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DIVISION COURTS.

OFFICERS AND SUITORS.

OFFICERS.—We are not without solid proofs of the exertions of officers to promote the circulation of this journal. If these exertions were more general, and not as now, confined to comparatively few officers, our means of becoming more useful to them would be greatly increased. In tendering renewed thanks to our friends, we would mention that a large edition of this and the January number has been struck off to meet demands for new subscribers; but as we intend after this month to shape the edition in conformity with the subscription list, we are anxious to have the latter completed by receiving the new names as soon as possible.

Officers suggesting subjects for examination, or putting queries on points of practice, will please condense their communications as much as possible, avoiding the introduction of all extraneous matter. Such communications are more convenient when kept separate from any letter sent at the same time,—and this remark applies also to Editorial matter, or cases sent for notice or insertion.

We direct particular attention to the notice "To Readers and Correspondents." Communications on matters Editorial should, as an invariable rule, be addressed to "*The Editors of the Law Journal, Barrie*;" on matters financial, to "*The Publishers.*"

For the future, answers to queries of general interest to officers will appear under this head. We have only one this week answering that description

ANSWERS TO QUERIES.

We think that the Clerk is "authorised to charge a Fee under the 8th *item* in the tariff of the last Act, when the Hearing on application for new trial takes place before the Judge at the County Town." The Judge's decision, wherever made, must be communicated to the Clerk (see Rule 52) and be by him entered in the *Procedure* Book—it it is for the *entering* that the charge is made, and the Judge's decision is a judgment, and is so designated in the Rule.

(*Continued from page* 3.)

CLERKS.—*Applications for New Trials.*—When the written application for new trial is made out, and (when necessary) verified by affidavit, the next proceeding is to serve copies thereof on the opposite party. The prudent suitor will be disposed to leave this work to the clerk and bailiff. As the service must be proved, clerks should compare the originals and copies with the bailiff who can then take the copies only from the office, which is the safer practice, as all the original papers must be delivered to the clerk within fourteen days after the day of trial. The requisites of service are not here in place for notice, but it will be well to caution bailiffs to make the service in good time, so that the application may be duly lodged within the period prescribed by the statute. If the opposite party should not live *within* the division, or have any agent or place of business *therein*, the duty of forwarding copies of the papers to him rests wholly with the clerk, who is required to transmit the same (that is a copy of the application and of every affidavit in support thereof) *forthwith* to the opposite party. It is not stated by what means the clerk is "to transmit," but we collect from the rule that it is by mail (particulars of claim put in in proper form show the plaintiff the place of residence): the clerk should receive and pre-pay the necessary postage; for the 47 Rule provides that postage shall be paid in the first instance by the party in whose behalf the proceeding is required.

In sending the papers it will be well to adopt a general form of letter,—such as in the subjoined form:

In the ——— Division Court for the County of ———
Between A.B., Plaintiff,
and
C.D., Defendant.

I do hereby give you notice that the *Defendant*, (*or* Plaintiff, *as the case may be*) has this day delivered to me an application, and affidavits (if any) for a new trial in this cause, and that copies thereof are herewith transmitted. N.B. "You are at liberty to answer the same in writing, or by affidavit, if facts stated by the applicant in his affidavit are disputed."

Dated this ——— day of ———, 185 .

———, *Clerk.*

To the above-named Plaintiff,
(*or* Defendant, *as the case may be.*)

When these papers have been served by the bailiff, or the party's agent, an affidavit thereof ought to be made without delay, for that is one of the documents which, according to the Rule, (No. 52,) must be delivered to the clerk within fourteen days. It will be unnecessary to give a form for this affidavit; the form No. 7 in the Rules will answer, substituting "application and affidavits" for the words "summons and statement of claim" in the form No. 27. In all cases the clerk should endorse on the application, &c., the date when received by him, and sign it; and if the opposite party does not live in the division, a note should be added stating the fact—something in this form:—

These papers were received by me this ——— day of ———, 185 , and I transmitted same day, by mail, copies thereof to ———, *Plaintiff*, (*or* Defendant, *as the case may be*), *who lives in* ———, *without this Division, and who has not, so far as I am informed, any agent or any place of trade or business therein.*

P.F.,
Clerk ——— Division Court, County of ———.

Before transmitting the application and affidavits to the Judge, the fees and necessary postage may

be demanded by the clerk of the applicant. A copy of the claim and other papers necessary to the proper understanding of the case, is to be sent at the same time. What are *necessary* papers must depend on the circumstances of each particular case and the grounds of application, and no general rule can be laid down. All these proceedings should be entered by the clerk in the Procedure Book, in regular order, viz.: the time when application received—when delivered to Bailiff to serve, and when returned—and the mileage,—or when transmitted by mail to a party resident out of the Division—when transmitted to Judge—when decision received—and what the decision is—and when communicated to the parties.

The Rule provides that the delivery of the papers to the clerk shall operate as a stay of proceedings, until the Judge's final decision is communicated: the clerk will of course observe this direction, and if an execution has been issued, will notify the bailiff that the proceedings are so stayed.

When the Judge's decision has been received, both plaintiff and defendant are to be notified of it "by mail or otherwise," (it is immaterial by what means the clerk does so, if he only brings the fact to their notice). It may be observed that in cases where the first trial is before a jury, *called by one of the parties*, the clerk should summon a jury on the new trial ordered. If the Judge has decided to hear the parties in the matter of the application, the time and place appointed for that purpose should be specially communicated "if the applications be refused, or if the party applying fail to comply with the terms imposed by the Judge, the proceedings in the suit shall be continued as if no such application had been." The terms imposed may be the payment of the costs of the former trial—the giving securities to satisfy any judgment, finally obtained—the payment into Court of the amount of debt and costs for which verdict has been rendered, or the like. The time, within which these terms are to be complied with, will be specified in the Judge's order for new trial, and should the party fail to comply with them within the time so specified, an execution may issue on the judgment as in ordinary cases.

