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DIARY FOR FEBRUARY.

2. SUNDAY..... *4th Sunday after Epiphany.*
3. Monday..... HILARY TERM commences.
4. Tuesday ..... Chancery Examination Term, Toronto, commences. Last day for Notice for Sandwich and Whitby.
7. Friday..... Paper Day, Q. B.
8. Saturday ..... Paper Day, C. P.
9. SUNDAY ..... *5th Sunday after Epiphany.*
10. Monday ..... Paper Day, Q. B.
11. Tuesday..... Paper Day, C. P. Last day for Notice of Chancery Examination Term, Chatham and Cobourg
12. Wednesday..... Paper Day, Q. B. Last day for service of writ County Court.
13. Thursday..... Paper Day, C. P.
15. Saturday..... HILARY TERM ends.
16. SUNDAY..... *Septuagesima.*
18. Tuesday ..... Chancery Examination Term Sandwich and Whitby commences Last day for Notice for London and Belleville.
22 Saturday..... Declare for County Court.
23. SUNDAY ..... *Sexagesima.*
25. Tuesday ..... Chancery Examination Term Chatham and Cobourg com.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

FEBRUARY, 1862.

NOTICE.

The attention of Subscribers is drawn to the fact that all desirous of saving One Dollar in the Subscription Money of the current volume must pay before the issue of our March number. The Subscription is only $4 if paid on or before 1st March in each year, but $5 otherwise. Subscribers in arrear are requested to settle without further delay. The amount due by each Subscriber may be ascertained upon reference to the cover of his paper.

PAYMENT OF CROWN WITNESSES.

Nothing more tends to the healthy administration of criminal justice than the hearty good-will and support of the people.

Whenever in the course of time a law is found to be opposed to public sentiment, it either becomes a dead letter or is expressly repealed by the representatives of the people in Parliament assembled.

So, when a law is by experience found to be ineffective, an effort should be made to amend it so as to meet the wants of the people.

Crown witnesses in Upper Canada receive no pay for loss of time—no compensation for necessary support. They are dragged from their homes to the assize town, at the risk of imprisonment, and compelled day after day at their own expense to await the pleasure of Crown officers and the convenience of the Court.

This is felt to be a grievous wrong. It is universally acknowledged to be so. Grand Jury after Grand Jury present it as such, and yet nothing is done.

The question arises, why should not something be done? Some say that the attendance on courts of justice to give evidence against criminals is a duty which every man owes to society. But is not every man in society as much interested in the suppression of crime as those who happen to be eye witnesses? Why should the circumstance that a man is accidentally the witness of a crime render it necessary for him, whether he can afford it or not, to give up much of his time and expend much of his money without any compensation from society? Is there any such principle established as this,—that all who are called upon to aid in the administration of the laws for the good of society shall do so without compensation from society? Quite the contrary. Are not jurors paid for loss of time and outlay? Are not judges, crown counsel, crown attorneys, clerks, criers, and bailiffs, all paid for their services? What is the difference between the duty which a man owes to society to serve as a juror, and that which he may happen to owe to serve as a witness? There is no solid difference. The obligation of the one is identical with the obligation of the other. And yet society compensates the one and does not the other. The truth is that whenever society requires any *special* service to be performed by one of its members, for the good of the whole, that service should be requited. This is the rule. We do not say that there can be no exception to it. But we do say that to make that exception in the case of crown witnesses is mischievous, unwise, and unjustifiable.

Crime is sometimes the attendant of want. The eye witnesses are frequently those of the humbler classes of society—those who can ill-afford to lose a day without its pay. All experience proves this, and it is especially true of crown witnesses in this colony. Often and often have we known the laborer or mechanic constrained to leave his family in want, we might say of its daily bread, in order to give evidence under recognizance many miles from his home. And this is not the worst of it. He finds himself in a city or town of strangers. He receives no hospitality from society or any of its members. He is obliged to pay for his bed and his board, perhaps in a town of small population, where the assize day is a long looked-for harvest to hotel and boarding-house keepers. All in attendance on the court are looked upon as fair game. They come only twice a year, and are accordingly plucked without compunction of conscience. The mechanic or laborer is earning nothing and at daily outlay, and all for the good of society!

True, if a man is prepared to swear he is a pauper, he

may under the present law of Upper Canada receive a pauper's allowance. But how many men are there, sturdy and healthy in daily employment if left at home, who would scorn the idea of branding themselves as paupers in any town or city? The remedy is worse than the disease. The law as it stands is well calculated to bring the blush to the cheek of many an honest man, and is worse in some instances than no law at all. It encourages deceit and fraud. It either compels a man to suffer the effects of straitened means, or to describe himself as a pauper when he is not one, and so cheat society of that which society should willingly give.

Then what is the general effect of such a state of the law? Men, instead of hastening to disclose what they know of crime, are deterred from so doing out of regard to themselves and families. When society, so far from rewarding them for such services, beggars them, the services are not likely to be performed. Men, instead of volunteering for the service, are much more likely under these circumstances to keep their peace or to hide themselves in holes and corners. In this way many scoundrels escape justice unwipt and society is with impunity outraged.

What is the remedy? We answer—a reasonable compensation to crown witnesses. The experiment is worth trying. The demand is not without precedent.

We are not of those who make invidious comparisons between Upper and Lower Canada for the sake of political capital, but on the present occasion must refer to the laws of Lower Canada as being much in advance of ours as regards the subject here discussed.

By an ordinance of Lower Canada, passed in 1839, it is enacted "that in the case of every person subpœned on behalf of the Crown, or bound by recognizance to give evidence in the Courts of King's Bench, Courts of Oyer and Terminer and General Gaol Delivery, and General Quarter Sessions of the Peace, touching any felony or misdemeanor, it shall and may be lawful for any of such courts, or for any judge or justice of any such court, in which any such person shall appear by virtue of any such subpœna or under any such recognizance, to give evidence as aforesaid, to order the sheriff for its district to pay out of the monies which shall and may be advanced to such sheriff as aforesaid for the purpose out of any unappropriated money in the hands of the Receiver General of the Province, by warrant of the Governor, Lieutenant Governor, or person administering the government thereof, to every such person, such sum of money as the court judge or justice thereof shall think reasonable, not exceeding the expenses he or she was *bona fide* put unto, making also a reasonable allowance for his and her trouble and loss of time; which sum the sheriff aforesaid, upon the production of the said order, shall respectively forthwith pay, and the same shall be allowed and sustained in the respective accounts of the said sheriff, any statute law or usage to the contrary notwithstanding." (Ord. Lower Canada, 2nd Vic. cap. 55.)

The laws of Lower Canada, as to the administration of criminal justice, are *said* to be the same as the laws of Upper Canada. Why are they not *in fact* the same? Why should this provision exist in regard to Lower Canada and not as to Upper Canada? If it is necessary there it is necessary here. Few are aware of the precise terms of the Lower Canada enactment. We have now published it, and hope that during the ensuing session of the Legislature some effort will be made to extend its operation to Upper Canada, or to pass a statute on the subject equally applicable to both sections of the province.

Some, perhaps will urge that such an enactment is likely to be abused. But is the probable abuse a valid argument against the reasonable use. Let any such enactment be surrounded by wholesome checks. The enactment of Lower Canada is not without checks. It expressly provides that "no such Court, Judge, or Justice, shall make any such order, unless the Attorney General, Solicitor General of the said Province, or other prosecuting officer on the part of the Crown, shall have certified upon the account made by such person for his or her trouble and loss of time as aforesaid that the charges therein contained are reasonable, and unless such person claiming the amount of charges stated in his or her account in the behalf aforesaid shall make affidavit before such Court, Judge, or Justice, that the said charges are true and correct, and that unless the same are paid he or she will sustain loss."

The checks against abuse are, therefore, two—first, the oath of the party receiving the money; secondly, the certificate of the Crown prosecutor. These, are also the checks we believe required in the case of pauper Crown witnesses in Upper Canada, and we have not heard of their being ineffectual. We have not heard of these checks being ineffectual either in Upper or Lower Canada. But if ineffectual, surely others can be devised. Experience will point out all that is necessary for the purpose. If a Parliamentary committee were appointed to make enquiry as to the working of the Lower Canada enactment, much useful information could be obtained and much good might be done.

What we complain of is the stolid inaction of the Provincial Government and Legislature in the matter. The evil is general and the mischief apparent to all concerned in the administration of criminal justice in this section of the Province. Not a Court passes but attention is drawn to the subject, and it is allowed to pass as the idle wind. We believe our Judges forward the presentments to the

Government, but there the matter drops, chilled and lifeless. Now, this should not be so. Governments are designed for the good of the people, and should not turn a deaf ear to their respectful requests.

One reason that the subject has been so long neglected is, that there is no unity of action on the part of those who desire the proposed amendment. If Sheriffs require a modification of the laws regulating their offices, they combine, and the end is attained. So with Clerks of the Peace, Crown Attorneys, and other public officers. Railway companies have not been an exception to this rule of conduct. Indeed, of late years, we fear that our Legislature has given too much consideration to Railway projects, and too little consideration to the social wants of the people.

We trust that on this occasion we call attention to the necessity for some provision for the payment of Crown witnesses for the last time. We are on the eve of a session of Parliament. That Parliament is a new one. It contains many members fresh from the body of the people, and emulous of distinction. The man who shall take up the subject of these remarks—stick to it—and push it through, will earn for himself well-merited distinction.

SELECTIONS.

ON FRAUDULENT TRADE MARKS

BY JOHN MORRIS, ESQ.

The Trade Marks Bill, which passed the House of Lords in the last session of parliament, was withdrawn by the President of the Board of Trade when it came into committee in the Commons, with notice that it would be re-introduced "the first thing next session, and referred to a select committee."

The object of this paper is to indicate some of the points to which attention will have to be directed in dealing with any bill to be hereafter introduced in lieu of that so recently withdrawn.

The late bill dealt with two very distinct offences—the first relating to fraudulent trade marks; the second to false labelling. At first sight the two may appear to be, if not identical, at all events intimately connected, but upon closer examination the principles applicable to each will be found to be widely different.

Trade marks refer wholly to ownership, or to that property which arises from manufactures. False labelling includes many cases in which no question of trade mark or peculiar ownership is involved; as, for instance, the false marking of goods as to *quantity* or *length*. For reasons which I shall afterwards explain I would limit the offence of false labelling to cases in which there is a false indication as to *quantity*, *length*, or the *name* of the manufacturer or owner.

Trade marks are not confined to the name of the manufacturer or owner, but extend, as we shall presently see, to the use of signs and marks of every conceivable kind, as to the right to use which there may be, and often are, disputed questions.

There can rarely be any dispute as to the right to use the name of the manufacturer or owner, where it is the name of a living person actually engaged in the production of the article; and, therefore, in such cases, I would put the name under the same protection as the quantity and length, because so far as the fraudulent use of the *name* is concerned (which will include most of the flagrant offences in this class of cases) you thereby get rid of many of the difficulties which arise as to trade marks.

The distinction between cases of false labelling and of trade marks is most important: the former is an offence against the public, and may, therefore, come under the head of the criminal law, while the latter partakes of the nature of a civil wrong; the former can be dealt with at once by legislation, but before the latter can be made the groundwork of criminal proceedings you must, by registration or otherwise, provide for settling preliminarily the two essential questions, what is a trade mark? and who, in any given case is entitled to its exclusive use?

Whether it will be wise to deal with both these subjects of false labelling and trade marks by one Bill may be open to question.

A trade mark is a species of private property, and there certainly seems no more reason why that should be protected by the criminal law than copyright, patents, or designs.

On the other hand, no one doubts the propriety of checking the false marking of goods as to lengths or quantity, or as to the name of the manufacturer or owner.

I will now proceed to examine in detail some of the provisions of the late bill; and first, as to false labelling:—Section 6 applied to cases where there should be "any false indication, statement or description of the quantity, quality, measure, substance, or material of such chattel or article or any part thereof, or of the manner or place in or at which, or of the person by whom, such chattel or article was made, manufactured, produced, or was, or is, dealt in."

The words "quality," "substance," "material," "manner or place," are (thus applied) all objectionable. They are not required to meet any admitted mischief, while they will give rise to all sorts of disputed questions, like the one now often raised—what is paper? Can carpets known as "Brussels" be sold under that designation when it is notorious they are not made at Brussels? What are "superfine," "firsts," "seconds," and all such terms applied to quality? Now, the mischief complained of is not that the public are misled by the use of any such terms as these, because as to them purchasers can and should exercise their own judgment; the real cause of complaint is, that the public are misled by misrepresentations as to quantity, length, and the name of the manufacturer or owner, as to which no skill or care on the part of a purchaser can protect him.

But even in those cases of false labelling to which I have said the criminal law might be properly applied, there is a clear distinction which should always be borne in mind between the case of the *maker* of goods so falsely marked and the *vendor*—the latter may innocently sell a reel of cotton marked 100 yards and containing only fifty; but the manufacturer cannot innocently make and mark it. It is impossible that the dealer can test the lengths and quantities of a large mass of articles dealt in, such as cotton, ribbons, lace, &c. Such articles are necessarily sold to the public in precisely the same state in which they leave the manufacturer's hands. Some protection, therefore, should be extended to the innocent vendor of falsely-labelled goods. This might be done by requiring proof of *knowledge and intent to defraud*, while in the case of the maker (the source of the mischief) less stringent provisions as to proof might be required.

A marked distinction is made by our law between the manufacturer and the dealer in the case of gold and silver wares having forged or counterfeited marks; such marks are *well known*, and if in any case the dealer ought to be held responsible for what he sells, it should be in that case,—yet, while the maker is liable to transportation, the dealer escapes

with a fine, and even that he can get off from by given up the name of the manufacturer. (See 7 & 8 Vic. ch. 22, ss. 3. 4.)

In order to protect the innocent vendee from vexatious charges under any Act to be passed, some provision should also be made for a preliminary notice before commencing proceedings, where the selling or exposing for sale complained of shall take place at the shop or warehouse of the alleged offender; the same being his usually known and established place of business. This will not, of course, prevent immediate proceedings in the case of those who have no settled place of business, and who would use any protection of this kind as a means of escaping altogether from the operation of the law; while, on the other hand, if some protection, such as is here suggested, be not thrown round the innocent vendor, traders will be liable to be dragged before magistrates by evil disposed persons, and it need scarcely be observed that the right to an acquital is not all the protection which is required. If a new class of cases like this is to be made subject to the criminal law, protection must be taken against its being abused, or the Act will become a nuisance instead of a benefit. Any protection of the kind suggested should provide for vendors being at liberty, on receiving the preliminary notice, to give up the name of the manufacturer or person from whom they purchased; and if the prosecutor should after this proceed against the vendor it should be at the risk of costs, if not also of a penalty in case he failed. This will protect innocent vendors, and at the same time facilitate the reaching of the real offenders—the manufacturers of the falsely labelled goods.

These remarks apply to false labelling. I now come to the trade marks portion of the late Bill.

By admitting that the fraudulent use of the *name* of the manufacturer or owner may be punished criminally, quite apart from any question of trade mark, much difficulty which would otherwise arise under this head is got rid of. The objections to this part of the late Bill cannot be better stated than in the words of a petition against the Bill from wholesale houses in Manchester, which alleged as follows:—

"That the said Bill defines a trade mark as including 'any *name, word, letter, mark, device, figure, sign, seal, stamp, label, or other thing lawfully used by any person to denote any chattel*; and makes the sale, or exposure for sale, 'of any chattel or article, together with any counterfeited trade mark, or any fraudulent addition to or alteration of a trade mark, or with any imitation of a trade mark so resembling such trade mark as to be likely to deceive; or with any trade mark, *whether the same be a genuine trade mark or not*, which shall have been applied without lawful authority or excuse, *the proof whereof shall lie on the party accused*,' a misdemeanor, and renders the guilty party liable to imprisonment for 'two years, with or without hard labour, or by fine or both, as the Court shall award.'

"That your petitioners deal in goods which are so variously marked that it is utterly impossible to ascertain, in most cases, whether any trade mark, or alleged trade mark, is interfered with, or even whether the mark is intended as a trade mark or not; and yet, at the instance of interested or malicious persons, your petitioners might be subjected to criminal proceedings, not only before the person claiming the trade mark has publicly established his right to use it, but, contrary to the principles of English law, with the proof of the non-infringment thrown upon the accused.

"That, in the opinion of your petitioners, no proceedings ought to be taken under this Bill until the person claiming an exclusive right to use any trade mark has publicly established and notified that right; and that the persons against whom criminal proceedings ought to be directed are those who are guilty of the overt act of fraudulently counterfeiting such mark, or falsely marking or labelling any article, and not the vendors of such articles, who may have purchased them in the ordinary course of business."

Even if the criminal law should be applied to trade marks generally, still the whole principle on which that part of the late bill was founded must be reconsidered in order to frame provisions which, while correcting the admitted mischief, shall not vex and harass trade.

The difficulties of registration I admit and have always seen. From the nature of the "marks," the number and complexity, it would be impossible, even with the aid of photography, to enable traders to be kept informed by means of an index of the registered marks, which would extend in number to thousands; but the difficulties in that direction would be lessened by requiring a preliminary notice of the trade mark claimed before making a party liable to criminal proceedings for infringing it. The idea of such a preliminary notice was suggested by the present Attorney-General, on the occasion of a deputation to the President of the Board of Trade on the subject of the late Bill. Such preliminary notice should contain a reference to the serial number in the register, and if the *right* to register be disputed, it would, of course, be open, to any party receiving the notice to take steps to question such right, as is now done in the case of copyright, &c.

This, and perhaps nothing but this, would afford protection against unfounded and malicious prosecutions in the case of trade marks.

It may be urged that any preliminary notice is inconsistent with a criminal offence. In answer I may draw attention to the fact that in Prussia, where there is no over sensitiveness about imprisonment, the vending of a forged trade mark is for the first offence punishable by fine only, and it is only *in case of repetition* that it is made liable to imprisonment. See Mr. Ryland's paper on "Trade Marks," p. 232, of the Transactions of the Social Science Association, 1859.

In France trade marks are, *by a recent law*, protected by registration; and the exclusive enjoyment of a mark thus established is limited to fifteen years, but it is renewable.

What is entitled to the protection of our law as a trade mark is a delicate and difficult question in disputed cases—so delicate and difficult that the Court of Chancery rarely ever grants an injunction until the legal right to the trade mark has been established by an action or issue at law.

As the law at present stands long *and exclusive* use is an essential condition to the establishment of a trade mark.

What construction would be put on the words, in the late Bill, "*lawfully used*," taken in connection with the words which followed in the interpretation clause, it is impossible to say. Taken literally several persons at the same time may *lawfully* use any given mark whilst none of them is entitled to the *exclusive* use of it.

It may be said that no one would venture to take criminal proceedings in cases of disputed right.

I am not so sure of this. It is easy to deter traders from dealing in particular goods merely on the *threat* of civil proceedings for an infringement of a patent. Still more will this be the case if the alleged offence be made a criminal one, against which no indemnity, as in a patent case, can protect them. A preliminary notice in such cases would (without registration or some other means of settling disputed rights) operate as a snare rather than a protection—it would legalise the threat of criminal proceedings which, from the small interest they may have in any particular case, would deter, parties from dealing in the goods in question, entirely apart from the question of right; so that the practical effect of the notice of threatened proceedings would, in such cases, be to put in the power of any particular manufacturer to get a monopoly to which he may not be legally entitled. Wholesale houses, dealing in thousands of different kinds of goods, will not run risks of civil, much less of criminal, proceedings, and into the *merits* of disputed questions of legal right *they* have neither time nor inclination to enter.

It has been said that magistrates will not grant summonses

against houses of high standing unless previously satisfied that there is a *primâ facie* a good case. To this doctrine I take entire exception. Houses, however high their standing, *ought to be* exposed to the equal operation of the law, and the remark, if it has any value at all, is a strong argument against this part of the late Bill; whereas if proper protection were inserted in the Bill against vexatious proceedings it would make the law all the more potent against the real offenders.

It has been said, again, that any one is exposed to be charged with stealing, say a pocket handkerchief, and it is argued that therefore traders should not complain of being liable to be charged even falsely with the offence in question; but there is no analogy between the two cases. A pocket handkerchief is tangible property and easily identified, whereas a trade mark is a claim rather than a right, and should itself be legally established before it is used for the purpose of a criminal prosecution.

First establish the right to a trade mark, and then the suggested analogy may apply, *but not before.*

Having said this much on the subject of applying the criminal law to trade mark cases generally, and the difficulties which arose thereon under the late Bill, I now suggest whether such cases ought not to be left to the civil courts.

In the discussion on Mr. Ryland's paper before referred to, Mr. Thomas Webster, the well-known patent lawyer, said that "the true remedy for the frauds complained of was to give *a copyright in trade marks.* He advised mercantile men to unite in obtaining an Act for this purpose rather than any criminal enactment." (See p. 270 of the Social Science Transactions, 1859).

The following is an extract from an opinion of Mr. Alfred Wills, of the Midland Circuit, on this part of the late Bill:—

"After all, however, the best corrective would be to turn the clause creating the *offence* of selling, &c., an article with a counterfeited stamp into one giving a *penal action*, such as is given in the case of patented articles by 5 & 6 Will. 4, ch. 83, s. 77, because then the party charged is a competent witness for himself, and in a case bordering so closely as this must often do either upon a mere civil infringement of right or upon a mere accident even the question of *intention* is all important. I remember very well a case tried at Warwick under that section, in which had it been framed upon the penal basis of clause 3 of the bill in question, two respectable men in a good way of business might have had a most narrow escape, if they would not have been convicted; but where their own evidence satisfied the Court, and everyone who heard them, that what was complained of had been done most innocently."

He afterwards wrote further thereon as follows:—

"When I mentioned the case tried at Warwick, in the remarks I wrote two days ago, I forgot to mention one of the most instructive parts of the case, which was, that the plaintiffs in that action had employed a firm in London to order from the defendants the goods stamped in the very way which they thought would bring them within the Act of Parliament, and having as they thought, caught them in a trap, they then sued them for penalties; and it turned out that the defendants were actually ignorant of the very existence of the patent of which they were charged with counterfeiting the designation."

