THE

Local Courts' and Municipal Gazette.

VOLUME II.

FROM JANUARY TO DECEMBER, 1866.

EDITED BY

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BARRISTERS-AT-LAW.

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TABLE

OF THE

CASES REPORTED IN THIS VOLUME.

DIARY FOR JANUARY.

1. Mon. ..*Circumcision.* Heir and Devisee Sittings com. [Co. Ct. & Sur. Ct. Term begins. Taxes to be [computed from this day. Municipal Elec.
4. Thurs. York and Peel Winter Assizes commence.
6. Satur. *Epiphany.* Co. Ct. and Sur. Ct. Term ends.
7. SUN...*1st Sunday after Epiphany.*
8. Mon. ..Election of Police Trustees in Police Villages.
10. Wed. ..Election of School Trustees.
14. SUN...*2nd Sunday after Epiphany.* [Board of Audit.
15. Mon. ..Treasurer & Chairm. of Muns. to make return to
16. Tues...Heir & Devisee Sitt. end. Muns. & M. C. (except [Co.'s) & Trs. of P.V. to hold 1st meeting.
20. Satur. Articles, &c., to be left with Secretary of L. S.
21. SUN...*3rd Sunday after Epiphany.*
23. Tues...Mun. County Council to hold 1st meeting.
25. Thurs. *Conversion St. Paul.*
28. SUN...*Septuagesima.*
31. Wed. ..Last day for Cities & Counties to make return to [Gov. Grammar School Trustees to retire.

NOTICE.

Subscribers in arrear are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JANUARY, 1866.

THE DIVISION COURT BILL.

We understand the Attorney-General has called for the opinion of the County judges upon the proposed bill of last session respecting the Division Courts. This is a satisfactory way of treating the subject, for of course those who are actually engaged in working the Division Courts are most competent to pronounce an opinion upon it. Most of these gentlemen have had large experience, some of them of over a quarter of a century, and if they will give full expression to their views there will be an amount of evidence of the highest character upon which legislation could be based.

Some of the changes proposed relate to an enlarged jurisdiction to the courts, and upon this point we do not at present express any opinion, but if the jurisdiction be increased provision should be made for increased fees, according to the increased powers, to the officers, as well, we think, as some scheme of remuneration to professional men for their services, which would be more generally taken advantage of in the event of an increased jurisdiction. The fairness of such a provision, not to the lawyer but to the client, has already been alluded to.* No changes in this respect are contemplated by the proposed bill.

Many provisions in the bill we are sure will meet the hearty approval of the County judges, but they must be altered in form to suit the courts. The whole statute law relating to them should be contained in one act. The Division Court suitors, clerks and bailiffs cannot be expected to have a library of books, even if nothing be said of the convenience of having the whole law in one book. The best plan would undoubtedly be to do as Hon. Sandfield Macdonald did, to repeal the existing statutes and consolidate the whole in one act. But we fear this is not likely to be done for some time.

The power to grant new trials in interpleader cases is much called for. It seems a preposterous thing that in the most important kind of cases there is no means of obtaining a rehearing, however strong the grounds that may arise for it—in mistake, surprise, the discovery of new evidence, &c. We have heard numerous complaints on this head. The right to call a jury in the same class of cases is much needed also, for in these cases questions of fraud in fact almost always arise and they are just such questions as may be best left to juries to dispose of. Mr. Attorney Macdonald has always shown great anxiety to have all that relates to the administration of the law placed on the best footing, and the measures introduced by him have all been of valuable character and tending to this end, and we think he has taken the best and safest course to learn the opinion of the County judges before giving his sanction to the legislation proposed, and those interested in courts are indebted to him for the course he has taken. Theorists with the best intentions in the world often injure the cause they intend to serve, and we should be extremely sorry if by hasty legislation the value of the Division Courts was impaired—a scheme that works well now, injured by being overgorged with a class of work it was not designed for. The capabilities of the courts for undertaking what is proposed by the bill will be ascertained from the opinions of the judges, and we are sure that neither Attorney-General Macdonald nor any other member of the House who has the best interests of these

* 10 U. C. Q. B. 258

courts at heart would run counter to the decided opinions of the County judges, or the greater part of them, deliberately expressed in the way we learn the Attorney-General has asked for them.

ELECTION OF WARDENS.

We commence the publication in another place of one of the most important decisions that has been given in our courts with reference to Municipal Elections. We speak of the case of *Reg ex rel. McManus* v. *Ferguson.*

The facts shew in the first place that great looseness prevails in drawing the certificates required by sec. 67 of the Municipal Institutions Act. There is scarcely any similarity between those prepared by the different township clerks, as given in the report of this case. They do not appear to have thought of taking the obvious and usually safe course of following the wording of the statute, some inserting one requisite and some another. If this is the case in the county of Simcoe, where municipal matters are managed at least as well as in any other county that we know of, it is doubtless the same in other counties. An attentive perusal of the full report which we give of this case, and the careful judgment of the learned judge who heard it, will amply repay the time spent upon its perusal by those who are concerned in such matters. This is specially incumbent on township and county clerks, upon whom devolves the duties respectively of drawing and deciding upon the validity of these certificates.

This brings us to another point, and that is the responsible position of county clerks, as presiding over the meeting of reeves and deputy reeves composing the county council, prior to the election of the warden. Whether or not it is the duty of clerks to examine these certificates before allowing their holders to take their seats and vote—and no opinion is expressed by the learned judge on this point—it certainly is their duty to act in the premises with the greatest care and circumspection, and in doubtful or difficult cases to obtain legal advice before coming to a decision, otherwise they lay themselves open to charges of partiality, whether truly or not matters little as far as their reputation is concerned, and render themselves liable to be charged with the costs incident to the application to set aside the election. But no order was made in this case, as the clerk had not been called upon to shew cause, and, as was remarked by the Chief Justice, was not therefore in a position to explain what seemed to be inconsistencies in his conduct, but which were very probably capable of explanation. The position of these officers is the more difficult, and their conduct more liable to misinterpretation, as they are, generally the nominees of one party in the council, and are liable to lose their office if they fail to retain the good wishes of that party. This is an evil, not attributable to any particular class or body of men, but necessarily inherent in the elective system that prevails in this country.

This, however, opens up a much wider field for discussion than we can enter into at present. Our object now is merely to draw attention to the case in point, with reference to the future conduct of persons holding the difficult position that we have been speaking of.

STAMPS.

We are curious to learn what the result of the stamp system has been in respect to collections for the fee fund. In some counties we happen to know there was great irregularity in the collection and return of fees. In these counties the sale of stamps will represent, no doubt, a larger amount of fees; while in the counties in which regular collections have been made, there will be probably little alteration. At first there was some little inconvenience and difficulty in working the stamp system; but from every quarter we learn that now things go on smoothly. The clerks. however, still complain, and with justice, we think, that although they are obliged to keep constantly on hand a supply of stamps they are allowed very small advantage on large purchases from the county attorneys This ought not to be so, for these officers have a standing credit as high as $600, in some cases, besides the uniform allowance of five per cent., and can well afford to make an allowance when stamps are purchased in quantity. In connection with this subject we would mention that some enquiries have been made of us upon which we would be glad of information from clerks, namely, the cost of stamp obliterators, with moveable type for months and date. Will some gentleman who has procured them give us the necessary information, and where they are to be had, material, &c. ?

EXEMPTION ACT.

A correspondent asks us whether a baker's bread cart, or a peddler's waggon, horses and harness, or a physician's gig, or a waggon used by a merchant to send home goods to his customers, come within the 6th subsection of the 4th section of the Exemption Act of 1860.

The section of the Act, reads as follows: "Tools and implements of, or chattels ordinarily used in the debtor's occupation, to the value of sixty dollars." It has been interpreted by our courts in a liberal manner. The intention was doubtless as far as possible to remove every obstacle in the way of the poor or the unfortunate man in obtaining an honest livelihood. As it so happens it was only last Term that a decision was given by the Court of Common Pleas in a case of *Davidson* v. *Reynolds* directly in point. It was there held that a horse, sleigh and harness owned by a farmer, and ordinarily used by him in his occupation as a farmer, and not exceeding the value of sixty dollars, were exempted from seizure under the act referred to.

SELECTIONS.

OBSOLETE LAWS OF TRADE.

The lawyer, the merchant, and the politician may all learn something to their advantage from an occasional review of the old laws of England in reference to trade and commerce. These laws were to a great extent adopted in this country under the colonial system, and although now happily either repealed or obsolete, yet as there are persons who have some faith in the system of cheapening prices by statute, they will do well to study the effect of such laws in the past. If the world was indeed better off in the sixteenth and seventeenth centuries than it is now, laws regulating prices may be defensible. But if the laboring man gets more food and better house-room by his day's work now than he did then, if society is upon the average better educated, more moral, and more comfortable now than it was two hundred years ago, no sensible student of the past can doubt that the relaxation of these laws has had a large share in producing this effect.