We would again repeat that every proceeding in this matter should appear in the Procedure Book.

BAILIFFS.—Besides the protection spoken of in previous numbers, there is this valuable provision in aid of officers acting under D. C. Acts, in respect to actions brought against them. "The plaintiff shall not recover in any such action, if tender of sufficient amends shall have been made before such action brought; or if after action brought a sufficient sum of money shall be paid into Court by or on behalf of the defendant." (D. C. Act, sec. 107.)

First of the *tender of amends:* where an officer finds that he has acted illegally, as by a seizure of a third party's property (which of course he should *give up as soon* as he discovers his error,) or the like, he should at once take the precaution of tendering to the party injured a sum of money amply sufficient to make amends for the trespass or wrong committed, that the party may have no excuse for bringing a subsequent action (this is the straight forward, honest course, and the politic one too).

In making the tender, care should be taken to *produce* the cash, and the offer should be unconditional and unqualified, or in all probability it would be held to be no legal tender. It is not always easy to determine what would be an adequate sum to compensate the party, but it is better in this particular to be on the safe side and tender something beyond what would make amends for the illegal act, and its consequences to the party injured. An officer himself may have an independent private claim, or note or account against the party, and think it will be sufficient to propose to credit the sum offered by way of amends on such claim; or if the note or account is insufficient for the purpose to tender a part and the note or account for the residue: but this is not a good tender; as before mentioned, the amount must be offered in cash. If an action is brought after tender made, the amount offered should be paid into Court (we are now speaking of actions in the D. C.), and a notice similar to that given in the Dec. number should be served, inserting specially "that before this action was brought, sufficient amends were tendered by him to the plaintiff for the matter alleged against him in the plaintiff's claim, and that the amount so tendered, viz.: £ , hath been paid to the Clerk of this Court for the plaintiff." The defendant must be prepared to prove at the trial the fact of tender, should the plaintiff proceed with the action; unless the plaintiff is able to prove a claim exceeding the amount tendered, he cannot recover in the action. It may be observed in addition, that although a party may in the first instance refuse to accept the sum tendered, yet if he alters his mind at any time before action commenced, and states to the officer that he is willing to accept in satisfaction the sum previously offered—and the officer does not pay him, the legal benefit of the previous tender is lost.

Payment into Court.—On this point there is little to be said: if an officer has not tendered amends, and an action is commenced against him, and there is no defence to the same, he should pay into Court a sum sufficient to cover the utmost claim that can be proved against him, with the costs, up to the time of such payment, and give notice similar to that in case of tender of amends, to the plaintiff,

leaving him to proceed for any further claim at his peril.

As a practical suggestion, we would recommend officers, in claims alleged against them for unascertained damages, to lay the matter before one or two disinterested and respectable neighbours; ask their opinion as to the amount of damages sustained and then tender, and pay into Court something more than the amount they fix; and afterwards call them, if required, as witnesses at the trial.

SUITORS.—*What the Defendant should do between the service of Summons and the Court-Day.*

(Continued.)

Having noticed in the last number what should be done by defendants with a view to save unnecessary costs, where the claim against them is wholly or in part correct, we come to *Defences*. Unless the defence be "statutable" there is no need of the defendant's giving any notice thereof to the plaintiff, for he can appear and state it by word of mouth at the hearing. It is beyond the scope of these remarks to enter on a dissertation of what defences come within the meaning of the term "statutory defences," (as used in the D. C. Act, sec. 43.) The ordinary defence of this description are *set-off* and the *Statute of Limitation* (i.e. where a debt or claim is "outlawed.") And as a general rule, every defence on the ground that the contract or claim is voidable by any particular Act of Parliament, is a "statutory defence," and notice thereof in writing must be given.

The object of such notice is to prevent the plaintiff being surprised by the defence set up, and to give him a chance to obtain proof (if able) to resist it; which is but reasonable and just.

Whenever a written notice of defence is necessary under the statute, it should be served as soon as possible after the defendant receives the summons; the time and mode of service is prescribed by the statute as follows:—notice thereof in writing shall be delivered to the plaintiff, or left at his usual place of abode, if within the division: or, if living without the division, to the Clerk of the Court, at least six days before the trial or hearing. Short, suitable forms of notice are provided in "the Rules," and these, and other forms in general use, the Clerk will always have on hand.

The Notice is headed in the same way as the notice mentioned in the last number, and shortly states that "the defendant will set off the following claim, on the trial, viz.:" &c., or that the defendant intends to give in evidence and insist on "the following ground of defence, viz.: that the claim he has been summoned for is barred by the Statute of Limitations (*or as the case may be*), and such notice is to be signed by the defendant. One of the statutory defences, that of set-off, requires a more particular and special notice: it is in effect a cross action, and as we have filled our allotted space, observations on it must be deferred to the next number.

(TO BE CONTINUED.)

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page 5.*)

THE WARRANT TO APPREHEND.

WHERE default is made in appearing to a summons, and it is deemed advisable, instead of proceeding *ex-parte* to bring up the defendant, as would be the proper proceeding where he is likely to abscond, the course is for the magistrate to satisfy himself, by the oath of the constable or other party who served the summons on the defendant, that it was duly served a reasonable time before the day named therein for his appearing, and *then* to issue the warrant: but it is quite in the option of the magistrate whether he will issue his warrant, or proceed *ex-parte* with the hearing of the case, notwithstanding the defendant's absence.[a]

Before the passing of the recent act, it was generally considered that where statutes empowered justices "*to cause the offender to be brought before them*," that this implied an authority to use compulsory process, and empowered them to issue a *warrant or summons in the first instance*, according to the justice's discretion,[b] and the like where the offence included a breach of the peace, or was of an indictable nature.[c]

The statutes relating to injuries to the person,—petty larceny, and malicious injuries to property,[d] and other modern penal statutes, gave *express* authority to justices to issue a warrant in the first instance, if they deemed such a course expedient; but by the recent act[e] more extensive powers are conferred upon them in cases of information laid for *any offence punishable upon summary* conviction. Sec. 2 enacts as follows:—

"*The justice or justices before whom such information shall* have been laid, may, if he or they shall think fit, upon oath or affirmation being made before him or them substantiating the matter of such information to his or their satisfaction, instead of issuing such summons as aforesaid, issue in the first instance his or their warrant for apprehending the person against whom such information shall have been laid," &c.