If it still be thought that the criminal law shall be applied to check and punish flagrant offences, then I suggest that the first offence as to trade marks might be made liable to a penal action, and a repetition of it the subject of criminal punishment. This would assimilate our law to that of Prussia. In the penal action any disputed question of right could be tried and settled before any question of criminal liability could be raised.

In conclusion I would suggest—

1st. That false labelling as to quantity, length, or name of manufacturer or owner be punished criminally in the case of the maker, and that the vender be also criminally responsible if he sells or exposes for sale, *knowing of the false labelling and with intent to defraud.*

2nd. That the fraudulent use of trade marks, not coming under what I have defined as false labelling, shall be made liable to a penal action, and that if it be made subject to the criminal law at all, then that for the first offence it be made liable to a penal action, and for any repetition thereof, after judgment shall be recorded against the defendant in the penal action, it shall be subject to criminal punishment.

3rd. That proper provisions be made for conventions with foreign countries upon this subject.

DIVISION COURTS.

TO CORRESPONDENTS.

All Communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed to "The Editors of the Law Journal, Barrie Post Office

All other Communications are as hitherto to be "The Editors of the Law Journal. Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(*Continued from page* 14.)

CHAPTER IV.

Of the Officers.

THE COUNTY CROWN ATTORNEY.

The County Attorney (or local Crown Attorney) in each judicial district is appointed by the Governor, and holds office at the pleasure of the Crown (U. C. Consol. Stat. cap. 37), his fiscal duties as receiver of fee-fund monies being imposed upon him by chapter 20 of the Consolidated Statutes of U. C., and the 7th sub-section of section 1 of "the Local Crown Attornies' Act" requiring him to perform all such duties and services as the Governor by regulation in council may prescribe "for carrying out the provisions of any act imposing duties upon County Attorneys."

He is in some sort an officer of the Division Courts, being receiver of the fee fund monies collected by the several clerks, receiving and examining their periodical returns, and defraying the disbursements required on account of the Courts; of which receipts and disbursements he is required to render half yearly accounts to the Minister of Finance (U. C. Consol. Stats. cap. 20, secs. 1, 2, 3, 4); and in case of the resignation or removal of a clerk, and neglect to pay over monies remaining in his hands, in addition to any other proceedings, the County Attorney is authorised in his proper name, or by his name and description of office, to sue for and recover the same from such clerk and his sureties, with costs of suit, in any court of record having competent jurisdiction (U. C. Con. Stat. cap. 20, sec. 7); and so in the case of the death of any clerk while in office, he may in like manner proceed against the personal representatives of the deceased clerk (U. C. Consol. Stat. cap. 20, sec. 10).

It may be briefly observed in respect to accounts required to be rendered by clerks, that if not duly delivered to him after the usual quarter days, or, as allowed by order in Council, within the ten days thereafter, and the monies collected paid over, the County Attorney should promptly report the default to the Judge, as well as to the Minister of Finance, and, if occurring at the period when the half yearly accounts are to be made by him (U. C. Consol. Stats. cap. 20, sec. 3), he is not to delay rendering them because all the returns have not been delivered, for the act is imperative that the accounts shall be rendered to the Minister of Finance at the times stated, and the monies, if a surplus, paid over within ten days to the Receiver General.

The fee fund monies coming into his hands "shall by the County Attorney be applied to defray the *disbursements required on account* of the County and Division Courts," &c., as well as the Judge's salary and allowance (U. C. Consol. Stats. cap. 20, secs. 3 & 5). What would fall under the head of "disbursements required," &c., it is not easy to determine, nor does it appear that any general order in Council has been passed to define. The words no doubt are sufficiently large to embrace all the current expenses of the Courts, but the County Attorney would probably not feel justified in acting on the large construction suggested, without an order in Council or special directions from the Crown Law Department.

THE CLERK AND BAILIFF.

The chief operative part of the Division Court system is carried on by the Clerks and Bailiffs, and on their fitness, fidelity and activity, the advantage to the public from these courts must in a large measure depend. To this end no doubt it is made the duty of the Judge to appoint officers, that he in the exercise of his duty may by previous scrutiny ascertain their qualifications.

Sec. 31 of the Act provides that for every Division Court in a Judicial District there shall be a Clerk and one or more Bailiffs, and the right of appointing to the office of Clerk or Bailiff is vested in the senior or the acting Judge of the County Court of the particular county in which the courts are respectively situated (sec. 23). No qualification for the office of Clerk or Bailiff is prescribed by the act, so that the choice is discretionary, subject only to the following restrictions, viz., the *Clerk or Bailiff* must be a British subject (sec. 21); and no County Court clerk, practising barrister, or solicitor, shall be appointed *Clerk* (sec. 22).

But the Judge's right of appointment is subject to common law qualifications, that is, to the appointment of such persons as are qualified by common law; and no doubt also it would be subject to the law relating to the sale of offices, and forfeited by persons infringing its provisions.—(Mosley's Courts, 12-52.)

As a general rule, all persons of a sound mind are by common law capable of holding office; the only disqualification which need be referred to being want of skill and ability, and the holding of some other office incompatible therewith. Want of skill is either implied by law as in the case of women and infants, or is apparent in fact.—(*R.* v. *Stubbs*, 2 Term Rep. 406.)* Persons under the age of 21 years are presumed by law incapable of the skill necessary to the proper discharge of the duties of an office. Whether such presumption be arbitrary and conclusive need not be considered, for Clerks and Bailiffs are required to give security by executing a covenant, as well as a bond for the due performance of these duties, before they can enter thereupon (secs. 24, 25, 26, 27); which instruments minors have no capacity to execute, and so they are clearly disqualified from holding such office.

Skill and ability in fact is a matter for the determination of the Judge, with reference to the nature of the particular office. The Clerk ought to be a person of good education, having a fair acquaintance with book-keeping and the mode of transacting business in the country. The Bailiff should be able to read and write correctly, and have some knowledge of accounts, besides possessing the necessary bodily ability; and it need scarcely be added that probity should in every case be considered amongst the elements of fitness for office. In our mixed population, the knowledge of another language may be desirable, as there are many settlements of Gælic, French, or German speaking people, who know only their mother tongue, and to them at least it would be a greater advantage to be able to transact business directly with the officers of a court without an interpreter. All these are considerations for the Judge in the exercise of the important discretionary power of selecting Clerks and Bailiffs.

CORRESPONDENCE

To the Editors of the Law Journal.

IN THE 10TH DIVISION COURT OF THE UNITED COUNTIES OF YORK AND PEEL.

This was an action brought by a Mr. Wilkson, against William Elliott and John Howell, sureties for the late John Cool, bailiff of said division. The grounds of the action were as follows:—On the 13th of November, 1858, an execution was issued on behalf of said plaintiff, and placed in the hands of said bailiff for collection, and no return was made

* In respect to women it is said that the implication of law as to the want of due skill to exercise a ministerial office is not arbitrary, so as to utterly incapacitate them, but the Court will judge in its discretion whether an office be of such a nature as a woman can perform (*R.* v. *Stubbs*, 2 T. R. 406); but it is not at all probable that any woman in Upper Canada would be found sufficiently "*strong minded*" to take the opinion of a Judge as to her skill and ability for a Division Court officer.

till November, 1859, and returned no goods. On the 1st of December, 1858, Cool put in fresh sureties.

The defence to the action was, that the above defendants were not responsible, on the ground that their liability ceased before the time allowed for the return of the execution expired.

For the plaintiff it was urged that the defendants were liable, on the ground, that when the execution was put into his hands they were his sureties, and upon their responsibility he, the bailiff, was trusted with the execution.

Your opinion, in the next *Law Journal*, is asked, as to which of the sureties are responsible for the misconduct of the late bailiff.

Yours, &c., &c.,
A Subscriber.

[We assume from what is said, that the action was against the bailiff's sureties, under the 148th section of the act which provides, that "if any bailiff neglects to return any execution within three days after the return day thereof," an action may be maintained against the bailiff and his sureties. The right of action in the above cause would be complete, say on the 16th of December, (supposing it to be the third day after the return day of the execution) and his sureties then, were not the defendants. Could the bailiff be sued on the 1st of December? Certainly not—he was not then in default, and had till the 13th (the expiration of the writ, we assume,) to execute it and could have done so in fact.

We have no doubt that the defence urged will be held good, and that it is good in law. The defendants, in our judgment, are clearly not liable.—Eds. L. J.]

U. C. REPORTS.

QUEEN'S BENCH.

Reported by Christopher Robinson, Esq., *Barrister-at-Law.*

Reeves v. The Corporation of the City of Toronto.

Improper construction of drain—Liability of Corporation—Damages.

In the city of Toronto the corporation take upon themselves the construction of drains required to lead from the houses into the main sewers. The plaintiff gave notice in the usual way to the committee of the council forming the board of works, that he wished a drain made, and paid the sum demanded. The drain was constructed under the superintendence of the city engineer, by the contractors with the city, but so unskilfully made that it would not carry off the the water, and in times of flood the water and filth from the main sewer flowed back through the drain into the plaintiff's cellar, putting him to much inconvenience, which he had endured for several months without being able to obtain redress.

Held, that an action would lie against the corporation, and that $325 damages was not excessive.

Held also, that a by-law to authorize the making of the drain was unnecessary.

(T. T., 25 Vic., 1861.)

The plaintiff complained in his declaration, that his premises were flooded by means of a drain being unskilfully and improperly made by the defendants, and their officers, and servants, to lead the water from his dwelling house to the main sewer on Queen Street, stating various injuries arising from the alleged overflowing.

The complaint was, that the drain from the cellar was laid too low, so that the water from the sewer frequently flowed back by private drain into the plaintiff's cellar.

There were three counts. In the first, the plaintiff complained that the defendants wrongfully and improperly caused a drain to be dug and made from their main sewer upon Queen street into the plaintiff's cellar, which cellar was deeper than the sewer, whereby the foul water in the sewer flowed and was forced back through the drain into the plaintiff's cellar.

The second, charged in substance, that the plaintiff and other proprietors were allowed to have drains from their cellars to the main sewer, paying for the making of such drains, which were to be constructed under the direction of persons employed for that purpose by the defendants: that the plaintiff did pay for a drain from his cellar, which the defendants procured to be made, but which was so improperly made that the water ran through it from the public sewer into the plaintiff's cellar.

In a third the case was stated in a manner somewhat different but the same in substance and effect.

The defendants pleaded not guilty, and to the second and third counts they pleaded that the plaintiff did not pay for making his drain, as stated in those counts.

At the trial, at Toronto, before *Robinson*, C. J., it did not appear that the corporation had passed any by-law for the regulation of the manner in which private drains might be constructed for draining the houses and premises of proprietors, by drains opening into the main sewers; but there was, it appeared, a committee of the city council, forming a board of works, through which matters of that kind were managed, and it was proved that a system of proceeding had been established, which was generally understood and conformed to. When any party desired to have his premises drained by a ditch entering the main sewer, he applied to the board of works, and made his wish known, stating such particulars as would enable the proper officer to compute the cost of the drain. The proprietor then paid the amount required, of which a memorandum was given to him, and the corporation had the drain made under the inspection of the city engineer, by contractors who had undertaken to perform all such works for the corporation.

The plaintiff in this case made his application, and was referred to the secretary of the board of works. He was told that $19.59 was the sum he must pay, and on the 26th of March, 1860, he paid it to the city chamberlain, and obtained his receipt. The defendants then took their own course for making the drain, through their engineer, superintendent and contractors. The plaintiff's house, which he was building, and was desirous of having drained, was on Queen-street. The cellar, which he was excavating, was open to examination and inspection throughout.

A person employed by the city went to it, and placed a pipe in the wall of the cellar, which was to form the commencement of the drain, and then the city contractor went to work, and made a drain into the main sewer. The plaintiff found, when all was done, that the pipe was not only too high to take off the water from the cellar, but that the fall from the cellar wall to the surface of the water in the main sewer, which is a distance of forty-four feet, was so small—only an inch, or at most an inch and a half in the whole distance—that the drain did not carry off the water, and whenever, during heavy rains, the water rose in the main sewer, a great quantity of water and liquid filth from the sewer flowed out of the sewer by the private drain into the plaintiff's cellar, causing an intolerable nuisance and inconvenience, and interrupting his business of baker, to his great damage.

He represented this to the chairman of the board of works, to the city inspector, and to the engineer, complaining throughout the summer of the damage he was suffering. In November, 1860, after the premises had been inspected and examined, he petitioned formally for redress to the common council, and the petition was referred to the board of works who reported that the drain should be cut off and made good at the expense of the corporation, and that Mr. Reeves should be paid back the money received from him for making the insufficient drain. The city council, however, though they had the drain cut off, declined to refund the $19.59, and the plaintiff in consequence brought this action.

It was proved that the ordinary rule was to allow an inch fall, or more, in every twelve feet in such drains, according to which rule there should have been a fall of five inches instead of one, made in the plaintiff's drain.

The jury found a general verdict for the plaintiff, and $325 damages.

Cameron, Q.C., obtained a rule *nisi* for a new trial on the law and evidence, and for excessive damages. He cited Consol. Stats. U. C., ch. 54, sec. 297, sub-sec. 18; *Mayor &c., of Lyme Regis* v. *Henley*, 2 Cl. & F. 331; Grant on Corporations, 283, 284, note *f*. *Robert A. Harrison* showed cause and cited *Farrell* v. *The Mayor and Town Council of London*, 12 U. C. Q. B. 343; *Brown* v. *The Municipal Council of Sarnia*, 11 U. C. Q. B. 87; *Alston* v. *Grant*, 3 E. & B. 128; *McDonald* v. *Cameron*, 4 U. C. Q. B. 1; *Robertson* v. *Meyers*, 7 U. C. C. P. 423; Mayne on Damages, 347.

Robinson, C. J., delivered the judgment of the court.

The corporation would have done better to have paid the small sum which had been charged to the plaintiff, and received from him for making a drain, which was much worse than useless, and I have no doubt the jury thought that their conduct in the matter had been unreasonable. In declining to return the money they acted on the advice of their engineer, who it seems to us, took too rigid a view of the matter.

The corporation acts judiciously, we think, in insisting on having these drains made under the direction of their officers, and by their own workmen and contractors, instead of the private proprietors, for it would not do to allow all persons to break into the main sewer, and make drains at their discretion. Besides the inconvenience, the health of the community would suffer from such a course, for the nuisance occasioned by defective drainage may often give rise to a wide spread evil, injuring many more than the persons on whose premises the cause of the nuisance exists. It seems a necessary policy therefore in the corporation to keep the matter in their own hands, for the welfare of the community, and no doubt that is their only reason. But then, as they do for good reasons prevent proprietors from making the drains they require, and oblige them to have it done by the city engineer and contractors, it is manifestly just and necessary that the corporation should see that the thing is done as it ought to be.

No person can consider the evidence in this case, we think, without being satisfied that there was in this instance an entire want of that attention to the purpose which the drain was to answer, and to its perfect construction, which was necessary to the due performance of the work. In fact no one seemed to concern himself about it while it was going on, for the purpose of ascertaining whether it was being rightly made. All was left to the labourers, who declared they knew nothing themselves about the comparison of level between the sewer and the cellar, and had no instructions or information given to them about it. It was proved that there was a collection of sediment in the main sewer ten inches deep, and the water which flowed over that in times of flood from rains or melted snow, would so raise the level of the top of the water in the sewer that the water and stuff in it must be, as they were, thrown back into the cellar. The evil was in this case by no means trifling or imaginary, but was very serious.

An attempt was made to prove that the plaintiff brought the mischief on himself by digging his cellar too low, especially in the back part of it, and it was insisted that he should have taken care that he did not make the cellar so deep that the pipe which had been placed in the wall would be above the bottom of the cellar, and so would not carry off the water. But we cannot say that the jury did wrong in not holding the plaintiff responsible for the evils he complained of. The engineer, or some one employed by him, should have seen that the drain was not being blindly carried forward. All was open to inspection. If the back part of the cellar was a few inches lower than the front, and too low for the pitch of the sewer, the consequence of that would be that the water coming from the surface or from springs into that part of the cellar would not find its way into the sewer; but that circumstance could not account for the filth coming up from the sewer by the pipe which the defendant's engineer had inserted in the wall.

Those witnesses who were best able to judge, such as the acting City Engineer, Brunel, the Chairman of the Board of Works, the City Inspector and others, gave evidence which strongly supported the plaintiff's case, and shewed that no proper attention had been given to the work.

As to the damages, we are not sure that they were excessive. The plaintiff suffered much injury and inconvenience.

Then as to any legal question, it does not appear to us that the case affords room for any. There was no necessity that the defendants should pass a by-law on the subject, certainly not in regard to every small drain that was to be made, though it would seem right and proper that there should be a general by-law upon the subject, laying down a certain system of proceeding.

That the corporation did in fact, through their servants, make the drain complained of is plainly proved, and the question whether the work was badly done, and occasioned the damage complained of, was also clearly resolved by the evidence in favour of the plaintiff. What is complained of is negligence. The action is founded in tort, and it cannot be held that every complaint of that kind must be founded on some by-law, or must grow out of some act or contract under seal, and in that way binding upon the defendants.

The defendants do not deny by their pleas that they undertook to make this drain, and did make it; they only deny that they were guilty of negligence in their manner of doing it. That and a denial of the plaintiff having paid them the money they required, which it is certain he did pay, are the only defences they set up. That the defendants need not have made the drain unless they had chosen, is no defence that can be urged by them so long as it is admitted that they did make it, and exacted and received the charge they imposed for making it.

A case very lately decided in England, of *Cowley* v. *The Corporation of Sunderland*, to be found in the *Weekly Reporter* of the 8th of June of this year, page 668, is in point to shew that an action of this kind will lie against a corporation in consequence of their illegal or negligent conduct, though they may not have imposed any such duty upon themselves by a contract or resolution under their seal.

We refer also to the case in our own court of *Farrell* v. *The Corporation of London* (12 U. C. Q. B. 343).

We think this rule must be discharged.

Rule discharged.

PORTMAN v. PATTERSON.

County court—Title to land in question—Jurisdiction—Practice.

The declaration was for wrongfully converting to the defendant's use the plaintiff's goods and chattels, to wit, one dwelling house, with the doors and windows, &c., thereto belonging. Defendant pleaded that the goods were not the plaintiff's.

At the trial in the county court it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was whether the house in question was part of the freehold. A verdict having been rendered for the plaintiff was afterwards set aside, on the ground that the title to the land came in question, and that the case should have been stopped upon the plaintiff's evidence.

Held, that this was right, and the judgment below was affirmed.

M. T., 25 Vic., 1861.

Appeal from the County Court of Middlesex.

The declaration complained that defendant converted to his own use, and wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods and chattels—that is to say, one dwelling house, together with the doors, windows, and window frames thereto belonging. And that the defendant wrongfully detained from the plaintiff certain goods and chattels of the plaintiff: that is to say, one dwelling house, together with doors, windows, and window frames thereto belonging.

Defendant pleaded—1. Not guilty. 2. That the said goods and chattels were not, nor were any or either of them, the plaintiff's as alleged.

At the trial it appeared that the plaintiff claimed as assignee of a mortgage, which he proved, executed by one Scott, of the land on which stood the house in question, which he contended was a fixture, and therefore part of the freehold.

It was objected, among other things, that the title to land came in question, and therefore that the court was ousted of jurisdiction. The learned judge reserved leave to move for a nonsuit, and allowed the case to proceed, when the plaintiff obtained a verdict of £25.

A rule *nisi* having been obtained, in pursuance of the leave reserved or for a new trial, SMALL, Co. J., delivered the following judgment:

"Upon the authority of the cases cited, and particularly the able article in the *Law Journal* of 1860, page 145, and the cases there referred to, I am of opinion that the moment the question arose at the trial upon the evidence the court was ousted of jurisdiction, and that all that subsequently took place was null and void; and consequently that the verdict must be set aside, and the parties stand in relation to each other as they stood at the close of the plaintiff's case.

"The rule is therefore made absolute for setting aside the verdict without costs."

From this judgment the plaintiff appealed.

Robert A. Harrison, for the appellant. First. The title to land was not brought in question. The statute enacts that "The said

courts shall not have cognizance of any action where *title* to land is *brought in question*" (Consol. Stats. U. C., cap. 15, sec. 16). It has been held that the title must be *bonâ fide* in question, and it may be so either on the pleadings or evidence. Here the learned judge thought it was upon the evidence, but unless title to the land was an *ingredient* in the trial and material to the decision of the case, it did not come in question (*Morton* v. *The Grand Junction Canal Company*, 6 Weekly Reporter, 543). *Title* is not necessarily *in question* because the subject of dispute is a house claimed to be a freehold or part of a freehold. Here defendant did not *question* plaintiff's *title* to the freehold. The only dispute was whether the house *formed a part of the freehold*. This was a question as to which the county court had jurisdiction. Defendant did not dispute plaintiff's title to the land. His contention was, that admitting the freehold to be plaintiff's, the house sued for was no part of the freehold (*Eversfield* v. *Newman*, 4 C. B. N. S. 418).

Secondly. The house here was clearly part of the freehold as between vendor and vendee (*Bunnell* v. *Tupper*, 10 U. C. Q. B. 414; *Bald* v. *Hagar*, 9 U. C. C. P. 382); and if so, plaintiff had a right to follow it (*Harris* v. *Malloch*, 21 U. C. Q. B. 82). But if not part of the freehold, it still belonged to the plaintiff, for the mortgage under which he claims was not only of the land, but of all buildings, &c., thereon.

Thirdly.—Even if the title to land did come in question, the judgment in the court below cannot be supported, for the court was then ousted of jurisdiction, and had no power to make the rule appealed from (*Lowford* v. *Partridge*, 1 H & N. 622; *Powley* v. *Whitehead*, 16 U. C. Q. B. 589; *Campbell* v. *Davidson*, 19 U. C. Q. B. 222).

