DIARY FOR JUNE.

1. Thur. Open Day.
2. Frid. New Trial Day, Q. B. Open Day, C. P.
3. Sat. Easter Term ends. Open Day.
4. SUN. *Trinity Sunday.*
6. Tues. Last day for notice on trial for County Court.
11. SUN. *1st Sunday after Trinity. St. Barnabas.*
13. Tues. General Session and County Court Sittings.
14. Wed. Last day for Court of Revision finally to revise Assessment Roll.
18. SUN. *2nd Sunday after Trinity.*
20. Tues. Accession of Queen Victoria, 1837.
24. Sat. *St. John the Baptist.*
25. SUN. *3rd Sunday after Trinity.*
26. Mon. Last day to declare for County Court, York.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JUNE, 1871.

AGENTS IN DIVISION COURTS.

The question as to whether persons not belonging to the legal profession are entitled to have audience in prosecuting or defending suits for clients in Division Courts has, at length, been adjudicated upon by the Court of Queen's Bench, as will be seen by the report of the case *In re Judge of the County of York*, in other columns.

It is more than doubtful whether the application, which was for a prohibition, was in form sufficient, but the Court very properly decided to go at once to the real point at issue, and to settle which the rule was asked for.

The result has been to deprive all sorts of unprofessional agents of the right they claimed, and in most Counties successfully, of representing before the County Judges those who might entrust their business to them.

A suggestion is thrown out by Mr. Justice Wilson, that in cases where professional assistance cannot be obtained, and where injustice might otherwise arise (for exnmple, if a suitor were incompetent to speak for himself, or necessarily absent from Court,and could not employ professional assistance) the Judge has a right in his discretion, to allow some one, who is not a legal man, to act for the suitor, but this can only be in a very exceptional case, and the learned Judge agreed with Mr. Justice Morrison, who delivered the judgment of the Court, that unprofessional persons have no *locus standi* as advocates in Division Courts.

It may be a matter of discussion as to the inconvenience that may possibly sometimes arise from the ruling in this case, but there can be no doubt that the allowance of incompetent persons to conduct cases in Division Courts has been productive of much mischief in various ways, and has been one of the principal means of driving from these Courts, where most important interests are often adjudicated upon, those who, from their education and knowledge, are most competent to represent litigants, thereby lowering the *status* of the Courts and this to the great detriment of justice, and sometimes to the discredit of its administration. In addition, it is a simple matter of right, that those who spend years of their life in study should not be supplanted by ignorant, pretentious interlopers, whose chief claim to notice is often their unblushing effrontery.

In some few Counties the Judges have followed a practice which the recent decision of the Court of Queen's Bench has shewn to have been the proper course to pursue. Judges throughout Ontario will now have a rule to guide them, though the necessities of some exceptional cases may require the exercise of a sound discretion as to whether, and how far, they may depart from it.

In connection with this subject, we direct attention to the remarks of a County Judge in England, which will be found on p. 84 post.

WITNESS FEES TO REGISTRARS.

Registrars of titles are as a class exceedingly tenacious of their rights. By united efforts they have succeeded at different times in moving the Legislature to action, and we have had amendment of the registration laws following upon amendment thereof. But these functionaries seem to have left unprovided for the matter which constitutes the heading of this paper.

By the late Ontario Act, 31 Vic. c. 20, s. 21, it is enacted that no Registrar shall be required to produce any paper in his custody unless ordered by a judge, upon which order a subpœna is to be issued in the usual way. This is in effect a statutory repetition of the rule of court: *Reg. Gen.* T. T. 1856, No. 31. But the act says nothing about the fees to which the officer shall be entitled upon the service of such subpœna, and to our certain knowledge no small squabbling has arisen at various trials to determine whether 75 cents

or $4 was properly claimable for the *per diem* allowance.

The matter must be settled by reference to the rules of court regulating the allowance to witnesses. At common law the tariff fixed by the judges in pursuance of the Common Law Procedure Act, governs the practice. By that tariff the only persons entitled to receive $4 a day are, (1) barristers and attorneys, physicians and surgeons, and then only when called upon to give evidence in consequence of any professional service rendered by them, or to give professional advice; and (2) engineers and surveyors, and then only when called upon to give evidence of any professional services rendered by them, or to give evidence depending upon their skill or judgment. In all other but these exceptional cases witnesses are entitled to no more than 75 cents if residing within three miles of the court house, and $1 if residing over three miles therefrom. These rules are binding upon individual judges, and nothing short of a rule of the full court either special, in the particular suit, or general, regulating the whole practice, can entitle any person to a larger allowance. We find it stated in *Re Nelson*, 2 Chan. Cham. Rep. at p. 253, that in a case of *Bennet* v. *Adams* in 1859, Richards, C.J., ordered $4 to be taxed to a clerk of Assize who attended to give evidence in that capacity as a witness. So far as we can judge this order if appealed against would have shared the fate of the orders made by one judge for extra counsel fees, as determined by the full court in *Ham* v. *Lasher*, 27 U. C. Q. B. 357.

In Chancery the practice has been, both in England and Canada, to follow the Common Law tariff in the allowance to witnesses,—a matter of some surprise, considering the independent position which this court usually occupies (see *Clark* v. *Gill*, 1 K. & J. 19). We find, however, in the case already referred to, *Re Nelson*, that the Common Law tariff is departed from. Special reasons are given by the late Chancellor for making a $4 allowance per day to the Registrar of the Surrogate Court.

This case is the stronghold of all public officers attending court under subpœna, and we shall therefore advert to the several reasons given for the extraordinary allowance. It is said (1) that the responsibility of the officer's position in keeping, searching for, and producing original documents should be regarded; (2) the trouble and loss of time in addition, which often occurs in searching for and producing such documents; (3) that in the case of an officer paid by fees, as he may be kept hours waiting in court before being called, he should be remunerated by a larger fee than is paid to ordinary witnesses. Now we do not doubt the power of the Court of Chancery, or a single judge of that court, to make special orders for the allowance of extra witness fees, but we submit that it would be beyond all measure better so to regulate the tariff that all occasion for making special orders should be done away with. By this means also the proper sum would be taxed or paid in the first instance, and the trouble and expense of an appeal from taxation, or of an application for a special allowance, would be avoided.

We do not quarrel with extra compensation being made to all public officials who attend as witnesses, if the courts think fit to alter the tariff in that respect, but while there is a tariff it should be adhered to. Now we do not see that, in principle, *Re Nelson* is sustainable as laying down a general rule, applicable, for instance, to registrars of titles. Apart from rules of court, the practice here would be governed by the old Statute 5 Eliz. c. 9, s. 12, and under that the principle is that the witness is not entitled to any thing for loss of time. He is entitled to travelling expenses, and if he is away from home for some time he is entitled to his expenses for maintenance during that time: *Collins* v. *Gregory*, 1 B. & Ad. 950; *Collins* v. *Godfrey*, 1 B. & Ad. 950 *Nokes* v. *Gibbon*, 3 Jur., N. S., 282; s. c. 26 L. J. Ch. 208; *Lonergan* v. *Royal Exchange*, 7 Bing. 731.

In this country there is no Chancery tariff for witness fees; the Common Law tariff is against the special allowance we have been considering, and in the old law underlying the tariffs, responsibility, trouble and loss of time, and loss or diminution of official fees form no ground for compensation.

Again we say that if the judges decide that public officers should receive the fees awarded to professional witnesses when called to give professional evidence, we shall be the last to object to such a scale of compensation. But one cannot fail to see that the whole force of the reasoning in *Re Nelson* would warrant the payment of extra fees to every professional or scientific man called as a witness upon any

point,—for what doctor, surveyor or lawyer, is ever subpœnaed who does not aver that he is losing money in attending as a 75 cent witness?

It would be very proper to have a general overhauling of the tariff as to witness-fees. We doubt not if the Registrars unite their exertions once more, that the thing will be done. It would be a breach of professional modesty for lawyers to move in the matter, doctors have too much internecine warfare to attend to, surveyors do not seem to possess sufficient vitality to agitate: it rests upon the harmonious, well-disciplined, aggressive band of Registrars to make the onslaught.

SELECTIONS.

ARREST BY OFFICER WITHOUT WARRANT.

No part of the law is of such importance as that which bears upon the security of life, and hence the vital importance of all that relates to the legality of arrests by officers without warrant, for in the struggles which occur death too often ensues, and the recent case before Mr. Justice Hannen, at the Hertford Assizes, illustrates the importance of the subject. To resist an officer who is lawfully attempting to execute a legal warrant is, of course, unlawful; and if the officer is killed it is murder, while if death is inflicted by him necessarily in enforcing the arrest or resisting attack, it is justifiable homicide. If an officer attempts to arrest unlawfully, either without any warrant at all (in cases where one is required), or with one which is invalid, the attempt is unlawful, and the same principle applies—that if he kills the person arrested, he is guilty of murder; while if the person arrested necessarily kills him in resistance and defence of his personal liberty, then, in like manner, it is justifiable: (*Simpson's case*, 4 Inst. 333; Cro. Car. 537.) It may be laid down as a broad principle that in no case will the law justify homicide unnecessarily inflicted. But, on the other hand, where the law justifies the use of force, it justifies the homicide necessarily and naturally resulting from that lawful use of force.