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[a] 16 Vic. c. 178, sec. 2.

[b] R. v. Simpson, 10 Mod. 328, 341; Bane v. Methuen, 2 Bing. 63; and 2 Hawk. c. 13, sec. 15.

[c] See cases in note [b] and 1 Str. 44.

[d] 4 and 5 Vic. chaps. 25, 26, and 27.

[e] 16 Vic. c. 178.

And by sec. 9 of the same statute, it is further enacted :—

"And in every case where the justice or justices shall issue his or their warrant in the first instance, the matter of such information shall be substantiated by the oath or affirmation of the informant, or by some witness or witnesses in his behalf, before any such warrant shall be issued."

If a warrant be issued without an information on oath, according to the statute first laid, the magistrate issuing it is liable to an action, even for a slight temporary imprisonment, if the party were apprehended on the warrant so improperly issued.(*b*) It may be added, that under the 2nd section of the Magistrate's Protection Act,(*c*) no action will lie for any act done under a warrant to procure the appearance of the party which shall be followed by a conviction or order, in the same matter, until after such conviction or order shall be quashed, nor for anything done under a warrant which has not been followed by a conviction, or under a warrant upon an information for an alleged indictable offence, if in such cases a summons has been previously served and not obeyed.

As to the exercise of the *discretionary* power, when possessed by justices, to issue a warrant in the first instance, we refer to what was said before at page 103 and 202. The issuing the warrant instead of proceeding by summons, should be the exception rather than the rule, unless, indeed, in cases under the *Petty Larceny* Act, which are in the nature of *Felonies*: in these cases, unless the offence be of a very trifling description, or the defendant is in that respectable station of life which would negative the idea of *thievery*, or an intention to abscond, a warrant would be the appropriate process. It is again urged that in every case, *before a man is deprived of his liberty*, an oath of his having committed an offence ought to be made: that is but reasonable and just, and magistrates cannot be too strongly impressed with this view.

ON THE DUTIES OF CORONERS.

(CONTINUED FROM VOL. I, PAGE 224.)

III.—APPEARANCES TO BE NOTED IN RELATION TO THE BODY.

It is desirable that every circumstance connected with the death of the party should be fully made known at the Inquest, and yet through inattention on the part of witnesses it frequently happens that very imperfect evidence is submitted to the Jury. Too much importance cannot be attached to the minute and careful examination of the body, and its relation to surrounding objects; we take, therefore, from a late work on "Medical Jurisprudence" the subjoined excellent suggestions for the guidance of witnesses and medical men. From the nature of his professional duties the medical man has many opportunities of furthering the ends of justice. "Whenever, then, he is called to witness the dying or the dead, under circumstances of suspicion, he should be alive to all that is passing around him, that no object, however trifling, which may possibly throw light on the cause of death, may be overlooked." In all cases the position of the body, its appearance and the objects which surround it, should be accurately noticed, but in the *post mortem* examination the skill and learning of the Medical Practitioner are relied upon to detect the hidden traces of violence. The subject admits of two divisions: 1st, the relation of the body to surrounding objects; and, 2ndly, the *post mortem* inspection for legal purposes.

1.—RELATION OF THE BODY TO SURROUNDING OBJECTS.

The place in which the Body is found.—This is the first thing which will attract attention; and the first caution with regard to it is, not to conclude too hastily, that a spot in which the body is discovered is that in which death actually took place. A case enforcing this caution, and strongly reminding us of the story of the Hunchback in the Arabian Nights, occurred about forty years since at Liverpool. A body was found in an upright position, supported by railings which fenced a shipwright's yard. On examination, it was proved that the deceased had been killed by a fracture of the skull inflicted by some blunt instrument. A reward was offered: every effort was made to discover the murderer, and several parties were taken up on suspicion, but acquitted from want of evidence. Forty years afterwards, an old woman, on her death-bed, made the following confession: she was standing at the door of her house, and the deceased, passing by in a state of intoxication, caught hold of her. She ran into the front parlor, and he with her; she called out, and her husband, who was a pilot, happening to come in at the moment, took up the poker and killed the deceased at one blow. He and his wife, terrified at what had happened, began to think how the body should be disposed of, when the wife hit upon the plan of taking the body out, between 12 and 1 at night, being very dark, and leaning it against the railings, where it was found by the watchman. The corpse was carried by her husband a distance of 200 or 300 yards from his house.(*a*)

The position of the body.—We must endeavor to ascertain whether this position corresponds with the supposed or ascertained cause of death. In the case just quoted, the mere fact of a man killed by a blow on the head being found in an upright position, would have led to the inference that the body had been placed in that position after death. It is not uncommon for a murderer, after having dispatched his victim, to dispose of the body in such a way as to make it appear that the deceased died by his own hand. Thus persons who have been poisoned, have been suspended by the neck, or thrown into the water. Sir Edmundbury Godfrey was found lying in a ditch with a distinct mark about his neck, which was dislocated, and with his own sword passed through his body; and there is little reason to doubt that he was first strangled: that the wound was inflicted after his death, and that the body was so disposed of as to lead to the belief that he had committed suicide.(*b*) It may happen, in cases of this kind, that something has been omitted by the criminal in the

(*b*) Candle v. Leymore, 1 Ad. and E. (N. S.) 889; and see Bridgett v. Coyney, 1 Mee. & By. Mag. Cases; 1 Morgan v. Hughes, 2 T. R. 226.