"Forestalling," which was defined by the statute 5 and 6 Edward VI. c. 14, as the purchase of goods while on their way to a market or port, was a grevious offence, even at common law (3 Inst., 195). By statute a forestaller forfeited the goods bought, and for the first offence was punished by two months' imprisonment; for the third, was deprived of all his goods, pilloried, and imprisoned during the king's pleasure.

"Regrating" was the purchase of provisions at a market, with intent to resell in the same or a neighboring market. This offence was, by the same statute, punishable in like manner. And if cattle were purchased while living, it was a penal offence to resell them in less than five weeks, during which time they must be kept on the buyer's own ground.

"Ingrossing" was the purchase of grain, butter, meat, fish, &c., with intent to sell again (5 and 6 Edw. VI., c. 14), otherwise, than in regular course of retail business. It was, in short, precisely what we now call speculating for a rise in provisions. This was punishable in the same manner as forestalling.

That these statutes were not a dead letter, plainly appears from the cases turning upon them in Rolle's Hardres' Bridgman's and Jones' reports, which of course represent the merest fraction of the whole number of prosecutions, which were mainly conducted before justices of the peace.

These laws were of course well meant, and for a very short time they doubtless kept down the prices of provisions by compelling farmers and other holders to sell directly to consumers or retailers. But by depriving producers of their readiest cash paying customers, such laws of course discouraged production, and thus in the long run actually raised prices. For none but speculators will buy the excess of a harvest over the wants of the people, and if they are excluded from the market, the farmer has no option but to hold or destroy his surplus crop. And in either case he is discouraged from planting as much the next season.

While the prices of provisions were thus supposed to be depressed, in the interest of the poor, the Legislature undertook, with more success, to keep down wages. By the statute (5 Eliz. c. 4), justices of the peace were empowered to fix the wages of agricultural laborers, and to compel all manner of workmen to serve in harvest time. Laborers were required to work from 5 A. M., until 7 or 8 P. M., but were allowed two hours and a half for meals. Of course, workmen had no power to escape from the operation of these laws. To guard against the little chance which they might have of improving their condition, they were not allowed to travel out of their county, without a certificate from a clergyman and churchwarden, which none but the servile and obsequious could get.

These are but specimens of a multitude of laws which undertook the regulation of trade. The only point in which they have permanently succeeded has been in keeping down the agricultural laborers of England, and in perpetuating great inequalities between the wages paid in different counties. For a long time they depressed the manufactures of the country, while intended to encourage them, but this evil has been done away. It is to be

hoped that no repitition of such follies will ever be witnessed in this age.—*New York Transcript.*

THE LAW & PRACTICE OF THE DIVISION COURTS.

(*Continued from Vol* I. *page* 153.)

The English decisions have been followed by our own Courts in questions arising on this section (sec. 71) as to "the cause of action," and where it arises, the construction in *Borthwick* v. *Walton*, 15 C. B. 501, and *Hernaman* v. *Smith*, 10 Ex. 659, has been expressly adopted.

In *Re Co. Judge of Brant—Watt* v. *Van Every and another*, 23 U.C.Q.B.196, a rule was obtained for a prohibition on the ground that the cause of action in the whole or in part arose in Goderich. The facts were these:—The defendants' agent made a contract with Watt at Brantford in the county of Brant that the defendants should deliver so many barrels of fish in good condition to Watt at the railway station at Goderich in the county of Huron, and the fish were so delivered, but in an unsound and worthless condition. Watt brought his action in the county of Brant for damages for breach of the contract. The defendants resided and carried on business in Goderich, in the county of Huron. It was held by the Court that the whole cause of action did not arise at Brantford, and that therefore the County Judge of Brant had not jurisdiction.

"The words *cause of action*," said Draper, C. J., in delivering the judgment of the Court, "have, in the English County Court Act, been repeatedly determined in England to mean the *whole cause of action:* in other words, whatever the plaintiff must prove to entitle him to recover. Now, what is the cause of action in this case? Not the contract only, but the contract and the breach, for which the plaintiff claims damages. The first was made at Brantford, but the fish were to be and were delivered to the plaintiff at the railway station at Goderich. The breach of contract alleged is, that the fish there delivered were unsound, &c., and if true, this breach occurred at the place of delivery stipulated for by the contract. The cause of action therefore arose partly at Brantford and partly at Goderich, and the plaintiff must bring his action according to the second alternative"—namely, in the division where the defendants reside.

In *Re County Judge of Lambton—Kemp* v. *Owen*, 14 U. C. C. P. 432, the facts were these:

The defendant resided in Goderich in the county of Huron. A verbal bargain was made there between the plaintiff and defendant for the delivery by the plaintiff of a quantity of coal oil to the defendant at Wyoming, in the county of Lambton; the oil was delivered at Wyoming, and the action was brought in the First Division Court of Lambton. The judge below determined that the cause of action did arise in the county of Lambton; but the Court held "that the cause of action did not arise, that is did not *wholly* arise at Wyoming, but partly at Goderich and partly at Wyoming," and that therefore the judge of Lambton had no jurisdiction.

Jurisdiction under this branch of the 71st section, it may be observed, is dependent wholly on the cause of action *having arisen* in the Court Division in which the suit is entered, the section expressly providing that the suit may be so entered and tried notwithstanding the defendant or defendants may at the time reside in a county or division, or counties or divisions different from the one in which the cause of action arose. This varies materially the general rule applicable to inferior tribunals, and gives a Division Court held for the division in which the cause of action arose jurisdiction over the subject matter irrespective of the residence of the defendant, if in any part of Upper Canada. To give effect to this, section 73 provides for the transmission of summonses for service to the clerk of any other Division Court in Upper Canada within the limits of which the defendant may reside; and section 76 provides for an extended period of service, before return day, according to the assumed distance, that is to say of fifteen days, in case none of the defendants reside in the county in which the action is brought, but one of them resides in an adjoining county; and of twenty days, in case none of the defendants reside either in the home or an adjoining county. And this rule applies also to cases brought within the section by reason of any of the defendants residing or carrying on business within the division.

That portion of the enactment is now to be considered, for, as already stated, under sec. 71 a suit cognizable in a Division Court may be entered and tried,

(B) In the Court holden for the Division

(1) *In which the defendants or any one of the defendants resides* or

(2) *Carries on business* at the time the action is brought.

(1) In which the defendant *resides*:— There are a number of cases bearing on the subject and applicable to the construction of the term here used: to these it is proposed to make brief reference. The term "residence" is synonymous with the terms "place of abode," or "dwelling." It means a domicile or home. A dwelling is constituted by actual occupancy coupled with the intention to give the character of permanence to such occupancy (See *R.* v. *Thompson*, 2 Leach, 771; *Lambe* v. *Smythe*, 15 L. J. Ex. 287). In the words of Story, that place is the domicile of a person in which his habitation is fixed without any intention of removing therefrom (Conflict of Laws, sec. 43). And domicile is equivalent to home or the place in which a man dwells. Indeed a person's *residence* (as used in 2 Wm. IV., c. 45, sec. 9) was said by *Erle*, C. J., to mean the same as his home (7 M. & G. 1). A man's dwelling or residence is *primâ facie* the place where his wife and family reside, and if he has a family dwelling in one place, and he occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home is where his family reside (Story's Conflict of Laws, sec. 63; *Rex* v. *Duke of Richmond*, 6 T. R. 560; and see *Reg. ex rel. Taylor* v. *Cæsar*, 11 U. C. Q. B. 461; *Reg. ex rel. Forward* v. *Bartels*, 7 U. C. C. P. 533).

Where a party had a shop or warehouse with a private parlour in which he passed all the day, taking his meals and entertaining his friends there, but neither he nor his servants sleeping there, this was held by all the judges as not sufficient to constitute it his dwelling house (or place of residence) (*Reg* v. *Martin*, 1 R. & R. 108).

Where a man only moved his goods into a house with an intent to dwell there, it is not his dwelling house (*Reg.* v. *Thompson*, 2 Lea. 771; *In re Harris*, Ib. 701). And it is not even necessary that either the party himself or his servants should be sleeping in any given place at that particular time in which it is sought to make him out as dwelling there, for if one has two houses, and at one time lives in one and at another in another, yet in his absence the empty house is still his dwelling house, or he may be said to dwell there though no one be in it (Hale P. C. 556). So though a barrister leave his chambers, or, *semble*, the student of a college his rooms during the vacation, in which he resides during term time, it will be his dwelling house, or he will be considered as dwelling there if the party on leaving them had an intention of returning. (*Ib.*) So if a man leave his house empty and locked up while he goes a journey, as for a month, with an intention of returning, the house will still be his dwelling house (*Reg.* v. *Murray*, 2 East P. C. 496).

When the claimant for a vote (under the Reform Act) as one "residing," &c., follows his occupation as a wine merchant at G., where he had for many years occupied a house in which he carried on his business and kept his family and a domestic servant, but had a bedroom in T. in the house of a friend, which he rented with a closet, for wine samples, and only slept there about eighteen or twenty times in the year on occasion of his coming to T. on business, and once took a meal there, it was held he did not reside there, and that there was no residence in fact (*Whitehorn*, appellant v. *Thomas*, respondent, 7 M. & G. 1). If there be an actual dwelling with an intention of continuing it for an indefinite period, even for a short time, it would seem to be a residence within the meaning of the section. In *King* v. *Sargent*, 5 T. R. 467, it was held that though a party had only slept in a house for two or three nights before the time in question, yet as he had an intention of continuing to do so he was a resident.