In the recent case the question arose thus: The prisoner was indicted for the murder of a police officer. There was a warrant against the prisoner for misdemeanor, and the officer had been instructed to execute it. This of course must be taken to have meant that he was lawfully to execute it, and according to a case decided some years ago (*Galliard* v. *Laxton*, 31 L. J. 193, M. C.), it could not be executed by an officer who had it not with him at the time, in order to show it to the man and satisfy him as to the right to arrest him. The officer, though he knew of the warrant, had not got it with him at the time he met the prisoner, and, therefore, it is to be presumed, did not attempt to arrest him on it —for that which is unlawful is never to be presumed—and there was no proof that he did attempt to execute the warrant, though the case for the prisoner was based on the assumption that he did. It did not appear that he knew the man, and called upon him to surrender, or attempted to arrest him. All that was proved was, that he was seen to lay his hands on the pocket of the man, in which was a gun, and that is quite consistent with the idea that he acted under Poaching Prevention Act (25 & 26 Vict. c. 114), which gives a power of seizure under circumstances of suspicion; circumstances which existed in this case, as the man had just fired a gun off. However, the case for the prosecution was that the officer attempted an arrest under the warrant. There was a protracted struggle, in the course of which the man struck two blows with his gun, which proved fatal. The prisoner's counsel, at the close of the case, submitted that an attempt to execute the warrant was illegal, as the officer had it not with him, and the learned Judge so held. Then it was proposed to rest the case for murder on the power in the Poaching Act, but the learned Judge most justly held that the case for the prosecution could not now be re-opened and put upon an entirely new ground; but that it must stand as it did. Thus the case for murder failed, for, of course, as the case stood, the attempt to arrest being illegal, the man had a right to resist it, and thus the offence could not be murder. The learned Judge, however, still thought that it was manslaughter, and so no doubt it would be according to the decisions if the homicide were not necessary to the resistance. But the learned Judge left no question for the jury on that point, and treated it as a matter of law. And undoubtedly there are authorities, at all events *dicta* of eminent judges—one of which he quoted—which might appear to support his view; but on the other hand, there are authorities perhaps stronger still the other way, and they require to be carefully considered. The earliest case on the subject—that of the Pursuivant of the High Commission Court, in the reign of James I.—is very strong. There the officer was known to have a warrant, and showed it; but the person against whom it was directed drew his sword and killed the officer. And all the judges held that as the warrant was illegal, the act was self-defence, and the verdict was "not guilty:" (*Simpson's case*, 4 Inst. 333.) In another case, in the reign of Charles I., where the officer had a valid warrant, but attempted to execute it unlawfully, by breaking into a house, and the owner, against whom the warrant was executed, slew the officer; it was held manslaughter only, because he knew the officer, and that he had the warrant, but it was said that if he had not known his business it would have been justifiable: (Cro. Car. cited

1 Hale P. C. 458.) Now in the present case there was no evidence that the prisoner knew that there was a warrant against him, or that the officer had any authority to arrest him. And it appears that there were two struggles, and that the prisoner used no deadly weapon, but struck two blows with the butt end of his gun, flying as soon as he could, leaving the officer alive and able to walk, and (as was admitted) having no idea that he had inflicted a mortal wound. On the whole, it is impossible not to see that according to the old law he would have been held justified.

There are, however, more modern authorities or *dicta* which require to be noticed, and to one of which—though not to the latest—the learned Judge referred. In one or two cases it has been said that it may have been so under the circumstances. In the case referred to by the learned Judge, where the man unlawfully arrested, without any attempt to resist by other means, stabbed the officer. Baron Parke said that it was manslaughter, and that if he had prepared the knife for the purpose it would have been murder: (*Reg.* v. *Patience*, 7 Car. & P.) But it is not easy to reconcile this with the older authorities, unless upon the ground suggested, that the use of the knife was not necessary for the purpose of resistance. It is to be observed, moreover, that in that case the officer did not die—the indictment was for cutting and wounding, and the very essence of the offence was the use of the knife, which, man against man, could hardly be necessary in the first instance.

There was, however, a very recent case, to which the learned Judge did not refer, and which appears to have put the question on a very sensible footing. In that case the Judge ruled that if the violence used to resist the unlawful arrest was no greater than was necessary for the purpose, it was justifiable; otherwise it was manslaughter (*Reg.* v. *Lockley*, 4 F. & F.). According to that ruling it ought to have been left to the jury whether the violence was greater than necessary to resist the arrest, and they ought to have been told that the man was entitled to resist the arrest by any means necessary for that purpose, and even to the extent of inflicting death, if the arrest could not otherwise be avoided. Whether in the case of a protracted struggle the infliction of two blows with the butt end of a gun was a wanton excess of violence, would have been for the jury to determine; but it is to be observed that a man engaged in such a struggle cannot measure very nicely the force of a blow, and it was admitted by the prosecution that the man did not think he had killed the officer. It appeared also that he ran away, as soon as he could. The question is whether, under these circumstances, it was a conclusion of law that the effect of striking those blows was manslaughter.

No doubt the sufficiency of provocation is a question for the Judge. And the learned Judge treated it as a question of provocation. But was it not according to the authorities a question of justification? If so, then unless there was wilful excess the man was entitled to an acquittal. As it was, he had a sentence of fifteen years' penal servitude for a homicide in self-defence, just the same sentence which the learned Judge inflicted at Maidstone in a case of deliberate homicide out of revenge. Both cases were treated as cases of mere provocation, and the distinction as to the use of a deadly weapon with intent to kill was apparently overlooked. In the poacher's case, however, according to the authorities, there was a question of justification arising out of self-defence against illegal violence. If so, it is manifest that there is an inconsistency in the judicial *dicta* on this most important subject.—*The Law Times.*

The County Court Judge of Norwich is entitled to the thanks of the Profession for his attempts to suppress the encroaching and objectional practices of non-professional persons issuing summonses in County Courts, and invoking the terrors of the law, as if they were duly qualified solicitors. At the last Norwich Court a Mons. Carlier was plaintiff in a case, and it turned out that the plaint had been taken out for him by a Mr. Samuel Dawson, jun., who was not an attorney, but one of the Registrar's assistants. Upon this, his Honour called the attention of the Registrar, Mr. T. H. Palmer, to the irregularity, which was aggravated by the fact of Mr. Dawson having written a notice to the plaintiff in connection with the cause as if he were a solicitor. Unless, the learned judge said, Mr. Palmer was prepared to give a direct assurance that such a thing would not occur again, he would feel it to be his duty to report the matter to the Lord Chancellor; and if Mr. Palmer was not able to prevent his assistants from granting plaints to individuals forbidden by Act of Parliament to take them out, those assistants must be dismissed. The irregularity complained of had long prevailed at Norwich; and while he held the position of Judge, he would endeavour that the business should be conducted in strict conformity with the rules of Court. Addressing Mr. Dawson, the learned judge cautioned him in similar terms not to attempt to act as an attorney, stating that if he ever heard of a similar proceeding as that which had been brought under his notice that day, he should certainly report the matter to the law officers of the Crown; and he would thank the professional gentlemen practising before him to keep him acquainted of any repetition of conduct so reprehensible as that upon which he had animadverted. He thereupon ordered Mr. Dawson to leave the table at which he was sitting, and to remove to some other part of the court, and struck out the case in which he had been concerned. Strong measures of this kind now and then will have a most salutary effect upon the conduct of County Court business.—*Eng. paper.*

MAGISTRATES, MUNICIPAL, INSOLVENCY & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Bankruptcy—Effect of English Composition Deed in Colony.—Where a debt arises in a country over which the Legislature of another country has paramount jurisdiction, a discharge by the law of the latter may be effectual in both countries.

Therefore, where a debt arose in Canada under a contract to be performed there, and the debtor obtained a discharge here under the Bankruptcy Act, 1861.

Held, that such discharge was an answer to an English action on the contract, for it was a discharge of an original debt, binding in Canada as well as here.

But, where the action here was on a judgment obtained on such contract in Canada.

Held, that a similar discharge obtained here after breach, but before judgment in Canada, was no answer to the action, for the Canadian judgment was final between the parties, and the defendant was estopped from saying that the discharge might have been pleaded there.—*Ellis* v. *McHenry*. *Ellis and another* v. *McHenry*, 19 W. R. C. P. 503; 7 C. L. J. N. S. 162.

Tolls—Statute.—By 3 Geo. 4, c. 126, s. 32, persons going to or returning from "their usual place of religious worship" are exempted from all toll on turnpikes. A minister of the Primitive Methodist Connexion had assigned to him, by the persons having authority, the services at F. on three Sundays in a quarter, and at four other places on other Sundays. *Held*, that he was exempt from toll in going to and returning from F. on the three Sundays indicated.—*Smith* v. *Barnett*, L. R. 6 Q. B. 34.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Ratification—Forged Instrument, adoption of.—A forged instrument cannot be ratified by the person whose name is forged, and he cannot adopt it so as to make himself liable thereon.

J. owed the plaintiff £20, and sent to him a promissory note for that amount, which purported to bear, and was believed by the plaintiff to bear, the signatures of J. and the defendant, who was J.'s brother-in-law.

Before the note became due the plaintiff met the defendant and mentioned the note to him. He denied the signature to be his, and the plaintiff thereupon said that it must be a forgery of J.'s, and he would consult a lawyer with the view of taking criminal proceedings against him. The defendant begged the plaintiff not to do so, and said he would rather pay the money than that the plaintiff should do so. The plaintiff then said that he must have it in writing; and that, if the defendant would sign a memorandum, he would take it. The defendant thereupon signed a document admitting himself to be responsible to the plaintiff for the amount of the note.