(*c*) 11 Vic. c. 150.

(*a*) *Times* newspaper, Nov. 30, 1838.

(*b*) See Beck's Med. Jur. p. 644.

arrangement of the body itself, or of the surrounding objects, which may enable an intelligent witness to detect the hand that has been committed. In cases of death by hanging, considerable importance may attach to the posture of the body.

Examination of the spot on which the body is found.—It is often highly important to examine carefully the spot on which a body lies. A wound or bruise has been inflicted, and there is reason to regard the injury as the cause of death. The question naturally arises:—Might not the wound or bruise have been caused by a fall on some body projecting from the spot on which the body was found? Thus, in the case of a man who was found lying in a field with a severe bruise on the head, the question was put:—Might not the deceased have fallen on a stone, or on a fragment of wood? The answer was easy: the field had been searched, and no such object could be found near the spot on which the body lay. In another extremely interesting case, an intelligent medical witness found a small wound in the head, which had passed through the integuments and bones to the brain; and he stated that it must have been caused either by a fall on a sharp object, such as a nail fixed in the floor, or by some pointed weapon. The floor was examined, but no such object was to be found. It followed, therefore, that the wound had been inflicted by some small pointed instrument. The murderer confessed that he had struck his victim with the point of a pair of snuffers. There are many occasions on which this close correspondence of wounds or bruises found on a dead body with the objects immediately surrounding it, forms a most important item in the evidence by which the cause of death is determined. Thus, in the case of the Prince de Condé, who was found suspended by the neck in his bedroom, certain abrasions found on the legs and one of the shoulders corresponded closely with the position of surrounding objects: those on the legs with a heavy chair placed close to the body, and that on the shoulder to a projecting part of the window to which he was suspended. This case created a great deal of discussion, and many persons were of opinion that the Prince had been murdered and afterwards suspended. The correspondence of the bruises with the position of the chair and window harmonized much better with the struggles of a man suspended during life than with any other cause to which they could be attributed, and gave strong confirmation to the opinion of those who attributed the death to suicide.

The soil or surface on which the body lies.—The soil or surface on which the body lies may furnish important indications. It rarely happens that a struggle takes place without leaving on the spot itself some traces which may be compared with the clothes of the suspected murderer or of his victim. Stains of blood upon the clothes, for instance, or impressions of the foot on the soil, have led to detection. An interesting example of this latter kind is given by Sir Walter Scott. The murderer was discovered by the print of his foot which he left on the clay floor of the cottage in the death struggle. The measure of the foot, the tread, and the mode in which the sole of one of the shoes had been patched, corresponded most closely with the footmark; and this was the first link in the chain of evidence which led to the conviction of the murderer. (c)

Position of surrounding objects.—Having examined the spot on which the body lies, attention should next be directed to the position of the objects that surround it. Oftentimes the instrument of death is found lying near the body, and as in certain cases, its relation to the corpse may furnish important evidence, it should always be carefully noted. In cases of suspected poisoning, every vessel in which food has recently been prepared and administered should be carefully examined, and its contents reserved for analysis. The same observation applies to suspicious liquids or powders which may be found in the apartment.

The bearing and conduct of the parties in attendance.—The bearing and conduct of the parties in attendance should not be overlooked. Crime is rarely self-possessed, and, when most on his guard, the culprit is apt to betray himself by an excess of caution. The medical man, therefore, should be alive to all that is taking place around him.

The Clothes.—Having noted the position of the body the spot on which it lies, the objects by which it is surrounded, and the persons who are in attendance, the medical man now proceeds to a more close inspection of the body itself. He examines the clothes; they may be covered with mud, or corroded by an acid, or stained by blood, or by some animal secretion; or they may be torn as if during a struggle, or cut by a sharp instrument. The position of the stain and direction of the rents or cuts must be carefully noted. The indications to be derived from an observation of these things must vary with each case; but it is easy to understand how they may prove important.

If the clothes have been cut, we must examine them to see whether the size, shape, and direction of the cuts, coincide in the several garments, and whether they correspond with any wounds that may be found on the body itself; for it sometimes happens that a murderer tries to conceal his crime, by cutting the clothes after he has wounded the body, and the wounds and incisions do not coincide.

Crimes have often been discovered in consequence of the close correspondence of things found in the possession of the accused, with things used in the perpetration of the crimes themselves.

These are some of the points to be attended to; but neither examples nor rules can do more than suggest the sort of enquiries which we should be prepared to make; each man's own judgment and foresight must prompt the particular points to be observed in individual instances. One general rule, indeed, may be laid down. The medical man should never content himself with the mere passive exercise of his senses or judgment. It is not enough to see the objects which actually present themselves to the eye: he must look for such as are not obvious at the first glance. To the correctness of a good observer he must add the intelligence and invention of an experimenter. He must beware of a hasty decision, and remember that the apparent cause of death is not always the real one. A man may die a natural death, in a situation or under circumstances which may cause suspicion to fall upon the innocent; the murderer may place his victim in a situation which may attach guilt to an innocent party, or lead to the belief that the deceased died by his own hand. To guard against all such sources of error, the medical man must arm himself with caution, and even with scepticism; without the first of these, at least, he may both endanger his own reputation and the lives of his fellow-creatures. The service which an intelligent medical witness may have it in his power to render to the cause of justice, cannot be better illustrated than by the following case, for which the author is indebted to his friend Dr. James Reid. It is given as nearly as possible in his own words:—"I was sent for one day to a man and his wife, whom I found lying in the same room with their throats cut. The woman lay on the floor with her right arm extended under the bed and a razor close to her right hand. Her throat was deeply cut from ear to ear, and she lay in a complete pool of blood. The husband, who was in bed, had received a wound in the throat, which had merely divided the trachea without wounding any important blood-vessel, and without causing any great loss of blood. When questioned, he gave the following account:—In the middle of the night he was roused from sleep by receiving a wound in the throat from the hand of his wife. The shock, the wound, and the loss of blood together, had