The sort of place in which a party resides seems immaterial provided that his dwelling is there in other respects (*R.* v. *Westwood*, 1 R. & R. 495; 3 Inst. 65; 1 Strange, 60; *R.* v. *Burton Bradstock*, Bur. S. C. 531).

Besides these decisions on analogous provisions, there are several cases upon the clauses of the English County Courts Act (9 & 10 Vic., c. 95) which may be said to be directly in point, the word used being "*dwell.*" Thus where the permanent residence of the plaintiff was at Inverness in Scotland, but every year he came to London on business, where he took lodgings for his business, and at the time the action was brought he had lodgings in Golden Square, London, which he occupied from March to October. The court held that this did not

constitute a dwelling within sec. 128 of the Act. "We are of opinion," said *Jervis*, C. J., "that under the circumstances the plaintiff did not dwell in Golden Square. Each case must depend upon its particular circumstances, but where a party has a permanent place of dwelling we do not think he *dwells* in the sense of that word as used in the statute at a place where he has lodgings for a temporary purpose only" (*Macdougall* v. *Patterson*, 11 C. B. 755; 21 L. J., C. P. 27).

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES

False Pretences—Intention to defraud not negatived by intention to pay for goods obtained—Evidence.—Upon indictment for obtaining certain carpets by false pretences, the jury found, *enter alia*, that the prisoner, at the time he made the pretences and obtained the carpets, intended to pay the prosecutrix the price of them, whereupon it was objected that the jury had negatived the intention to defraud, and that he was entitled to be acquitted.

Held, upon a case setting out the facts and finding of the jury, that the conviction was right.—*Reg.* v. *Naylor*, 14 W. R 58.

Sale of land for taxes—Money paid under Protest.—*Held*, that money paid to a county treasurer after sale of his lands, is, though paid under protest, money paid to the use of the purchaser and not to the use of the plaintiff, so as to entitle plaintiff to maintain an action for money had and received. Appeal disallowed with costs.—*Boulton* v. *York and Peel*, Q. B., M T. 1865.

Insolvency.—Place where assignee should call meetings of creditors—Computation of time for publication of notice—Where notice must be published.—*Held*, that the county town of the county, in which the assignment is filed, is the place where the assignee should call all meetings.

That not less than two weeks should intervene between the first publication of the notice and the day of meeting.

That the notice must be published in a newspaper at or nearest the place where the meeting is to be held.

That all papers and minutes of proceedings in insolvency should be forthwith filed and entered of record in the proper office.—*In re Atkins*, 2 U. C. L. J., N. S. 25.

Insolvency—Composition—Surety—Fraudulent Preference.—Where a bankrupt agreed with his creditors for payment of eight shillings in the pound, to be secured by bills drawn on the bankrupt by a surety, and one of the creditors became surety, the bankrupt agreeing, in consideration thereof, to pay him in full, but such agreement was not recited in the composition deed, nor made known to the other creditors,

Held to be a fraudulent preference, and the agreement not supported.—*Wood* v. *Barker*, 14 W. R. 47.

Insolvency — Partnership and separate debts—Payments.—Where a partnership firm becomes insolvent, having partnership property and partnership creditors, and also separate property and saparate creditors, and the partnership creditors exhaust the partnership property, the séparate creditors have a priority of right to receive an equal percentage of their claims out of the separate estates, and if anything remains it is to be distributed amongst both classes of creditors *pari passu*.—*Northern Bank of Kentucky* v. *Keizer*, 5 Am. Law Reg. N S., 75.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

Libel—Newspaper—Matter of Public Interest.—The conduct of public worship by a clergyman, and the uses to which he puts his church and vestry, are lawful subjects of public comment, so as to excuse, under the plea of not guilty, the publication of matter otherwise libellous.—*Kelly* v. *Tinling*, 14 W. R. 51.

Liability of Husband for Medical Attendance on, and Necessaries for Wife.—Where a wife is turned out of the house by her husband without necessaries, and without the means of procuring them, it is a presumption of law, incapable of being rebutted, that she has authority to pledge his credit for necessaries suitable to her station. Where a husband and wife are cohabiting, it is a presumption of fact that she is his agent for ordering articles supplied to their establishment, which are suitable to the station which he allows her to assume; but, if they be unsuitable to that station, a presumption arises that she was not his agent to pledge his credit for them. It is for the husband, and not the jury, to fix the standard of living for his family. *Harrison* v. *Grady*, 14 W. R. 139.

RIPARIAN PROPRIETOR—RIGHTS OF PUBLIC.—Every one who buys property upon a navigable stream, purchases subject to the riparian rights of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or his works, for the qualified use which he may make of the water, within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth, for the purpose of improvement, chooses to maintain the water of the stream at a given height within its channel.—*McKeen* v. *Delaware Division Canal Company*, Phil. Leg. Intel.

RAILROAD LAW—NEGLIGENCE.—The violation, by a passenger, of a rule of the railroad company of which he had no notice, is not negligence in him, if he conformed to it as soon as he had notice thereof. In an actlon against a railroad company for negligence, the burden of proof is on the defendant to show that its rules were brought to the plaintiff's notice.—*McAuliffe* v. *Eighth Avenue R. Co.*, N. Y. Transcript.

LOSS OF PASSENGER'S LUGGAGE.—A railway company is liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling.—*Le Couteur* v. *L. & S W. R. W. Co.*, 14 W. R. 80.

DEED—ALTERATION AFTER EXECUTION.—If a deed which is complete in form, with the exception of the omission of the name of the grantee, is in that condition signed and sealed, the subsequent insertion of the name of the grantee and the change of a qualified covenant into an absolute one, in the absence of the grantor, though by his parol authority, will make the deed invalid as to him, and no action will lie against him upon any of the covenants therein contained. And it is immaterial that such alterations are made by the co-grantor, and that a description of the occupation of the contemplated grantee had been inserted at the time of such signing and sealing.—*Basford* v. *Pearson*, 9 Allen; 5 Am. Law Reg. N. S. 124.

UPPER CANADA REPORTS.

COMMON PLEAS.

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

FRIEL v. FERGUSON ET AL.

Magistrate—Trespass—Information—Warrant, evidence of—Joint tort—Evidence—Notice of action—Direction to jury—General verdict—Restriction to one count—Verdict against two defendants on separate counts.

(Continued from Vol. I., p. 189.)

There was no evidence of any joint act by both the defendants. Ferguson cannot be liable for anything that took place after the making of the warrant; nor for the arrest, because that took place under the backing by Moulton in the county of Leeds; nor for the plaintiff having been sent by Moulton up to Kingston. Moulton did take and could take these depositions, and adjudicate upon the charge himself: Con. Stats. for Canada, c. 102, secs. 47—48. Nor can he be liable for refusing to accept of the plaintiff and to try the case in Kingston, and for the plaintiff's being conveyed back to Moulton in Leeds.

The question of malice should not have been left to the jury under the count in trespass, although it might properly have been left to them in the count on case; and this shews the objection to the joinder of these counts, for the plaintiff was making a cause of action upon one count, while he was going to the jury for damages upon the other count. The plaintiff should have been nonsuited: Con. Stats U. C. c. 126, s. 16; *Warner* v. *Gouinlock*, 21 U. C Q. B. 260.

If he gave evidence of malice he should have boen confined to the count in case only; nor should it have been left to the jury to say whether there had been an information in fact or not, and to infer malice if there had not been, for the warrant recited there had been an information, and it was not competent to the plaintiff to contradict it after he had put it in evidence as part of his case. The notice to produce, also, which he served, called for the production of the information, and he could not be permitted to call for the information, and then to assert there was not one.

The venue should have been laid in Frontenac and not in the county of Leeds.

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

The first part of the rule raises the questions, whether the defendant Ferguson was entitled to notice of action; and, if he was, then, whether the notice, which was served upon him, was sufficient.

It is contended he was not entitled to the notice:

1st. Because he acted without having taken any information, or having had any charge made before him against the plaintiff; and

2nd. Because he made and issued his warrant to arrest the plaintiff in the city of Kingston, in which place he was not a magistrate.

By the Consolidated Statutes for Canada, (c. 102, s. 8,) it is enacted, that "in all cases, when a charge or complaint for an indictable offence is made before any Justice of the Peace, if it be intended to issue a warrant in the first instance against the party charged, an information and complaint thereof in writing, on the oath or affirmation of the informant, or of some witness in that behalf, shall be laid before such justice."

There should have been a charge or complaint made before the warrant issued, and it should have been in writing.