Held, (by Kelly, C.B., Channell and Pigott, BB.), first, that the foregoing document was no ratification of the forged promissory note, but an agreement on the part of the defendant to treat the note as his own and to become liable upon it, in consideration that the plaintiff would forbear to prosecute J., and that this agreement was against public policy and void, as founded upon an illegal consideration; and, secondly, that the foregoing document was no ratification, inasmuch as the act done—that is, the forged signature to the note—was illegal and void, and that, although a voidable act might be ratified by matter subsequent, it was otherwise when an act was originally and in its inception void.

Held, (by Martin, B.) that the above document was a good and valid ratification of the forged note, and that the defendant was liable to pay to the plaintiff the amount thereof.—*Brook* v. *Hook*, 19 W. R. Exch. Ch. 508; 7 C. L. J. N. S. 158.

Landlord and Tenant.—1. D. was a lessee for years at a rent payable quarterly, and S. was mortgagee of the reversion; D., having no notice of the mortgage, paid to his lessor the amount of two quarters' rent before any of it was due; afterwards and before rent-day the mortgagee gave him notice to pay the rent to him. *Held*, that the transaction between D. and the lessor was not a payment of rent due, and that D. must pay the rent to the mortgagee.—*De Nicholls* v. *Saunders*, L. R. 5 C. P. 589.

2. Covenant in a lease that the lessors would at all times during the demise maintain and keep the main walls, main timbers, and roofs in good and substantial repair, order, and condition. *Held* (Martin, B., dissenting), that an action on the covenant could not be brought against the lessors without notice of the want of repairs.—*Makin* v. *Watkinson*, L. R. 6 Ex. 25; 7 C. L. J. N. S. 128.

3. A debtor assigned by deed, for the benefit of his creditors, all his personal estate to the defendant, who executed the deed and acted

under it. The debtor was a tenant from year to year of the plaintiff, but the defendant did no act to show his acceptance of the lease. *Held,* that the lease passed to the defendant by the assignment, and that he was liable for the rent. —*White* v. *Hunt,* L. R. 6 Ex. 82.

MASTER AND SERVANT.—1. Actions for assault, false imprisonment, and malicious prosecution. There was "a scuffle" in a railway-station yard between A. and two persons; W., the plaintiff, denied that he took part in it, but after he had left the station and was walking away he was delivered into custody by A. A. was a constable in the employ of the defendants, under a rule by which he might "take into custody any one whom he may see commit an assault upon another at any of the stations, and for the purpose of putting an end to any fight or affray; but this power is to be used with extreme caution, and not if the fight or affray is at an end before the constable interposes." *Held,* that the act of A. was beyond the scope of his employment.

The defendants' attorney appeared to conduct the prosecution of W. The depositions of A. and other servants of the company contained evidence of violent assaults upon them in the exercise of their duty. *Held,* that there was no evidence of ratification, it not appearing that the original act was done on behalf of the company, nor that the attorney knew of the circumstances of the imprisonment; *held also,* that the *onus* was on the plaintiff to shew absence of probable cause, and there was no proof of it.

S. took part in the struggle above mentioned, and was wrongfully given into custody by A. *Held,* that there was evidence that A. was acting within the scope of his employment.—*Walker* v. *South Eastern Railway Co.*; *Smith* v. *Same defendants,* L. R. 5 C. P. 640.

2. The defendant owned a vessel, and employed K., a stevedore, to unload it. K. employed other laborers, and among them the plaintiff and D., one of the defendant's crew, all of whom were paid by K. and were under his control. While at work the plaintiff was injured by D.'s negligence. *Held,* that D. was acting as K.'s servant, and that the defendant was not liable.—*Murray* v. *Currie,* L. R. 6 C. P. 24.

NEGLIGENCE.—Servants of a railway company left cut grass and hedge trimmings by the side of the railway for a fortnight; the summer was exceedingly dry, and a fire caught near the rails shortly after the passing of two trains, and a strong wind blowing at the time, ran across a stubble-field for two hundred yards, crossed a road, and set fire to the plaintiff's cottage. *Held,* that there was evidence for the jury that the defendants were negligent in not removing the cuttings, and that the fire originated from sparks from the engine; *also,* that they were responsible for the natural consequences of their negligence, and the distance of the cottage from the point where the fire originated did not affect their liability.—*Smith* v. *London and South Western Railway Co.,* L. R. 6 C. P. (Ex. Ch) 14; s. c. L. R. 5 C. P. 98; 4 Am. Law Rev. 717; 7 C. L. J. N. S. 102.

PATENT.—A chignon-maker obtained a patent for the use of "wool, particularly that kind known as Russian tops, or other similar wools or fibre, in the manufacture of artificial hair, in the imitation of human hair, and also in the manufacture of crisped or curled hair for furniture, upholstery, and other like purposes." *Held,* that the specification was too extensive; *also,* that the simple use of a new material to produce a known article is not the subject of a patent.—*Rushton* v. *Crawley,* L R. 10 Eq. 522.

RAILWAY.—When land is taken from a railway, no claim of statutory compensation can be made in respect of damage for which the claimant would not have had an action if the Railway Act had not been passed. The damage must be damage done in the execution of the works, and not afterwards when the railway is completed; and anticipated damages from noise of trains and smoke, which may accrue hereafter, are not proper subjects of compensation before they happen.—*City of Glasgow Union Railway Co.* v. *Hunter,* L. R. 2 H. L. Sc. 78.

ONTARIO REPORTS.

QUEEN'S BENCH.

IN RE THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF YORK.

Division Courts—Unprofessional Advocates.

Only barristers and attorneys, to the exclusion of unprofessional persons, are authorized to conduct or carry on litigation for others in Division Courts, as well as all other courts in Ontario.

Per Wilson, J., that courts have a discretion to permit others than professional persons so to act in cases of great necessity, if professional assistance cannot be obtained.

Quære whether attorneys can act as advocates in Division Courts.

[Q. B., Easter Term, 1871.]

This was an application made by and on the behalf of Robert M. Allen, a barrister, calling upon the Judge of the County of York, and the junior Judge of the same county, to shew cause why a writ of prohibition should not issue, commanding them to refuse audience to one Joseph Cupples and one G. D. James and others in the conducting or defending the causes of suitors in the Division Courts of the County of York.

The application was based on an affidavit of Mr.

Allen, that the persons named and others were in the habit of attending the First Division Court of the County of York, and acting as advocates contrary to law, in prosecuting and defending cases, examining witnesses, &c., to the injury of members of the Bar and attorneys, and to the detriment of the general public: that he, Mr. Allen, frequently objected to such unprofessional persons being so engaged: that the same was brought under the notice of the said judge and junior judge, accompanied by a memorial numerously signed by both branches of the profession in the City of Toronto, praying that such unprofessional persons should not be recognised or permitted to act as advocates in the Division Courts, but without effect; and that the persons named in the rule would continue to act as such advocates unless prevented by judicial authority.

During last term, *C S Patterson* shewed cause, taking several preliminary objections to the form of the application and the grounds of the motion, and Mr. *Allen* supported his rule.

MORRISON, J. — We do not think it necessary, in this case, to consider the preliminary objections, as the object of this application was to obtain the opinion of the Court upon the right of persons, not being barristers or attorneys, to practice in the Division Courts, in the prosecution and defending of suits. Mr. Patterson referred us to several sections of the Division Courts Act, Con. Stat. U. C. cap. 19, as indicating that unprofessional persons were not prevented from conducting causes in those courts. We find that in the 84th sec. it is enacted "On the day named in the summons, the defendant shall in person or by some person on his behalf, appear in the court to answer; and on answer being made, the Judge shall without further pleading or formal joinder of issue, proceed in a summary way to try the cause," and in the 106th section it is stated, "The judge in any case heard before him, shall openly in Court, and as soon as may be after the hearing, pronounce his decision; but if he is not prepared to pronounce a decision *instanter*, he may postpone judgment and name a subsequent day and hour for the delivery thereof in writing, at the clerk's office, and the clerk shall then read the decision to the parties or their agents, if present," and by the 109th section "The Judge may in any case, with the consent of both parties to the suit, or of their agents, refer the matters in dispute to arbitration;" and in section 114 it is provided that "in cases where the plaintiff does not appear in person or by some person on his behalf, &c., the Judge may award costs to the defendant, &c.;" and by section 139 "the clerk shall, upon application of the plaintiff or defendant (or his agent) having an unsatisfied judgment in his favor, prepare a transcript of such judgment, and shall send the same to the clerk of any other Division Court, &c." These are the only sections of the Act which contain any expressions referring to agents or persons acting on the behalf of suitors.

Now, with reference to sections 106 and 139, I see no reason from the very nature of these provisions, that the person who may attend in the one case or makes the request in the other, need be a barrister or an attorney; but with respect to the other sections, they appear to me to have relation to persons who are duly authorised to *practice as barristers and attorneys* in her Majesty's Courts; particularly when we come to consider the provisions of the statute respecting barristers-at-law, Con. Stat. U. C., cap. 34, and that respecting attorneys-at-law, in cap. 33 of the same statutes—the former passed many years before the Division Courts Act, and the latter several years after. It seems to me clear that no persons can solicit or defend any action or suit in a Division Court, other than barristers or attorneys duly qualified. The first section of the Act respecting barristers, enacts that only certain persons and no others may be admitted to practice at the Bar in His Majesty's Courts of Law and Equity in Upper Canada.