(c) Lockhart's Life of Sir Walter Scott, Vol. III. p. 39.

prevented him from making any resistance or giving any alarm.—My suspicions were aroused, partly by the man's manner, and partly by observing the water in a basin standing in the room slightly tinged with blood. In endeavouring to find some confirmation of my suspicions a thought struck me. *I turned up the bed clothes, and found the sole of the foot covered with dried blood.* I stated this fact to the jury at the coroner's inquest: a verdict of guilty was immediately returned, but the man died almost at the moment that the sentence was passed."

A more instructive case than this could scarcely have been selected.

2.—EXAMINATION OF THE BODY—POST-MORTEM INSPECTION.

Should the body be that of some person unknown, we must note all those circumstances which may lead to its identification—the sex and probable age, the stature, the degree of corpulence, the colour of the hair and eyes, and any peculiar marks which may exist on the surface of the body. Those appearances which serve to denote how long the party has been dead, viz.: the presence or absence of animal heat, of cadaveric rigidity, and of putrefaction, and the extent to which the latter change has gone must then be observed.

The condition of the several parts of the body must now be noted, and any wounds, contusions, or excoriations which may exist, must be described, and in this description we must not content ourselves with general phrases, if any certain measure can be applied. We must then examine the neck, back, and limbs, to ascertain whether any dislocation or fracture exists, and we must not hastily assume that the bones are not displaced or injured because the external parts of the body bear no traces of contusion or laceration. We should compress the chest to ascertain whether blood, or any fluid mixed with air or gas escapes from the mouth or nostrils. The cavity of the mouth should be inspected; for suffocation has been produced by foreign bodies introduced into it. The anus should be examined, for poisons have been introduced into the body In new-born children the orbits, fontanelles, and nuchæ should be inspected, in search of minute wounds inflicted by pointed instruments. In women the breasts should be examined, especially beneath the deep fold which they form with the skin of the chest; for there is a case on record in which a woman, found suspended by the neck, was at first thought to have died of strangulation, but, on closer inspection, a minute wound, inflicted by a pointed instrument, and extending to the heart, was found concealed by the left breast.

There is one great rule to be observed in conducting post-mortem inspections for medico-legal purposes, and that is to examine every cavity of the body. Even when the cause of death is quite obvious, it is well to observe this caution; for if any parts of the body have been left unexamined, the objection may be made that the cause of death might have been found there, or, at any rate, that some disease may have been present which would have given a mortal character to an injury not otherwise fatal.

Chaussier has given very minute directions for performing post-mortem examinations for legal purposes; but such detail is quite unnecessary. No one who is aware of the important object of the inspection will be likely to perform it in a hasty or slovenly manner; and provided it be done with care, the precise order or mode in which the several cavities are opened is of little importance. All traces of injury, whether external or internal, must, of course, be very minutely and carefully examined and described.

Unless the death be obviously the result of external violence, the stomach, with its contents, should always be carefully removed for examination. Notes of the appearances should always be taken at the time, and carefully laid by for future use, if occasion require. Where the stomach, uterus, or any other organ show signs of inflamation or injury, they should be preserved in alcohol, to meet future conflicting testimony, or remove doubts.

(TO BE CONTINUED.)

U. C. REPORTS.

GENERAL LAW.

RICHARD SHAW *v.* DAVID ORMISTON.

Action brought without authority of plaintiff—Staying proceedings—Attorneys duties in taking instructions.

[Practice Court.]

Rule calling on R. A., attorney on the record for the plaintiff, to show cause why all further proceedings should not be stayed, and the said R. A. be ordered to pay all the defendant's costs in this cause, and the costs of the motion, on the ground that this action is wholly proceeded without the authority of the plaintiff.

DRAPER, J.—Nothing can be more positive than the plaintiff's denial that he ever authorized or directed the institution of this suit, or that he contemplated becoming a plaintiff for the alleged seduction, by the defendant, of Agnes McKebbon. And if the facts are correctly stated in his affidavit, the action could not be maintainable, for she did not become his servant until many months after she became pregnant.

The affidavits, in reply, do not meet this statement with equal positiveness; they rather, in some particulars, confirm the plaintiff's statement, that his motive in accompanying Anne McKebbon to the office of Messrs. A. & B., was rather that she might be advised what course she might or could take under the circumstances, than that he contemplated instituting an action to recover damages for any injury he had sustained. And there is not a little in the affidavits to lead to the conclusion that Anne McKebbon herself, and perhaps others, looked upon the suit as instituted for her benefit, and were on that account desirous it should proceed. And Mr. B.'s affidavit appears to me rather to lead to the conclusion that he inferred the plaintiff wished this action brought because no other person could sue for damages, than that the plaintiff desired any such suit to be brought.

With regard, therefore, to the plaintiff's authorizing the suit, I must say I think the affidavits, carefully considered, fully tend to the opposite conclusion; and I cannot refrain from quoting Lord Tenterden's language, given in a note in 1 Chit. General Practice, 440:—

"It too frequently occurs that upon a client's statement a suit is precipitately commenced without first ascertaining the evidence; and sufficient enquiry into the details of proof is not made until just before the trial, after much expense has been incurred: and then it will appear that for want of adequate evidence the suit is not sustainable. This is grossly absurd and culpable negligence." In the present case a proper enquiry into "the details of proof" would have prevented this action having been instituted, and would have saved all this subsequent trouble and expense.