The only evidence of there having been a charge made to justify the issuing of the warrant, is the recital of it in the warrant itself, which states that, "whereas John Friel and Benjamin Friel, of the township of Leeds, in the

county of Leeds, have this day *been charged upon oath* before the undersigned, one of Her Majesty's Justices of the Peace in and for the said united counties," referring to the united counties of Frontenac and Lennox and Addington, in the margin of the warrant. If this statement be conclusive, because the warrant was put in by the plaintiff as part of his case, then it is needless to go further with this part of the case, because the plaintiff's objection that there was no charge in fact made, will have been repelled.

That it is evidence for the defendant is no doubt correct: *Haylock* v. *Sparke* (1 E. & B. 471); but how can it be said to be *conclusive* evidence of the truth of the fact? That would be to make the very ground of complaint against the magistrate a full and sufficient justification for his misconduct, and for the injury he had done to the plaintiff. The plaintiff's assertion is, that the warrant is false in fact; and the defendants' answer is, that although it be so, the plaintiff is not to be allowed to say so. This would be to carry the doctrine of estoppel to an alarming extent, if a warrant, which is not an adjudication or conviction, but a mere personal order of the magistrate to arrest the plaintiff, drawn up by himself, and upon his own individual responsibility, were to draw along with it the same incontrovertible verity which a record does, so long as it remains unimpeached.

No authority was cited for this position, and we can find none for it; and we think the law is quite favourable enough for the magistrate, by making it evidence, that is, *primâ facie* evidence, for him, and leaving it for the plaintiff to repel, if he can, this *primâ facie* case.

In *Leary* v. *Patrick* (15 Q. B. 272), where the conviction had been quashed, and did not recite that the magistrates had awarded costs, but they issued a distress warrant, which recited that they had adjudicated upon them, Lord Campbell, C. J., asked, "Was there any evidence that the justices did in fact ascertain the amount of the costs, except the recital in the distress warrant?" And he afterwards said: "The distress warrant recited an adjudication to pay costs, but that was contrary to the fact. The imprisonment and warrant and seizure are all defended on the ground that there was an adjudication to pay costs; and as there was no such adjudication, I think it is an illegal warrant, and that the imprisonment was wrongful, and the seizure of the goods an excess of jurisdiction."

The distress warrant, in that case, was entitled to as much faith and credit as the warrant in the present action: the one was not only tested by the conviction, but by the actual fact, apart from the conviction, whether such an adjudication had or had not been made; and the present warrant can be tested, also, by the alleged information, if there be one, or by the absence of one, if it be shown that there was not one in fact.

We think the plaintiff had the right in law to show there was no such charge made before the defendant Ferguson, as he had represented in his warrant; and we think it was proved, by reasonable evidence, at the trial, that no charge of any kind, verbal or in writing, on oath or without oath, had ever been made to the magistrate, as he has described in his warrant.

Then, as to the effect of acting without an information upon oath.

It appears that the law always required there should be an information: *Rex* v. *Fuller* (1 Ld. Ray. 509); and that in strict form it should have been in writing: *Brookshaw* v. *Hopkins* (Lofft. 240). In *Rex* v. *Birnie* (1 Moo. & Rob. 160) it was decided by Lord Tenterden, C. J., that magistrates had no right to detain a known person to answer a charge of misdemeanour verbally intimated to them, but without a regular information before them in their capacity of magistrates, that they may be able to judge whether it charges any offence to which the party ought to answer.

In the *King* v. *Wheatman*, (Dougl. 346,) Lord Mansfield, C. J., said, "The defendant can be convicted only of the charge in the information, and that must be sufficient to support the conviction;" and Ashurst, J., added, "The evidence must prove, but cannot supply any defects in the information."

In *Baxter* v. *Carew*, (3 B. & C. 649,) it was ruled that magistrates were not obliged to take an information upon oath, when the statute did not require they should do so.

In *Reg* v. *Millard*, (17 Jur. 400,) Parke, B., said, "No magistrate can proceed without an information; but unless the statute require that the information should be in writing, or on oath, it need not be so."

In *Caudle* v. *Ferguson*, (1 Q. B. 889,) where the clerk of the magistrate had taken the information in the absence of the magistrate, and the warrant to arrest did not recite any information, Lord Denman, C. J., said, "The warrant is clearly insufficient: it does not state any information on oath: the magistrate's jurisdiction depends not on jurisdiction over the subject matter, but over the individual arrested: to give him that jurisdiction, there should have been an information properly laid."

Coleridge, J., said: "It is true that a magistrate has jurisdiction over the offence in the abstract; but to give him jurisdiction in any particular case, it must be shown there was a proper charge upon oath in that case. A man, because he is a magistrate, has no right to order another to be taken for an offence over which he has jurisdiction, without a charge regularly made. The warrant does not state a charge, and the facts, independant of the warrant, do not shew such a charge on oath as justifies the defendant."

See also *The Queen* v. *The Justices of Buckinghamshire*, (3 Q. B. 807); *Haylock* v. *Sparkes* (1 E. & B. 485); 1 Wm. Saund. 262, note (1); and *Crepps* v. *Durden* (1 Smith's L. C. in the notes.)

These declarations of the law, coupled with the positive provisions of the statute, that an information in writing and on oath *shall* be laid before the magistrate, leave no doubt that it was not only the duty of the defendant Ferguson, but that he had not authority to issue his warrant for the arrest of the plaintiff, without such information having been first made to him.

The direction which the judge ought to give to the jury in an action against a justice, would be and should be to this effect, whether Ferguson honestly believed he was acting in the execution of his duty, as a magistrate, with respect to any matter within his jurisdiction—(see U. C. Act, ch. 126, sec. 1); or whether he honestly believed he was acting in the execution of his office,

(s. 9); or, as it is put in *Roberts* v. *Orchard*, (2 H. & C. 769, in the Exch. Ch.) following the direction in *Hermann* v. *Teneschall*, (13 C. B. N. S. 392,) whether Ferguson honestly believed in the existence of those facts which, if they had existed, would have afforded a justification under the statute, and honestly intended to put the law in force.

This was the proper direction to be given to the jury: *Booth* v. *Clive*, (10 C. B. 827); *Coz* v. *Reid*, (13 Q. B. 558); *Read* v. *Coker*, (13 C. B. 850); *Heath* v. *Brewer*, (15 C. B. N. S. 803). Whether the defendant had reasonable ground for that belief, that is, whether he judged reasonably or not, is a subordinate question, an ingredient in enabling the court to arrive at a conclusion as to his *bona fides;* for when the question is whether a man has or has not acted *bonâ fide*, the reasonableness of the ground of belief may be fit to be considered; and a party is entitled to notice of action, provided he has acted *bonâ fide* in the belief that he is pursuing the statute, even although there may be no reasonable foundation for such belief: per Maule, J., (13 C. B. 863.)

In the case last mentioned, where an omnibus proprietor wrote upon the driver's license, that he had discharged the plaintiff from his employ for damaging his cab and not bringing home money, but the Statute, (6 & 7 Vic. ch. 86, secs. 21-24) did not confer this power upon the proprietor, but only on a magistrate, upon the driver being properly brought before him, and an action was brought by the driver against the proprietor for defacing the license and writing defamatory matter upon it, the court held that the proprietor was not entitled to notice of action under that statute. Erle, C. J., said: "Can it be said that the defendant could honestly believe that he was acting under the authority of this section? The defendant could not honestly believe he was a magistrate, or that he could be justified in acting as a judge in his own case. There was no pretence for saying that he was acting, or could for a moment suppose he was acting, under the authority of the statute."

Now, by considering the necessity there was that there should have been an information in writing and under oath laid before the magistrate to confer upon him jurisdiction to issue his warrant for the arrest of the plaintiff, and by considering the nature of the direction which the judge ought to give to the jury in such a case, we shall be able to determine whether the defendant Ferguson was entitled to notice of action or not.

Can it be said, as Erle, C. J, expressed himself in the last case, that Ferguson could himself believe he was acting under the authority of the statute in the execution of his office or duty, by issuing the warrant to arrest the plaintiff, without any charge or complaint of any kind, verbal or otherwise, having been first made against the plaintiff? And I think we may also add, as was said in the same case, there was no pretence for saying that he was acting, or could for a moment suppose he was acting, under the authority of the statute. He acted in a manner which the statute under no circumstances could justify; this was to "exceed his jurisdiction:" *Ratt* v *Parkinson* (20 L. J. Mag. Ca. 208.)

The facts of the case shew not one single circumstances to remove the suspicion that the defendant was not a stranger to the purpose which Collinson manifestly had in instigating and promoting this criminal proceeding against the plaintiff. There was no evidence of *bona fides*, nor room to conjecture it. There was nothing, in fact, to leave to the jury respecting it; but if there had been, no objection was taken to the mode in which the learned judge left the case to the jury.