Burns, contra.—If the rule was a nullity, as seems to be contended on the other side, then there can be no appeal, and if there can be an appeal the judge had power to interfere, and set the proceedings right. He is the person to judge whether title to land came in question, and his decision on such a point is not the subject of an appeal (*Trainor* v. *Holcombe*, 7 U. C. Q. B. 548). If the article in the *Law Journal* referred to by the learned judge states the law correctly, his decision is certainly right. The only ground here on which the plaintiff claims this house is that it is part of the land, and if it be, then as the title to the house is in question the title to the land must be in question as well. The plaintiff can only succeed by proving his title to the land, which he does through a mortgage of the realty.

[Robinson, C. J.—Your argument amounts to this: that evidence could not be received to prove his title to the land, and that through such evidence he must derive his title to the house.] Yes! The moment the plaintiff began to prove his title to the house he had to prove title to the land, and then he was out of Court. [Robinson, C. J.—Suppose the plaintiff had chosen to set out his title to the house, that he was the owner of the land to which it was attached, and that defendant removed it, and defendant had pleaded that though the plaintiff owned the land, yet the house was not part of it. How would it have stood then?] There would then have been an admission on the record, which might have dispensed with plaintiff's proof of title, but there is nothing which could have that effect here (*Gooderham* v. *Denholm*, 18 U. C. Q. B. 203; *Carscallen* v. *Moodie*, 16 U. C. Q. B. 304; *Cleaver* v. *Culloden*, Ib. 582; *Gasco* v. *Marshall*, 7 U. C. Q. B. 193; *Walton* v. *Jarvis*, 14 U. C. Q. B. 640).

Robinson, C. J., delivered the judgment of the court.

The county courts have not jurisdiction where the title to land is brought in question. In this case the title to land was not, for all that appears on the record, brought in question by the pleadings. Then was it by the evidence upon the trial?

The plaintiff had never been in possession of the house, and his claim to it was as assignee of a mortgage (we assume in fee) on which the house had stood, being built on posts set in the ground, and not itself set in the ground.

We do not see the mortgage. The plaintiff as assignee of the mortgage had never entered; a great part of the mortgage had been paid, and the whole debt was not yet due. We infer, however, from the evidence that the mortgagor was in default, and if so, the plaintiff had a right to enter. Being in that position, he sees that the house in question had been taken off the premises and was being removed by a person to whom the mortgagor had sold it, as he swore, because he never meant to pay any more money on the mortgage.

The plaintiff naturally was inclined to oppose this as diminishing the value of his security, and so brought this action in the county court, the value of the building being small. Could he have his right tried in that court? Defendant pleaded that the house was not his.

So far as that might depend on the question whether it had been a fixture or not while it stood on the mortgaged land, that would be a question in one sense regarding title to land, for if a fixture it was part of the soil, and it could only be in that view that it could be the plaintiff's property. Then the plaintiff would have to show his title to the land in order to make out his title to the house, and the court would have to try and determine upon that right.

We think the learned judge rightly held that he had no jurisdiction, and so could take no proceeding in the cause after he saw that title to land was brought in question.

Appeal dismissed.

Standing v. The London Gas Company.

Contract—Corporation—Sub-contract—Liability.

One T. contracted with the defendants, a corporation, to construct certain work for them, and on the same day the plaintiff agreed with T. to do a portion of it for $900, subject to the same conditions which bound T. in his contract with the defendants, one of which was that 20 per cent. of the price should be retained until three months after completion of the work, and then paid upon the certificate of the manager that it had been performed to his satisfaction. T. on the same day by letter authorized defendants to pay the plaintiff for his work up to the amount of T.'s contract with him, and defendants in answer agreed to this, provided the plaintiff should carry out his contract with T., and perform his work to the satisfaction of the manager, on whose certificate alone any money should be paid. Defendants paid the plaintiff all but the 20 per cent. as the work progressed, but the manager refused to certify, complaining that it was improperly performed. It was proved, however, that he had verbally agreed to pay the men who had worked under the plaintiff $100, if they would discharge the Company. *Held* (reversing the judgment of the court below), that the plaintiff had no right of action against defendants, for there was no contract between them, and at all events they would not be liable without the manager's certificate.

(T. T., 25 Vic.)

Appeal from the County Court of Middlesex.

Action for work and materials, money had and received, account stated, &c.

Plea, never indebted.

The facts out of which this suit arose appeared to be as follows: one George Taylor, by contract entered into with the London Gas Company, dated the 20th of June, 1859, agreed to construct certain works for the defendants. By the contract the defendants covenanted to pay Taylor from time to time as the work progressed by semi-monthly payments eighty per cent. of the work performed, retaining twenty per cent. until three months after the completion of the contract, when the same was to be paid upon the certificate of the manager that the contract was fully executed and performed.

On the same day, 20th June, 1859, Taylor sub-let a portion of the work—namely, the construction of the tank and dry well for the gas works, to the plaintiff for the sum of $900. The plaintiff covenanted with Taylor to do the work precisely in the manner indicated in Taylor's contract with the company, the provisions of which contract were to be as binding on the plaintiff as if he was the original contractor with the company. Taylor covenanted with the plaintiff for payment as follows: "To pay him from time to time as the work progresses, by semi-monthly payments, say on the fifteenth and thirtieth days of July and August next, eighty per cent. of the work so performed, retaining twenty per cent. until three months after the completion of this contract, when the same is to be paid upon the certificate of the manager of the London Gas Company that this contract is fully executed, the puddle perfectly water-tight, and the whole work properly and satisfactorily performed."

On the same day, 20th of June, 1859, Taylor addressed a letter to the plaintiff in these words:

"With reference to our understanding relating to the payments mentioned in the contract entered into this day, for the excavation and puddling of the tank and dry well for the London Gas Company, I beg to say that I am willing, and I do hereby authorize

the company to pay into your hands at each time of payment the amount of each certificate you may be entitled to, to the full amount of your contract with me, above alluded to, amounting in all to ($900) nine hundred dollars, which the said company will charge to my account, and deduct the same out of my contract prices with them."

On the 30th of June the plaintiff enclosed the foregoing letter to the defendants, requesting their acceptance of it. The manager of the company, on the 28th of July, replied to the plaintiff as follows.

"Your letter of the 30th June last was duly received, enclosing Mr. George Taylor's letter to you, dated 20th of June, 1859, and requesting the company to accept its terms. In answer, I am instructed to inform you that the London Gas Company are willing to comply therewith, provided you fully comply with your agreement with Mr. Taylor, and strictly according to the plans, specifications and conditions which bind Mr. Taylor with this company; and on the express condition that your portion of works with Mr. Taylor be done to the satisfaction of the manager of the London Gas Company, on whose certificate alone shall any money be paid."

As the work progressed the defendants paid all of the $900, except $180, being the twenty per cent. to be retained, and which was to be paid upon the certificate of the manager, after the work was completed to his satisfaction. The manager never did certify and complained of the manner in which the work was done, and that it had sustained injury by the well not being properly puddled The defendants appeared to have settled with Taylor for all the other works contracted for, leaving this matter open.

The plaintiff gave verbal evidence by men who worked for him, and by other persons, that the manager of the company was willing to pay the men something, and would divide among the parties to whom the plaintiff was indebted as far as $100 would go, if they would discharge the company, but this seemed to have ended in nothing. The plaintiff brought this suit against the defendants seeking to make them his debtors for the balance due on his work $193, and obtained a verdict for $180.

A rule *nisi* obtained for a new trial was afterwards discharged.

The following extract from the judgment given in the court below, will show upon what grounds it proceeded:

"The question in my opinion was for the jury, whether the defendants accepted the plaintiff's work and labour in lieu of Taylor's under his contract, and if they did, did they do it without objection during its continuance, and not only use it ever since, but upon several occasions promised to pay. These being questions for the jury, and having by them been found to the plaintiff, ought I to disturb their verdict? I think, upon the authority of the case cited from 17 U. C. Q. B., *The Great Western R. W. Co.* v. *The Preston and Berlin R. W. Co.*, pages 486 and 488, where Robinson, C.J., remarks: "We may, however, take it to be clear that, in case the works for which the plaintiffs are seeking to recover was done upon the defendants' railway" (gas works) "at their request, and had been accepted and used by them, they would be bound to pay for it according to its value, notwithstanding the want of any undertaking by them under their corporate seal to pay for it."

And again he says: "We think the defendants should be held to have accepted the work and materials of the plaintiffs, when they saw and approved" (did not object) "of the work going on, and expected to derive profit from the use of it; and besides it is permanently upon their land." There is no doubt the verdict of the jury in this case was correct. The cases are so similar I can see no distinction, except that in the one the defendants were a railway company, and in the other a gas company.

From this judgment the defendants appealed.

Becher, Q.C., for the appellants, cited *Morgan* v. *Birnie*, 9 Bing. 672.

M. C. Cameron, contra, cited *Gross* v. *Bricker*, 18 U. C. Q. B. 410; *Cocking* v. *Ward*, 1 C. B. 868.

McLEAN, J.—It is quite clear that the defendants never assumed to pay the plaintiff for his work any thing except what Taylor would have been entitled to for that portion of the work, according to the terms of his contract, had he performed the whole of the work himself. The consent given by the manager in his letter of the 28th July, 1859, that the plaintiff might look to the gas company on the conditions stated therein, could not entitle the plaintiff to sue that company for work and labour, as if the work were being done for them, instead of under a contract with Taylor. I cannot understand how the plaintiff can be allowed to waive his contract with Taylor, and look to the defendants as if they were answerable for the work done under that contract, without a single condition contained in it being performed by the plaintiff.

If the learned judge told the jury that the plaintiff had made out no case in law, as stated in the motion for a new trial before him, I think he was quite right in so telling them: but I am quite at a loss, if he did so direct them, how he could also tell them that "they were to deal with the whole case upon the evidence as they thought right." Juries are too often in the habit of setting up their own ideas of right when they are told that no legal claim has been established against a defendant by the evidence; but it is the duty of the courts not to encourage that disposition, and to see that, as far as they can, the laws of the land shall be purely and correctly carried out. If the mere will of a jury were allowed to over-ride the law of the land, great danger of injustice and great uncertainty would be introduced into our courts, which would have a tendency to sap the foundations of justice altogether.

The witnesses who spoke of the offers to pay specific sums for the work as it had been done, did not, as the learned judge seems to suppose, establish an indebtedness or any admission of such indebtedness on the part of the defendants. They had a certain amount in their hands coming to Taylor, which they were authorized to pay to the plaintiff if he had fully completed his contract with Taylor, and produced the certificate of the manager of the gas company to that effect, but they were under no obligation to pay to the plaintiff; and even if the manager's certificate had been produced, they were not bound to pay to him as for work and labour done for them at their request. He is still bound to Taylor, and his surety also, if the contract with him has not been carried out according to its spirit. If it has, then Taylor is answerable to him for any balance due, but the defendants cannot on any ground be made liable in such an action for anything.

The fact of taking the work into their possession does not affect the matter; they were entitled to do so at the time appointed for the completion of the contracts, and were not bound to submit to injury by the failure of a man who, according to the testimony of one of the witnesses, was not a day sober while he was engaged in the work. The testimony shows that the work was not done according to the contract with Taylor, and that it was badly done, and under any circumstances there is not any ground whatever on which a verdict can be maintained against the defendants.

The judgment of the learned judge must be reversed, and the verdict set aside, and a new trial granted without costs.

BURNS, J.—What was the learned judge's charge to the jury we are not told by the appeal papers, further than this, that the rule to set aside the verdict and for a new trial, expresses that "the jury were told by the judge that the plaintiff had made out no case in law, and that they, the jury, were to deal with the whole case upon the evidence as they thought right." If such a direction as that were given, it could not be sustained; for if the plaintiff had made out no case in law to charge the defendants, the judge should have directed them to find a verdict for the defendants.

In giving his judgment on the application of the defendants for a new trial, the learned judge has based his opinion, in refusing the application, upon the case of *The Great Western Railway Company* v. *The Preston and Berlin Railway Company* (17 U. C. Q. B. 477). The case was one turning upon two questions; first, whether the plaintiffs were engaging in the construction of works *ultra vires*; and, secondly, whether the defendants were liable, not having entered into any contract under their corporate seal. In the present case the defendants did enter into a contract under their corporate seal with one Taylor, for the construction of the work, the remainder of the price of which is sought to be recovered in this action, and Taylor subcontracted the work to the plaintiff. The questions upon all that took place were, first, whether the defendants were at all liable to the plaintiff as debtors to him for the work done, and, secondly, whether the defendants had not a right to insist

upon the condition of the plaintiff having fully executed the contract to the satisfaction of the manager. The plaintiff expressly covenanted with Taylor to that effect; and the defendants, in their letter to the plaintiff, say they were willing to pay the plaintiff on the express condition that the plaintiff's portion of the works with Taylor should be done to the satisfaction of the manager, on whose certificate alone should any money be paid.

Neither of these questions seems to have engaged the attention of the learned judge, though urged upon him by the defendants' counsel. There should be a new trial, without costs. The judgment of the court below must therefore be reversed, and the cause remitted back with such direction.

THE CHIEF JUSTICE, having been absent during the argument, gave no judgment.

Appeal allowed.

REGINA v. POWELL.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions, is by writ of error, not by certiorari and *habeas corpus*.

(M. T., 25 Vic.)

The defendant was tried at the quarter sessions for the county of Middlesex, upon an indictment under Con. Stat. U. C. cap 91, sec. 8, and being convicted was sentenced to be imprisoned *for two years in the common gaol*

By statute, cap 99, Con. Stat. U. C. sec. 100, it is enacted that "whenever any offender is punishable by imprisonment, if it be for life, *or for two years, or any longer term, shall be in the Provincial Penitentiary.*"

The defendant, meaning to contend that the sentence passed upon him by the quarter sessions was illegal, moved for and obtained a writ of *habeas corpus* and a *certiorari* to remove the record; and upon their return *M. C. Cameron* moved for his discharge. He cited *Rex* v. *Ellis*, 5 B. & C. 395; *Leonard Watson's* case, 9 A. & E. 731; *Ex parte Lees*, 1 E. B. & E. 828.

R. A. Harrison showed cause, and cited *Rex* v. *Bourne*, 7 A. & E. 58; *Ex parte Newton*, 4 E. & B. 869; *In re Newton*, 16 C. B. 97; *In re Smith*, 3 H. & N. 227.

ROBINSON, C. J., delivered the judgment of the court.

The proper proceeding to reverse a judgment of the Court of Quarter Sessions is by writ of error, not by summary interference of this Court upon a return to a *certiorari*, as in cases of summary convictions, in which no writ of error will lie.

And if the prisoner shall bring error in this case, then, under the Con. Stat. U. C. cap 113, a proper sentence may be passed.

We must remand the prisoner to the proper custody in the meantime.

COMMON PLEAS.

Reported by E. C. JONES, Esq., *Barrister-at-Law.*

IN THE MATTER OF GEORGE MICHIE AND THE CORPORATION OF THE CITY OF TORONTO

Held—1st, That an ordinary lease, containing the words "and to pay taxes," covers a special rate created by a corporation by-law, as well as all other taxes.

2nd. A by-law should state a day on its face when it shall take effect, and should not require extrinsic evidence to be looked for to ascertain that fact.

3rd. The Municipal Institutions Act authorizes the clerk of the Council to "examine and finally determine" whether petitions are in conformity with the provisions of that Act; and a certificate being given by the clerk, the court has no power, except *in a case of fraud or mala fides*, to interfere.

In Easter term, *R. A. Harrison* obtained a rule calling on the Corporation of the City of Toronto to show cause why their by-law No. 292 should not be quashed, on the grounds: 1st, That the by-law does not name a day, in the financial year in which the same was passed, when it is to take effect. 2nd, That the debt created by the by-law is not made payable in twenty years at furthest from the day on which the by-law took effect. 3rd, That the debentures issued, or to be issued, under the by-law, are not made payable in twenty years at furthest from the day on which the by-law took effect. 4th, That the by-law is based on a petition of less than two-thirds in number, and one-third in value of real property directly benefited thereby, of the owners of such real property. 5th, That instead of being a petition of two-thirds in number, and one-half in value, of owners, it purports to be a petition of owners and occupiers, some of the latter not being owners, and many of the owners not being occupiers. 6th, That the by-law was passed without any previous notice having been, according to the by-law No. 292 of Corporation, left at the place of abode of the applicant, and other parties intended to be assessed for the contemplated improvements.

The by-law was produced. It was passed on the 8th August, 1859, and entitled "To provide for the construction of a stone side-walk on Yonge-street, and to levy a rate to defray the cost thereof." It recited a petition of certain persons and firms for the purpose, and that it had been ascertained as determined that the property comprised within certain fixed limits would be immediately benefited by the construction of the stone side-walk, and that the petitioners are two-thirds in number and one-half in value of the owners of real property to be directly benefitted, and that the value of the whole of the real property ratable under the by-law is $520.182; that the cost will be $6925.50, and amount required to be raised annually by separate rates to pay debt and interest is $761.80½. It further recites the rate to be imposed per lineal foot frontage on the real property directly benefited, and enacts—1. That the side-walk be constructed. 2. Imposes the special rate. 3. Authorizes raising the money by loan on debentures. 4. Directs that the debentures be made payable on the 1st of January, 1880, and the interest thereon half-yearly on the 1st of January and 1st of July. 5 Regulates the debentures as to place of payment, and directs expenditure of money raised, in constructing the side-walk. 6. Has no bearing on the points raised. 7. Ditto ditto. 8 That the by-law shall come into operation on the day it bears date.

Affidavits in support of the application were filed—1st, Of the relator, sworn 21st May, 1861, stating that to the best of his knowledge, recollection and belief, no notice was left at his place of abode or elsewhere for him, of the assessment made or proposed to be made by the by-law No. 292, or the amount thereof, or that such by-law would be passed; that he is one of the parties assessed under the by-law: that he was not aware of the by-law until some time after it was passed, and first became aware of the particulars of it, and of the proceedings on which it was based, when called on to pay taxes for last year (1860), which was the first year in which an assessment was made under the by-law; and that this was, to the best of his recollection, in February last, 1861; that he consulted counsel, and was advised it was illegal, but as it was too late to move against it last Hilary term, he was advised, in order to avoid a distress, to pay under protest, and to apply in the following term to quash the by-law; that he accordingly did pay under protest, and with the avowed intention of moving to quash the by-law.

Another affidavit of the relator stated, that the total number of assessed owners of real estate affected by the by-law were, as he believes, as ascertained by the city clerk, twenty-three; that to the petition on which the by-law is passed, there were subjoined the names of sixteen persons, setting them out; that out of the sixteen, eight persons were owners of real property affected; that the Bank of British North America and the Bank of Montreal were also owners, but neither their corporate name nor seal were set and subscribed to the petition, but their respective cashiers or managers signed in their own names; that the other six persons did not own the real property they occupied, which was affected by the by-law.

Another affidavit showed that by a by-law of the city, No. 12, passed on the 30th May, 1859, it is provided that the clerk should cause a notice to be left at the place of abode of each of the parties to be assessed; that such assessment had been made, and the amount thereof, and that a by-law in accordance therewith would be passed by the Council, unless appealed from, as provided by act of Parliament; that to the best of the deponent's recollection, no such notice was left at his residence or place of abode, or elsewhere, for him, though he was an occupant of property affected by the by-law, and was assessed thereunder.

Copies of two by-laws were also put in, providing for the assessment of property benefited by the local improvement, by which all petitions for such improvements, when received by the Council and referred to the city Board of Works, are to be examined by the clerk of the Council, who is to "examine and finally determine" whether such petitions are signed by

two-thirds in number, and one-half in value of the owners of the real property to be directly benefited thereby; and such petitions, when found to comply with the provisions of the statute 22 Vic. cap. 40, 1859, he shall among other things endorse thereon his certificate of the correctness thereof, and of the value of the whole of the real property ratable under the by-law. The city engineer is to make a report, showing what real property will be immediately benefited by the proposed improvements, and the proportions determined by him, in which the assessment to defray the cost is to be made on the various portions of the real estate so benefited, and the clerk is to cause a notice to be left at the place of abode of each of the parties to be assessed for such improvement, that the assessment has been made, and the amount thereof, and that a by-law in accordance therewith will be passed by the Council unless appealed from as provided by law.

Among the regulations of the city Board of Works is one that they will only recommend the construction of new works by special assessment, *when the petitioners represent two-thirds in number* of the proprietors in fee, and one-half of the assessed value of the property.

By the clerk's certificate, attached to the petition for this improvement, it is stated that the total number of persons assessed for property to be directly benefited by this improvement was twenty-three; that sixteen names were signed to the petition; that the total value of the assessed property was $520,182; that the amount represented by the signers of the petition was $413,496, leaving unrepresented $106,686. The petition began thus: "The petition of the undersigned, being owners and occupants of property," &c All these words were printed except "and occupants," which were interlined in writing.

In Trinity term, *J. H. Cameron, Q.C.*, showed cause. He contended the relator could not go behind the petition and by-law; that the day of the passing of the by-law was a sufficient naming of a day for the by-law to take effect. He showed by affidavits that the debentures were in fact made payable within twenty years, and gave up the 4th section of the by-law moved against, which might be quashed, though the residue stood. He insisted that the relator was only an occupant (a counterpart of the lease to him being by consent put in), and that his lease only subjected him to pay rent and taxes in terms which do not apply to a special rate and if so, as the relator showed no other interest, he was not a person authorized to move against the by law.

Harrison admitted that if the last objection was sustainable, the case was out of court.

Cameron filed affidavits: 1. From the Chamberlain of the city, stating that all debentures issued by the city were drawn up under his direction, and that all those issued under the by-law in question were made payable within twenty years from the date thereof, being dated on the 16th August, 1859, and made payable on the 1st July, 1879. 2. From the assistant clerk of the Council, proving a copy produced of so much of the assessment roll of 1859 as refers to the stone side-walk in question, as that roll was finally passed by the court of revision for the year; that the roll is the only means whereby the officers of the Corporation can make the necessary computation as to the number of owners of real property to be benefited by any improvement petitioned for, and the value of such real property That according to the roll, the petition in question was signed by more than two-thirds in number and one-half in value of real property directly benefitted thereby, of the owners of such real property; that he made the calculation, and believes the same to be correct, and made the necessary certificate, which was signed by the clerk of the Council; that on the 2nd August, 1859, he filled up and addressed to each of the persons named in the seventh column of the assessment roll, under the head "owners and address," a notice of the application for the improvement, and the intention to pass the necessary by-law for that purpose (annexing a copy), and gave such notices to the messenger of the Corporation to be forwarded to such parties. In this roll the relator's name is entered in the first column as occupant, and in the seventh column, J. L Robinson as owner, and the name of Mr. R. Gilmor, who made an affidavit in support of this application, appears in the first column. "Gilmour & Alfred Coulson," as occupants, and John Crawford in the 7th column, as owner 3. Roddy, the messenger, made affidavit that all notices given to him by the assistant clerk to be forwarded, were either delivered by him to such persons personally, or left at their places of abode, or put in the post office, and he believes the notices referred to in the foregoing affidavits of the assistant clerk, were placed in the post-office in Toronto, on the day they were delivered to him.