As it is, however, having arrived at the conclusion on the affidavits that this action was brought without authority from the plaintiff, the case of Hubbart *v.* Phillips, 13 M. & W. 702 is an express authority for making this rule absolute; and that case was referred to and approved in 1 Exch. 1. The rule, therefore, will be absolute.

Wright *v.* Castle, 3 Mer. 12 Per Ld. Ch. If plaintiff denies and solicitor asserts authority to have been given, and there is nothing but assertion against assertion, the Court will say that the solicitor ought to have secured himself by

having an authority in writing, and that not having done so, he must abide the consequence of his neglect. Bill dismissed on application of plaintiff—solicitor to pay costs.

Wade *v.* Stanley, 1 Ive & Walk, 674. A bill was dismissed with costs A person who is made a co-plaintiff without his authority or knowledge, is liable for costs to the defendant, but is entitled to be indemnified by the solicitor.

Vide 1 Ive & Walk 457, similar to Wright *v* Castle.

Doe Davis *v.* Eaton, 3 B. & Ad. 785. The ejectment was brought under the authority of a power of attorney purporting to be from the lessor of the plaintiff, then abroad. Notice of trial was given, and default made. Defendant's costs amounted to £215. Lessor of plaintiff came back, disowned the action, the power of attorney being a forgery. The Court, on motion of lessor of plaintiff, made attorney pay defendant's costs.

Low *v.* Kellett, 2 Myl. & K. 1, only decides that it is not indispensable the authority should be in writing.

See language of Lord Tenterden, in Owen *v.* Ord, 3 C. & B. 349.

Doe Barber *v.* Roe, 3 Dowl. 496.

Newton *v.* Matthews, 4 Dowl. 237.

1 Dowl. 632.

3 Bing. W. C. 301.

CONOLLY *v.* MCCANN.

Venue—Practice in changing—Record, where passed on change of venue—Waiver of irregularity by defendant entering on defence—Discrepancy between rule and motion papers—Costs of application.

[Practice Court.]

RICHARDS, J.—In Easter Term, 18 Vic., Mr. J. B. Read obtained a rule calling on the plaintiff to show cause why the Nisi Prius record, and all subsequent proceedings thereto should not be set aside for irregularity, with costs, on the ground that the Nisi Prius record was not passed at the principal office of the Court, at Toronto; or because the said record was not passed by any officer of the Court other than the Deputy Clerk of the Crown for the County of Hastings, after the venue in the cause had been changed from the said county to the United Counties of Northumberland and Durham, and on grounds disclosed on affidavits filed. The only affidavit filed by defendant was that of Mr. Cockburn, his attorney, who stated that the venue in the cause was originally laid in the County of Hastings; that the same was changed by a Judges order to the County of Northumberland; that the nisi prius record was entered for trial at the last assizes for Northumberland and Durham; that before the cause was tried, an objection was taken on the part of the defendant, that the record had not been passed by the proper officer; that the trial was allowed to proceed by the learned Judge, subject to the said objection, which was expressly made by him, Mr. Cockburn, who acted as counsel for the defendant at the trial. That the order to change the venue was transmitted by him (Mr. C.) to his agent at Belleville, in the County of Hastings, for service on the plaintiff's attorney, and there to be filed in the office of the Deputy Clerk of the Crown, and the venue changed thereby; and that he verily believes the original venue, in the plaintiff's declaration, was changed according to said order, and that said order is filed with the proceedings of the cause, at Belleville aforesaid.

On the last day of Term, Mr Hagarty Q.C., for plaintiff, shows cause, and takes the preliminary objection that the rule is not according to the motion papers filed. The latter is to set aside the *verdict*, whilst the rule is to set aside the nisi prius record, and all subsequent proceedings. He further objects, that it does not appear from the affidavits filed, that the record was not passed at the proper office or by the proper officer. The rule, it is true, calls on him to show cause *why* the record should not be set aside on the ground of irregularity, but the affidavit itself does not show where the record was passed, or by what officer. That defendant went into his full defence, and the jury have decided against him: having taken his chance before the jury, he ought not now to be permitted to apply to set aside the verdict.

It does not appear, from the affidavit filed by the defendant, that a rule to change the venue was ever taken out, or that anything more than a judges order for that purpose was handed to the officer, on which he changed the venue, in the declaration and a copy of the order served on plaintiff. It seems to me that this proceeding was irregular.—See Chitty's Archbold, 8th edition, p. 1067, & 1 Taylor's Reports U.C. p. 598. I am inclined to think the proper course, when the defendant obtained a rule to change the venue on the common affidavit, is for him, in addition to having the necessary alteration made, to cause the papers to be transmitted to the proper office. In this case, however, the plaintiff having in passing his record altered the venue or adopted the alteration after it was made, having given notice of trial for the assizes of the county to which the venue was to be changed, may be considered as having waived the irregularity referred to. In Figg *v.* Weddehan, 11 L. J. 45, PATTERSON, J. observes: It is a rule of practice always acted on, that if a party appear at a trial and make his defence, he shall not be allowed afterwards to come to the court and say he had no notice of trial, and is therefore entitled to another trial. He ought, if he means to avail himself of such an objection, to stay away from the trial altogether," * * * I certainly intend to adhere to the rule, that a defendant who goes down to trial, and takes his chance of success there, is not entitled afterwards to come to the Court to set aside the verdict which has been found against him, upon the ground that he had no notice of trial."