As we find that Ferguson was not entitled to notice of action on the ground just stated, it is unnecessary to consider the other reason advanced by the plaintiff why notice of action was not necessary; namely, that the warrant was made out of the local jurisdiction of the magistrate. The cases of *Partridge* v. *Woodman*, (1 B. & C. 12); *Arnold* v. *Dimsdale*, (2 E. & B. 580); and *Hughes* v. *Buckland*, (15 M. & W. 346,) are applicable to this part of the case; and from these cases it would seem, that, although Ferguson did make the warrant without the limits of the county for which he was a magistrate, he would not, therefore, necessarily forfeit his right to notice of action. And it is, also, unneccssary to consider the sufficiency of the notice: the first part of it relating to the trespass seems to be unquestionably bad, for not stating time and place.

As to that branch of the rule which relates to the application for a new trial, we should first dispose of such facts of it which we cannot entertain. They are contained in the 2nd, 4th, 6th, and 7th objections above stated, and we decline to entertain them, because we see or know of nothing to shew us that the learned judge, as to the 4th objection, refused to receive any evidence which was admissible; for it could not be permitted to the defendant to prove the plaintiff guilty of any charge that had never been made made against him, or of which he had never been convicted, even if such evidence be admitted to have been tendered to him; or, as to the 6th and 7th objections, that he misdirected the jury in the manner represented, and because, as to all the objections, we do not find in the notes of the learned judge that the defendants, or either of them, took any exception to the course which was pursued at the trial, or desired any other course to be taken. The defendants must, therefore, be precluded from now objecting to that which they did not object to at the proper time and before the proper authority.

We may also dispose at once of the 10th objection in the rule, as to the venue, because it is now of no moment, as, according to our opinion, Ferguson was not entitled to notice of action, and is not within the protection of the act.

The other questions raised by the remaining part of the rule are:

1st. That in a declaration containing a count in trespass, and another in case, the verdict, if it be general on both counts, is contrary to law. This is the first objection of the rule.

2nd. That the evidence did not establish any joint tort against the defendants, in which they could in law be, or were, in fact, jointly liable. This, we think, is the effect of the third, fifth and eighth objections of the rule.

3rd. That the evidence did not justify a verdict against either of the defendants. This is the ninth objection of the rule.

Then as to the first of these three objections, that a general verdict is bad in law, when a count in trespass and in case are joined in the same declaration, no authority was cited in support of it; and we find the contrary to be the law and practice. Some of the cases cited in the argument were like the present, one count in trespass and the other in case, and general damages assessed.

In *Preston* v. *Peeke*, (1 E. B. & E. 336), a record was received in evidence in which the first count was in trespass, the second for the wrongful sale of a distress, and the third for distraining when no rent was in arrear, and general damages had been assessed; and it was held that the parties could shew, as a matter of fact, how much of the damages had been assessed on one count and how much on the others; but no kind of exception was taken to the legal effect of the general finding on all the counts.

As to the second objection, we are clearly of opinion against it: we think the evidence did justify a verdict against both the defendants.

The chief objection, next to that which was taken to the notice, was the 3rd,—that the evidence did not establish any tort against the defendants for which they could, either in law or in fact, be jointly liable.

The evidence did establish that Collinson procured the warrant to be isseud by his co-defendant Ferguson, and that they both knew there was no complaint or charge made by Russel to justify the making of the warrant. The warrant was given by Ferguson to Collinson that the plaintiff might be arrested upon it, and the plaintiff was accordingly arrested, and arrested, as it has turned out, illegally and without any colour of right; yet this arrest would not have been made but for Ferguson's act. It is of no matter that this arrest took place in the county of Leeds, and under the authority of another magistrate, by his backing the warrant; for the arrest is, nevertheless, wrongful, not from the backing, but from the prior illegal proceedings of the defendants. The backing was not strictly the authority to arrest: it was a proceeding which authorized the original warrant to be executed in the county of Leeds; and for such an arrest the defendant Ferguson is as much responsible, as if it had been made in his own county. It was made by him for the express purpose, as the warrant shews, and the evidence too, of its being executed, not in his own county, but in the county of Leeds, to authorize which he knew that the backing by a magistrate of that county would be necessary to be made.

Now, if the person who makes an illegal warrant, and delivers it to another to be executed, can in law be joined in an action for the wrongful arrest which was made under it, with the person who made the arrest, or who specially procured it to be made, this objection must fail; for it specifically denies that this is the law; but it is too well established that all are principals in trespass: procuring, commanding, aiding, or assisting makes one a trespasser: *Barker* v. *Braham*, (8 Wils. 377).

It is upon this principle that the attorney and client, and landlord and bailiff, and magistrate and prosecutor, have been so frequently, and can be properly joined together, respectively, in the one action.

We are of the opinion that both of the defendants were, upon the evidence, rightly charged with the one and the same wrongful act, the illegal arrest of the plaintiff under the warrant by which they are both connected with the arrest.

If it had appeared by the evidence that Ferguson was liable to a particular measure of damages on some special ground personal to himself, and that Collinson was liable, upon some other ground, to a different measure of damages, it may be that the same general damages should not have been awarded against the two; and, perhaps, the jury should have assessed the damages severally, according to the degree of wrong or malice which was chargeable against each, leaving it to the plaintiff afterwards to deal with such a finding as he might be advised: *Clark* v. *Newsam*, (1 Exch. 131); *Gregory* v. *Cotterell*, (17 Jur. 525, 1 E. & B. 360). The damages rendered we think to be quite applicable to both the defendants, and that there is no ground for complaint in this respect.

It appears what Collinson's purpose on this arrest of the plaintiff was: it does not clearly appear that Ferguson had the same purpose; and there is no conclusive evidence of concert between them. Perhaps, it might have been inferred; for there was some ground to suspect it; but we think that, as there was only one cause of action, and that that was the trespass, the plaintiff ought to be restricted to a verdict upon the first count only.

It is not necessary to say whether, in an action such as this, one of the defendants could have been convicted on the count in trespass, and the other on the count in case. These causes of action may be joined: the writ supposes the defendants to be jointly liable for all; yet there are not wanting authorities that, in actions of tort, one defendant may be found guilty of committing an act at one time, and the other of an act at another time; or, one may be found guilty of one conversion, and another of a different conversion; or, one guilty of a part, and the rest of all.

The defendants' rule, we think, ought to be discharged.

Rule discharged.

ELECTION CASE.

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

THE QUEEN EX REL. MCMANUS V. FERGUSON.

Election of warden—Proper description of warden—Sufficiency of certificates of reeves and deputy reeves—Duty of clerks—Nature and effect of certificates—New election—Costs.

Held 1. That the proper designation of a warden in a *quo warranto* summons, is "warden of the corporation of the county of ——."

Held 2. That "warden of the county of ——" is not improper, as there is no particular name or designation in the Municipal Institutions Act.

Held 3. That "warden of the County Council of the County of Simcoe" might, if deemed necessary, be amended by striking out the words "of the County Council" after the word "warden," and before the words "of the County of Simcoe" in the writs to be issued in pursuance of the judgment in a *quo warranto* matter.

Held 4. That after appearance by defendant in a *quo warranto* matter, the 18th Rule of court applicable to such proceedings, is against holding any proceeding irregular or void, which does not interfere with the just trial of the matter on the merits.

Held 5. That a reeve of a township who was duly elected and had made and subscribed the declarations of office and qualification, had not a right under sec. 67 of the Municipal Institutions Act to take his seat in the County Council, when the certificate of the township clerk did not state that he "had made and subscribed the declarations of office and qualification" but only that he had "taken or made the declaration of office."

Held 6. That where reeves and deputy reeves who had filed defective certificates were notwithstanding allowed by the clerk to take their seats in the County Council, their votes therein could not be challenged for such defective certificates, sec. 67 of the Municipal Institutions Act being only directory and not imperative.

Held 7. That the certificate is only evidence that what is contained in it was done—if it have not been done, or the reeve or deputy reeve have not been duly elected, the mere certificate would not give the party holding it, a right to sit and vote in the council.

Held 8. That where a vote is improperly rejected in a County Council on the election of warden, and it does not appear that the reeve or deputy reeve whose vote was rejected tendered it for the complaining candidate, though his vote if recorded might and probably would have influenced the result of the election, the proper course is to order a new election instead of seating the complaining candidate.

Held 9. That where the clerk properly refused to allow a reeve to take his seat, but allowed several reeves and deputy reeves whose certificates were equally if not more defective, to take their seats and vote, the proper course was to order a new election.

Held 10. That no costs should be given against the sitting member, although he accepted office and was sworn in and his seat was afterwards vacated on the ground of the improper decision of the County Clerk, unless shown that he in some manner directly interfered with the decision of the clerk or otherwise misconducted himself.

[Chambers, April 10th, 1865.]