The lease put in was from James Lukin Robinson to George Michie and Thomas Kay, dated 24th April, 1857, made in pursuance of the act to facilitate the leasing of lands and tenements.

Habendum for five years, with a covenant by the lessees among other things to pay rent "and to pay taxes."

DRAPER, C. J —I am of opinion their is no weight in the objection as to the effect of the covenant to pay taxes. The statute in giving the enlarged sense of the limited expression extends it to all taxes, rates, duties, and assessments whatsoever, whether municipal, parliamentary, or otherwise, charged or to be charged upon the demised premises, or upon the lessor on account thereof. We must therefore treat the relator as a person having an interest in the by-law.

As to the first objection, I have felt a good deal of doubt whether the legislature did not intend that in the body of every by-law shall be stated a day upon which it is to take effect. The date on which the by-law is passed does not necessarily form a part thereof, though it may be the practice for some officer of the corporation to mark the day of its passing thereupon. And I think the legislature meant that it should not be necessary to refer to any thing extrinsic to the by-law for the purpose of learning when it would or had come into operation. The purchaser of a debenture, for instance, would require to see that it and the by-law under which it was issued were legal, and might on that account require to see when the by-law took effect The third objection is answered by the affidavits in reply, the debentures are made payable within twenty years from the day the by-law was passed, on which day it took effect.

I think the fourth objection that the petition on which the by-law is based, was not signed by three-fourths in number and one-half in value of the owners of the real property to be benefited, cannot be entertained by us The Municipal Institutions Act, section 300 expressly provides that the number of the owners and the value of the real property is to be ascertained and "finally determined" in the manner and by the means provided by by-law. There is a by-law for that purpose, under which the clerk of the city council has acted. It is not objected that he acted corruptly and fraudulently, and though, as I gather from the unanswered statements in the relator's affidavits, the city clerk has fallen into error, an error easily accounted for, as his conclusions were drawn from the assessment roll only, yet I think we cannot on that account annul the whole proceeding.

The 191 section of the act plainly contemplates that this objection should be heard and disposed of by the Council of the city before the by-law is passed.

I am not to be understood as determining that he should have confined his enquiry to the assessment roll, when he was required to ascertain and finally determine the matter of number and value, but I think that having acted as we must assume, *bona fide*, the legislature intended his determination to be final, as the foundation for the by-law authorising the improvement and imposing the special rate. The fifth objection involves the same consideration.

The sixth objection is sustained in fact as I understand the statements. But the provision requiring notice of the intention to pass the by-law to be given or sent to parties affected by it, is not statutory, nor is the validity of the by-law made dependent on provisions contained only in by-laws. And although the relator states in his affidavit that he had no notice of the by-law "until some time after it was passed," and that he first became aware of the particulars of it, and of the proceedings on which it was based in February last, yet it is difficult to suppose that he was not aware long before that date, that the stone sidewalk was being laid down, or that the work was of that character which was usually paid for by special local rate. This was enough to put any one on enquiry. Then he seems from his own expression to have become aware of the by-law some time before he became aware of its precise contents, but the knowledge of the first was

notice of the second, and he might then have learned everything necessary to support a much earlier application to quash the by-law.

There remains only the second objection, which is pointed at the fourth section of the by-law, and this section has been abandoned on the argument as illegal. To this extent therefore the by-law must be quashed, and the question is whether the residue can be supported without it. I do not perceive that the statute makes it indispensable that the by-law should name the day on which either the debentures or the interest thereupon should become payable. The third section of the by-law distinctly authorises the raising the money by loan on debentures. It appears that the debentures themselves were issued in conformity to the statute, not in compliance with this illegal provision in the by-law. The other portions of the by-law are independent of the fourth section. And it would have been, as I think, a legal and effectual by-law if this fourth clause had not been introduced. We may, I think, lop off this rotten limb, and leave the tree to which it was attached in full vitality. It is unnecessary to its existence, and to its bearing the fruit it was intended to produce. To drop metaphor, it appears to me the defect is confined to the fourth section, and does not vitiate the rest: the fourth section must be quashed.

Upon the whole, though leaning in favor of the first objection which strikes at the whole by-law, yet when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we ought, as a matter of discretion, if we possess such discretion, rather to discharge than to make absolute this rule. It is true, a distinction has been well taken between objections extrinsic to the by-law, and such as appear on the face of it, as to the duty of the court on applications to quash; and this objection is not extrinsic, but the Consol. Stat. U. C., ch. 2, sec. 18, subs. 2, enables us to treat the word *may* "as permissive," not mandatory, and the 195 section of the municipal institution act says the court *may* quash a by-law in whole or in part for illegality. Treating the expression as conferring an authority, with a discretion to abstain from its exercise, I think this a fitting occasion to exercise that discretion.

I think, therefore, the rule should be made absolute to quash the fourth section of the by-law, and should be discharged as to the residue, without costs on either side.

Per cur.— Rule discharged.

SNARR v. BALDWIN ET AL.

Lease—Covenant for quiet enjoyment—Breach of, under superior authority not existing at execution of lease—How far lessor liable.

By letters patent, bearing date in the year 1840, certain lands situate on the water's edge in the city of Toronto, were granted to one "A.," the patent containing a condition for the erection of an esplanade according to a certain plan, within three years from the date thereof.

A., by indenture demised the said lands to plaintiff, with full covenants against all the world.

In 1853 the stat 16 Vic cap 219, enacted, that unless the owners and lessees should, within twelve months, erect the esplanade, the corporation of the city of Toronto should do it and impose a special rate to defray the expense thereof; and by stat. 20 Vic cap. 80 further powers were granted to the corporation with respect to the erection of the esplanade, among others to enter upon the water-lots, &c.

Under the above mentioned statutes the corporation, by their agents, entered upon the premises in question, and by filling up the space between the water's edge and the esplanade prevented the working of the plaintiff's mill, which was the damage complained of in this suit. *Held* that the act of the corporation being done under superior authority (the legislature) although the statute did not exist at the time of the execution of the lease, yet as the breach of covenant did not arise from the neglect, fraud or procurement of the lessor, but from the nonfulfilment by the lessee of his own covenants, the defendants were entitled to succeed.

The declaration set out a lease of certain premises in the city of Toronto, being a water lot, made by one Margaret Phœbe Baldwin to one John Mulholland. The plaintiff shewed the term (of 42 years from 1st November, 1844) to be vested in himself by assignments, and stated that all the estate and interests of the lessor became legally vested in the Hon. Robert Baldwin, that he died, and that the defendants are his executors, and set out a covenant in the lease for quiet enjoyment by the lessee, his executors and assigns, without the lawful let, suit, hindrance, denial, ouster, eviction, ejection or interruption of the lessor, her heirs or assigns, or any other person or persons whomsoever, having or lawfully claiming any estate, right, title, interest or demand of, in, or to the demised premises, by or through her or them, or by or through her or their acts, measures, consents, default, neglect, or procurement, or by, from or through any other person or persons whomsoever. Breach, that after plaintiff became assignee of the term, and possessed of the premises, and while the reversion was vested in Robert Baldwin, and in his lifetime, and during the term, the corporation of the city of Toronto had the lawful right and title (not derived under Mulholland, &c) to enter and to grant to others the right of entry upon the demised premises, and to retain possession and to disturb plaintiff in the enjoyment thereof; and afterwards and while plaintiff was possessed, the Grand Trunk Railway Company, and other persons, having lawful right from and under the corporation of the city of Toronto, (not derived under Mulholland, &c) and having full, just and perfect right to enter into the possession of the demised premises, by and with the consent and approbation of Robert Baldwin, in his life time, did enter and did rightfully put out the plaintiff from possession, and disturb and interrupt him in the enjoyment of the demised premises, and being in such possession the Grand Trunk Railway Company and other persons claiming title, and acting under the city corporation, and with the consent of the said Robert Baldwin, did fill up with earth the water-lot from the water's edge southwards to the northern limit of an esplanade, of 100 feet wide, built along the bay at the southern limit of the water-lot, and thereby, &c, stating the injury inflicted upon the plaintiff, and the damage.

Demurrer.—1. Because it is not shewn that the corporation of the city of Toronto claimed the alleged right, through Margaret Phœbe Baldwin, her heirs or assigns, or by her or their acts, consent, &c 2. That it is not shewn that such alleged right accrued before the making of the covenant. 3. That it is not shewn by what right the corporation, or the railway, or the other persons claiming under the corporation, entered.

Pleas — 1. That the entry, eviction, &c., in the breaches charged, were not occasioned by reason of any matter or thing contained in the covenant. 3. That Mulholland, in the said indenture of lease, covenanted, that he, his executors, administrators or assigns, should within the time, and in the manner appointed by provincial, municipal or other competent authority, at their own cost, erect, build, &c, all such buildings, matters or things on the demised premises, or in the immediate neighbourhood thereof, according to the provisions contained in certain letters patent from the crown, dated 21st February, 1840, granting, amongst other things, certain lands adjoining to the demised premises, to the city of Toronto, upon certain trusts, were or might be necessary to be erected on behalf of the said Margaret Phœbe Baldwin, her heirs or assigns, as proprietors of the demised premises, so as to entitle her or them to a conveyance of the said adjoining lands from the corporation of Toronto, according to the provisions of the letters patent. That by the letters patent, and by force of the statute 16 Vic. cap. 219, it became necessary, on behalf of the said Robert Baldwin, as proprietor of the demised premises, and in respect of the same, to entitle him to a conveyance of the adjoining pieces of land, as in the covenant mentioned, to build in front of and upon the demised premises, an esplanade, within twelve months from the 1st of January, 1853, and plaintiff did not build the same at any time, wherefore, and by authority of the said statute, and also by authority of the statute 20 Vic. cap. 80, the corporation of Toronto and the Grand Trunk Railway Company, and the said other persons for the purposes in the said acts authorized, entered upon the premises, and did the several acts in the said breach charged.

2nd Replication to 3rd plea, that, according to the provisions of the said letters patent, it was not necessary in order to entitle the said Margaret Phœbe Baldwin, or the said Robert Baldwin, as her assignee and proprietor of the demised premises, to erect, build, &c., any buildings, works, matters or things, either on the demised premises or in the immediate neighborhood thereof, but that by the letters patent the said adjoining lands, with other lands, were granted to the corporation of Toronto, in trust, to convey the same to the owners of the demised premises, subject to a charge thereon binding the lands; that the proprietors of the

demised premises and adjoining lands would build the esplanade across the lands referred to in the third plea; that according to the letters patent, the building the esplanade was not a condition precedent to the conveyance by the corporation of the adjoining lands, but it was the duty of the corporation at once to convey the same without any erections, &c., being first made.

3rd Replication to 3rd plea, that according to the provisions of the said letters patent, and of the stat. 16 Vic. cap. 219, it became necessary on behalf of the said Robert Baldwin, as assignee of the said Margaret Phœbe Baldwin, as proprietor of the demised premises, and in respect of the same, so as to entitle him to a conveyance of the adjoining piece of land, that an esplanade of only 100 feet in width should be built in front of and across a small portion of the south end of the demised premises, and across land covered with water to the south thereof, and that no other erection, &c., was necessary according to the conditions of the said letters patent; that the building the esplanade according to the letters patent would not and did not disturb, &c., plaintiff in the quiet possession of that portion of the demised premises in the declaration specified, and that it was not necessary in the construction of such esplanade to do the several acts in the breach charged, but that the breaches of covenant complained of were on account of the rightful disturbance, against plaintiff's consent, by the Grand Trunk Railway Company and others, lawfully claiming and having title by and under the corporation of Toronto, of the plaintiff's quiet enjoyment of that portion of the demised premises extending from the northern side of the esplanade up to the water's edge, and not including the esplanade, and were other and different breaches and wrongs than those justified in the third plea.

Demurrer to first plea, because it neither denies, nor confesses and avoids the specific breaches charged. That the declaration does not allege that the breaches were occasioned by any thing in the covenant of Margaret Phœbe Baldwin, but that they were in contravention of that covenant. That the plea admits the facts stated in the breach, and only traverses the legal effect of them, and that the facts admitted were matters and things contrary to the covenant of Margaret Phœbe Baldwin.

Demurrer to the third plea.—Plea no answer, for the breach complained of is not the construction of the esplanade, but the entry by the Grand Trunk Railway Company and others, having lawful title under the corporation of Toronto (not derived under Mulholland, &c.,) upon the demised premises, and filling up a part other than that covered by the esplanade, with earth, and disturbing plaintiff in the enjoyment thereof; that it is not shewn that in the construction of the esplanade it was necessary to do the acts complained of, and it appears that the esplanade was erected before the disturbance complained of in the declaration; that the covenant declared on, and the covenant of Mulholland, pleaded, are independent covenants; that the justification attempted to be set up does not apply or refer to the breaches alleged.

Rejoinder.—Demurrer to 2nd replication to third plea, because it does not answer the plea; because the plea justifies not only under the covenant, but also under the statutes, in the plea mentioned.

Demurrer to 3rd replication to 3rd plea, that the replication only answers so much of the 3rd plea as justifies under the covenant of the lessee, and the stat 16 Vic., but leaves unanswered the justification under the stat. 20 ic , that the replication admits the justification as to that part of the premises included in the esplanade, to which part only the replication applies.

Joinder in demurrer.

Harrison for plaintiff.—The covenant is in the most general terms against the acts of every person lawfully claiming any right or interest in the premises.

It is unnecessary that the right of the corporation of Toronto to enter should be shewn, (*Foster* v. *Pierson* 4 T. R. 617, *Hodgson* v. *E. I. Company*, 8 T. R. 278); nor need it be shewn that such right existed when the lessor entered into the covenant. (*Buckley* v. *Williams*, 3 Jur. 325; *Skinner* v. *Kilbys*, 1 Show. 70; *Wotton* v. *Hele*, 2 Saund. 181, note 10; *Jordan* v. *Twells*, Cases Temp Hardw. 172; *Brooks* v. *Humphreys*, 5 Bing. N. C. 55.) The declaration shows that the Grand Trunk Railway, and other persons, entered by authority of the corporation of Toronto, and their title is sufficiently shewn.

The first plea contains no answer to the declaration; it only alleges that the eviction, &c , were not occasioned or suffered by reason of any thing in the covenant of Margaret Phœbe Baldwin contained. Granted that it it so, yet the covenant which is for quiet enjoyment, against the acts of all persons, is broken by what is charged, and so the plea is no answer.

As to the 3rd plea, in *Lyman* v. *Snarr*, 9 U.C C.P. 101, the court held that this plaintiff, who was lessee of Lyman, was bound to pay rent according to his covenant, although he pleaded that the city of Toronto had, under the 20 Vic. cap. 8, filled up the water lot leased with earth. (*Shaw* v. *Stenton*, 2 H. & N. 858; *Paschell* v. *Scott*, 15 C. B. 69) See *Hale* v. *Rawson*, 4 C. B. N.S. 85; *Schilizzi* v. *Derry*, 4 E. & B. 873, which shew only that when a man engages to do a particular act, unless prevented by specified exceptions, the temporary existence of the prevention does not discharge him from his engagement. Then the power to build the esplanade does not include the filling in the rest of the land; and the two statutes, or the later one, 20 Vic. cap. 80, sec. 5, makes the filling in a charge on the lands, not on the occupants.

A. Wilson, Q C, contra, contended that as the plaintiff, in the third replication to the third plea, restricted his claim to the filling up the lot between the northern boundary and the esplanade, such restriction was in effect a discontinuance. He argued that it was not enough to aver that the corporation of the city had lawful title, not derived from the plaintiff, *i. e.*, a lawful title shewn to have been created before the lease to the plaintiff; but it is not averred the title was derived from defendant. (2 Saund 180, n. 10)

Plaintiff, as assignee of Mulholland, was bound to erect the esplanade within a year after the passing of 16 Vic. Owing to his not fulfilling this covenant, in the lease of which he was assignee, the provisions of 20 Vic. became applicable, and afford a justification to the corporation to do or authorize to be done the acts complained of. The plaintiff asserts that certain things were not necessary under the letters patent, but how can the court judge of them when they are not set out? The first plea, perhaps, cannot be entertained, but the third is good. The principal point is, whether under a general covenant for quiet enjoyment like the present, there being nothing in existence then inconsistent with the conveyance to the covenantee, a matter subsequently originating, which causes disturbance to plaintiff, gives him a right of action against the covenantor. (*Reid* v. *Hoskins*, 4 E & B. 979; *Melville* v. *De Wolf*, 4 E. & B. 844; Rawle on Covts. 187, 188; *Dudley* v. *Folliott*, 3 T. R. 584)

C. Patterson on the same side.

DRAPER, C. J.—The principal question is, whether the third plea answers the breach of covenant charged in the declaration. Considering the two statutes relied upon by that plea, and so much of the letters patent as the plea and those statutes set forth, it appears to me the corporation of Toronto had lawful right to enter on the demised premises, and to authorize others to enter and do the acts charged as constituting the breach of covenant, and the plaintiff himself asserts, and the defendants do not deny, that such lawful right existed. The right to enter and make the esplanade, and the right to enter upon and fill up the water-lot, rest upon distinct grounds, the one precedes, the other is created after the execution of the lease set forth in the declaration, and the alleged breach of covenant is declared in the replication to the third plea, to consist in the exercise of this later right.

And it could not well be otherwise when we observe that according to the letters patent as set out in the preamble to the 16 Vic. cap 219, the erection of the esplanade in front of the water-lot, would entitle the owner thereof to a conveyance of an extension of the water-lot, as described in a map annexed to the letters patent, and also to a conveyance of other land specified. Margaret Phœbe Baldwin, as such owner, leased to Mulholland under whom the plaintiff derives his title, and Mulholland covenanted to build the esplanade; but according to the letters patent the esplanade should have been erected within three years from February, 1840. But no esplanade was even begun in 1853, when the statute 16 Vic. enacted, that unless the owners or lessees of the different water-lots should, within twelve months, erect that portion of the espla-

made fronting upon or crossing their respective premises, the corporation of Toronto should do it, and that corporation was empowered to impose a special rate to defray the expense of such erection by that body.

In 1857, the act 20 Vic. cap. 80, was passed, which recites that under the former act the corporation of Toronto had contracted with the Grand Trunk Railway Company to build an esplanade in front of the city, and that it had become necessary *to grant further and other powers* to the corporation to enable them to complete the esplanade according to the contract, and certain other work connected therewith; and in addition to authorizing the construction of the esplanade, and the entry upon all lands and water-lots and the crossing all wharves, docks, piers and premises lying within the limits of the esplanade, this act further empowered the corporation to contract for filling the whole space between the northern limit of the esplanade and the shore of the bay of Toronto, and for that purpose to enter into and upon all water-lots, &c. The expense of filling up, &c., was to be repaid to the corporation by the owners or other persons having estates in the land on which the grading, levelling and filling in shall be done.

The alleged breach of covenant, therefore, appears to consist in this—that the legislature, after the lease to Mulholland, who had not erected the esplanade in front of the demised premises according to his covenant, conferred powers on the corporation of Toronto to interfere with the private rights both of lessor and lessee, and their respective assignees; that the corporation exercised this right, and thereby disturbed the plaintiff in the quiet enjoyment of the water-lot. That the act of the corporation was lawful, being done under an *authority* paramount to the lessor, though exercised after the making the lease; and that this is analogous to an entry by *title* paramount, and therefore the defendants as executors of Robert Baldwin, in whose lifetime and possession of the reversion these acts were done, are liable to the plaintiff.

The declaration expressly negatives that the corporation of Toronto derived their title by, through or under the lessee or any subsequent assignee, and is not, therefore, open to the objection that it was matter of doubt whether the corporation did not derive their title in that manner. (See *Noble* v. *King*, 1 H. Bl. 85; *Brookes* v. *Humphreys*, 5 Bing. N. C. 57.) But the plea discloses what the title of the corporation was—shews that it is derived from the exercise of a superior authority, not from a prior or paramount title, and that it accrued after the lease to Mulholland was executed. It asserts in fact that the disturbance of plaintiff's possession was under the authority of the two statutes, and especially of the latter, and thus confesses the disturbance, but seeks to avoid the breach of covenant charged. And if the law be, as I understand it, from the case of *Wotton* v. *Hele*, 2 W n. Saund. 177, and the authorities referred to in note 10 to that case, that in order to constitute a breach of this covenant the lawful title under which the act complained of was done must have existed before or at the time of the lease, the plea is a good answer, admitting that the declaration is sufficient.

Looking at all these pleadings, it appears clearly to me that the lawful right exercised by the corporation of Toronto, and those who acted under them, did not exist when the covenant declared upon was entered into; and so far as the statute 16 Vic. is concerned, the exercise of the powers granted to the corporation was contingent on the fulfilment or non-fulfilment by Mulholland of his own covenant set out in the third plea. Both statutes proceed from the supreme authority, the legislature; and I do not see how it can be said from anything that appears on the pleadings, that the exercise of that authority was brought about by or through the acts, measures, consent, default, neglect or procurement of the lessor or of Robert Baldwin. If what the plaintiff contends for be correct, then it would appear to follow that wherever the legislature have granted a charter to a railway company, with the usual powers to enter and take lands, the exercise of these powers will cause a breach of covenant on the part of lessors or former owners of such lands, who, prior to the granting of the charter, have leased or conveyed with a general covenant for quiet enjoyment. Such a covenant, however, is intended as an indemnity against the acts of particular persons: that is, of those having lawful title before the covenant was entered into. It is not a covenant to do some specific act or acts. And if it be conceded, as the language used by Sir N. Tindal, in *Evans* v. *Hutton*, 4 M. & Gr. 968, tends strongly to shew that a contract may be dissolved by superior authority, so that the contractor is relieved from performance, I do not see why the act of the Legislature in this case may not equally relieve the covenantor from indemnifying his lessee. If after the letters patent and the lease to the plaintiff an act had been passed prohibiting the erection of the esplanade, there is, I apprehend, no doubt that the plaintiff would have been relieved from his covenant to erect it; and it appears to me the defendants should be equally relieved from indemnifying against acts lawful, because done under powers given by the legislature, and which acts, if not so legalized, would not have constituted a breach of the lessor's covenant for quiet enjoyment.