The effect of this statute was much discussed in the case of *In re Lapenotiere*, 4 U.C.Q.B. 492; the question in that case being whether an attorney was entitled to be heard as an advocate in the then District Courts, which had not a jurisdiction as extensive as the the Division Courts—and the majority of the judges of the court held that attorneys could not be heard, by reason of the Stat. 37 Geo. 3, cap. 13, which is consolidated by cap. 34. Macaulay, J., in giving judgment, says, "The statute enacted that no person (subject to certain exceptions, not including attorneys) should be permitted to practice at the bar of any of his Majesty's courts, &c. It does not appear to me that an attorney, not a barrister, can, as of right, claim to be heard as an advocate in the District Courts in the face of this express prohibition, if such Courts come within the denomination of 'any of his Majesty's courts in this Province.' All courts of record are the King's Courts, and the statute 8 Vic. cap. 13, in creating the District Courts, establishes them as courts of law and record; and sec. 48 empowers them to fine and imprison."

Now by 32 Vic. cap. 23, (Statute of Ontario,) all judgments in the Division Courts shall have the same force and effect as judgments of Courts of Record, which is in other words constituting them Courts of Record; and they have, by section 182, power to fine and imprison. But when we come to look at the act respecting attorneys, passed several years after the passing of the Division Courts Act, the language of that statute is so clear, that there is little room to doubt the intention of the Legislature, as expressed in the first section, which enacts "Unless admitted and enrolled and duly qualified to act as an attorney or solicitor, no person shall, in Upper Canada, act as an attorney or solicitor in any superior or inferior court of civil or criminal jurisdiction in law or equity, or any court of bankruptcy or insolvency, or before any justice of the Peace, or as such sue out any writ or process, or commence, carry on, solicit or defend any action, suit or proceeding in the name of any other person or in his own name." These words are as large and wide as they possibly can be made; and, as indicating the comprehensiveness of the intention of the Legislature, unprofessional persons are prohibited from soliciting or defending any proceeding before a Justice of the Peace.

It has been suggested that as there are no pleadings in the Division Court, there was no necessity for the services of a professional gentleman, and that any person might act for another in cases in those courts. The same observations might be applied to proceedings

before a justice; but we see the Legislature expressly prohibiting the employment of unqualified persons in such cases, and it may be suggested as a strong reason why such a rule should prevail in Division Courts, that the cases in those courts may be tried by a jury at the request of either of the parties. On the whole, from the express language used by the Legislature in the statutes referred to, I think it is manifest that the Legislature intended that only barristers and attorneys should be authorised to conduct or carry on in any court, any kind of litigation, and that consequently unprofessional persons are not entitled to have audience in the prosecuting or defending suits in the Division Courts.

As this rule was granted for the purpose of having the point discussed and an expression of the opinion of the court obtained, we assume that it will not be necessary that any further steps should be taken.

Wilson, J.—The Attorneys' Act is very direct and positive in its terms, and prohibits any one from acting as an attorney or solicitor, unless he has been duly admitted, enrolled and qualified.

The Barristers' Act, C. S. U. C. ch 34, is differently worded. It declares that "the following persons and no others may be admitted to practice at the bar, in her Majesty's courts of law and equity in Upper Canada." And it provides the class of persons who shall be so admitted.

The expression *admitted* in that Act appears to me rather to mean who shall be admitted to the bar, that is, by the Law Society, to practice at the bar. Section 1 of cap. 33 provides that the Law Society and the Benchers thereof shall have the power "to call and *admit* to the practice of the law as a barrister, any person duly qualified to be so *admitted*, &c. And the term appears to be used in that sense throughout chapter 34.

The 37 Geo. III. ch. 13, sec. 5, which has been consolidated by ch. 34, sec. 1, enacted "That no person other than the present practitioners and those hereafter mentioned, shall be *permitted* to practice at the Bar of any of His Majesty's Courts in this Province, &c." And when the word *admitted* is used in that act, it is used with reference to the admission of the person into and by the Law Society.

The word *admit* has not quite the same signification as *permit*. The Law Society may *admit* into its body those gentlemen who are to practice at the bar. The law does not, or the judge or other judicial person presiding for the time being shall not, permit any one who has not been so admitted, to practice at the bar.

It may therefore be, notwithstanding this act, that a judge might, in case of great necessity permit persons who were not barristers, to act before him It is certainly within the power of the English Courts to allow such persons to act as counsel in the matter before them as they please; the *Serjeants'* case, 6 Bing. N. C. 187, 232, 235; *Collier* v. *Hicks*, 2 B. & Ad. 662. And it is said in Roger North's Life of the Lord Keeper Guilford, that when the Serjeants of the Common Pleas would not move when called on, having taken offence at some action of the court which interfered with their monopoly, the Chief Justice said to the attorneys who were present, "And do you attorneys come all here to-morrow, and care shall be taken for your dispatch—and rather than fail we will hear you or your clients or the barristers-at-law, or any person that thinks fit to appear in business, that the law may have its course." See also Campbell's Lives of the Chancellors, Vol. 3, p. 361.

It can only be a case of great necessity which will warrant a departure from the general, approved, and settled practice of the courts. The policy of the legislature on this subject has plainly been to exclude all unqualified and non-professional practitioners, and judges should give effect to that legislation. In *Tribe* v. *Wingfield*, 2 M. & W. 128, it was said by the different judges "They could never lend their authority to support the position that a person who was neither a barrister nor an attorney, might go and play the part of both; and that in such a case there was none of that control which was so useful where counsel or attorneys were employed." It is however clear law that "any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice." *Collier* v. *Hicks*, 2 B. & Ad. 662, 668.

I agree in the conclusion my brother Morrison has expressed. The rule will be absolute, but it is not to be taken out of the office without the further order of the court.

COMMON PLEAS.

Moore v. The Corporation of the Township of Esquesing.

Dedication of highway—User by public—Stoppage by by-law.

Where a road was laid out over land by the owners thereof, and was so used by the public, without interruption for 30 or 40 years.

Held, that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser from one of such owners of the land, with knowledge, too, on his part, of the existence of the road.

[21 U. C. C. P. 277.]

In Michaelmas Term last, *McGregor* obtained a rule *nisi* to quash by-law No. 211, passed 25th July, 1870, to stop up the highway or allowance for road situated at or near the limit between lots 31 and 32, 2nd concession of Esquesing, on the ground that the same was illegal under sec. 320 of the Municipal Act, and *ultra vires*, and on grounds disclosed in affidavits and papers.

A large number of affidavits were filed.

The by-law stated that the road between 31 and 32 was not an original allowance, nor had any compensation been given in lieu thereof, and enacted "that the travelled road through Mr. Cummings' land, situate on or near the limit between lots 31 and 32, 2nd concession of Esquesing, shall be and the same is hereby stopped up."

Lot 32 was the last lot in Esquesing, and the town line between Esquesing and Erin bounded that line on the north. The road stopped up ran on the south side of 32, between it and 31, the width of the lot being between the two roads, which were parallel. It ran from one concession to the other, east and west. But the portion stopped, *i. e.*, the portion through Cummings's land, was only half the depth of the concession between the east halves of 31 and 32; the remainder, between the west halves, was left open.

It was sworn that in April, 1836, Hamilton

Walker was possessed of the west half of 31, Robert Bedford of the west half of 32, and Thomas McCoy of the east half of 32; that before that time the road between the east halves had been travelled; that a writing, produced, was then executed by Walker, Bedford and McCoy, in these words: "Whereas it is thought necessary that a road should be opened across the 2nd concession of Esquesing between lots 31 and 32 of the same, we, that is to say, Hamilton Walker, owner of the west part of 31, Robert Bedford, owner of the west of 32, and Thomas McCoy of 32, east of said 2nd concession, we, the above-mentioned Hamilton Walker, Robert Bedford, and Thomas McCoy, do promise and agree to give each a part for the purpose of opening the same; that is, Hamilton Walker one rod in width from the concession line, between 1st and 2nd to the centre of said 2nd concession; likewise Robert Bedford one rod in width from line between the 1st and 2nd concession to the centre of said 2nd concession; and Thomas McCoy two rods off his lot, if the owner of 31 should not be willing to give a part for the purpose of having said road opened. In witness, &c., set our hands, 12th April, 1836." (Signed by the three.) It was sworn that when the writing was given, the whole was formally opened, and had ever since been used.

John Cummings, who petitioned for this by-law, and who had since its passing stopped up the road, owned 25 acres of the east half of 32, off which McCoy, the former owner, thus dedicated the road. He also owned the east half of 31 south of the road.

Harrison, Q.C., shewed cause, the defence set up for the by-law being that it was considered a private road, and was only to be used till the town line was opened; that the town line had been opened, and the municipality had also caused a road to be opened parallel to this road between lots 28 and 27, in 2nd concession, for the convenience of the public.