In ex-parte Crawshaw *v.* Bailey, 1 Bail Court Cases, 66. This was a motion for a certiorari to bring up and quash an inquisition before the Sheriff, to assess the value of certain lands belonging to Mr. Bailey, which the railway company required. The parcels were described in the notice to treat as Nos. 169 & 171 on the map of the line deposited, and as coloured in certain colors thereon. In the precept to the sheriff to summon the jury, the parcels claimed were described as Nos. 164, 165, and 181. This discrepancy was made a ground of objection on behalf of Mr. Bailey, but was overruled. The trial proceeded: Mr. Bailey's counsel does not withdraw, but conducted the case as usual, and the jury assessed the damages.—WIGHTMAN, J observed: Mr. Bailey appeared before the Sheriff, and took his chance of getting a verdict which would suit him. * * * He was in the same situation as a defendant who having received no notice of trial, appears and protests, but nevertheless goes on. If he had got such a verdict as he liked, he would no have applied to the Court, and the company could not be waived the objection by proceeding, and he cannot now complain.

It may be contended that in cases where there were irregularities in writs of trial, though the defendants have appeared at the trial, and after making objections gone into their defence, yet the Courts have set aside the verdict. Many of these objections have arisen like some of the cases referred to in our own Courts, where alterations or amendments of the record or writs of trial have been made without proper authority, or not in due form. I think, however, the inclination of the Courts now is to overrule these objections (where they are considered as irregularities) in those cases where the defendants have appeared, and had the full benefit of their defence.

In the case before us, the defendant appears to have gone fully into his defence, and the jury found against him, we

are to presume, rightly I think, the objection he urges to the passing of the record an irregularity, and one which he ought not to complain of. The papers remained in the office of the Deputy Clerk of the Crown and Pleas, at Belleville: if the defendant had caused them to be transmitted to the proper office, as I think would be the proper course to pursue on a change of venue, the irregularity he complains of would not have taken place.

With the papers remaining at Belleville, the Record could not have been passed in any other office for want of them. The Deputy Clerk of the Crown there certainly has power to pass Records; and whilst the papers remained in his custody he was the only person who could pass the record. I therefore come to the conclusion that the proceeding complained of is an irregularity. The defendant himself appears to have been guilty of an irregularity in reference to the change of venue; and having appeared at the trial and entered into a full defence, I think he must be considered as having waived his right now to come in and take the objection urged.

Had the plaintiff given notice, and taken his record down for trial at the assizes for the County of Hastings, I think his proceedings would have been regular: and having so far recognized the change of venue as to take his case down for trial at the assizes for Northumberland and Durham, I think passing his record with the Deputy Clerk of the Crown for Hastings was irregular; and as that induced the defendant's motion, I think in discharging this rule I should do so without costs.

Rule discharged without costs.

MARGARET RUNNING, ADMINISTRATRIX, &c., *v.* JOHN KIDD.

C.P.

Costs—Certificate for—Query if title to lands in question.

[In Chambers.]

Trespass—2 Counts.

Declaration.

1st—For seizing goods in lifetime of intestate, and detaining same.

2nd—Similar, alleging a conversion.

Pleas:

1st—Not guilty to the whole.

2nd to 1st count; 3rd to 2nd.—Special justification, alleging that the intestate occupied and enjoyed a farm of defendant, being front part of 17 in 7th con., Landsdowne, as tenant of defendant under a demise thereof, under yearly rent of £2 10s., payable Feb. 1st in each year.

On February 1st, 1852, £7 10s. was due for rent. Defendant distrained goods, then being subject to such distress as and for distress for said rent, and so justifies the detention under first count till rent paid. And so as to the 2nd.

Replication.

To 1st plea—*Similiter.*

To 2nd and 3rd.—That said intestate did not before said time when, &c., hold, occupy or enjoy said close, in which, &c., as tenant thereof to defendant, under supposed demise in said pleas mentioned, *modo et formâ*, &c. Concluding to the contrary.

At trial, alleged trespass was proved, and a demise; but varying from the plea in the description of the close—being the rear instead of the front part of the above-mentioned lot. A verdict was given for plaintiff for £12 10s. damages. A certificate for costs was moved for and opposed. The learned Judge reserved the question.

Freeland, in Chambers, applied for certificate, and contended that the case was a proper one in which to certify, and that plaintiff was at all events entitled to full costs on the record.

Hagerty, Q.C., showed cause.

MACAULEY, C.J., C.P.—I am not disposed to certify for costs, under the circumstances of this case, as they appeared in evidence; nor am I prepared to order costs, as of right, on the ground that it appears on the face of the record that the title to land was brought in question. I am disposed to think the plea and replication do not necessarily bring up title to land in question; but on that point I leave the plaintiff to apply to full Court, if so advised.

13 & 14 Vic. c. 52 s. 1. Extended jurisdiction of Co. Court to "All matters of tort relating to personal chattels, where the damages shall not exceed £30, and where the title to land shall not be brought in question.

9 & 10 Vic. c. 95, s. 58, in which title, &c., shall be in question; 2 Y. & J. 544, Wright *v.* Peggin; 3 M. & W. 288, Parnell *v.* Young; *ib.* 458, Pugh *v.* Roberts; 3 C. B. 243; 7 C. B. 814; 17 Q. B. 440; D. C. Act, 13 & 14 Vic. c. 53, s. 23; 14 & 15 Vic. c. 64, s. 5; 4 W. IV. c. 7, s. 7; and 1 & 2 Geo. IV.

CROFT *v.* THE TOWN COUNCIL OF PETERBOROUGH.

Municipal Corporation.

The defendants, a municipal corporation, having passed a resolution to authorize the raising and levelling of a street within their jurisdiction, which was accordingly done, and plaintiff's premises overflowed thereby,

The plaintiff having been nonsuited on the ground that the defendants were authorised by statute to do what they had done, the Court set aside the nonsuit and granted a new trial, in order to ascertain whether in fact the work done constituted a repair of the street within the statute, or exceeded such a repair, to the injury of the plaintiff's house and land.

McLEAN, J., *dissentiente.* [5 U. C. C. P. Rep. 35.]