I think the defendants are entitled to judgment on this record.

Per cur.—Judgment for defendants.

THE BISHOP OF TORONTO v. CANTWELL.

Ejectment—Notice of intention to proceed—Necessary when four terms have passed without any steps having been taken.

Held, that one month's notice of intention to proceed is necessary in ejectment as in other actions, when four terms have passed without any proceedings having been taken.

M. C. Cameron, in Easter term, obtained a rule *nisi* to set aside the notice or trial, trial and verdict in this cause for irregularity, with costs, issue having been joined more than four terms, and no term's notice of intention to proceed having been given, or for a new trial on the merits.

The affidavits stated that the writ in this ejectment suit was served on the defendant in the latter end of February or beginning of March, 1859, and an appearance was entered on the 14th of March, 1859; that no notice or proceeding of any kind was served or taken in the cause from the last date until the 9th March, 1861, when notice of trial was served for the then next ensuing assizes at Guelph. That on the 25th of March, 1861, notice was served on the agent of the plaintiff's attorney, that if the trial was proceeded with, application would be made to set aside the proceedings for want of a term's notice, and that no such notice had been given; that the plaintiff proceeded to trial and obtained a verdict; that the defendant's attorney caused the defendant to be written to, informing him of the service of notice of trial, directly after such notice was served. The defendant swore he never received this letter; that he only became aware the cause was entered for trial by being casually in Guelph on the first day of the assize: that he was not prepared to defend, and that no defence was offered, and that he had a good defence on the merits as he verily believed, stating that he and his father, under whom he claimed, had been about 27 years in possession, occupying, clearing and improving.

In Trinity Term, *N. Kingsmill* shewed cause on affidavits, that the notice not to proceed was not served until after the opening of the assizes at Guelph; that the verdict would have been taken on the first day if the defendant had not expressed a desire to have it put off till the arrival of his counsel; and on the following day the verdict was taken, the defendant's counsel being in court, but not appearing. On the question of merits an affidavit was filed setting out a letter dated in 1846, from defendant, according to which he desired to purchase the land from the Church Society of the Diocese of Toronto, for whom the plaintiff holds this land as trustee. (*Hagarty*, J., referred to *Scrope* v. *Paddison*, 4 L. T. N. S. 254.) 4th May 1861.

M. C. Cameron contended that *Scrope* v. *Paddison* did not apply. The objection here is, that a term's notice has not been given. The English rule No. 176 of Hilary Term, 1853, has not been adopted by our courts, and consequently the old practice remains. He referred to *Tyre* v. *Wilkes*, U. C. 2 Prac. Rep. 325.

DRAPER, C. J.—The case of Doe on the demise of *Vernon* v. *Roe*, 7 A. & E 14, establishes that the practice of requiring a term's notice of intention to proceed, when there had been no proceeding for a year, applies to ejectment as well as to any other kind of action, and the case is the more remarkable since the tenant had not even appeared, and the parties to the record as it stood were fictitious. The plaintiff John Doe being one and the defendant Richard Roe, the other. Still on the tenants application a judg-

ment against the casual ejector was set aside for want of a term's notice. I confess I have not been able to understand why the rule should not apply to actions of ejectment as well as to any other actions. The reason of the rule requiring a term's notice, viz., to prevent any surprise on the defendant after the plaintiff has laid by four terms or a year without proceeding, is as applicable to ejectments as to other cases.

I do not understand the statement of counsel in *Scrope* v. *Paddison*, that in ejectments under the old practice, the plaintiff was out of court if there was no step taken for two years. I do not find the practice so laid down in any authority or book of practice that I have been able to consult, and I have never met with any instance of such a practice obtaining. With regard to the difference in the proceeding since the Common Law Procedure Act, it is true there is now no declaration, nor yet any plea, but after appearance the writ and appearance are in effect substituted for declaration and plea, an issue is made up upon the writ and appearance, and the statute defines what question the jury is to try. A special verdict may be given, a bill of exceptions tendered, and judgment may be entered on the verdict, and costs taxed for or against either party. In that case *Pollock*, C. B., merely decided that a commission to examine witnesses might go, although a month's notice of intention to proceed had not been given, and this may have been on the ground that the granting a commission is not a step in the cause towards the attaining judgment, it is a collateral proceeding like issuing a subpœna; or, which I incline to view as the best reason for the decision, that the objection of the defendant's counsel was that the plaintiff had not declared within a year after the service of the summons, and therefore he was out of court, which objection might be conclusively answered by remarking that the rule could not apply to ejectments since the Common Law Procedure Act, because the writ itself was substituted for a declaration as soon as the defendant put in an appearance, which that statute makes equivalent to a plea. In these suggestions, however, I am speaking for myself only.

I confess I see no reason why the case of *Doe Vernon* v. *Roe* should not still govern us, and as nothing is specifically settled upon this point either by statute or other rules of court, we think we should adhere to the old practice, which has been heretofore in accordance with that case.

We decide, therefore, this rule should be made absolute, costs of the application to be costs in this cause.

Per Cur—Rule absolute.

McMaster v. The Corporation of Newmarket.

By-law, quashing of—Corporation, ordinary expenditure of—Power to dispose of funds.

Motion to quash by-laws 68 and 69, passed by the Corporation of the village of Newmarket, on the 5th August, 1861. The first, after reciting that it is necessary that the Corporation should purchase a site for a town hall enacts that they purchase a certain parcel of land for the sum of $250, secondly, that the Reeve shall issue his draft for the said sum payable the 1st November, 1861. The second (No 69), after reciting that the inhabitants of the village are desirous of erecting a town hall, and that there will be a large surplus in the hands of the Corporation after paying for the site, and paying the ordinary expenses of the village for the year, enacts that $750 be appropriated for the erection, and that the Reeve should issue his drafts, payable the 1st November, 1861.

At the time of passing these by laws, there had been no by law passed to provide for the ordinary expenditure of the year.

On motion to quash, *held*, that the Corporation has no power, without the consent of the electors to authorize the expenditure of money for purposes not falling under the head of ordinary expenditure without having the money in hand to meet the demand, and without making provision, by rate or otherwise, to raise the required amount to meet the demands when they become due.

S. M. Jarvis obtained a rule *nisi* to quash by-laws Nos. 68 & 69, of the Corporation of Newmarket, on the following grounds: 1st. That they are by-laws for raising money upon the credit of the municipality, and for contracting debts not payable within the present municipal year, not required for its ordinary expenditure, and have not received the assent of the electors of the municipality. 2nd. They do not name a day in the financial year, when the same shall take effect. 3rd. They do not name a day when the debts thereby created shall become payable. 4th. No special rate is settled, to be levied for paying the debts to be created, nor the amount to be levied annually. 5th. The amount of the ratable property in the Corporation for the year 1861 is not ascertained. 6th. The by-laws do not show the amount of the rate in the dollar to be levied by the Corporation for the year 1861, nor that such rate will not exceed the rate of five hundredths in the dollar. 7th. They do not contain the recitals required by the Municipal Corporations Act, Con. Stat. U. C. cap. 54, sec. 222. 8th. A by-law for a similar purpose was rejected by the rate-payers of the village.

By-law No. 68 was passed on the 5th August, 1861, and is entitled "A by-law for purchasing a site for a town hall." It recites that it is necessary the Corporation should purchase a piece of land, whereon to erect a town hall, and that a certain piece can be bought from Moses W. Bogart for $250; and enacts that the Corporation do purchase the said parcel of land for $250, to be used as a site for a town hall. 2nd. That the Reeve shall issue his draft to the said Moses W. Bogart for $250, so soon as he shall have properly conveyed and assured the said parcel of land to the Corporation, payable the 1st day of November, 1861.

By-law No. 69 was passed on the same day, and is entitled "A by-law for erecting a town hall." It recites that the inhabitants of Newmarket are desirous of erecting a town hall; that the Corporation are about purchasing a site for such hall; and that it appears there will be a large surplus in the hands of the Corporation after paying for the site and paying the ordinary expenses of the village for the year; and enacts, 1st, That the committee appointed to obtain a site for a town hall, and to make the necessary arrangements for the building of the same, do at once proceed to erect a hall on the land to be purchased as a site therefor. 2nd. That the sum of $750 be appropriated, to be expended by the committee on the erection of the hall. 3rd. That the Reeve do issue his draft for such sums as may be required by the committee as the work on the hall progresses, so that the amount for which said drafts are issued shall not in the aggregate exceed $750, not payable before the 1st November, 1861. 4th, This by-law not to take effect unless the by-law for the purchase of a site passes.

An affidavit of a resident and rate-payer of the village of Newmarket was filed, stating that a by-law was prepared by the Council of the Corporation of that village in June, 1861, for raising by loan $4,600, upon interest, payable within fourteen years, to be applied in the purchase of a site and the erection of a town hall and market in the said village, a copy of which was annexed to the affidavit; which by-law, on the 9th June, 1861, was put to the vote of the electors, and was rejected by a majority of 85 out of 109 voters, only 12 voting for it. That three of the Council, being a majority, passed by-laws Nos. 68 & 69, the other members opposing them. That neither of these by-laws was submitted to the electors, and they were passed in defiance of a petition signed by a very large majority of the electors. That at the time the affidavit was sworn—the 29th August, 1861—the assessment roll had never finally been revised, nor had any estimates of the ordinary expenditure of the Corporation for the current year been prepared or submitted to the Council, and no rate had been settled for the payment of the ordinary expenditure, nor had any special or other rate been imposed for discharging the debts to be created by the purchase of the site and the erection of the town hall. That for 1860, the whole ratable property of the village was $14,800 or thereabouts, and the rate levied for that year was 5c. in the dollar, leaving a surplus of about $13. That the ratable property of the present year, as appears by the assessment roll, as it then stood, was $17,017 27c. A rate of 6c. in the dollar would produce the sum of $850 or thereabouts, and the income of the said Corporation from all other sources will not exceed $700 or thereabouts, and the ordinary expenditure will amount to about $1,000, as the deponent believes. That the architect had shown him the plans and specifications for the town hall, and had told him (deponent) that the building could not be completed for less than $1,400, and that it was only intended to complete the external portion of the work this year.

Harrison, R. A., showed cause. He filed an affidavit of one of the Municipal Council, attacking the motives of the person whose affidavit is above set forth, and stating that the place selected by by-law No. 68, is approved by a majority of the rate-payers, who have signed a certificate to that effect. That neither of the by-laws Nos. 68 & 69 was submitted to the rate-payers, because it was neither necessary nor proper, as the money to be expended was intended to be raised and expended within the present year, and the members of the Council who passed the by-laws were

aware that a large majority of the rate-payeas were in favor of the proceedings of the Council as regarded those by-laws. That the revenues of the year will be sufficient for this purpose, after providing for all other expenses made or contemplated. That the rate usually levied is 5c. in the dollar, which the deponent believed had been levied every year since the village has been incorporated. That the other resources of revenue will produce $1,250 and upwards. That estimates of revenue and expenditure for the current year have been repeatedly made by committees (not shown what they are). That the site of the hall cost $250, and has been conveyed to the Corporation. That the estimate of the architect for the hall was $750 to $800. That this expenditure will complete the hall, so that the same will answer all the purposes of a town hall. That certain additions will probably be made at a future day, such as a gallery and partitioning off two ante-rooms, but they are not included in the work the Council contemplates doing, though if added the architect estimates the whole expense at $1400. That the Council has contracted for the lumber and timber, and accepted tenders for the erection. That there will be a pecuniary advantage (explained how) result to the Corporation, if the hall is up and closed this autumn. That the drafts are not made payable until the 1st December, and that the rates are not usually collected until October and November. That the principal part of the lumber and timber has been delivered, and the carpenters' work is in a forward state. Attacks the petition stated in the other affidavit to have been signed by a majority, because signatures, as the deponent believes, were obtained by misrepresentation and fraud, and many of the signers have since signed a certificate approving what the Council have done.

J. H. Cameron, *Q. C.*, supported the rule, citing *Harrison's Municipal Manual*, p. 108, note *a*.

DRAPER, C. J.—It would be better if the affidavits were confined to the statement of such matters of fact as have a bearing upon the questions which the court are called upon to decide. A good deal of what is above stated, and much more which is not stated, might have been omitted without injury to the real merits, viewing the nature of the application, and the duty of the court in respect to it.

We are of opinion that the rule must be made absolute to quash both by-laws. Each of them authorizes the expenditure of a considerable sum, for a purpose clearly not falling under the head of ordinary expenditure, without having money in hand to meet the demand, when, according to the by-laws, it will be due and ought to be paid.

It appears that the subject matter of each of these by-laws had been already discussed, and to effect the desired object it had been thought advisable to authorize the creation of a debt not to fall due within the financial year. This rendered an appeal to the electors necessary, and they decided by a large majority against the proposal. The present by-laws are intended to attain the same object by a different mode, and to avoid the necessity of a reference to the electors by making the debt payable within the financial year. It is urged on behalf of the municipality that they have hitherto been in the habit of imposing a rate of 5c. in the dollar (the highest rate they have power to impose) for their ordinary expenditure, and that the produce of that rate, if again imposed for 1861, added to some other revenues, will leave a sufficient surplus to meet these new debts when they become payable.

This, however, seems open to very serious objection. There is no existing surplus shown. If there were, and this expenditure was directed by these by-laws to be made out of it, there would be no difficulty, for the objects are within the authority of the Corporation; but for all we see, there has been no by-law passed for the ordinary expenditure, and I do not see what right the Corporation have to create a surplus to be at their disposal, by raising, under the declared purpose of providing for ordinary expenditure, more than is obviously or probably necessary for it. It is true that the Corporation might even yet pass a by-law authorizing a special rate to supply funds for the purposes of these two by-laws; but in the meantime the whole debt may be incurred, for the operation of these by-laws is not made contingent on the imposing a sufficient rate to raise the money, or upon the money being raised by other means. Money or no money, the expenditure is directed, and thus, unless a rate be specially imposed, or under the name of ordinary expenditure a much larger sum than is necessary is raised (if that can legally be done), when the 1st November arrives there will be no funds to meet the Reeve's drafts for $1000, and a debt will exist which must be paid by funds to be raised during the ensuing year, though in terms made payable in the present year.

Considering the whole scope and apparent intention of the statute with regard to the incurring debts by municipalities, we think that no expenditure for extraordinary purposes should be authorized by by-law, unless it be out of unappropriated money in hand, or unless the by-law provides expressly for raising the necessary money, or is not to come into effect and be acted upon until some other by-law is passed making the necessary provision.

We think, therefore, this rule should be made absolute, with costs.

Per cur.—Rule absolute.

DEVLIN v. BAYNE.

Con. Stat. U. C. cap. 56, secs. 2 & 3—Injury to plaintiff on a highway—Questions to be submitted to jury.

It is by sec. 2, Con. Stat. U C cap. 56, provided that "in case any person travelling upon any highway, in charge of a vehicle or on horseback, be overtaken by any vehicle or horseman travelling at greater speed, the person so overtaken shall quietly turn out to the right, and allow the said vehicle or horseman to pass."

It is by sec. 3 of the same statute provided that "in case of one vehicle being met or overtaken by another, if by reason of the extreme weight of the load on either of the vehicles so meeting, or on the vehicle so overtaken, the driver finds it impracticable to turn out as aforesaid, he shall immediately stop," &c.

Plaintiff was driving a sleigh and horses, and, at a point where it was impracticable to turn out, was overtaken by defendant's sleigh and horses; and defendant, in attempting to pass plaintiff, drove him into a ditch, whereby his leg was broken. Plaintiff did not stop when overtaken by defendant.

The jury found a verdict for plaintiff, for £60.

Held, that the opinion of the jury should have been taken as to whether the injury to plaintiff was caused by the improper conduct of defendant, or was contributed to by the act of the plaintiff in not turning out or stopping his horses; and it not appearing from the notes of the judge who tried the cause, that any such question was submitted, a new trial was granted—costs to abide the event.

(M. T., 1861.)

The declaration contained two counts. First, That plaintiff and defendant were each driving their horses and sleighs along the same highway, the defendant driving behind plaintiff at a part of the highway where it was impossible for one sleigh safely or without a collision to pass the other, or to turn out of the road to allow the other to pass, as plaintiff well knew; yet defendant, intending to hurt plaintiff, violently and unlawfully, and without notifying his intention to plaintiff, who was carefully driving his sleigh in front of defendant, endeavored to pass the sleigh and horses of the plaintiff at the said point of the highway, and there so violently, unskilfully and improperly conducted himself that in so driving past the plaintiff the sleigh and horses of defendant were driven with great violence against the plaintiff and his sleigh and horses; and plaintiff, having no notice of defendant's intention so to do, and being unable to avoid the said collision, was thereby thrown and bruised, and one of his legs broken.

Second, That the defendant so violently, negligently and unskilfully drove and managed a sleigh and horses on a public highway, that the same were forced and driven with great violence against the plaintiff, and against his sleigh and horses, which he was then driving on the highway, whereby the sleigh and horses of the plaintiff were much broken and damaged; and thereby the plaintiff, who was driving his said sleigh and horses along the said highway, and unable to avoid the said collision so caused by the negligent and improper conduct of defendant, was then thrown down and bruised and crushed between the said two sleighs, and one of plaintiff's legs was thereby broken.

The plea was Not guilty.

The cause was taken down to trial at the last fall assizes for the United Counties of York and Peel for 1861, before the Chief Justice of this Court.

It appeared that plaintiff and defendant, in February last, were both coming along the plank road of the third concession of the township of York. The defendant was driving a load of hay, and plaintiff a load of stone. Both were proceeding in the same direction. Plaintiff's team was so close to the side of the road that he could not turn out. Defendant, on turning out to pass plaintiff's sleigh and horses, shoved them off into the ditch, and plaintiff's leg was broken.

For the defendant it was contended that, under cap. 46, sec. 3, of Con. Stat. of Upper Canada, plaintiff should be non-suited; that

it was his duty to stop when he found defendant was desirous of passing him.

The learned Chief Justice refused to non-suit.

The defendant called witnesses, and they gave evidence that when the defendant was about to pass the plaintiff's team, they increased their speed, and if plaintiff had stopped his team or turned out the accident might have been avoided.

The jury were told that there seemed no doubt that defendant was travelling at a greater speed than plaintiff, but were asked to say whether the plaintiff, by reason of the extreme weight of his load, found it impracticable to turn out, or whether his not turning out arose from the ditch being so near that he could not turn out; further, that under the statute it was the duty of the plaintiff to stop when defendant was coming up at the greater speed. They were further told that if the extreme weight of the load on plaintiff's vehicle made it impracticable for him to turn out, they were so to find; and if they found for plaintiff on the other points, defendant had leave to move to enter a verdict for him. They were further asked if defendant drove his horses so as to run against plaintiff's horses or himself, so as to do him an injury, and the amount of the damages.

The jury found for the plaintiff, with £60 damages, and said that plaintiff could not turn out, by reason of the depth of the snow on the track, and from the weight of his load.

In Michaelmas term last, *James Boulton* moved in pursuance of the leave to enter a verdict for defendant, or for a new trial, the verdict being contrary to law, evidence, and the judge's charge.

During the same term, *R. A. Harrison* showed cause, and contended that under the facts proven, the case was not brought within the provisions of Con. Stat. U. C. secs. 2 & 3; and if it was, plaintiff, by non-compliance with the statute, only forfeited the penalty imposed under sec. 11; and the statute did not interfere with his right to recover in this action. He further contended, under the evidence, that plaintiff ought to recover, as his alleged negligence in disobeying the statute did not in any way contribute to the accident.

RICHARDS, J.—Secs. 2 & 3 of Con. Stat. U. C. cap. 56, provide that "in case of any person travelling on any highway, in charge of any vehicle, be overtaken by any vehicle travelling at greater speed, the person so overtaken shall quietly turn out to the right, and allow the said vehicle to pass;" and sec. 3, that "in case of one vehicle being overtaken by another, if by reason of the extreme weight of the load on the vehicle so overtaken, the driver finds it impracticable to turn out as aforesaid, he shall immediately stop, and, if necessary for the safety of the other vehicle, and if required so to do, he shall assist the person in charge thereof to pass without damage."

Now the jury have found for the plaintiff, but at the same time have also found that he did not turn out, as required by the statute, because of the depth of the snow and the weight of his load. Then, according to the statute, he ought to have stopped.

It does not appear, from his lordship's notes, that he left it to the jury to say whether the plaintiff, by his negligence, contributed to the accident, or whether it was caused by the improper conduct of the defendant

Under all the circumstances of the case, we think there ought to be a new trial

The finding of the jury seems inconsistent and unsatisfactory on the points submitted.

We think the opinion of the jury, on a new trial, in addition to the questions submitted on the former trial, should be taken, whether the injury to plaintiff was caused by the improper conduct of the defendant, or was contributed to by the act of the plaintiff in not turning out or stopping his horses.

Neither party seems to have called the attention of the presiding judge to this point, and it is probable the new trial is rendered necessary in consequence. The rule for a new trial will be made absolute; costs to abide the event.

Rule absolute; costs to abide the event. *

* On the second trial of the late York and Peel Assizes a verdict was again rendered for Plaintiff for £60 damages.

CHAMBERS.

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

ANDERTON v. JOHNSTON.

Specially endorsed writ—Declaration—Judgment—Setting aside.

Where plaintiff specially endorsed his writ for $266.62½, and afterwards declared on the common counts claiming £100 at the end of the declaration, and then signed judgment for £100, the judgment was held to be irregular and set aside. Under the particular circumstances of this case, leave to amend the judgment was refused.