Cummings swore that in 1840 he purchased 31 in 2nd concession from one Jones, and his deed contained no reservation of any road: his lot was then wild. He did not deny but that the road in question was then in existence and used; but he swore that eighteen or nineteen years ago, when he cleared up to the line, he made some alterations in the road, which was "accordingly moved to its present position." In 1846, he said, he bought the south-east 25 acres of 32 from Thomas McCoy, the deed containing no reservation; that he always considered he had the right to stop the road, but said he did not intend doing so till the town line was opened.

It was also sworn that at different times when the pathmasters were doing statute labour on the road, he forbade them putting stones on it or making holes in it; and his son swore the pathmasters submitted and did not do so, though it very clearly appeared that no attempt was ever made to exercise any right to obstruct or interrupt the use of the road. His son also swore that most of the road was on the lot 31, bought from Jones, and only a small portion on 32, bought from McCoy.

A large portion of the affidavits on the defence went to shew that it would be as convenient or nearly as convenient for the persons residing west of the road to go round by the town line as to go straight to the east. This was strongly denied by the applicants.

McGregor and *Guthrie*, contra.

The following cases were cited: *Regina* v. *Plunkett*, 21 U. C. Q. B. 536; *Borrowman* v. *Mitchell*, 2 U. C. Q. B. 155; *Dawes* v. *Hawkins*, 4 L. T N. S. 288; *Chapman* v. *Cripps*, 2 F. & F. 864; *Selby* v. *Gas Co.*, 30 Beav. 606; *Holmes* v. *Goring*, 2 Bing. 76; *Osborn* v. *Wise*, 7 C. & P. 761; *Carrick* v. *Johnson*, 26 U. C. Q. B. 65; *Regina* v. *Phillips*, L. R. 1 Q. B. 648.

HAGARTY, C. J.—It is clear that this road was not an original allowance, but has been a public travelled road for between thirty and forty years. The town line parallel to it being over rough land, remained for many years unopened till lately, and this road was used, it is sworn, as the regular high road from Toronto to Guelph. Statute labour seems to have been usually done upon it, and the farmers to the west seem to have used it extensively as their road to Acton village and station.

It seems to me that the evidence of this road having acquired the legal character of a public highway is irresistible. It was first used as a road; then we find the three owners, thirty-four years ago, in writing, declaring there was to be a road there, and each agreeing to give a portion of his land for that purpose. It is quite true that Jones, from whom Cummings purchased, in 1840, the east half of 31, does not appear to have done anything in the matter; but McCoy, who owned 31 on the north of the Jones lot, agreed to give double the width given by the other two if the owner of 31 should not be willing to give a part for that purpose.

Then, in 1846, Cummings purchases from McCoy the south 25 acres of 31, off or along which McCoy, his grantor, had already appropriated the allowance for the road, and dedicated it to the public as formally as he could.

It matters little, I think, that McCoy, in the deed to Cummings, did not expressly reserve this. The road was then open and travelled, and was always clearly in the knowledge and sight of Cummings, who then owned on both sides of it.

His declared opinion that it was only a private road or that he had the right to stop it or would stop it when the town line was made passable, cannot avail. It could not matter much to him that most of the road may or may not be on the McCoy part. When he took from McCoy the latter had dedicated two rods wide off his lot for this road.

The evidence, also, as to statute labour being usually done on it, is clear.

I think the case of *Regina* v. *Plunkett*, 21 U. C. Q. B. 536, cannot help the defendants. It was what was called "a trespass road," running diagonally across some lots on the Humber plains; in the view of the Court "only a temporary substitute for the proper allowance, which ran alongside of the lot," and that there was not sufficient evidence of dedication.

It cannot be pretended that this road comes under the class of "trespass roads," running as near perhaps as the irregularities of the ground of the public allowance for road will permit, or of the "short cuts" often made across unenclosed land, and used for years by the public with the permission of the owner till he finds it

convenient to fence in his property and leave the public to the legal allowances. See also *Borrowman* v. *Mitchell*, 2 U. C. Q. B. 155.

All such cases should be dealt with in a liberal spirit and with a due regard to the customs and necessities of a new country, where roads are in their infancy and much land unenclosed.

Here the origin of the public user and the express dedication by the owners is established.

In *Dawes* v. *Hawkins*, 8 C. B. N. S. 848, an adjoining proprietor had illegally stopped up an ancient highway without interference by the owner of the soil. He substituted for it a new road which the public used over twenty years; then the obstruction on the ancient road was removed, and the owner of the soil of the substituted road shut it up.

Sir W. Erle's judgment fully discusses the law. He held there was no sufficient user of the substituted way, from which a jury could infer a dedication: "The user of the line of deviation over the adjoining land by reason of a wilful obstruction is no more the user of a deviation over adjoining land by reason of the highway being founderous. I know of no decision and no principle making a distinction between a road impassable by non-feasance, that is, neglect to repair, and a road impassable by misfeasance, that is, by a ditch and bank wilfully made."

Byles, J.: "It is clear there can be no dedication of a way to the public for a limited time, certain or uncertain. If dedicated at all it must be dedicated in perpetuity. It is also an established maxim, "once a highway always a highway," for the public cannot release their rights, and there is no extinctive presumption or prescription. * * It was plain the public had never used the deviating track, except when they were shut out from the true ancient highway. The public user, therefore, was referable to the right of the public to deviate on to the adjoining land whenever the owner of the soil illegally stops a highway."—*Absor* v. *French*, 2 Show. 28.

I have quoted from this judgment to illustrate the marked distinction between the case before us and the common case in this country, already noticed, of a line deviating from, or used close to, or adjoining as near as practicable, a road allowance unopened or impassable.

I am clearly of opinion that the road stopped up by this by-law was in every sense a public highway.

The question remains as to the right to stop the highway.

The Act of 1849, 12 Vic ch. 81, sec. 31, sub-sec. 10, gave power to open, &c., any new or existing highway, road, &c.

Sec. 187 absolutely forbade the stopping up of any original allowance for road.

20 Vic. ch. 69 (1867), sec. 2, allows the municipality to stop up and sell the original allowance, and sec. 7 introduces, as I believe for the first time, the provision that it should not be lawful to close up "any public road or highway, whether such road or highway be an original road allowance or a road which has been opened by Quarter Sessions, County or Township Councils, through any land by which any person shall be excluded from ingress or egress to and from a place of residence over the said road; but all such roads shall remain open for the use of the person who shall require the same."

In the Consol. Statute of 1859, ch. 54, sec. 318, and in the Municipal Act of 1866, cap. 51, sec. 320, the clause, slightly altered, reads thus: "No Council shall close up any public road or highway, whether an original allowance or a road opened by the Quarter Sessions, or any Municipal Council, or otherwise legally established, whereby any person will be excluded from ingress and egress to and from his land or place of residence over such road, but all such roads shall remain open for the use of the person who requires the same."

We are called on to place a construction on this clause, so far as I know, for the first time.

The power to stop up a road was before the court in *Johnston* v. *Reesor*, 10 U. C. Q. B. 101. This was prior to the passing of the act as to egress and ingress. Sir J. B. Robinson says: "Here was a road first allowed at an early period as a mere accommodation to the immediate neighbours, for enabling them to pass through private property, by a short road, from one concession to another, instead of going round by the nearest public allowance when the ground might have been wet or unfavourable. It may be very reasonable, afterwards, when the township becomes cleared and populous, and roads can be made more easily, to relieve the proprietor of the land from the disadvantage of having the thoroughfare through his property, and to have only the public allowance."

It would seem that the municipality then had unlimited powers to stop all highways not being original allowances. Then the Act of 1857 extended their power over original allowances, and added the restrictive clause as to ingress and egress, applicable to all roads legally established. Are we to construe this clause as applicable only to cases where, by shutting up a road, ingress and egress would be totally barred? This would confine the restriction to cases chiefly where the road to be stopped was what is commonly called a *cul-de-sac*.

Under the usual system of laying out roads in this country there are not many cases where a person would be excluded from ingress and egress to and from his land by the stopping of any one road. He would generally have an approach by going round by another road. Small holdings could of course exist along a road cut across lots from one concession line to the other, where the stopping up of such road might effectually cut off the owners of such holdings.

In the case before us it does not appear that by the stoppage of this road any persons will be completely cut off from ingress and egress, but the affidavits shew that a very serious inconvenience and injury must be done to them by forcing them to make a circuit of nearly a mile longer to reach the village of Acton and the railway station.

We can see no shadow of justice in the course taken by the council. Mr. Cummings has no right to complain. He bought his land from the man who had already expressly dedicated a portion to the public, and the road was there, visible to all. If councils have power to shut up such a road as this road, the general result may be most serious. A person desirous of selling off a portion of his land in small building lots, or of having a short access from a valuable mill to a railway station, might pay a large sum of

money to an intervening proprietor to open a public road across his lot. After this had been done, and the road established as a legal highway, the council might interpose and shut it up, telling the sufferer that he might still enjoy ingress and egress to his property, to mill or market, by going one, two, or three miles round.

In view of this possible injustice, I desire to construe the clause as strictly as I can against the power of the council.

The legislature says, in effect, "You must not stop any road whereby any person will be excluded from ingress and egress to and from his lands or place of residence *over such road.*" If, then, such a road be stopped, most certainly all persons must be excluded from ingress and egress to or from their lands *over that road.* There can be no ingress or egress over a stopped up road. Therefore, I presume all persons who came into their lands directly from that road, or passed from their lands directly on to that road, are to be protected. This would leave all persons who merely used the road as a convenience, but had no lands abutting thereon from or to which ingress or egress would be effected, without the protection of the clause.

