defendant alleges. But we cannot help observing that creditors trust those who are liable as shareholders, those against whom the company is entitled to enforce the duty of shareholders. If the defendant had got on the register through forgery of his name he would not be liable, though as much trusted by creditors as now; see per Turner, L. J., *Ship's case*, 13 W. R 599, 2 D. J. & S. 544. But with this we have nothing to do; we have to decide a common law question. The authorities at common law are in the defendant's favour, and the ruling of Willes, J., at Guildford, in *The Glamorgan Iron Company* v. *Irvine*, at the Surrey Summer Assizes, 1866, is in point. Our judgment is for the defendant.

Judgment for the defendant.

* Kelly, C.B., Martin, Bramwell, and Channel, B.B.

CORRESPONDENCE.

The Question of Costs in the Division Courts.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—It is to be regretted that those persons who think it their duty to the public to criticise the Division Courts and their officers, could not be induced to confine themselves to the candid statement of facts, without the exaggerations which, it seems to me, they uniformly indulge.

Your correspondent "Communicator" is evidently a gentleman of some education and culture—probably a lawyer—belonging, therefore, to a class from whom the public have a right to expect enlightened and comprehensive views, and fair and candid statements on all questions of public interest which furnish occasion for a variety of opinions. It cannot be claimed that his recent communications in your journal in any sense answer these expectations, but, on the contrary, like most of the newspaper attacks upon Division Court Clerks and Bailiffs, they abound in exaggerations. I do not intend to review these letters at length, but only to call the attention of your readers to a single instance, as a specimen of the spirit and *animus* of the whole.

In your July number he stated that in the Division Courts it was not *unusual* (I think this was the phrase—the number is not before me,) to run up a bill of costs for twenty dollars upon a suit for the same amount; and in your last number (October) he reasserts this

statement in a form slightly modified. "Mr. Agar," he says, "questions the assertion that a twenty dollar suit *often* causes $20 costs in these Courts. My experience in Division Court matters leads me to think that this assertion is correct." He does not tell us what his experience has been. Mine is as follows: I have been Clerk of the Second Division Court of the County of Oxford since 1858. The total number of suits entered in this Court within that time, including the said year, is 2,776. Of these, so far as I can now discover, or remember, only two have been charged with the amount of costs mentioned. One of these was for $100. The costs amounted to $35 70. But this included the costs of an attachment and sale of perishable property, attendance of five witnesses, and mileage, and a reference to an arbitration to ascertain the amount due on complicated cross accounts, the arbitrators holding two meetings and calling several witnesses. [*Quære:* Could all this have been done in the County Court for $35, or $65?] The other was for a small amount, but several witnesses were in attendance, one of whom was brought from Owen Sound, about 100 miles, under a Queen's Bench subpœna.

In order still further to satisfy myself as to what is about the average amount of costs per suit in this Court, I have examined, with reference to this question, the first 38 suits of the present year, on which any order was made, as they stand in the Procedure Book of this Court, with the following result:—

The total amount sought to be recovered was $1,336 22; average amount per suit, $33 16. The total amount of costs charged on these suits, including aliases, adjournments and witness fees, was $157 48, or an average cost per suit of $4 14, nearly. I have no reason to doubt but the above is a fair representation of the usual costs in these Courts, and that the same number of suits taken consecutively from any other part of the Procedure Book of this Court, or from the Procedure Book of any other Division Court, would give very nearly the same results.

Your correspondent pretends to give the costs of a suit in the County Court, for a claim for $400. "I pay for the summons," he says, "62c. I pay the sheriff, say $1, for service, and the lawyer's costs would be $6, if paid on service." Is it by such loose statements as the above that the public are to be informed on questions of this nature? And what need is there for loose conjectural statements at all? Are not the costs in both Courts exactly regulated by law? If your correspondent will refer to the tariff of costs of the respective Courts, he will find that he cannot prosecute a claim to judgment in the County Court, allowing $6 for lawyer's fees, for less than $11 81, making no allowance for witnesses or for sheriff's mileage. In a Division Court a claim for $20 may be prosecuted to judgment for $1 65, or a $100 claim for $4 20, in case no witness is called and no mileage allowed to bailiff. If more than these amounts accrue in costs, it will be owing to witness fees, mileages, adjournments, &c., to which one court is as liable as the other, with this difference, however, that in a Division Court no witness can claim more than 50c for attendance, while in the County Court this item often amounts to $5 or $6.

From these simple statements of facts, I think I am justified in arriving at the following conclusions:—

1. It is not true that the costs in a $20 suit in these Courts *usually*, or *often*, run up to $20.

2. It is not true that a $400 note can be prosecuted to judgment in a County Court with no more costs than is represented by your correspondent's figures—62c., $1 and $6.

Lastly, it is not true that the costs in Division Courts are proportionately higher than in County Courts.

I remain, Gentlemen,

Very respectfully yours, &c.,

CLERK.

APPOINTMENTS TO OFFICE.

Major-General CHARLES HASTINGS DOYLE, to be Lieutenant Governor of Nova Scotia.—(Gazetted October 19, 1867.)

Colonel FRANCIS PYM HARDING, C.B., to be Lieutenant Governor of the Province of New Brunswick.—(Gazetted October 19, 1867.)

TO CORRESPONDENTS.

"CLERK," under Correspondence.

"T. A. AGAR," too late, Will appear in our next.