An affidavit disclosing a set off merely, is not an affidavit of merits.

In order to set aside a judgment entered on a specially endorsed writ, an ordinary affidavit of merits is not sufficient.

(Nov. 8, 1861.)

A writ specially endorsed for $266.62½ was issued on 9th October, 1861, and served on same day. The defendant appeared in proper time, by his attorney.

The declaration was on the common counts for work, goods, and money, and was served on the 23rd of October, 1861, on the defendant's attorney in Toronto. It was accidentally mislaid in his office and not found until the 31st of October, the day after the time for pleading expired.

Judgment for want of a plea was signed on the 31st of October, for £100 damages laid in the declaration, and £5 16s. 11d. costs.

The defendant was sent to immediately for an affidavit of merits, which was sworn to on the 1st of November, in which he stated that the plaintiff had agreed to teach him to make patent and enamelled leather, &c., which engagement the plaintiff had entirely broken; that the defendant in consideration of such agreement, gave him promissory notes for £50, which plaintiff discounted, and which are outstanding and unpaid, and that defendant had a just account against plaintiff, which, with the £50 would exceed plaintiff's claim.

It was objected the affidavit shewed only a set off, and that as an affidavit of merits it should have explained what the account was. *Warrington* v. *Leake*, 11 Exch. 304, *Wiley* v. *Wiley*, 6 W. R. 649.

DRAPER, C. J.—It must rest, I think, on the regularity of the judgment, whether the plaintiff could sign judgment for £100. Sec. 147 of our C. L. P. enacts, that where the plaintiff seeks to recover a debt or liquidated, demand in money, the true cause and amount of which is stated in the special endorsement on the writ of summons, or in declaration, judgment by default shall be final.

Final judgment has been signed in this cause for £100 damages and costs; the declaration is on the common counts, only claiming that sum at the end.

I do not think this can be treated as the true amount, though among the common counts the true cause is no doubt to be found.

In my opinion the judgment is irregular, and must be set aside. It might have been signed for $266 62½.

The plaintiff now asks to amend it, reducing it to that sum, but I think the defendant's affidavit discloses enough to meet the application, though not sufficient as an affidavit of merits to set aside the interlocutory judgment.

JOHNSTONE v. JOHNSTONE.

Pleading—Judgment for want of a plea—Form thereof.

Where the first count of the declaration was on an award, and the second on the common counts, and defendant demurred to the first count of the declaration, and as to the residue pleaded "that he never was indebted as alleged," and "that the plaintiff at the commencement of this suit, &c.," (pleading a set off,) "which amount the defendant is willing to set-off against the plaintiff's claim," the plea of set-off was held to apply to the second count only: and the demurrer to the first count having been set aside as frivolous, plaintiff was held entitled to sign interlocutory judgment for want of a plea.

Form of interlocutory judgment in such a case given.

(November 8th, 1861.)

This was a summons to set aside interlocutory judgment to first count of declaration, for irregularity in this, that it was not signed in the manner and form required by the practice, and was signed while a plea was on the files to the first count.

The action was commenced by writ of summons specially endorsed with a claim for the amount of an award and costs. An appearance was entered on 18th September, 1861: declaration

filed 20th September. The first count was on an award, and the common counts were added. The defendant demurred to the first count; and "the defendant to the residue of the declaration pleaded that he never was indebted as alleged, and that the plaintiff at the commencement of this suit," &c., (pleading a set-off,) "which amount the defendant is willing to set-off against the plaintiff's claim."

On the 21st October the demurrer was set aside as frivolous. On the same day the plaintiff's attorney signed judgment for want of a plea in the following form:—

"*In the Court of Common Pleas.*

"WILLIAM JOHNSTONE, Plaintiff,
"vs.
"FRANCIS JOHNSTONE, Defendant.

"The 20th day of September, in the year, &c., 1861, William Johnstone, by George Robinson Vannorman, his attorney, sues Francis Johnstone, who has been summoned by virtue of a writ issued on the 9th day of September, in the year of our Lord one thousand eight hundred and sixty one. For that, &c.

"Interlocutory judgment signed this twenty-second day of October, in the year of our Lord 1861, as to the first count of the declaration for want of a plea to the first count."

Notice of trial and assessment of damages was given for the then following Guelph assizes. The plaintiff swore that the defendant had not pleaded to the first count.

For the defendant it was insisted that the plea of set-off stands to the first count.

The managing clerk to the defendant's attorney swore that the judgment was informal, and not signed according to the practice of the court, which was the very point in dispute.

On the 4th October the plaintiff filed a joinder in demurrer, and took issue on the plea of the defendant to the second count in the declaration.

DRAPER, C. J.—The judgment seems to me well signed according to the directions given in Chitty Archb. Prac. 921 (9th Edn.). The papers filed may be treated as the *incipitu* of the declaration, or of the roll containing an *incipitu* of the declaration.

Therefore the only objection of form to the judgment fails, and the question which remains is, whether the plea of set-off extends to the first count; as to which I think it is properly to be treated as pleaded to the second count only.

It does not appear that there was leave to plead and demur to the first count, and I conclude that there was no such leave, for filing a frivolous demurrer would not have been advisedly permitted.

Summons discharged.

WARNOCK v. POTTER.

Order—Surprise—Rescinding same.

Where the true state of facts was not laid before the judge who made an order for leave to amend pleadings, and he acted on an affidavit not conveying the right impression of the actual proceedings, he, on subsequent application to him on behalf of the party affected by the amendment, rescinded his order to amend.

(9th November, 1861.)

On the 30th October last Draper, C. J., made an order in this cause that the plaintiff might amend his replication served by making it correspond with the replication filed, and that the issue book might be amended by making it correspond with the replication; and that the notice of trial and all other notices should stand, and be deemed good and effectively served.

This order was made upon affidavits stating that the replication served was "by mistake" not a copy of the one filed; and that the issue book was made out incorrectly, omitting a plea of set-off.

On the 2nd November the defendant obtained a summons to rescind the foregoing order, or vary it in part so far as relates to the notice of trial and other notices served.

In support of this application defendant filed several affidavits from which and from others filed by the plaintiff the facts appeared to be that the declaration was served on the 19th October; that the time for pleading expired on the 26th October, that the defendant's attorney, with the apparent view of preventing the plaintiff from getting to trial at the Berlin assizes on the 4th November sent a clerk to the Deputy Clerk of the Crown's office, at Berlin, on the last day of pleading, with instructions not to file the pleas (never indebted, payment and set-off) "till after the hour of three of the clock in the afternoon; that he had sent copies of his pleas to his agents in Toronto to be served by them on the agents of the plaintiff's attorney there, but not to serve them until after three o'clock in the afternoon—the 26th October being on a Saturday; that the plaintiff's attorney was waiting in the Deputy Clerk of the Crown's Office, and as soon as the pleas were filed he filed a replication, and according to the clock in the Office of the Deputy Clerk of the Crown, both were filed before the hour of three in the afternoon; that the defendant's attorney lived at Elora; that the plaintiff's attorney had prepared an issue book, containing, as defendant's pleas, never indebted and payment, on which plaintiff took issue; that plaintiff served that issue book, with notice of trial, and notice for the defendant to appear at the trial before three o'clock on Saturday the 26th October; that the issue book served consequently did not correspond with the pleas filed, the plea of set-off being omitted, nor with the replication filed, as there was no issue on the plea of set-off.

This was stated in the affidavit on which was made the order of the 30th October, in the following words, "that the replication served on the 26th October was not a copy of the one filed."

In fact it appeared probable, as represented in the affidavit of the defendant's attorney, sworn on the 31st October, that the plaintiff's attorney took the step in this cause of serving the notice of trial, notice of examination of defendant, issue, and issue book before the defendant's pleas were filed or served; but it was certain that he made up the issue book, and served it and the notice of trial and other papers speculating on the chance that the defendant would plead the pleas which he (the plaintiff) set out in the issue book.

The reason for this course appeared to be that he had let a day slip by in declaring, and thus incurred the almost certain risk of being thrown over the assizes; and the defendant having pleaded differently from what he anticipated, he applied to amend his issue book, as if it was a mere clerical error in copying.

DRAPER, C. J.—According to the copy of the order of the 30th October, now before me, as well as according to the original summons of the 29th October, on which the order was made, the plaintiff did not ask to amend the issue book by inserting the plea of set-off, though in the affidavit of the plaintiff's attorney, sworn 28th October, he refers—not very distinctly—to the variance between the pleas filed and those set out in the issue book. I am not certain that the plea of payment is not omitted as well as that of set-off. The latter I have no doubt is.

Considering that the true state of facts was not before me when I made the order of 30th October, and that I was acting on an affidavit not conveying the right impression of the actual proceedings; and observing, moreover, that the leave to amend the issue book does not apparently extend to the pleas, but is confined to the replication, I think that order should be rescinded so far as respects the service of the notice of trial, and shall order accordingly. The defendant will then be obliged to move the court above to set aside the verdict, and the whole matter will be reviewed. In order to accomplish this I shall also order that further proceedings be stayed until the fifth day of next term.

Order accordingly.

RUTTAN, ONE, &c., v. AUSTIN.

Bills of Costs—Lapse of time in applying to have same referred—Refusal of Order

Where several bills of costs were delivered by plaintiff to defendant, the first in January, 1854, and the last in January, 1859, where there were several applications for payment, and a payment made in January, 1860, where an action was commenced in respect of the bills, in August, 1861, and no application made to refer the bills, or any of them till 4th November, 1861, a summons then obtained to refer them to the Master was discharged.

Read et al. v. Cotton, 6 U. C. L. J., 114 upheld.

(November 15, 1861.)

A summons was obtained on 4th November, 1861, to refer plaintiff's bill of cost to the Master of Queen's Bench for taxation, plaintiff to give credit for all payments, &c., master to certify what shall be found due on the bill, &c., and the costs of the reference; plaintiff to be restrained from prosecuting his action

during the reference, and on payment of what might appear due, and costs, further proceedings to be stayed, defendant to have leave to dispute any retainer charged in the bills.

There were eight bills—No. 8 was delivered in January, 1854, when defendant paid £100, leaving a balance of £35 1s. 4d. The other bills were delivered in January, 1859. No objection was made to the bills till January, 1860, when defendant paid £25, saying that was enough. Defendant swore then that plaintiff claimed only £5 additional; this plaintiff however denied, but admitted the receipt of £25. Plaintiff asserted that as to the balance defendant promised to make all right.

Plaintiff had written on 4th August, 1859, requesting a settlement. To this letter there was no answer. He wrote on 9th July, 1861, demanding payment or threatening suit. The suit was brought in August, 1861.

The pleas were,—never indebted—payment—and set off.

The following cases were referred to during the argument:—*Cook* v. *Gillard*, 1 E. & B., 26; *The Queen* v *Eastwood*, 6 Ib., 285; *Read et al.* v. *Cotton*, 6 U. C. J. L., 114; *Robinson* v. *Powell*, 5 M. & W., 479.

DRAPER, C. J.—Considering the lapse of time that the last bills were delivered in January, 1859, that there were several applications to pay; that a payment was made in January, 1860; that an action was commenced in August, 1861, and no application to refer made until this month, I think in accordance with the decision of Hagarty J., in *Read et al.* v. *Cotton*, 6 U. C. L. J., 114, this summons must be discharged.

Summons discharged.

WORTHINGTON v. THOMAS PEDEN AND JOHN PEDEN.

Attachment of debts—Money accruing due on Mortgage—Assignment of Mortgage between order to attach and order to pay—Effect thereof.

On 30th July, 1859, garnishee executed a mortgage to secure the payment of £200 to the judgment debtor, by six equal annual instalments of £33 6s 8d each. About a month after the date of the mortgage, garnishee paid to the judment debtor £50 on account of the mortgage. An order was obtained at the instance of plaintiff, before the first instalment fell due, attaching all debts due or accruing due from the garnishee to the judgment debtor, and this on 29th June, 1860, was followed by an order that the garnishee should pay to plaintiff £34 11s 8d. in the following manner:—£16 13s 4d. on 30th July, 1861, and £17 18s. 4d on 30th July, 1862. An application was afterwards made to set aside these orders upon a suggestion that the mortgage had been assigned; but it appearing that the assignment, if any, was made after the attaching order had been served, the application failed.

(Nov. 16, 1861.)

On 29th June, 1860, Logie, County Court Judge, made an order, founded upon an order of McLean, J., made in this cause, that the garnishee should pay to plaintiff £34 11s. 8d., in the following manner:—£16 13s. 4d. on the 30th July, 1861, and £17 18s. 4d. on 30th July, 1862, and in default of payment execution was to issue against garnishee.

The only affidavit referred to in this order was one made by garnishee, who swore that on 30th July, 1859, he executed a mortgage to secure the payment of £200 to the defendant, by six equal annual instalments. That about a month after the date of the mortgage he paid him £50 on account. That the balance remained unpaid, which, as it fell due he was willing to pay to the person lawfully entitled. If £50 were paid nothing would be due until 30th July, 1861, and then only £16 13s. 4d., which was precisely what the judge ordered.

On the 29th October, 1861 Draper, C. J., granted a summons to shew cause why the attaching order, of McLean, J., and the order of the County Court Judge should not be rescinded and the writ of execution against the garnishee's goods set aside, on the ground that the debt had been assigned before the same became due from the garnishee to the defendant on the mortgage, or to the plaintiff by the order, and because the defendant was not served with a copy of the attaching order and summons to appear before the County Court Judge, and because the order was not served on the garnishee until the 12th October, 1861, and therefore must be treated as abandoned or void, not having been drawn up or served within proper time, according the practice, or why the order should not be varied under the circumstances appearing.

Two affidavits were filed, on which this summons was granted; they shewed that the garnishee appeared before the County Court Judge, filing the affidavit already stated. That neither the garnishee nor his attorney then knew, as they have since learned, that the defendant had not been served with the attaching order and summons, and that no person appeared before the County Court Judge on behalf of the defendant.

The garnishee further swore that he had since been notified, (not stating when), and led to believe that the defendant duly assigned the mortgage to one Edward Carter, before the second instalment became due, and that Carter had not any notice of the garnishee summons or order that part of the second instalment was due at the time he made his affidavit, and he apprehended the assignee would take proceedings against him for it; that the plaintiff had issued a writ of execution against his goods, and the sheriff had seized them.

In reply, affidavits were filed suggesting that the assignment was fraudulent, and that the judgment debtor had the control of the mortgage, and that the assignment had never been registered.

DRAPER, C. J.—The debt was properly attached, for all that appears, inasmuch as the attaching order was taken out and served before the first instalment became due.

The garnishee had no ground for disputing it, beyond the payment of the £50 which as was conceded to him, satisfied the first instalment and part of the second.

If the debt was properly attached it was bound in the garnishee's hands, though he was not bound to pay it over to the judgment creditor until served with the order to pay, but he could not pay it to any one else, neither to the defendant, the original mortgagee, nor to any assignee, after the attaching order.

The judgment debtor, the defendant, is, according to the garnishee's last affidavit, residing in Hamilton. If he never was served with the attaching order his affidavit of that fact might have been procured. In the absence of proof to the contrary, I think the presumption is, that as he or his attorney was served. No such objection was raised against the order to pay over.

Then there is no direct proof that the mortgage has been in fact assigned, though if assigned after the attaching order was made and served on the garnishee, the assignment would not avail.

I see no ground to interfere with either the attaching order or the order to pay, least of all with the former, which, according to *Kersch* v. *Coates*, 18 C. B. 757, must be sustained.

Summons discharged with costs.

CHANCERY.

(*Reported by* ALEXANDER GRANT, ESQ., *Barrister-at-Law*)

ATTORNEY-GENERAL v. HILL.

Crown patent—Mistake

Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier, and not returned by the government, the patent was set aside as having issued in error and mistake, but under the circumstances, without costs.

The facts are set forth in the judgment.

Mr. Mowatt, Q. C. and *Mr. Blake*, for relator.

Mr. G. D. Boulton, for defendant.

ESTEN, V. C.—This is an information by the Attorney-General, at the relation of Mr. McKellar, for the purpose of annulling a patent, as issued in error and mistake, by which lot No. 19, in the 9th concession of Vaugham, was appropriated as a glebe, parcel of the rectory, of which the defendant Hill is the incumbent. The other defendants are the Lord Bishop of Toronto as the ordinary, and the Church Diocesan Society as the patrons of the living. The error and mistake under which it is alleged that this patent issued, was, that the government at the time of issuing it, thought the lot in question was vacant, whereas it had been and was then occupied and improved. The report of the case of *Martin* v. *Kennedy*, decided in this court, was agreed to be admiited in evidence of the points there "decided, ruled and set out," and certain evidence taken before a committee of the House of Assembly, on the petition of Martin McKinnon, the occupant of the lot, was also agreed to be received; to which were added some affidavits, filed in support of the present motion, and the answer of the defendants, which, this being a motion for a decree, is of course to be treated as an affidavit. From these data it is abun-

dantly clear that the government never would, without some extraordinary reason, have appropriated as a glebe a lot which had been occupied and improved, much less where the patent fee had been paid upon it, and not been returned. If such then be the facts here, a strong presumption of mistake arises on the part of the government in issuing this patent. Some facts are clearly established by the evidence, namely, that one French, in 1829, applied to purchase lots 17, 18 & 19; also, as I think, that he paid the patent fees on them; that the patent fee for lot 19 was never returned to him: that he transferred his interest in this lot to Martin McKinnon for valuable consideration; and that McKinnon in 1835 had built a house, and cleared and brought under cultivation sixteen acres, and was then in occupation of the lot. That the government should have granted a lot, so circumstanced as a glebe, was totally contrary to their ordinary practice, and the question is, whether it was not done in error and mistake. If the books were consulted, they shewed that French in 1829 applied to purchase lots 17, 18 & 19; that upon the entry of this application was endorsed a memorandum in pencil, to the effect that it had been cancelled, as it appeared that French had applied only to obtain money for his interest as first applicant; that opposite lots 17 and 18 was an entry that "the certificates of payment of patent fees had issued;" and opposite lot 19 an entry in these words: "Application made to purchase by John French." In 1835 an inspection and return was made of this lot. The return was dated 9th April, 1835, and was in these words: "Martin McKinnon, 19, 9th concession Vaughan, has been 14 years in the country—owned land in Caledon—is now cutting staves—purchased from John French—returned as a glebe. James McLean states that he and J. French applied together, 16th April, 1835."

This return of course negatives the idea of McKinnon being in occupation of the lot. The officer never would have stated concerning the occupant of the lot, merely that he was cutting staves on it. There was enough, I think, in these entries to invite enquiry. The memorandum of French's application to purchase was left standing against lot 19, and the inspecting officer had thought it right to mention McKinnon in connexion with this lot, as he had purchased it from French, and he so stated.

The government, however, appear to have considered that as French's application to purchase had been, as appeared from the pencil memorandum, cancelled, and attaching no importance, under these circumstances to the memorandum opposite lot 19, or to McKinnon's purchase from French, and supposing from the return of the inspecting officer that McKinnon was not in the occupation of lot 19, but was merely cutting staves on it, and was probably living in Caledon, concluded that the lot was vacant, and under this impression granted it as a glebe.

In short, the government had reason to think that French had applied to purchase, but that his application had been cancelled, although the memorandum of it still stood against the lot that he had sold to McKinnon, and that McKinnon was cutting staves; but they were ignorant of the fact that McKinnon had occupied and improved, and was then living on the lot.

It is to be observed that French states that he was deprived of 17 & 18, but not 19, and the evidence seems to countenance this, with the exception of the memorandum of cancellation, which appears to include the three lots; for the memorandum of the issue of the certificate of payment of patent fees (which means, I think, payment by others than French) is confined to 17 & 18, and the memorandum of application to purchase is confined to lot 19. I am strongly inclined to think that the Government, although considering French a speculator, left him in possession of lot 19; and that the patent fees of 17 & 18 were returned to him, but not of lot 19, at all events I am satisfied that French was persuaded of his title to lot 19, and *bona fide* transferred his interest in it to McKinnon, who occupied it and improved it, and in 1836, when this patent issued, had done a great deal to it, and was living on it, of which the government were ignorant, but if they had known it, would never have appropriated this lot as a glebe.

I think, therefore, that this patent was issued in error and mistake, and must be declared void, but I give no costs.

I may remark that in the case of *Martin* v. *Kennedy*, it was considered that if the patent fee had been paid and the lot occupied and improved, the government would not appropriate it as a glebe. Mr. Baines in his evidence in this case goes further, and says, that although the patent fee had not been paid, and although the lot had been returned as a glebe, yet, when it had been occupied and improved, it was not the practice to appropriate it for a glebe, but to respect the rights of the occupant, and I am satisfied that he is right. No man was more competent to give testimony. I think the lease taken by McKinnon from Mr. Mayerhoffer in 1841 would not have prejudiced his own claim under the circumstances: much less can it operate to the prejudice of the rights of the government.

GOODRICH v. WIDDIFIELD.

Mortgage—Usury

Quære, whether the amount of interest reserved by a mortgage may not be so great as to evidence such a case of oppression as would induce this court to refuse to interfere on behalf of the mortgagee, leaving him to his remedies at law, notwithstanding the repeal of the usury laws.

This was a bill of foreclosure, which had been taken *pro confesso* against the defendant, setting forth the execution of a mortgage by the defendant in favor of the plaintiff, for securing the payment of certain monies, with interest thereon, at the rate of 21 per cent. per annum; and on the cause coming on for hearing.

Mr. Fitzgerald for plaintiff, asked the usual reference to the master at London, to enquire as to incumbrances, and take accounts.

SPRAGGE, V. C.—The question which suggests itself to my mind, has formed the subject of conversation amongst the members of the Court of appeal; the question being, whether a case so gross may not arise as to justify this court in refusing to lend its aid in carrying out the contract between the parties, on the grounds of undue influence and oppression. Before any decree is drawn up, I will take occasion to consult with by brother Esten.

On a subsequent day his honour stated that on consulting with Vice-Chancellor *Esten*, he found that in one case a decree was pronounced in favour of the mortgagee, where the rate of interest reserved was 30 per cent; under these circumstances he made the decree as asked, observing that it may be urged that the legislature intended when they abolished the usury laws, that all the remedies both at law and in equity should be open to the lender.