The stopped road extended westward to the north-east angle of the Moore's lot, and the south-east angle of Lachlan McMillan's lot. According to the plan before us, either of these proprietors could pass directly from this corner of his lot to the road. In this way are they not within the letter of the protection? They undoubtedly have ingress and egress to and from their lots without this road, but they also had it *over this road.* It may be mathematically inexact to speak of substantial ingress and egress between two figures whose only point of contact is at the apex of a right angle of each. Practically, we know that, in a case like this, there may be such passage, especially as McCoy gave two rods off his lot, which would leave the road one rod at least north of the north line of the road given by Bedford and Walker.

The law undoubtedly needs amendment, as any construction of this clause may produce most unlooked-for results. If this construction of the clause be correct, the by-law cannot be supported, at all events as against the rights of the parties referred to.

Therefore, as far as the municipality was concerned, there was no just ground whatever for closing this road, laid out as it was and dedicated to the public by the owners of the land. It seems to have been passed solely to serve the interests of Mr. Cummings. It is not necessary for us to discuss the possible distinction between the rights of individuals whose ingress and egress may be affected, and that of the general public: it is enough to decide that this by-law, in its present shape at least, cannot be supported.

The council evidently acted under a mistaken idea as to Mr. Cummings' rights. Even if we did not feel ourselves at liberty to quash the by-law, I will give the council the credit of assuming that they would gladly repeal it on being pointed to the absolute injustice done by its enactment.

GWYNNE, J.—The persons who originally, in 1836, gave land off their respective lots for the purpose of the road in question, and dedicated it to the public, did so, in my opinion, not merely for a dedication to public uses but for the special and peculiar accommodation and benefit of themselves and the owners, for the time being, of the respective lots; and if no public labor or money had ever been laid out upon the road, I am of opinion that each proprietor of the lots 31 and 32, after more than twenty years user of such road, would have acquired the right and easement of insisting, as against each other, upon the road being kept and maintained open, and the municipality in such a case would have had no control over the road or power to close it to the prejudice of any of the parties who had dedicated it for their own special benefit.

For the purpose of the Municipal Institutions Act, that is, for the purpose of bringing the road within the character and description of a common and public highway, it was necessary that statute labor should be usually performed upon it within the 315th section of 29 & 30 Vic., ch. 51, or that a by-law of the municipality should be passed assuming the road within the 339th section. Now in this case no by-law has been passed assuming the road, but statute labor sufficiently appears to have been usually performed upon it. Whether or not, under these circumstances, the municipality is liable to keep the road in repair, notwithstanding the 339th section, is a question we are not called upon to consider. The question we have to consider is merely whether the by-law passed for the purpose of stopping it up is valid. If the parties who originally laid out the road have, as I think they have, a peculiar interest in maintaining it open for the special accommodation of the owners of the lots through which the road is laid down, whether it had been assumed by the municipality or not, the municipality could not, in my opinion, even if they had assumed the road by by-law, afterwards shut it up by by-law to the prejudice of those peculiar rights of the owners of the lots who originally dedicated the road. In so far as the general public might have a right to the road, the municipality may perhaps be able by by-law to divest those rights; but I do not see how, even independently of sec. 320 of the act, a by-law of the municipality could divest parties of peculiar private rights which they had acquired *inter se* by contract or conduct and prescription. The 320th section, as it appears to me, but expresses what would be law in the circumstances of this case without that section. Upon the facts of this case, I am of opinion that the municipality in passing the by-law in question, have exceeded their jurisdiction.

GALT, J., concurred.

Rule absolute.

JENKINS v. THE CORPORATION OF THE COUNTY OF ELGIN.

By-law—Sealing of—Notice—22 Vic. ch. 66, secs. 75 & 76—29 & 30 Vic. ch. 51, sec. 196, sub-sec. 6—"Majority"—Construction.

Held, that a "majority" of the electors referred to in the Railway Act of 1859 (22 Vic. ch. 16, secs. 75 & 76) and the Municipal Institutions Act of 1866 (29 & 30 Vic. ch. 51, sec. 196, sub-sec. 6), required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for the same.

Held, also, that the notice of a by-law for the granting of aid by a municipality to a Railway Company, should be

published in accordance with the provisions of the Municipal Acts.

Held, also, that the objection to a by-law that it was not sealed, when submitted to the electors was untenable.

[21 U. C. C. P. 325.]

Anderson applied for a rule *nisi*, to quash a by-law in aid of the Canada Southern Railway Company, on the following grounds: 1. That the by-law was not advertised four times in each newspaper printed within the limits of the municipality.

2. That when it was submitted to the ratepayers, it was not sealed.

3, That it was not passed with the consent first had of a majority of the electors.

As to the first ground he referred to the Railway Act, chap. 66 of Con. Stat. Can. sec. 77.

On the third ground he referred to *Simpson* v. *County of Lincoln*, 13 C P. 48; *Billings* v. *Municipal Council of Gloucester*, 10 U. C. Q B. 278.

Curia advisari vult.

HAGARTY, C. J.—The Railway Act of 1859, ch 66, secs. 75 & 76, allows municipal corporations to subscribe for stock or lend money to railways, but forbids their so doing, "unless and until a by-law to that effect has been duly made and adopted with the consent first had of a majority of the qualified electors of the municipality, to be ascertained in the manner determined by the by-law, after public advertisement thereof, containing a copy of such proposed by-law, inserted at least four times in each newspaper printed within the limits of the municipality," &c.

The Municipal Act, chap. 54, sec. 346, contained provisions for taking stock and subscribing under this Railway Act; and the Municipal Act of 1866, sec. 349 had a similar provision, with the words, "But no municipal corporation shall subscribe for stock or incur a debt or liability for the purpose aforesaid, unless the by-law before the final passing thereof, shall receive the assent of the electors of the municipality in manner provided by this Act."

The Ontario Act, ch. 82, 88 Vic., incorporates "The Canada Southern Railway Company." Sec. 5 allows municipalities in addition to the powers conferred by the clause respecting Municipalities in the Railway Act, to give money by way of bonus, &c., to the company, "Provided always, that no such loan, bonus, &c., be given, except after the passing of the by-law for that purpose, and the adoption of such by-laws as provided by the Railway Act; *provided always*, that any such by-law to be valid, shall be in conformity with the laws of this Province respecting municipal institutions"

We have, then, these two provisions for a by-law giving a bonus to a railway company.

First.—It must be a by-law *passed* and *adopted* as provided by the Railway Act.

Secondly.—It must be a by-law *made* in conformity with the laws respecting municipal institutions.

The Railway Act provides for a by-law being made for the purpose of aiding the railway, and then for its adoption with the consent of the majority of the electors, leaving it to the by-law to determine how that majority is to be ascertained.

This would seem to satisfy the words in the last special Act as to *passing* and *adoption*, provided by the Railway Act.

Turning to the existing municipal law, we find sec. 196 (Act of 1866) provides, "In case a by-law requires the assent of the electors, &c., before the final passing thereof, the following proceedings shall be taken for ascertaining such assent." Provision is then made for fixing days of polling, &c.

Sub-sec. 2. The council shall, for at least one month before the final passing of the proposed by-law, publish a copy thereof in some newspaper published weekly or oftener in the municipality, &c.

Sub-sec. 4. That a poll be taken and proceedings conducted in the same manner as nearly as may be as at a municipal election.

Sub-sec. 6, directs the clerk of the council to add up the number of votes for and against the by-law, and to certify to the council under his hand, whether the majority have approved or disapproved of the by-law.

I am of opinion that the majority required to assent to a by-law, is not an absolute majority of all the existing qualified electors, but a majority of those coming forward to vote for or against the proposition submitted to them.

It stands thus:—

1. The assent of the majority is required.
2. It is devolved on the municipality to determine the manner in which the assent of such majority is ascertained.
3. The Legislature has further itself directed, that this is to be ascertained by giving full opportunity to all to vote, if they so desire.
4. The majority of those actually voting must be considered the majority of the electors.

I think this result is clear on the statutes.

The provision quoted as to the clerk certifying whether the majority have approved or disapproved, must certainly mean the majority on the poll-books. He could hardly in fact ascertain the actual majority of all existing electors, except by personal enquiry outside the poll-book. He might find 500 names on the assessment roll at the beginning of the year. Ten or twenty per cent. of that number might have died, or sold their property, and left the country, before the vote was taken.

It never could have been intended that an absolute majority must come forward and vote. The difficulties would be almost insuperable, and require most complicated machinery. Had the Legislature intended any such result, we may assume that very different language would have been used.

In the case before us the applicant does not venture to swear that a majority of the electors have not voted. He merely states that so many names appear on the assessment roll for 1870, and that a less number than half voted for the by-law, and asks us to infer therefrom that the law did not receive the assent of the majority.

As to the sufficiency of the notice, I think the proper construction is, that the notice provided in the Municipal Act is sufficient, and ought to govern.

The Railway Act requires it to be advertised four times at least in each newspaper published in the municipality. If only a daily paper existed, four insertions on four consecutive days would suffice In a semi-weekly, two weeks would cover the time.

The Municipal Act makes a much better pro-

vision, requiring publication for at least one month in some newspaper in the locality.

Here the objection is that as to two out of three of the local newspapers, the notice only appeared three times, instead of four.