This was a proceeding in the nature of a *quo warranto* to unseat Thomas R. Ferguson, warden of the corporation of the county of Simcoe for the year 1865, based on the statement and relation of George McManus, of the township of Mono, in the county of Simcoe and province of Canada, Esquire, reeve of the said township of Mono, who complained that Thomas R. Ferguson had not been duly elected, and had unjustly usurped the office of warden of the County Council of the county of Simcoe, and province of Canada, under pretence of an election held on Tuesday the 24th day of January, A.D. 1865, at the town of Barrie, in the said county of Simcoe, and had accepted and acted in the said office of warden; and that George McManus, the relator, was duly elected thereto, and ought to have been returned at such election, and declaring that the said relator had an interest in the said election as a candidate for the said office of warden, and also as a municipal voter at the said election. The relator stated and showed the following causes why the election of the said Thomas R. Ferguson to the said office should be declared invalid and void, and the said George McManus be declared duly elected thereto:—

First. That the said election was not conducted according to law, in this, that Duncan Mathewson, the reeve of the township of Sunnidale, in the said county of Simcoe, was not allowed by the clerk of the County Council of the said county of Simcoe to vote at the election of warden of the said County Council: but on the said Duncan Mathewson offering to take his seat at the said election for the purpose of giving his vote at the said election, Robert T. Banting, the clerk of the said County Council, who was then presiding as such clerk at the said election, told him to withdraw from the Council, alleging that he the said Duncan Mathewson had no right to remain in the Council, in consequence of certain informalities in his certificate of election. The said Duncan Mathewson then withdrew from the Council and was prevented from voting at the said election of warden, which took place immediately after his withdrawal; and if the said Duncan Mathewson had been allowed to vote at the said election, he would have voted for the relator, who was a candidate for the office of warden at the said election, which election was at first a tie between the said Thos. R. Ferguson and the relator, and was only carried against the relator by the casting vote of the said Thos. R. Ferguson, who for the second time at said election voted for himself as the reeve of the municipality having the largest number of names on its last revised assessment roll.

Second. That the said election was not conducted according to law in this also, that John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and J. Rowatt were allowed by the said clerk to take their seats in the County Council of the said county of Simcoe at the said election as the reeve of the township of Medonte in the said county, the reeve of the town of Collingwood in the said county, the reeve of the town of Barrie in the said county, the reeve of the township of Innisfil in the said county, the deputy reeve of the said township of Innisfil, and the reeve of the township of Flos, in the said county, respectively; and to vote at the said election when they had not, nor had either or any of them filed the necessary certificates from their respective township and town clerks certifying that they had respectively been duly elected reeves and deputy reeves of their townships and towns, and that they had made and subscribed the declarations of office and qualification as such reeves and deputy reeves respectively, as required by law, inasmuch as the said reeves and deputy reeves had all of them, without exception, filed certificates not in accordance with the requirements of the act respecting the municipal institutions of Upper Canada.

Third. That the said Thomas R. Ferguson was not duly or legally elected or returned in this, that by reason of his not having filed a proper certificate of his due election as reeve of the said Township of Innisfil, and of his having made and subscribed the declaration of office and qualification as such reeve, he was not entitled to a seat in the said County Council, and in consequence could not be legally elected warden thereof.

Fourth. That the said Thomas R. Ferguson was not duly or legally elected or returned in this also, that the aforesaid John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and James Rowatt, voted for the said Thomas R. Ferguson as such warden at such election when they were not nor was either of them entitled to vote thereat by reason of their not having filed proper certificates as aforesaid; and without the votes of the said John Craig, John Hogg, William D. Ardagh, Thomas R. Ferguson, William C. Little, and James Rowatt, or without the vote of either or votes of any of them, the said Thomas R. Ferguson would not have been declared elected warden of the said County Council, inasmuch as with the said votes

there was a tie between the said Thomas R. Ferguson and the relator, as aforesaid.

Fifth. That before the said election and after the said council was called to order by the said clerk, the certificate of the aforesaid John Hogg was openly objected to, and the attention of the said clerk was called thereto, but he overruled the objection and allowed the said John Hogg to keep his seat and to vote in the said council at the said election as the reeve of the town of Collingwood.

Sixth. That just before the said election, it was suggested to the said clerk that some of the other certificates besides those of the said Duncan Matthewson and John Hogg might be defective; but he paid no attention thereto, although charged at the time with acting partially in the election, and in favour of the said Thomas R. Ferguson.

Seventh. That the said relator was duly elected to the office of warden aforesaid, and ought to have have been returned thereto in this, that he received the largest number of legal votes for the said office at the said election; whereas the said clerk declared the said Thomas R. Ferguson duly elected to the said office of warden which office he accepted and acted therein.

The certificates to which objection was made were in the following forms:—

"To T. R. Banting, Esq., County Clerk.

"DEAR SIR,—I hereby certify that Duncan Matthewson, Esq., was duly elected as councillor for this township, and that he has made and subscribed the declaration of office and qualification of office as such, and that he has been also "*appointed* reeve" of said township, and has taken or made the declaration of office of reeve for the said township of Sunnidale.

"I have the honour to be, yours, &c.,

ALEX. HISLOP, { *Corporate Seal.* }
T. C."

The objection raised to this certificate was that it did not state that Mathewson was *elected* reeve.

"This certifies that at the first meeting of the Municipal Council of the corporation of the town of Barrie, held on the 16th January, inst., William D. Ardagh, Esq., was *unanimouly* elected reeve of said corporation for the current year, A.D. 1865.

(Signed) GEORGE LANE,
Council Room, Barrie, } *Town Clerk.* { *Corporate Seal.* }
Jan. 20th, 1865."

The objection to this certificate was that it did not state that Mr. Ardagh was *duly* elected, or that he had taken the *declarations of office and qualification*, as required by C. S. U. C., ch. 54, sec. 67.

"I do hereby certify that on the sixteenth day of January, 1865, at the first meeting of the Municipal Council of the corporation of the township of Innisfil, held in the village of Victoria, in the said township, Thos. R. Ferguson, Esq, was *unanimously* elected reeve of the said township for the year 1865, and that he has made and subscribed the declaration of office and qualification.

(Signed) BENJAMIN ROSS, [*Seal.*]
Township Clerk.
Innisfil, Jan. 17, 1865."

The objection to this certificate was that it did not state Mr. Ferguson was *duly* elected, nor that the declaration of office and qualification were made and subscribed as "*such reeve.*"

"I do hereby certify that on the sixteenth day of January, 1865, at the first meeting of the Municipal Council of the corporation of the township of Innisfil, held at the village of Victoria, in the said township, William C. Little, Esq., was *unanimously* elected and chosen deputy reeve of the said townships for the current year 1865, and that he was made and subscribed the declaration of office and qualification.

(Signed) BENJAMIN ROSS [*Seal*]
Township Clerk."

The objections to this certificate were the same as to that of the reeve of Innisfil.

"I, Joseph Hill Lawrence, clerk of the municipal council of the town of Collingwood, do hereby certify that John Hogg, Esquire, of the town of Collingwood, has been duly elected reeve of the corporation of the said town of Collingwood, and that he has made the declaration of qualification of office prescribed by law as such.

Witness my hand and seal, this twentieth day of January, 1865.

J. H. LAWRENCE, [*Seal*]
Clerk."

The objections to this certificate were, that it did not state for what year Mr. Hogg had been elected.

"This is to certify that James Rowatt, Esq., has been duly elected reeve of the township of Flos for the year 1865, and that he has made and subscribed the declarations required by law. Given under may hand at Flos, this 16th day of January, 1865.

(Signed) W. HARVEY, { *Corporate Seal.* }
Township Clerk of Flos."

The objections to this certificate were that it did not state Mr. Rowatt had made and subscribed the declarations of office and qualification; that "the declarations required by law" may have been the proper ones, but this depends upon the clerk's reading of the law, and wants explanation. They may not have been as "such reeve," but merely as a councillor.

[*Corporate Seal.*]

"I, Edward Moon, clerk of the municipality of the township of Medonte, hereby certify that John Craig, Esq., has been elected reeve of the municipality for the year 1865, and that he has made and signed the declarations of qualification and office.

(Signed) EDWARD MOON,
Medonte, Jan. 16, 1865. *Town. Clerk.*"

The objections to this certificate were that it did not state that Mr. Craig was duly elected, and that he made and *subscribed* the declarations of office and qualification as "such reeve," and that it had no seal.