COUNTY COURT CASES.

In the County Court of the United Counties of Frontenac, Lennox & Addington before his Honour Judge Mackenzie.

McCARTHY v. SHAW.

Collector of Taxes avowing for distress, in levying a municipal rate, must show on his avowry that a By-law was passed authorizing the levying and collecting of such rate, or the avowry will be bad.

(January Term, 1862.)

Replevin—for household furniture.

Avowry—That defendant had been duly appointed by the Council of the Corporation of the City of Kingston, to collect certain unpaid taxes, and that there had been delivered to him, (the defendant) the roll for the purpose of collecting such unpaid taxes, and he at the said time, when, &c, held the Collector's Roll for St. Lawrence Ward, of the said city, for the year of our Lord, 1854, duly made out by the clerk of the municipality of the said city, and containing the names of the parties assessed, and the assessed amount of the ratable, real and personal property of such assessed parties, for which might be assessed in the said municipality, as ascertained after the final reversion of the assessment for the said ward in 1854, containing the amounts for which each respective party is chargeable for the taxes or rates, ordered by the said Council to be levied in the said year, under, and in accordance with, the provisions of the assessment laws in force in Upper Canada in 1854, calculated and set down opposite the lot of land. The defendant averring that it was his duty to collect from the parties, by law liable to pay the same taxes appearing on the the said roll; and that on the said roll a certain lot of land and premises situate in the said ward, and now and at the said time when, &c., in the occupation of the plaintiff, was set down and

assessed to one John Johnson, as owner, (he being then the occupant of the same) as assessed at the annual value of £65, and the rate ordered to be levied by the said Council for the year 1854, in respect thereof, was three shillings in the pound, for all purposes or £9 15s. taxes for the said year 1854, payable in respect of the said lot of land, rated and assessed against the said John Johnson as aforesaid. The defendant averred further in his avowry that payment of the said sum of £9 15s. taxes was duly demanded as required by law, and that the same so being due and unpaid, and the plaintiff at the said time when &c., being the occupant of the said lot of land, and then having in his possession thereon the goods in the declaration mentioned, and 14 days having elapsed after payment was demanded, without the same having been paid, he, the defendant, in performance of his duty, justly took the goods in the declaration mentioned, the same being then in the possession of the plaintiff on the said premises, as he lawfully might, as for and in the name of a distress for the taxes aforesaid, so imposed and remaining due and unpaid.

The plaintiff demurred to the avowry.—and among other exceptions taken to it, took the exception that the avowry does not show that a By-law was passed authorizing the levying and collecting of the rates and taxes mentioned in the avowry.

A. S. Kirpatrick for demurrer.

Agnew, Contra.

MACKENZIE, Co. J.,—The case of *Haacke* v. *Marr*, 8 U. C. C. P. 441; the 23 section of the Act, respecting the Municipal Institutions of Upper Canada, and the 12th section of the Consolidated Assessment Act of Upper Canada, show very pointedly that the avowry is bad for not showing that a By-law was passed by the council of the corporation of the city of Kingston, authorizing the levying and collecting the rate of three shillings in the pound upon the assessed value of property in the Municipality of the City of Kingston for the year 1854.

The Corporation of the City of Kingston could not set or fix a rate of three shillings in the pound on the assessed value of the property within the city, except under the authority of a By-law.

It is not pretended in the avowry that such a By-law was passed in 1854. Consequently the defendant has not shewn a legal cause or excuse for seizing the property of the plaintiff.

On looking at the case of *Haacke* v *Marr*, and the sections of the Assessment and Municipal Acts to which I have already referred in connection with the 89th section of the Assessment Act, it will be seen that the Clerk of the Municipality cannot lawfully make out a Collector's Roll until the rate of so much in the pound or in the dollar, shall be fixed and settled by a by-law duly passed in that behalf.

If a collector of taxes chose to proceed to collect taxes by distress and sale of goods, without knowing whether a by-law has been passed by the Council of the Municipality by which he is employed, settling a rate and authorizing his roll or not, he proceeds at his own peril.

If a by-law has been passed, all well—if it should turn out that no by-law had been passed, he, the Collector, would make himself liable as a trespasser, if he proceed to sell goods by distress for non-payment of taxes.

The Roll is the Collectors warrant. The by-law is the authority upon which the roll rests. The Collector should take good care that such authority exists before he makes a seizure under his collection roll.

The distinction taken in the case of *Haacke* v. *Marr*, between a justification to an action of trespass and an avowry in replevin, is as applicable to the present as it was to that case.

In trespass "it is sufficient for the defendant to allege in his plea, matter to excuse the trespass, but in replevin the avowant is in the nature of a plaintiff, for he is to have a return, and therefore the avowry, which is in the nature of a declaration, must show a good title, *in omnibus*, and contain sufficient matter to entitle him to a return."

In the present action of replevin, the defendant in his avowry, to make out a good title to a return of the goods, should show that he received a Collector's Roll from the Corporation of the city of Kingston, for the purpose of collecting the taxes under consideration, and that such a collection roll was made out and founded upon a by-law passed by the Council of the Corporation, authorising the levying and collecting of the rate in the avowry mentioned.

In the case of *Mace* v. *Rattan*, decided in this court in last October Term, 7 U. C. L. J. 298; a plea of justification to an action of trespass against a Collector of taxes contained, properly, an averment that the Clerk of the Council of the Municipality of Loughborough made out a Collector's Roll under the authority of a by-law of the Council in that behalf passed.

The present avowry is clearly insufficient by reason of its not showing that such a by-law was passed by the Council of the Corporation of Kingston, in 1854.

As the judgment of the Court must be for the plaintiff on the demurrer to the avowry, it becomes unnecessary to examine the other points presented on the record.

Judgment for the plaintiff, on the demurrer to the avowry, with leave to defendant to amend in ten days.

In the County Court of the County of Wellington, before his Honor JUDGE MACDONALD.

KELLY v. GAFNEY.

Gambling debt—Division Court jurisdiction—Certificate for C. C. Costs.

Plaintiff sought to recover $60 deposited with defendant, as a stakeholder, to await the result of the running of plaintiff's horse against time. A verdict was rendered for the plaintiff, and his counsel moved for a certificate for C. C. costs, contending that the Division Court had no jurisdiction.

Held, that case was within the jurisdiction of the Division Court, and certificate refused.

The plaintiff brought an action in the County Court to recover $60 paid to defendant as a stakeholder, to abide the result at the running of plaintiff's horse against time. The bet was between plaintiff and one Morgan, $100 aside; $70 was put up by each, and a side bet with another person for $30.

The plaintiff recovered, having given defendant notice not to pay over to the other party, and having demanded his deposit before the time for the running of plaintiff's horse had elapsed.

The plaintiff's counsel moved for a certificate for County Court costs, on the ground that the Division Courts have no jurisdiction in such a case, it being contended that the plaintiff's claim is "a gambling debt," within the Division Court Act, which precludes gambling debts from being recovered in such courts.

MACDONALD, Co. J.—I am clearly of opinion, this is not a gambling debt.

There is nothing in the Division Court Act to shew what was thereby intended to be included by the term "gambling debt."

The term is used as if to express something known in legal phraseology. I cannot read the act as if the legislature had used the words in a more extended sense, than implied expressly by the words themselves. I cannot extend them to mean any claim connected with, or arising out of a gambling transaction. The words must be taken to apply to some particular kind of debt known at common law, or by the language of the statute as a gambling debt. To determine what is meant we should ask ourselves, what debts in connection with gambling transactions might be recovered in the Division Court, not recoverable in any court, but for the prohibition contained in the Division Court Act?

The statute of Anne, c. 14, sec. 1, enacts that notes, &c., or other securities for money, &c., won by gambling or playing at cards, &c., or other game, or for repaying money knowingly lent for such gambling, betting, &c., or lost at the time of such play, &c., shall be void. The second section declares that any person who shall loose at a sitting, the sum of £10, by playing, &c., may within three months recover the same by action; or any other person may sue and recover from the winner treble the value with costs.

Now, at common law gambling was lawful, although it was an indictable offence to keep a *common gambling house;* and since the statutes an action lies to recover a less sum than £10 fairly won at play—(*Bulling* v. *Frost*, 1 Esp. 235, and Chitty on contracts, p. 713).

I am of opinion that the legislature meant only to exclude from the Division Courts, the recovery of such debts connected with gambling, as would (if the amounts were beyond the limits fixed in the statute, as the least sum to be affected by them) not be

recoverable at all in any court, on account of the statutes affecting gambling debts.

I am further of opinion that the plaintiff's claim in this case cannot be called "a gambling debt," for the defendant is a mere stakeholder; and the plaintiff's right to the money claimed does not depend on the result of any race or game; the money in the defendant's hands was always the plaintiff's from the time of the deposit, and subject to the plaintiff's own orders, as proved by the result of the case in favor of the plaintiff, the law having determined, that notwithstanding the terms of the deposit, it required the plaintiff's own act only, by commencing the action before the money was paid over by the defendant, to enable the plaintiff to recover.

I think the jurisdiction of the Division Court is clear. I have never had any doubts about it, and have sustained suits in the Division Courts for just such claims, in one case where the dispute arose after the race was run, but before the money was paid over.

Under the circumstances I cannot grant a certificate for County Court costs.

I refer to *Warner* v. *Hickman*, 5 C. B., 271; *Moore* v. *Durden*, 2 Ex., 22; *Martin* v. *Hewson*, 10 Ex., 572.

Certificate refused.

UNITED STATES LAW REPORTS.

NEW YORK COMMON PLEAS.

HENRY RASQUIN v. THE KNICKERBOCKER STAGE COMPANY.

A settlement privately effected between the parties with the design of preventing the attorney in the cause from obtaining his costs, will not be recognised by the Court but the Attorney, on application to the Court, will be allowed to go on and collect the costs in the action, that he may thereby secure himself.

(July, 1861.)

The opinion of the Court was delivered by

DALY, J.—This was a motion on the part of the defendant for an order discontinuing the suit on the ground that it had been settled between the plaintiff and the defendant. The action was brought by the plaintiff, to recover for the loss of service, and the expense he had been put to, in consequence of an injury sustained by his son, arising from the negligence of the defendants' servants, in which the plaintiff laid his damages at two thousand dollars. The cause had been at issue for eleven months, during which period it had been twice reached and was ready for trial on the part of the plaintiff, but was put off on the defendants' motion. A settlement was then effected between the President of the Stage Company and the plaintiff, without the knowledge of the plaintiff's attorney, by the defendants paying to the plaintiff three hundred and fifty dollars, and the plaintiff executing and delivering to the defendants, a written instrument, by which he discharged them from all claims growing out of the accident, declaring that it was the express understanding that they were not to pay any more costs and charges of any kind than were embraced in the above named sum. The next day after this settlement was effected, the plaintiff's attorney wrote to his client, informing him that the cause would be on the day calendar for trial, on the following Monday, and requesting him to call for subpœnas for his witnesses, to which the plaintiff answered by letter, that his means did not allow him to continue the suit, and directing his attorney to let it rest. Though the plaintiff's attorney did not notify the defendants that they had a claim for costs, and that they were not to settle or compromise with the plaintiff, Mr. Clegg, one of the attorneys, swears, that he was informed and believes that the defendants knew of the right of the attorney to the costs of the action, and that they combined with the plaintiff to defraud them out of their costs; that they knew that the plaintiff was totally irresponsible, and that they made the first overtures to him, and induced him to act without the knowledge of the attorney, and in fraud of their right; and as this is not denied on the part of the defendants, nor on the part of the president, by whom the settlement was made, it must be taken to be true.

Where a settlement is privately effected between the parties, with the design of preventing the attorney from obtaining his costs, the Court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action, that he may thereby secure himself. *The People* v. *Hardenburgh*, 8 Johns., 259; *Pinder* v. *Morris*, 1 Car., 165. *Read* v. *Dupper*, 6 T. R., 361; *Chapman* v. *How.*, 1 Taunt., 341.

That there was such a combination in the case is, as I have said, not denied,; but the defendants insist that before verdict or judgment the attorney can have no lien, except upon money paid into Court; that there must be something to which his lien will attach, and that that does not exist until the liability of the defendant or of the plaintiff is ascertained by verdict or by the entry of judgment. They claim the rule to be that if, after verdict rendered or judgment entered, the parties settle in fraud of the attorney's lien, the Court will allow him to enforce the judgment to the extent of the costs included in it, and even then only where he has given notice to the defendant of his lien. The case of *Swain* v. *Senate*, 5 Bos. & Pul., 99, is expressly to the contrary. In that case there was a conclusive settlement before judgment, and the attorney had given no notice of his claim for costs; yet he was allowed to enter judgment, and issue a *scire facias* against the bail. The Court said that it was a fraudulent attempt to deprive the attorney of his costs, and that therefore the plaintiff's attorney ought to be at liberty to proceed for his costs, and to recover nominal damages.

We are referred to the case of *ex parte Harte*, 1 Barn. & Adolph. 462, to shew that where the action is for unliquidated damages, the parties may settle, even though the attorney has given notice to the defendant not to compromise or settle the suit without his consent, and in which the Court refused to aid the attorney. The Court did notice that feature as distinguishing it from the preceding cases, which were for the recovery of a liquidated amount, but they also put their decision upon he ground that there was no collusion in that case. Where there is collusion, it can make no difference whether the damages claimed are liquidated or not. The power of the Court is not limited to cases where the action is brought for a liquidated sum, but it interposes upon the general principle that it is equitable and right to protect the attorney against a dishonest combination between the parties to deprive him of the fruits of his labor and services. The plaintiff's attorney had a right to go on and enter up judgment for the costs, and the motion of the defendants for an order discontinuing the action was properly denied.

A. R. Lawrence, Jr., of counsel for appellant.

Clegg & Semler, for respondent.

SUPREME COURT OF PENNSYLVANIA.

MUNN & BARTON v. THE MAYOR, &C., OF PITTSBURG.

A city has a right to connect its sewers and drainage with any natural channel for the flow of water, without incurring a liability to keep that channel open to its mouth. Nor does it change the right or responsibility if the State or the lot owners have made an artificial and covered substitute for the natural channel.

The fact that the city has occasionally made repairs on the sewer substituted by other parties for the natural channel, is not evidence tending to shew that the city has adopted it as its own.

The city is not liable in such case for damage done to lot owners by the falling in of the sewer thus substituted for the natural channel, unless the damage has been caused by the negligence of the city's agents in connecting their own sewer with the former, or in keeping their own sewer in order.

Error to the District Court of Alleghany County.

The facts of the case appear sufficiently in the judgment of the Court.

Gilmore and *Marshall*, for plaintiff's in error.

Kuhn and *Slagle*, for defendant in error.

The opinion of the Court was delivered at Pittsburg, October 31st 1861.

STRONG, J.—In this case the District Court, on the trial, ordered a non-suit to be entered, being of opinion that the plaintiffs had given no such evidence as in law was sufficient to maintain the action. It was an action of trespass upon the case to recover damages alleged to have been sustained by the plaintiffs in consequence of the breaking and falling in of a sewer, by which their mill and manufactory had been thrown down. The fall of the sewer was averred to have been caused by the wrongful act of the defendants, or to have happened in consequence of their negligence. It alleged, and so the evidence submitted proved, that the

broken sewer was not in any highway, or on any land belonging to, or in possession of the defendants, but on a lot of the plaintiffs.

It was constructed thirty years ago by the Commonwealth of Pennsylvania to carry the water of a small creek called "Sukes Run," and to prevent its flowing into the State canal, which, in places occupied the bed of the stream. It was a substitute for the run, located near where the old run was, and, probably, at the place where it broke, in the old channel. Whether this was so or not is however immaterial. There was no contradiction in the evidence that it was a substitute for the run, and that the water of the run passed through it. In 1849 the defendants caused another sewer to be constructed along Pennsylvania avenue, in the city of Pittsburgh, to the old sewer constructed by the Commonwealth, formed a connection with it, and thus discharged the water of the avenue and other streets throught it into the Monongahely river. The junction of the two sewers is on the lots now owned by the plaintiffs, and they were covered with earth in places to the depth of fifteen feet. In 1838 the plaintiffs became the purchasers of the lot where the State sewer commenced, and through which it passed and erected their mill directly over it. In July, 1854, the old sewer broke under the mill, and as a consequence the mill itself was injured. Such are the prominent facts of the case as they appeared in evidence. Other facts which are considered of consequence by the plaintiff's in error, will be noticed hereafter. Now, it is clear that on such a state of facts the action could not not be sustained against the defendants unless they were guilty of such negligence, in not keeping the State sewer in repair, or unless the connection of their own Sewer with it was a wrongful act and the injury was caused by that connection. Whether they were guilty of such negligence, depends upon the question whether it was their duty to maintain the State sewer in a safe condition, for if it was not, their omission to do it was no wrong to the plaintiffs. It is not easy to see, however, how it can be maintained that such was their duty. The sewer was not built by them, and it was not upon any lands of which they had the control. It was the property of the Commonwealth, or of the Pennsylvania Railroad Company, to whom the Commonwealth sold, and it was upon ground belonging to private owners, the plaintiffs and others, ground upon which the defendants had no right to enter. It is argued that by connecting their own sewer with it, the defendants adopted it as their own, and again that inasmuch as it was shown that on several occasions they had made some slight repairs to it, they may be considered as having assumed the obligation to maintain it. The argument loses sight of the fact that the sewer is the substitute of "Sukes run," is in fact "Sukes run" itself. Into that run the city had a right to pour its sewers and drains, without being under any obligation to keep it clear to its mouth, on the private property of all the lot holders through which it flowed. This right it could not loose by the fact that the lot owners, or some one else had conducted the run through a covered passage way. Conveying the water of their own sewer into the old State sewer was, therefore, but the exercise of a right burdened with no obligation. It no more imposed upon them the duty to maintain the old sewer than their conducting the water into the run, before the Commonwealth interfered with it, would have compelled them ever after to keep the run clear to its mouth.

Nor can the repairs of the old sewer, occasionally made by the defendants, be regarded as any evidence of their voluntary assumption of the duty of maintaining it. It is conceded that when there has been a dedication of a highway to public use, a municipal corporation may become bound to repair by adopting it, and that making repairs is evidence of adoption. The cases cited by the plaintiffs in error prove this, but they prove no more. In such cases there is not only a right to make the repairs, but they can only be accounted for on the supposition that there exists a liability to make them, and they work an estoppel in pais against the owner of the land. They are cases of dedication. But when the repairs made have been rendered necessary to the enjoyment of a right without any obligation to make them; when a channel which the corporation may use, without any duty to maintain it, has been appropriated and exposed to obstructions, and has thereby become dangerous to the sewerage which the corporation has constructed, it would be going very far to hold that work done to guard against the danger was evidence of obligation to do it. The present is not a case of dedication. The defendants have no right of entry on the private property of the lot holders, for the purpose of repairs, and probably the plaintiffs, themselves, would stoutly deny their right, if it became necessary to take down the mill in order to keep up the sewer. Under the circumstances of this case the repairs made were no evidence of a duty of the city to maintain the sewer built by the Commonwealth.

Then was there evidence that the old sewer was broken in consequence of a wrongful connection of the new sewer with it? That the defendants had a right to make a connection, and conduct the water from their sewer into it we have already said, and we discover no evidence that the mode of connection was negligent or unskilful. It is urged that the diameter of the city sewer was three inches greater than the old, and that it brought into it an additional quantity of water. These facts it is contended tended to estab'ish a liability of the defendants for damages resulting from the fall of the old sewer. It was proved, however, and there was no conflict of testimony, that the old sewer would vent more water than the city sewer could bring into it, in consequence of its greater inclination. Nor was there a spark of evidence that it broke in consequence of being gorged with water. The proof was the reverse. Nor was it proved that any injury was or could be sustained by it in consequence of the alleged fact that the city sewer increased the flow of water. This part of the case has not been relied on in the argument, and it could not be. There was no evidence to sustain it. The case has been rested upon the assumption that it was the duty of the defendants to maintain and keep safe the sewer built by the Commonwealth, a position which we have shown untenable.

The Court then was right in holding that there was no evidence sufficient in law to maintain the action, and in directing a non-suit. The complaint that the constitutional right of trial by jury has been violated, is made without due consideration. The province of a jury has always been to determine facts. What is the law applicable to those facts has always been a question for the Court. In ordering the non-suit, the Court conceded all the facts which the jury could have found, and simply declared that under the law as applicable to them, there was no liability on the part of the defendants.

The judgment is affirmed.

LOVE & SON v. BROWN, BROTHERS & CO.

Time given to the endorser of a note, or a composition accepted from him by the holder, does not discharge the maker: yet to the extent to which the endorser pays the holder, the maker of accommodation paper is discharged.

Error to District Court of Philadelphia Co. Opinion by

WOODWARD, J.—The acceptor of a bill of exchange and the drawer of a negotiable note stand as principal debtors, and after endorsement, the endorsers stand as sureties. . between themselves, the payee may be, after negotiation of the paper, the principal debtor, and the maker the surety. This is always the case as between an accommodation drawer and his payee, but in the hands of a third party, the paper is, as to him, just that which it imports to be on the face of it. It follows, of course, that the time given to the endorser, or a composition accepted from him by the holder, does not discharge the drawer, since a principal debtor is not discharged by the indulgence shown to his surety. Yet to the extent to which the endorser pays to the holder, the drawer of accommodation paper is discharged, else part of the debt would be collected twice. These principles, sustained abundantly by the authorities cited in the argument, entitled the plaintiffs below to a judgment for the sums of the notes sued, less whatever they had received from Hillborn, the endorser. This is stated in the affidavit as twenty per cent., *or thereabouts*, which is too indefinite for a good affidavit of defence; but, as on the arguments before us, counsel consented to a credit of twenty per cent., we will affirm the judgment for the balance, directing the court below to ascertain the amount by deducting the twenty per cent., as of the date of the payment if readily ascertainable, and if not, then as the date of the judgment.

GENERAL CORRESPONDENCE.

Municipal law—Town—Mayor—Reeve.

To the Editors of the Law Journal.

Gentlemen,—A question has lately arisen in this town, the decision of which may be of practical benefit to the public, and I therefore venture to trouble you with it.