I think we are bound to hold that the notice to the public is to be governed by the provisions of the Municipal Act.

The Municipal Loan Fund Act (16 Vic. ch. 22), and again Con. Stat. Can. ch. 83. provides for the passing of by-laws for aid to railroads and other public objects, after a month's notice and publication "in some newspaper," &c.; and formal provisions are introduced for ascertaining the assent or refusal of the ratepayers by the votes of those present at appointed meetings, and giving power to demand a poll; and the majority of votes polled is to be certified, &c.

In some places the words are, "the qualified municipal electors, or such of them as choose to attend the meeting shall take the by-law into consideration, and approve or disapprove of the same": sec. 18, ch. 83: 1859.

In *Boulton* v. *Corporation of Peterborough* (16 U.C.Q.B.380) the by-law was submitted to a public meeting of the electors: it was carried, and no poll demanded.

The objection was taken that the consent of the majority of the electors was not obtained. The point does not seem to be much argued.

Sir J. B. Robinson says, "The first of the objections is, that the consent of the ratepayers had not been obtained. * * * By this we understand to be meant that the electors were not polled; but that could not be necessary unless some one objected and a poll was demanded. It is declared that the by-law was unanimously approved of by those present; and there is no evidence to the contrary." The case cited of *Billings* v. *Corporation of Gloucester* (10 U.C. Q.B. 273) can hardly be considered as any authority on the point. The by-law was clearly bad, irrespective of the voting. No cause was shewn, and the proceeding was under a special Act.

We have directions in statutes for surveys and other matters, in which doubtless the proved assent of an absolute majority of parties interested is necessary. But this is wholly apart from any question of voting or ascertainment of majorities in prescribed manners, and confined to matters specially affecting individual properties.

We think the objection as to the by-law not being sealed, when submitted the electors, is untenable. It was only a proposed by-law, and did not become an actual by-law until approved of. It is easily distinguishable from the case cited from the Queen's Bench.

Gwynne, J.—The Canada Southern Railway Act (33 Vic. ch. 32, sec. 5,) in my opinion, is to be read as conferring upon municipalities (in addition to the powers conferred upon them by the clause respecting municipalities in the Railway Act,) power to give money, by way of bonus, to the Railway Company, provided always, that no such bonus shall be given, except (as provided by the Railway Act in relation to the taking of stock, that is to say), after the passing a by-law for that purpose, and the adoption of such by-law by the electors; provided always, that such by-law, to be valid, shall be made in conformity with the laws of the Province respecting municipal institutions; thus making the validity of the by-law to depend wholly upon its conformity to sec. 195 of 29 & 30 Vic. ch. 51, which this by-law does. It is not, therefore, open to the first objection taken to it. There is nothing in the second objection; and as to the third, I entirely concur that the majority of the qualified persons who voted upon the by-law, must be taken to express the voice of the electors.

Galt, J., concurred. *Rule refused.*

MUNICIPAL CASE.

Reg. ex rel. Coyne v. Chisholm.

Municipal Election—Right of candidate to resign—C. S. U. C. c. 54, sec. 97, sub-sec. 5—Municipal Act of 1866, sec. 110, sub-sec 6, and sec. 113.

A candidate for the office of reeve, who is proposed and seconded at the nomination meeting, may, with the consent of his proposer and seconder and of the electors present, withdraw from his candidature.

A voter, who nominated another for a municipal office, having at the meeting permitted his candidate to retire from the contest, without expressing at the time any objection to his withdrawal, cannot afterwards insist upon having the name of his nominee published in the list of candidates, or entered as such upon the poll book.

[Chambers, Feb. 10, 1871,—*Mr. Dalton.*]

The statement of the relator complained that Kenneth Chisholm had not been duly elected, and usurped the office of reeve of the village of Brampton, under the pretence of an election held on the 2nd January, 1871.

The grounds stated were: that at the nomination the said Kenneth Chisholm, Jacob P. Clark, James Fleming, John Haggart, and the relator, were duly proposed and seconded as candidates for the said office of reeve, and that no other candidates were proposed within one hour after the meeting of the electors for the said nomination: that the said John Haggart was proposed for the said office by the said Kenneth Chisholm, and seconded by the said relator: that no one of the said persons so nominated retired or withdrew from the said nomination within one hour from the time the said meeting was held and the said nominations were made: that no poll was demanded for the said office of reeve, but a poll was granted and allowed by the said returning officer: that a show of hands was called for on behalf of John Haggart, and a large majority of the electors present appeared to be in his favor: that the said John Haggart then said (but after a considerable number of the electors who had been present had left the meeting) that he would retire from and not contest the said election: that the relator, who was his seconder on his said nomination, never consented to the retirement of the said John Haggart, and on the day following the said nomination informed the said returning officer that he must post up the name of John Haggart as one of the persons proposed as reeve, as he, the relator, insisted that Haggart should be voted for at the election: that John Haggart himself notified the said returning officer, two days before the election, that he was a candidate for the said office, and requested the returning officer to enter his name on the poll-book as a candidate: that the returning officer did not post up in the office of the clerk of the said village, or anywhere else, the name of John Haggart as one of the persons proposed as reeve, but refused so to do, and his name was not at any time so posted up: that on January

2nd, the day of the said polling, John Haggart presented himself as a candidate to the returning officer: that the returning officer would not place the name of the said John Haggart in his poll-book as a candidate for reeve, and would not record any votes for him, although many (some eighty-two) were tendered for him; and that if the returning officer had received votes for John Haggart, he would have been elected reeve of the said village, instead of Kenneth Chisholm, who was declared duly elected.

The returning officer, in his affidavit, swore:

1. "That I was chairman of the meeting of electors held in the village of Brampton, on the 19th December last, for the nomination of candidates for the office of reeve, and I took the chair thereat at noon of the said day; and in the course of an hour thereafter, five candidates, being the same as are mentioned in the statement of the relator herein were duly nominated for said office; and after such nominations they all addressed the electors present at the meeting; and John Coyne, the said relator, and James Fleming, and John Haggart, at the close of their respective addresses, declared that they were not candidates for the said office, and withdrew from the contest therefor; and as each of them did so, I struck his name off the list of candidates for said office; and no person present at said meeting made any objection to the withdrawal of the said candidates; and although the relator was present at said meeting, and knew of the withdrawal of said Haggart and the said other candidates, he did not object thereto; and I believe the said relator and the said John Haggart also believed at the time that all the said withdrawals were complete abandonments of their candidatures by said parties.

2. "After the said relator and the said John Haggart and James Fleming had withdrawn as aforesaid, I read out the names of the defendant and Jacob Paul Clark as the candidates for the said office (the relator being present and making no objection), and I adjourned the meeting to 2nd day of January, stating at the time that the candidates for the said office who remained on the list after the said withdrawals, were the defendant and said Clark.

3. "That there was no show of hands called for said candidates; but the said John Haggart, in his address to the electors, stated that if he was to be opposed, he would not contest the election; and in order to see what opposition he would be subjected to, he called on those who were in his favor as against Mr. Clark (who was thought to be the only person who would contest the election with him), to hold up their hands; but only a small proportion of the electors did so, and the majority of those who did, were in favor of said Haggart; and he then asked Clark if he intended to contest the election with him, and Clark said he did; whereupon the said John Haggart announced that he withdrew from the contest, and desired me to strike his name from the list of candidates, and I did so.

4. "All the proceedings aforesaid took place at said meeting, and were part of the proceedings thereof, before I announced that the only candidates standing were the defendant and said Clark; and no one made any objection to said proceedings or to any of the said withdrawals; and the relator was present during the whole time."

R. A. Harrison, Q C., and *J. K. Kerr*, showed cause.

1. Though at first a candidate, yet, under the authorities and the circumstances of this case, Haggart was not, at the close of the nomination, a candidate.

2. The relator acquiesced in the withdrawal, and cannot now be heard: *Reg. ex rel. Rosebush* v. *Parker*, 2 U. C. C. P. 15; *In re Kelly* v *Macarow*, 14 U. C. C. P. 457; *Reg. ex rel. Bugg* v. *Bell*, 4 Prac. Rep. 226.

3. Where there is no probability shown that a new election would make a change in the person elected, mere irregularity is no ground for setting aside the election. See *Morris* v. *Burdett*, 2 M. & S. 212; *Reg. ex rel. Charles* v. *Lewis*, 2 Ch. R. 171; *Reg ex rel. Walker* v. *Mitchell*, 4 Prac. Rep. 218.

J. H. Cameron, Q C., and *Dr McMichael*, supported the summons, citing *The Queen* v. *Mayor of Leeds*, 11 A. & E. 512; *Reg.* v. *Bower*, 1 B. & C. 585; *Reg.* v. *England*, 2 Leach, C. C. 767; *Reg.* v. *Woodrow*, 2 T. R. 731; *The King* v. *Burder*, 4 T. R. 778; Comyn's Digest, Title Indictment, D.; Municipal Act of 1866, sec. 186; Har. Mun. Man p. 91; *Reg.* v. *Mooney*, 20 L. T. Q B. 265; *The Queen* v. *Preece*, 5 Q B. 94.