The relator made oath that he was the reeve of the township of Mono, having been duly elected to such office at the last annual election held in the month of January last, and had made and subscribed the declarations of office and qualification as such reeve. That he was present at the Court House in the town of Barrie, in said county of Simcoe, on Tuesday the 24th day of January, A.D. 1865, at the election of warden of the County Council of the said county, and at such election he took his seat and voted as such reeve of the township of Mono. That at such election

there were three candidates proposed for the office of warden, namely, Thomas R. Ferguson, John Hogg, and deponent. That the said John Hogg withdrew his name as a candidate for the office, leaving the election to be contested between the said Thomas R. Ferguson and deponent. That previously to the Council being called to order by the clerk of the said Council, the said clerk ordered Duncan Mathewson and Anson Warburton, the reeves of Bradford and Sunnidale respectively, to leave the Council, alleging that their certificates of election and qualification were informal. Whereupon the said Duncan Mathewson and Anson Warburton had to leave the said Council, and did leave the same, and were not allowed to and did not give their votes, nor did either of them give his vote at the said election. That both before and after the said election of warden the said Duncan Mathewson and Anson Warburton told deponent they intended voting for him as warden at the said election, and deponent verily believed that both of them would have voted for him at such election if allowed to take their seats. That on the vote being taken at the said election for the said Thos. R. Ferguson, the result was declared by the said clerk as follows: for the said Thos. R. Ferguson, the reeve of Barrie, the reeve of Medonte, the reeve of Tiny and Tay, the reeve of Flos, the deputy reeve of Nottawasaga, the reeve of Collingwood, the reeve and deputy reeve of Adjala, the reeve and deputy reeve of Essa, the reeve and the deputy reeve of Innisfil, and the deputy reeve of West Gwillimbury, in all thirteen. Against the said Thomas R Ferguson the reeve of Tecumseth, the reeve of Oro, the deputy reeve of Oro, the reeve of Vespra, the reeve of Tosorontio, the reeve of Mulmur, the reeve of West Gwillimbury, the reeve of Nottawasaga, the reeve of Tecumseth, the reeve of Mono, the reeve of Orillia and Matchedash, the reeve of Morrison and Muskoka, the deputy reeve of Mono, in all thirteen. The result being a tie; a vote was then taken for deponent, which also resulted in a tie, the various reeves and deputy reeves last before mentioned who voted against the said Thomas R. Ferguson voting for the deponent, and the various reeves and deputy reeves last before mentioned who voted for the said Thomas R. Ferguson voting against deponent. The clerk of the said Council then requested the said Thomas R. Ferguson, as the reeve of the municipality having the highest number of names on its last revised assessment roll, to give the casting vote, which he did in his own favour. Whereupon the said clerk declared the said Thos. R. Ferguson duly elected warden of the said council, after which deponent protested against such election, and requested the said clerk to enter his protest on the minutes of the Council. The Council then adjourned until the following morning, when the said Thomas R. Ferguson took the oath of office as warden of the said Council, and took his seat as such warden, and called the Council to order and presided over the Council as its warden during the remainder of the session. That during the discussion in the Council, before the said election, deponent distinctly heard Thomas Saunders, the deputy reeve of Tecumseth, call the said clerk's attention to the certificate filed by John Hogg, the reeve of Collingwood, as being informal, and not sufficient to entitle the said John Hogg to take his seat in the Council: But the clerk ruled the certificate sufficient and allowed said John Hogg to take his seat and vote as the ereve of the town of Collingwood. That previous to such election deponent also heard the said Thomas Saunders suggest to the said clerk that some of the other certificates filed by the various reeves and deputy reeves present might be informal, and that they ought to be all looked into. Which suggestion was taken no notice of by the said clerk, who declared all the certificates filed, except those of the said Duncan Mathewson and Anson Warburton, were sufficient and correct. That on the said clerk so ruling deponent charged him with acting partially in the election, and deponent heard Thomas Saunders, the deputy reeve of Tecumseth, also charge him with acting partially, yet the said clerk neglected to make any further examination of the aforesaid certificates.

Affidavits of Thomas Saunders, J. McManus, and Duncan Mathewson, corroboratory of the foregoing, were also filed.

The following abstract of the Minutes of the Council of the corporation of the County of Simcoe, as to the 1st days proceedings relative to the election of warden, was also filed:—

"The certificates of the reeves of Bradford and Sunnidale being presented, were considered informal by the clerk; the members present suggested that he do take legal advice, which advice being had, the clerk felt justified in not allowing said gentlemen their seats in the council, and consequently they were requested to leave their seats and retire."

"The clerk called the council to order and requested them to elect their warden. It was moved by Mr. Hogg, seconded by Mr. Clarke, that Thomas R. Ferguson, Esq, M P.P, be and he is hereby elected the warden of the county for the current year.

"It was moved by Mr. Kean and seconded by Mr. Murphy, that George McManus, Esq, reeve of Mono, be warden of this council for the current year. It was moved by Mr. McMurchy, seconded by Mr. Rowatt, that John Hogg, Esq., reeve of Collingwood, be the warden of this council for the current year. The first motion was put in order by the clerk—Yeas—Messrs. McClain, Davis, Little, Dewson, McMurchy, Kelly, Langley, Ardagh, Ferguson, Clark, Craig, Rowatt and Hogg, 13—Nays—Messrs. Saunders, Steele, Scott, Sissons, Murphy, Aberdeen, Armson, Russell, J. McManus, G. McManus, Kean, Stewart and Elder, 13. The second motion was then put by the clerk for McManus—Yeas—Messrs. Saunders, Steele, Scott, Sissons, Murphy Aberdeen, Armson, Russell, G. McManus, J. McManus, Kean, Elder and Stewart, 13—Nays—Messrs. McClain, Davis, Little, Dewson, McMurchy, Kelly, Langley, Ardagh, Ferguson, Clark, Craig, Rowatt and Hogg, 13.

"The last motion nominating Mr. Hogg was then put by the clerk, and lost; Mr. Hogg requesting his name to be withdrawn, there being an equality of votes for both the other candidates. The clerk upon ascertaining from the Assessment Rolls in his possession, that the Township of Innisfil had the largest number of inhabitants, suggested to Mr. Ferguson the reeve of said township, to give the casting vote in accordance with the statute in such case made and provided:

whereupon Mr. Ferguson voted for himself. The clerk then declared Thomas R. Ferguson, Esq., reeve of Innisfil, duly elected warden of the County of Simcoe, for the current year. Mr. George McManus requested the clerk to enter his protest against the election of Mr. Ferguson."

D. McCarthy, jun., shewed cause. He objected, that there is no such office known to the law as "warden of the County Council of Simcoe." Subject to this objection, he argued that Mathewson's vote was not improperly rejected; the clerk of the County Council is the proper and only judge of such a matter and has decided against it; it was not shown that Mathewson, had his vote been received, would have voted for relator; and in the absence of fraud, the acts of the clerk and of the council were binding at law. *The Queen ex rel Hyde* v. *Barnhart*, 7 U. C. L. J., 126. If an appeal lay from the decision of the clerk, the several certificates objected to were sufficient as against the objections taken. *Rex* v. *Swyer*, 10 B. & C. 486; *In re Hawk and Ballard*, 3 U. C. C. P. 241; *Reg. ex rel Helliwell* v. *Stevenson*, 1 U. C. Cham. R. 270; *Reg. ex rel McGregor* v. *Kerr*, 7 U. C. L. J. 67, 69. But if not so, similar objections existed against the certificates of Robert Murphy, the reeve of Tosorontio, John E. Steele, the reeve of Oro, Michael Scott, the deputy reeve of Oro, Thomas Saunders, the deputy reeve of Tecumseth, John McManus, the reeve of Tecumseth, Roderick Stewart, the reeve of Morrison and Muskoka, James Aberdeen, the reeve of the township of Mulmur, John Kean, the reeve of Orillia and Matchedash, George McManus, the relator, reeve of the township of Mono, and Thomas Elder, the deputy reeve of the township of Mono.

He filed several affidavits, to which it is unnecessary to refer.

Robert A. Harrison and *W. Boys*, in support of the application, argued that the warden of a county is not a corporation sole having a corporate name; that the only question is one of identity; and that there being no dispute as to identity, the description contained in the statement and writ is sufficient.—*Johnston* v. *Reesor et al*, 10 U. C. Q. B. 101; *Fisher* v. *The Council of Vaughan*, 10 U. C. Q. B. 492; *In re Barclay and the Township of Darlington*, 11 U. C. Q. B. 470; *In re Hawkins and Huron and Bruce*, 2 U. C. C. P. 72. Effect should not, after appearance by defendant, be given to objections of a technical character, rule No. 18; *Reg ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44, 45. Mathewson's vote had either been improperly rejected, or if properly rejected, several who voted for the defendant ought equally to have been rejected. The clerk of the council is not the sole judge on such matters; his decision is subject to review in this case, Con. Stat. U. C. cap. 54, ss. 127, 133. Notwithstanding his receiving and filing the certificates of the several persons to whom objection is now made, inquiry can now be had as to their legal sufficiency, and for that purpose the court may go behind the act of the clerk, and is not bound by his receipt or rejection of a certificate *Harding* v. *Carry*, 10 Ir. C. L. Rep. 140; *Re Jennings*, 8 Ir. Ch. R. 421; *McDowell* v. *Wheaty*, 7 Ir. Com. L. Rep. N.S. 562.

(*To be continued.*)

DIVISION COURTS.

In the First Division Court of the County of Wentworth, before His Honor JUDGE LOGIE.

MURRAY v. McNAIR.

Distress for taxes—Collectors fees—Poundage.

A collector of taxes, or his bailiff, distraining for arrears of taxes, is entitled only to $2 for distress and sale. He is not entitled to collect from the debtor poundage on the amount of taxes levied.

The defendant, a constable, received a warrant from the collector of taxes for the city of Hamilton to levy by distress of plaintiff's goods the sum of $57 for arrears of taxes due the city. As soon as the distress was made the plaintiff paid the amount, and also $560 which the defendant claimed for his costs of the distress.

The costs were paid under protest and by force of the distress, and the plaintiff brought this action to recover back the amount overpaid.