At the meeting for the organization of the Town Council for this year, the Mayor of the town was elected Reeve. The question arises is the Mayor of a town eligible for the office of Reeve?

By replying to this query, you will oblige

Yours, &c., Lex.

St. Catharines, Jan. 21, 1862.

[In our opinion, the Mayor of a town not separated from the county in which situate, is not eligible to be elected Reeve thereof.

We ground this opinion upon a careful perusal of secs. 66 120, 135, 144 & 147 of the Municipal Act.

It is provided by sec. 66, subsec. 2, that "The Council of every town shall consist of the Mayor, who shall be the head thereof, *and of three Councillors* for every ward, &c.; one of the *Councillors* to be elected by the Council to be Reeve of the town."

It seems to us, under this clause, that the Mayor is not a Councillor within the meaning of it.

This opinion is strengthened by sec. 144 of the Act, which provides that "In case of the death or absence of the head of a Town Council (in other words, the Mayor), the *Reeve* shall preside,"—intending, as we think, that the Reeve and Mayor shall not be one and the same person.

Though the Mayor of a Town Council is for many purposes a member, it appears to us that he is not such a member as is intended by sec. 135, read in connexion with the other sections of the Act to which we have referred.

We know of no decision on the point.—Eds. L. J.]

MONTHLY REPERTORY.

CHANCERY.

V. C. W. Gardner v. Stevens. *Dec.* 10.

Will—Construction—Absolute interest.

Leaseholds were bequeathed to executors in trust for A. & B. for their use and benefit until A. is 25 years old, and in case A. & B. should die before A. attains 25, then the leaseholds shall be equally divided between C. D. & E., A. attained 25.

Held, that A. & B. become absolutely entitled in moieties to the leaseholds.

S. C. Haswell v. Haswell. *Nov.* 22, 26.

Power of appointment—Extinguishment of—Power in gross.

Settlement of money upon trust to pay the income to a husband until his insolvency or death, then to wife for her life; and after the determination of these trusts, for the children as the survivor of them (husband and wife) should appoint; and in default of appointment after the several deceases of them, or the sooner determination of the interest limited to them, upon trust for the children and issue. The husband having become insolvent before the death of his wife.

Held, that although the power of appointment was given to the survivor, yet there being a clear indication that the power was to be exercised while the interest of the husband or wife continued, upon the death of the wife—the husband's interest having previously determined—the power was extinguished, and the fund became divisible.

V. C. S. *Re* Ryan's Settlement. *Dec.* 14.

Vesting order—Settled fund—Right to capital vested in husband.

A sum of £500 stood settled on the trusts of a marriage settlement. The trustees were dead, there were no children, the wife was fifty eight years old, and had assigned all her interest to her husband, who was one of the *cestui que trusts*. On the petition of husband and wife, the court ordered that the right to transfer might vest in the husband, and that he might transfer to himself.

V. C. S. Courtenay v. Wright. *Nov.* 6, *Dec.* 6.

Debtor and Creditor—Debtor's right to securities on payment—Grantor and Grantee of annuity.

Where the relation of debtor and creditor subsists (the debtor and creditor in this case being grantor and grantee of a life annuity) and the true construction of the instruments, and the evidence of the real nature of the transaction shews that a policy of assurance was effected by the creditor as an indemnity, if the debtor substantially bears the expense of that security, he is entitled on a principle of natural equity to have it delivered up to him when he pays the debt, which it was directly or indirectly effected to secure.

L. C. Maclachlan v. Tait. *Nov.* 23, 26.

Will—Construction—Vesting.

Devise to trustee for testator's wife for life, remainder for E. and S for their lives, and, if either should die without issue, for the survivor for life; but if either should leave issue, then one moiety for the children of E., and one moiety for the children of S., and their respective heirs, executors, administrators, as tenants in common, "the said children to become beneficially interested on the death of their respective parents.

Held, that the period of vesting in the children was at the death of the testator, and not at the death of E. or S.

V. C. K. *In re* Wrangham's Trust. *Dec.* 14.

Will—Construction—Contingency—Order for maintenance.

A testator gave the dividends of certain specific stock to his daughter for her separate use, and after her decease the principal to her child or children equally on their attaining 21, with a gift of the dividends to the husband of his daughter, in case he survived her; but should she die without leaving any issue, then, after the decease of her husband, to the testator's son absolutely. The testator's daughter predeceased him, leaving one child, a daughter, who survived her and her father, and died under 21, an order having been made for a guardian and maintenance. On the question whether such child took a vested interest in the fund,

Held, that she did not, and on her death under 21, the fund went over to the testator's son.

L. C. Jenner v. Jenner.

Undue influence—Parent and child—Setting aside family settlement.

Bill by a tenant in tail against his father to set aside a re-settlement of the family estates, by which the estate tail had been converted into an estate for life—affirming the decision of Stuart, V. C., dismissed with costs.

The father having gained no pecuniary advantage by the re-settlement, which was in itself reasonable, it would not be set aside on the ground of parental influence, or because the son had not a separate solicitor.

L. C. BORLON v. DUNBAR. *Nov.* 8, 9.

Will—Construction—"Remainder of my money and effects"—Reversionary Interest—Costs.

An officer while returning to England, made his will, by which he gave two legacies of £10, and directed his portmanteau, &c, to be sent to his father, and then as follows:—"I beg that the remainder of my money and effects be expended in purchasing a suitable present for my godson," naming him. The testator was then, and at his death, entitled to reversionary interests in two considerable sums of stock.

Held, that the stock did not pass by this gift to the testator's godson.

The appellant having failed in his appeal ordered to pay costs.

M.R. NORMAN v. KYNASTON. *Nov.* 10, 12.

Will—Construction—Absolute Gift—Revocation.

A testatrix by her will desired that all her fortune should be divided between R. N. and A. K.

By a codicil, after stating that A. K. was dead, she expressed her desire that her fortune should be divided between R. N. and T. K., adding these words, "for the use of their children, and when they come of age to have settled upon them, share and share alike."

R. N. died after the testatrix, never having had any children.

Held, that the absolute gift of the moiety to him was not revoked; it was only limited to the extent that a beneficial interest was given to his children which afterwards failed.

V. C. S. BLAND v. MACCULLOUGH. *Nov.* 8.

Gift—Inter vivos.

A. from time to time purchased debentures, amounting altogether in value to between £2000 and £3000, and deposited them with B., who lived with him as his wife. As they were purchased B. received the stockholder's receipts. She cut off the Coupons as they were wanted, and accompanied A. to receive the dividends. By the evidence it appeared that before purchasing the debentures A. had promised them to B., and had said she must keep them; and that subsequently he had frequently alluded to them as her property. A. bequeathed £3000 to B. during her life and widowhood, and £3000 for her daughter by him.

Held, that there was a good gift *inter vivos*.

V. C. W. RE THE ERA ASSURANCE SOCIETY. *Nov.* 8, 15.

WILLIAM'S CASE.

THE ANCHOR ASSURANCE COMPANY'S CASE.

Joint Stock Company—Amalgamation—Illegality—Liabilities—assumed by purchasing company.

In the absence of any special power for that purpose in their deeds of settlement an amalgamation between two joint stock companies is *ultra vires* and invalid, and the obligations and liabilities arising out of such attempted amalgamation and assured by the directors of the purchasing company, cannot be enforced against the shareholders of such company.

M. R. GOVER v. DAVIS. *Nov.* 19.

Will—Construction—"Money,"—Reversionary interest in stock—General words not restricted by words of enumeration.

A testator by his will gave as follows:—"To my wife I hereby bequeath the whole of my pay, balance of pay, clothing, balance of clothing, money that may be now due or may become due to me at my decease; also the whole of my property and effects—that is to say, my box, clothes, bedding, &c. &c, I bequeath to my wife." At the time of his death the testator was entitled to certain reversionary interests in certain sums of stock.

Held, that the words under the *videlicet* did not restrict the general words which preceded them, and that the stock in question passed by the will.

V. C. S. QUINN v. RATCLIFF. *Nov.* 22.

Practice—Affidavit as to documents—Evidence of title.

Defendants by their answer stated that certain documents made out their title, and did not shew any title in the plaintiff.

Held, that the defendant must make the common affidavit of documents in their possession, stating whether any and which of them related to the plaintiff's pedigree.

V. C. W. APPLIN v. CATES. *Nov.* 12.

Debtor and creditor—Assignment of debt—Costs.

A. being indebted to B., a letter of license was granted to him upon condition of paying off the debt by monthly instalments. B. subsequently assigned the debt to C., who served A. with notice of the assignment and claimed from him an assignment of the instalments.

A. however was informed by B. that the assignment was disputed, and that if the instalments were not paid to him (B.) as before, the letter of license would be revoked.

A. thereupon declined to pay C. until a bill had been filed and an injunction obtained.

Held, that A. was justified in withholding payment from C. until the injunction had been obtained, and that he was entitled to retain his costs of suit out of the future instalments before payment to C.

V. C. W. *Nov.* 14, 16.

COTTAM v. THE EASTERN COUNTIES RAILWAY AND OTHERS.

Vendor and purchaser—Invalid transfer—Notice—Forged signature.

Trust monies standing in the names of three trustees were invested in railway debentures under the authority of the trust deed. These debentures were subsequently transferred to a purchaser for value by one of the three trustees, who forged the signatures of his co-trustees to the instrument purporting to effect the transfer, and absconded with the proceds.

Held, that the purchaser who had taken the transfer with notice of the trust, and without inquiring into the circumstances attending the alleged signatures, could not insist upon his purchase as against the co-trustees, who were entitled to have such forged transfer cancelled.

L. C. BOWSER v. MACCLEAN.

Demurrer—Pleading—Averment of Title—Jurisdiction—Relief in Equity against Trespass.

B. was seized of Y. estate, which was customary freehold of a certain manor, the surface being demised. The lord demised the coal mines within the manor to M., who was also working the coal mines of an adjoining estate Z. Bill by B. alleging these facts; and also that M. had sunk a shaft on a part of the lord's land other than Y., and conveyed coals from Z by and underground tramroad through Y. for the purpose of drawing such coals to the surface by the said shaft.

Demurrer, upon the grounds—1st of want of averment of title or possession; 2nd want of averment of injury; and 3rd of want of jurisdiction in the Court.—Overruled.

V. C. K. DAY v. BARNARD. *Dec.* 7.

Will—Construction—"Unmarried."

A testatrix bequeaths personal estate to trustees in trust for such persons as R., a single woman, should by will appoint, and in default for such persons as should at the time of the death of R. be entitled to her personal estate under the statutes of distribution, as if she had died intestate and unmarried. R. married, had eight children, and survived her husband, dying a lunatic and never having exercised the power of appointment. Upon the question whether the word "unmarried" under the circumstances, signified R. dying a *femme sole*, or simply not having a husband at the time of her death.

Held, that the latter sense was that in which the testatrix intended to use the word.

V. C. W. GIBBS v. LAWRENCE. *Nov.* 20.

Will—Construction—"Goods chattels and effects."

A testator gave all his household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which should be in, upon, or about his dwelling house and premises.

Held, that bank notes and gold did not pass under this bequest.

M. R. LYWOOD v. WARWICK. *Nov.* 23. 24.

Will—Construction—"Issue Male"—Males claiming through females excluded.

Gift of stock to A. for life, and after his death unto and amongst his issue male.

Held, that the words "issue Male" meant "Issue male claiming through males" and that males claiming through females were excluded.

COMMON LAW.

EX. LEGH v. LILLIE. *Nov.* 9.

Lease—Covenant to pay increased rent—Pleading.

Where in a lease there was a covenant that straw, &c., should not be carried off the farm without the consent of the plaintiff (the lessor), unless an increased rent of £10 for every ton &c., so carried off should be paid to the plaintiff.

Held, that a declaration upon this covenant, which alleged that straw, &c. was taken off the farm, but did not allege that the increased rent was not paid, was bad.

C. C. R. REG. v. GEORGE OLIVER. *Nov.* 10.

Common Assault—Verdict of—Indictment for inflicting grievous bodily harm—Arrest of Judgment.

Where a prisoner was found guilty of a common assault upon an indictment for inflicting grievous bodily harm, and actual bodily harm, the conviction was held good.

C. C. R. REG. v. HENRY SPARROW. *Nov.* 10.

Assault with grievous bodily harm—Common Assault—Verdict of "aggravated assault"—Malice.

Upon an indictment containing counts for assaulting and maliciously inflicting grievous bodily harm, and a count for a common assault, after evidence of grievous injuries inflicted by the prisoner, the judge told the jury there was evidence to go to them of grievous bodily harm; and that the question of whether the prisoner intended to inflict grievous bodily harm did not arise. The jury found the prisoner guilty of "an aggravated assault" without premeditation, under the influence of passion.

Held, that the assault was intentional in the understanding of the law; that upon the facts the jury were justified in finding the defendant guilty of an assault with grievous bodily harm, and that the prisoner was properly convicted of that offence.

C. C. R. REG. v. HOLT. *Nov.* 10.

False pretences—Evidence of an obtaining money not charged—Inadmisssble—Intent.

Upon an indictment for obtaining money from H. by false pretences, it appeared that the defendant was employed to take orders for goods, but had no authority to receive the price; and that eleven days after he was so employed he obtained the money from H, by representing that he was authorized by his employer to receive it for goods delivered in pursuance of an order which the defendant had taken. Evidence of an obtaining by a similar representation from another person, within a few days of the time when the monies were obtained from H, not charged in the indictment, was tendered for the prosecution to prove the intent; and after objection, admitted.

Held, that the evidence objected to was inadmissible.

C. C. R. REG. v. JAMES TONGUE. *Nov.* 10.

Embezzlement as servant—Secretary of money club—Suing on a note by direction of a club and appropriating proceeds—Isolated employment to receive money.

The prisoner, being the secretary of a money club regulated by rules, which, as well as the practice of the club, were stated in the case, was directed by the club to sue upon a joint promissory note, the property of the club, or get better security; and the note was handed to him by W., the Treasurer, who was not a member of the club, and who, at the same time, desired that his name should not be used in legal proceedings. The prisoner indorsed W's name on the note, employed an attorney who issued a writ, and in consequence of the action money was paid to the prisoner by one of the joint makers, which he fraudulently withheld from the club and appropriated.

The duties of the prisoner stated in the rules of the club, comprised duties cognate to that of receiving money for the club, but not expressly that duty.

Held, (Crampton, J., *dubitante*), that the prisoner had received the money as servant for the use of the club, and that he was properly convicted of embezzlement.

Held, also, that the employment to receive money was sufficient, though receiving money was not the prisoners usual employment, and it was the only instance in which he was so employed.

C. P. EVANS v. REES. *Nov.* 17.

Costs—Slander.

In an action of slander in which the plaintiff gets less than 40s. damages, the judge cannot certify to give him more costs than damages, the 21 James 1, c. 16, s. 6, not being repealed by the 3 & 4 Vict., c. 24.

C. P. PARIS v. LEVY. *Nov.* 16.

Libel—Comment on handbill—Publication in writing of oral comment on handbill.

If an oral criticism be made on the contents of a handbill, and that oral criticism be published in a newspaper, in an action against the proprietor of the newspaper for a libel for so publishing, it is for the jury to say whether the criticism was fair and reasonable, and not reflecting on the plaintiff's private character. If the action be for publishing an article in the newspaper reflecting on the tendency of the contents of the handbill, the same question as above is for the jury as to the criticism in the article.

Q. B. SAUNDERS v. EPPE. *Nov.* 9.

Will—Construction—Contingent remainder—Trustee to preserve.

A testator devised an estate to his wife for life, and upon the determination of that estate by forfeiture or otherwise to a trustee to preserve contingent remainders, nevertheless upon trust for his wife for life, and after her death he gave, devised, and bequeathed the rents to his two daughters in equal parts for life; and in case of the death of either without leaving issue, then to the survivor: but if either daughter should leave issue, such issue to be entitled to the mother's share, and on the death of both daughters, then he devised one moiety to the issue of each daughter or the whole to the issue of one, if the other should die without issue.

Held, that the legal estate was in the trustee until the death of both daughters.

C. P. ST. LOSKEY AND LEVY v. GREEN AND ANOTHER. *Nov* 7.

Amendment—Real question in controversy between the parties—Statutes of amendment—Costs of amendment—Common Law Procedure Acts.

A judge is bound to amend the pleadings so as to raise the real question in controversy between the parties. Where an amendment was made in the declaration, the costs were made defendant's costs in the cause.

Q. B. CRAMPTON v. WALKER. *Nov.* 20.

Pleading—Set off—Action on indemnity against a Bill of Exchange.

In an action on an indemnity against a Bill of Exchange, the plaintiff alleged generally, as damages, that he had been compelled to pay the Bill with interest, and the costs in an action brought by the holder of the bill, and had incurred costs himself in defending the said action.

Held, that each of these heads of damage constituted a distinct cause of action, and that the plaintiff could not, by declaring in the above form, deprive the defendant of his right of pleading a set off to that portion of the of the damage which was liquidated; that a set-off therefore which was confined to the amount of the Bill and interest only was well pleaded.

EX. *Nov.* 14.

GEE AND ANOTHER v. LANCASHIRE & YORKSHIRE RAILWAY.

Damages, measure of—Contract—Misdirection—New Trial—County Court appeal—Costs.

In an action against a railway company for delay in carrying and delivering goods where there was no special contract, the judge directed the jury to find a certain sum for the wages of the plaintiff's servants who were kept out of employment by the non-arrival of the goods; and also left it to the jury to name the amount the plaintiff's should recover by the loss of profits from the same cause.

Held, to be a misdirection.

In a county court appeal, the appellant begins:—

When new trial granted on ground of misdirection, no costs allowed.

Q. B. MYERS v. SARL. *Nov.* 20.

Evidence—Custom—Written Instrument.

A contract contained a clause in which it was stipulated that "a weekly account of work done" should be delivered. A weekly account was delivered, but of a portion of the work done only.

Held, that parol evidence was admissible to shew that in the trade to which the contract had reference the term was applicable to work only of a peculiar kind.

Where in a particular class of dealing words have acquired a peculiar meaning, well established, parties contracting with reference to that class of dealings who use those words, must be taken to have used them in the acquired, and not in the ordinary and popular meaning. Where a clause stipulated for all extra work written directions should be given, under the hand of the architect.

Held, that a sketch made by the architect, and not signed by him, was not such a direction as complied with the contract.

B. B. BAILEY v. OWEN. *Nov.* 24.

Common Law Procedure Act, 1852, *ss.* 10, 11, 222—*Re-sealing of writ of summons—Statute of limitations.*

The court will not allow a writ re-sealed too late to take a cause out of the provisions of the statute of Limitations by mistake of the attorney to be re-sealed *nunc pro tunc* for this purpose.

B. C.

COOK ET AL. v. JONES (In the matter of a plaint in the County Court of Montgomeryshire).

County Court—Rule to enter verdict—Time for application

Where on the 20th of April, 1860, a cause was tried in a County Court, and the jury having found a verdict for £10, the judge directed the Registrar to enter a verdict for nominal damages only; an application on the 4th of May, 1861, for a rule nisi to enter the verdict for the sum found by the jury, was held too late.

REVIEWS.

SKETCHES OF CELEBRATED CANADIANS AND PERSONS CONNECTED WITH CANADA FROM THE EARLIEST PERIOD IN THE HISTORY OF THE PROVINCE DOWN TO THE PRESENT TIME: by HENRY J. MORGAN, compiler of the Tour of H. R. H. the Prince of Wales. Quebec: Printed and Published by Hunter, Rose & Co.

This is the title of a very handsome volume containing 800 pages, recently issued in Lower Canada. The author is a young man occupying a subordinate place in the public service, who, instead of wasting his time, in idleness or dissipation, has sufficient good sense to turn it to better account.

The author does not presume to advance any claims to originality with respect to a great portion of the contents of the work, derived, as they have necessarily been, from various home and local publications, a list of which he publishes. The author at the same time expresses himself sensible that his work is imperfect not only in its details, but in the exclusion from its pages of numerous names which ought to have figured in, and graced the work. For these he pleads the inexperience and incapacity of youth in matters with which he has perhaps prematurely grappled, the difficulty of obtaining accurate information, and the long period of time which the work covers.

The author having said this much, has nearly disarmed criticism. Indeed it would be cruel and unfair when we know the circumstances under which the work was written, and the comparative inexperience of the writer, to do or say anything which might have a tendency to crush such praiseworthy endeavors. The work does not profess to be a complete biography of every celebrity, or complete in details as to those whose lives do appear. It is called "Sketches of Celebrated Canadians." In it will be found much to interest and much to entertain. It will be found a much more pleasing and instructive railway companion than the trash which is generally dealt out by news venders on railway trains. It will be found very opportune to wile away the leisure hour either on car or boat, or at the fireside. The reading matter is not heavy. The mind will not be burdened by details about which it cares nothing. No one is obliged to read all the lives published in the volume. A selection may be made, and by random snatches time may be pleasantly, if not profitably beguiled.

Some readers may be disappointed in not finding lives which they may have good reason to expect. Such readers must remember the circumstances under which the book was written, instead of hastily condemning it. The book certainly does not for the present profess to give a sketch of the life of every celebrity. It is wonderful that under the circumstances mentioned by the author, so much has been done. No doubt in the future editions of the work he will avail himself of such information as can in the meantime be collected towards supplying acknowledged omissions.

The work is a credit to the author and a credit to the publishers, It reflects as much on the industry of the one as it does on the enterprize of the other. It is an effort that deserves encouragement at the hands of all Canadians and all interested in Canada. We are glad to learn that so far neither the expectations of the author or publishers have been disappointed.

APPOINTMENTS TO OFFICE, &c.

REGISTRARS.

WILLIAM GEORGE DRAPER, Esquire, to be Registrar of the City of Kingston.—(Gazetted, 18th January, 1862.)

NOTARIES PUBLIC.

ROBERT SMITH, of Stratford, Esquire, to be a Notary Public in Upper Canada.—(Gazetted, 18th January, 1862.)

TO CORRESPONDENTS.

"A SUBSCRIBER"—Under "Division Courts."

"L. N."—Under "General Correspondence."