Mr. Dalton.—Upon the objection, which has been urged, to the defendant's election as reeve of Brampton, I will read the affidavit of Mr. McCulla, the returning officer, as containing a statement of the facts upon which I act. Mr. McCulla is in an official position, independent of both parties, and gives a very clear statement of what occurred, which I have no doubt is quite correct. Indeed I do not know that there is any dispute at all as to what took place at the nomination. He says: [Mr. Dalton here read the extract from the affidavit of the returning officer, which is given above.]

It seems to me to be very clear, whatever may be the derivation of the word, that a "candidate," in the sense of the statute, is one put forward for election, no matter whether with or against his own will; from which it would seem to follow that he cannot, without the assent of others, resign. His assent is not necessary to his candidature, but he must have a proposer and seconder. He need not be present at the meeting, and his dissent from the proceeding is unavailing.

But the question is, can a candidate, once nominated, be withdrawn? It is difficult to comprehend why this cannot be done before the close of the meeting, with the assent of all concerned; for every one then acts of his own free will, with a full knowledge of the facts. Contracts can be dissolved by the will of those who made them. There are exceptions, but it is *generally* true; and it is the *general* rule that the legal effect of all action may be annulled or reversed by the common agreement of *all* who are concerned. Why then, before being acted on, cannot a nomination be withdrawn, as here, by the candidate himself, his proposer and seconder, and the electors present? It is true that the clause of the Act does not speak of any power of resignation or withdrawal, but directs that the poll-book shall contain the names of the candidates "proposed and seconded," which no doubt means the names of *all candidates* proposed and seconded. But the answer to this seems to be, that when the nomination is withdrawn at the meeting by the agreement of every

one affected by the nomination or withdrawal, it is as though that candidate had never been proposed and seconded at all; for he does not continue to be to the close of the meeting, and is not then, a "person proposed" for the office. That this is the construction put upon the statute in practice, is very clear; for nothing is more common than for a number of candidates to be proposed, where there is no intention on the part of any one that they should contest the election; and upon their withdrawal, it has never, that I know of, been suggested until now, that it may be demanded, after the meeting, that their names shall be entered in the poll-books.

From the nature of the proceeding, the electors and the returning officer are entitled to know, at the close of the meeting, who are the candidates; for in case there is but one candidate, the returning officer is to declare him elected; and in case there are more candidates than one, the returning officer, on the day following the nomination, is to post up the names of the candidates. So that I do not understand how Mr. Haggart's or Mr. Coyne's communications with the returning officer after the nomination day can affect this proceeding. But suppose the first case had happened, and Mr. Chisholm had been the only candidate remaining; then the returning officer, with the assent of all the other candidates, their proposers and seconders, and of the electors present at the meeting, would on the spot have returned Mr. Chisholm as reeve. If it is asserted that an election so conducted would be void, I must say that only judicial decision could make me assent to it. I have been speaking of the statute as though the relator here were an elector, not present at the meeting, who had afterwards voted at the election for Mr. Haggart. His position would, in my opinion, be very different from that of Mr. Coyne; for if I am wrong in supposing that the proceedings at the election were legal, there are still reasons which apply *ad hominem* to prevent Mr. Coyne from setting up the objection. It was urged, upon the argument, that this proceeding was so much in the interest of the electors, that the truth of the facts must alone be regarded, and that the conduct of the relator or of Mr. Haggart could not here be set up to exclude the truth. But the cases cited by Mr. Harrison and Mr. Kerr are quite clear on the point that the conduct of the relator may waive objections otherwise good, or may estop him from alleging them. Indeed he is regarded as any other plaintiff, claiming in his private right.

Now, Mr. Coyne was present throughout the whole proceedings at the meeting. He must have heard the withdrawal of all the candidates but Mr. Clark and Mr. Chisholm; he must have heard the returning officer announce that they were the only candidates remaining; and yet he allowed the meeting to close—all present supposing such to be the fact—without expressing objection or dissent. I think he must be bound by the rule in *Pickard* v. *Sears*, 6 A. & E. 649, and the kindred cases. Surely this is estoppel by conduct. It is very easy to suppose cases where such a course would completely throw the electors—especially those opposed to Mr. Haggart—off their guard, if they were to find, the next morning, that Mr. Haggart was still in the field. I think the course taken in this election was legal; and that if otherwise, neither Mr. Haggart nor Mr. Coyne can be heard to urge this objection. I think there should be judgment for the defendant with costs.

REVIEWS.

La Revue Critique de Legislation et de Jurisprudence. Montreal: Dawson, Bros. January and April, 1871.

We welcome this publication with no ordinary pleasure. It is of much promise, and the articles carefully selected and well written.

The prospectus, referring to the work, says, that "the editing committee have imposed upon themselves the task of combating, without hesitation, the errors and chief faults which present themselves in legislation or jurisprudence;" and it was, we understand, with especial reference to various unsatisfactory features in the conduct of business by their own judiciary that this Review was first thought of. Among its contributors, and those who have promised their support, we notice the names of the best men at the bar in Lower Canada.

It is a difficult and invidious task for individual members of the bar to call to account persons holding judicial positions with whom they are daily thrown in contact, nor is it pleasant to feel that a Judge who has the decision of your case in his hands, above suspicion of any ill feeling though he may be, may perhaps still be smarting under a severe criticism of his law, or remarks on his want of attention or industry.

So far as Upper Canada is concerned, there has never been anything of this kind; but the Bench of the Lower Province has never, we think we may safely say, equalled ours either in industry, mental force, dignity, or general eminence. We have never felt any pressing need of sharp criticism on the conduct of our Judges. Some of them, of course, have been more dignified, learned or talented than others; but all, to the best of their ability with more or less laborious research, have, with most commendable diligence, endeavoured to discharge their duties faithfully to the public, and have done so with credit to themselves and to their profession, ever keeping in view the high honour and dignity of their office.

It is reported that all this cannot be said of their brethren to the east of us, though nothing is farther from our thoughts than to

insinuate aught against them as being anything but honorable and upright Judges. It is complained (at least we are so informed) that not only do they not write their judgments, but also very generally simply state the result of their deliberations, without giving the reasons on which their judgments are founded. The former practice, though not essential, is very useful and satisfactory, but without the latter the confidence of the Bar cannot be retained. The reckless conflict of decisions also sometimes leads counsel to suspect that a judgment has resulted, not from an anxious scrutiny and comparison of the authorities, but from thoughtlessly trusting to a crude notion of what might seem at first glance to be the proper adjustment of the disputed point.

The Review before us, conducted by some of the most fearless and best of the profession in the Province of Quebec, intends to try the effect of a little wholesome criticism in the hopes of remedying some of the defects of their Judges in the conduct of public business, so far, at least, as such conduct comes strictly within the bounds of proper public comment. But it is not alone in this respect that the Review will be useful, as will be seen by reference to its contents (which we shall now more particularly refer to), for the articles shew an intention to discuss fully and impartially the public questions which affect the Dominion.

La Revue Critique is published quarterly, each number containing about one hundred and twenty pages, much the same in shape and size as the English *Law Review*. The articles are written some in French and some in English, at the option of the contributor—and as to this we wish that they were all in English, since much is lost to many outside of the Province of Quebec which would be instructive and interesting to them, and we submit to the editors the propriety of taking a hint in this matter, if it is contemplated increasing the circulation of the Review beyond the limits of that Province.

The articles in the first number are—A Discussion of the Alabama Question; The Fishery Question; The Provincial Arbitration, wherein the Quebec view of the matter is strongly urged; My First Jury Trial; A Review of Mr. Kerr's work on "The Magistrates' Act of 1869;" a Summary of Decisions, &c.

The second number, just to hand, commences with an essay on the conflict of commercial jurisdictions, added to and altered from an article which appeared some time ago in this journal, headed "*Lex loci contractus—Lex fori*," from the pen of M. Girouard, a talented and rising member of the Quebec bar. The same gentleman also discusses in this number "Le droit constitutionel du Canada," and "The Joint High Commission." The Hon. E. T. Merrick, of New Orleans, contributes an article on the oft-quoted Laws of Louisiana; Mr. W. H. Kerr, who occupies a leading position at the bar in Montreal, writes about deeds of composition and discharge under the Insolvent Act; also about the Navigation of the River St. Lawrence, and has a few words—to be amplified, he says, hereafter—about the observations of the *American Law Review* on the Fishery Question, to which we alluded last month. A few useful hints are given to legislators by M. Racicot. The secretary of the committee of management then, in a few pages, gives, without note or comment, what cannot but be looked upon as a most curious picture of the state of the decisions in the Court of Appeal. Side by side are placed extracts from different judgments, the most conflicting and contradictory; not merely conflicts between different Courts and different Judges, but contrary opinions expressed by the same Judges at different times. If there is nothing in these cases which could, on a careful examination, reconcile such apparently opposite opinions, we can well fancy that the task of giving an opinion on a case submitted to counsel must be a much more hopeless task in the Province of Quebec than in any other civilised country that we are aware of.

La Revue Critique has arisen mainly from the alleged necessities of the case, and whilst fully endorsing the view so well established and acted on in England, that judicial opinions on matters brought before the Judges of the land in their public capacity, are open to free, but fair and respectful comment, we trust the editors may carefully keep within the due limits they have prescribed to themselves, and not weaken the moral force of the judicial office, whose claim to respect and confidence is somewhat different in a new country like this from what it is in England, and in many ways somewhat weaker, but which *must*, on the other hand, both in England and every other country, in the long run, lie in its own inherent excellence and integrity.