The amount of costs claimed by the bailiff included possession money and poundage on the amount of the taxes.

Adams for plaintiff, *Bruce* for defendant.

LOGIE, Co. J.—The 96th section of the Assessment Act provides that "in case any person neglects to pay his taxes for fourteen days after demand made, the collector shall levy the same, *with costs*, by distress of the goods and chattels of the person who ought to pay the same." And section 98 points out what notice of sale shall be given, and authorizes the collector to sell the goods at the time named in the notice. Although the collector is thus authorized to levy for costs as well as for arrears of taxes, there is nothing in the statute fixing the amount which he may charge for fees. After the collector's roll has been returned the collection of arrears of taxes belongs to the treasurer of the county (or in the case of cities to the chamberlain of the city). If there is a distress on the lands of non-residents, the treasurer is authorized to issue a distress warrant to the sheriff of the county, under which he must levy the arrears of taxes by distress and sale of the goods found upon the premises *in the same manner, and subject to the same provisions as in the case of distresses made by collectors* (see sec. 122). And after the warrant to sell the lands is in the hands of the sheriff it is his duty, if it comes to his knowledge that there is a distress to be found upon the premises, to levy the arrears of taxes *and costs of distress* by sale of the goods and chattels found upon the premises (secs. 134 and 135). The duties of the sheriff, therefore, in levying the arrears of taxes by distress and sale, are identical with those of the collector, and the remuneration allowed to the sheriff should be sufficient to satisfy the collector, and I think such was the intention of the Legislature. And as the Act provides (sec. 135) that the sheriff may charge $2 for each *distress and sale*, the collector would be entitled to collect a similar sum. The act apparently contemplates the personal action of the collector in distraining, but his office being merely ministerial he could no doubt act by his bailiff; but the bailiff would be entitled only to the same fee which the collector himself could receive if he acted in person, in the same way as a sheriff's bailiff can only collect such fees as the sheriff is authorized by law to collect. It must be remembered that while the sheriff is allowed for his trouble in

collecting arrears of taxes a commission of five per cent. to be deducted from the amount collected, the collector is also paid for his trouble in collecting, either by a commission on the amount, or such other remuneration as may be allowed by the municipality employing him; so that the charge of $2 is only for the extra trouble of making a distress. If the collector or sheriff could charge a commission of five per cent. to the debtor on making a distress, as well as the amount allowed by law or by the municipality, he would in fact receive a double commission, and it would be his interest to harass and distress unnecessarily those whose taxes it was his duty to collect with as little harshness as possible. In this case the defendant has charged $5.60 for his costs and poundage; if he had sold the goods distrained he would be entitled to $2, but as the money was paid immediately on the distress being made, I think he would only be entitled to charge half that sum, or $1, for his costs. He must therefore refund $4.60, the amount collected by him in excess of fees.*

CORRESPONDENCE.

To the Editors of the Local Courts Gazette.

Gentlemen,—A. rented a farm from B., verbally at twenty-five pounds per annum. Some three or four months ago, an execution was coming against A., and B. took out a landlord's warrant and sold for his rent; now the execution creditor serves B. with a summons to appear in court in order to recover his claim from him. Is he bound to appear, or has the execution creditor a claim against him. Should he not have replevied the property. Your answer will confer a favour on

Yours respectfully,

Bailiff.

[The above is not sufficiently explicit to enable us to help our correspondent. But in any case, it scarcely comes within our province to answer, as the matter of it does not appear of importance except to the parties concerned.—Eds. L. C. G.]

Transcripts of Judgment in Division Courts.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you permit me to offer a few remarks on the communication from your correspondent "C," in the last number of the *Gazette*.

After providing for the sending of a transcript of judgment from the clerk of a Division Court in one county to the clerk of a Division Court in another county, the 139th section, cap. 19, of the Consolidated Statutes of Upper Canada enacts, that "all proceedings may be taken for the enforcing and collecting the judgment in such last-mentioned Division Court by the officers thereof that could be had or taken for the like purpose upon judgments recovered in any Division Court."

Under this clause, no direction to the receiving clerk from the party to the suit is required, as your correspondent maintains; nor is a certificate by the one judge and an order by the other rendered necessary.

The 137th section of the statute requires such certificate and order in this event, viz., "If the person against whom the judgment has been entered up *removes to another* county without satisfying the judgment."

Your correspondent contends that, after a transcript has been sent, the clerk who sends it has no further control over the suit. There seems no sufficient reason for this opinion. On the contrary, the fair and reasonable view appears to be, that he possesses the exclusive right to have a return made, and the money, if recovered, remitted to him.

However, as doubt exists in some quarters, the best course is to have the matter set at rest by legislation.

Your obedient servant,

Jan. 5, 1866. M.

Transcripts of Judgment—Uniformity of Practice in Division Courts.

To the Editors of the Local Courts' Gazette.

Gentlemen,—In the December number of your "*Gazette*," I observed a communication signed "C." on the law and practice in reference to Division Court Transcripts. As your correspondent truly remarks, much diversity of opinion exists among clerks on the two points to which he specially alludes. His evidence goes to show the necessity for some mode whereby more general uniformity of practice can be obtained; so that the carrying out of the intention of the law may not be to such an extent, a matter of "opinion." If, for instance, a convention of the officers of the courts could be got together, and an understanding come to, which would result in more uniform practice, than now obtains, it would be desirable, for although as "C." observes, the business of the courts has much

* In answer to a question from Mr. Bruce, the Judge intimated that, in his opinion, the bailiff would be entitled, in addition to the $2, to possession money in case of a person being left in possession, or to any necessary disbursements caused by the removal of the property for the purposes of sale.

diminished within the past few years, they are still an important institution in our Province, and should be made as efficient as possible.

The experience of your correspondent appears to be large. Although the yearly number received in my Division falls very far short of his quotation, yet, as my practice extends over a period of ten years, I necessarily have had a considerable number of transcripts passing through my hands, and the result is, that, in no single instance during that period has the "letter of the law" in such cases, been complied with. For instance, not in one case has the certificate of the judge, in whose county the judgment had been obtained, been attached to the transcript, neither have I obtained that of my County Judge on those so received, to authorize me to issue execution thereon; and I must say too, with all due deference, that I think my practice, being more simple, is preferable—the obtaining of the judge's certificate seems to me almost a work of supererogation, necessitating too, as it would in some cases, a delay of perhaps a week or two; some divisions being distant from the county town, rendering access to the judge and the procuring of his certificate a work of time, perhaps to the detriment of suitors; and, for all purposes of authenticity, the clerk's certificate under seal of the court, ought to be sufficient.

"C." also gives us his opinion as to the connection of clerks with suits where a transcript has been sent to a foreign division. He holds that the connection of the transmitting clerk with such suit then ceases. I am not prepared to say that he is wrong in taking that view—he may be perfectly correct; but, the fact that difference of opinion does exist, shews the desirability of discussing the point, that unity of action may be brought about; for, as Sir Roger de Coverley might have said under similar circumstances, "much may be said on both sides." My practice is different. I always make my return to the clerk from whom I receive a transcript, and expect a return to me from the clerk to whom I transmit, thus going on the principle that my connection with a suit entered in my division does *not* cease on forwarding the transcript.

I am inclined to think, too, that, by such a course, the interests of the plaintiff are fully as well attended to, and with less trouble to him, because personal access to the first clerk, as a general rule is easier if he wishes to know the progress and exact position of a suit after judgment had, which, experience tells me, is not so easily obtained when it has to be written for. But some clerks set the difficulty at rest by sending with the transcript a private form of request, signed by the plaintiff or his attorney, to forward proceeds to the clerk from whose office the transcript issues. This I consider a good plan, and if generally adopted would be desirable.

I am inclined to think that uniformity of practice, by whatsoever means brought about, would add to the efficiency and respectability of the Division Courts as an institution—the absence of it argues a want of *status* not in keeping with their importance in a community.

I have on a former occasion said, I think, that the introduction of the power to garnish debts would add to their efficiency in realizing judgments in some cases. I still incline to that opinion.

There are several other points which might also be touched upon; but I have sufficiently trespassed on your space, and for the present subscribe myself

Respectfully yours,

January 8th, 1866. H.

[We have much pleasure in publishing the foregoing. Discussion of the various topics that interest those concerned in the administration of justice in Division Courts is one great aim of the *Local Courts Gazette;* and, with this in view, we did not hesitate to publish the letter which has called forth those that are given above, though not, at the same time, coinciding with "C" in all the opinions he then expressed. Perhaps some other of our friends among the Division Court clerks will express their views on this subject, which is of considerable practical importance.

Uniformity of practice is, as our correspondent "H." remarks, a matter of the greatest importance, and we shall further any scheme that affords reasonable hope of effecting such a desirable end.—Eds. L. C. G.]

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

CORNELIUS HARPER, of Durham, Esquire, to be a Public Notary in Upper Canada. (Gazetted Dec. 9. 1865.)

TO CORRESPONDENTS.

"Bailiff"—"M."—"H."—under "Correspondence."