This is an action on the case against the defendants for wrongfully raising the street and side-walk, on which plaintiff's house and shop abutted, several feet higher than it was before; by means whereof his said house was overflowed with water, to the damage of his business, health, &c.

Pleas.—First, Not guilty by statute. Second, Not guilty of raising the street, &c., by statute. Third, Not guilty of raising the side-walk, by statute. Fourth, Plaintiff not possessed. Fifth, As to raising the street, a special justification that defendants were a municipal corporation and authorized so to do, the street being within their jurisdiction, and being below the proper level opposite plaintiff's house, whereupon it became defendants' duty to raise it, and they did so. The plea alleges that the defendants caused it to be done, not saying that a by-law was passed for the purpose.

Replications.—Similiter to first, second, third, and fourth pleas. To sixth plea—*De injuriâ;* that defendants, of their own wrong, and without the cause alleged, committed the grievances, &c.

It was urged at the trial, before *McLean, J.*, at the last Peterborough assizes, that the defendants had caused the street to be raised, being within their jurisdiction, but that the work was only authorized by a resolution of the municipal council of the town, and not by a by-law under the seal of the corporation; wherefore the act was illegal, and defendants liable as wrong-doers through their agents and workmen.

The learned judge nonsuited the plaintiff, with leave to move, &c.

In the following term (Trinity Term, 1854), *Weller*, for plaintiff, obtained a rule on the defendants to shew cause why such nonsuit should not be set aside,—referring to Pro. Stat. 12 Vic. ch. 81, sec. 31, No. 10, and secs. 60, 190, 192, 195; Brown *v.* The Municipal Council of Sarnia, 11 U.C.Q. B.R. 86; S. C. *ib.* 215; Sutton *v.* Clarke, 6 Taunt. 29.

Crooks, A., shewed cause during the same term, and referred to the peculiar terms of the declaration, and contended the defendants had no authority in the premises without acting through the medium of a by-law—12 Vic. ch. 81, sec. 192; Kerby v. The Grand River Navigation Co., 11 U. C. Q. B. R. 331; Young v. The Grand River Navigation Co., 12 U. C. Q. B. R. 75; 16 Ju. 6; Grant on Cor., sec. 78. Moreover, that defendants could not be made liable without a by-law; and if no by-law, that the remedy should be against the persons who did that which caused injury to plaintiff's close—14 & 15 Vic. ch. 109; 16 Vic. ch. 181, sec. 33. That being treated as wrong-doers in this action, the defendants might justify the act as clearly within their legislative jurisdiction by means of a by-law, and consequently within their executive powers when prosecuted for an act they were clearly empowered to direct.

Weller, in reply, contended—First, That the defendants were liable, because they directed the road to be raised without doing so through the medium of a by-law, against which, if passed, plaintiff might have remonstrated, or appealed, or become entitled to compensation. Second, Not only did defendants act without any by-law, but employed servants or agents, who did the work negligently, to plaintiff's damage, as he was prepared to have proved, had he not been nonsuited. That the powers entrusted to defendants should be strictly pursued, and power to pass by-laws for certain specified purposes did not authorize such purposes to be accomplished without by-laws—22 Eng. Rep. 198. That defendants had no independent or incidental power to raise the street; only power to pass by-laws for that, among other enumerated purposes—Brown v. The Municipal Council of Sarnia, 11 U. C. Q. B. R. 215; and that the street could not, by defendants or their servants, be raised as it was to plaintiff's serious damage, without a by-law at least to sanction it—Sutton v Clarke, 6 Taunt. 29; Leader v. Moxton, 3 Wil. 461; The Governor, &c., of the Cast-plate Manufacturers v. Meredith, 4 T. R. 794; Allen v. Hayward, 7 Q. B. 960; Pro. Stat. 12 Vic. ch. 81, sec. 195. He also submitted that what had been done was equivalent to a change of the old road, under the statute entitling plaintiff to compensation which he could not enforce or obtain in the absence of a by-law.

MACAULAY, C. J.—By the statute 12 Vic. ch. 81, sec. 190, all powers, duties or liabilities, vested in or belonging to the magistrates in quarter sessions, with respect to any particular road, &c., at the time that act came into force, were vested in the municipal corporation of the county, &c., subject always to the provisions of that act as to the mode and manner of exercising, performing, and meeting such powers, duties, and liabilities, and all rules and regulations made and directions given by such municipal corporation in the premises, shall have the like force and effect, &c., as those which the magistrates had previously the power of making, &c.

By sec. 61 certain towns, including Peterborough, were incorporated with the same corporate powers as the inhabitants of villages incorporated, to be exercised by, through, and in the name of the town council of such town, &c. Sec. 67 says the same powers, duties, and liabilities. Section 71, No. 5, authorizes by-laws to assess proprietors of real property in the town to defray the expense of making or repairing any flagging, posts, or pavements in any public street opposite or near such property, &c.; No. 7, for borrowing money necessary for the execution of any town work; No. 9, or generally. Section 60, No. 1, enacted that the municipality of each village should, moreover, have power and authority to make by-laws for the opening, constructing, making, levelling, raising, lowering, repairing, improving any new or existing highway, road, street, side-walk, &c., within the jurisdiction of the village corporation, and for the stopping up, putting down, widening, altering, changing or diverting, any such highway, road, street, &c., subject to the provisions added thereto; then follow various other specific objects from No. 2 to No. 24. Sections 191, 192, and 195, contain further provisions on the subject. Section 177 provides for levying necessary funds for municipal purposes.

Previous acts relating to this subject are—1 Geo. IV. ch. 9, secs. 6 & 9; 1 Vic. ch. 21, sec. 20; 4 and 5 Vic. ch. 10, secs. 45 & 51. Subsequent acts are—14 & 15 Vic. ch. 109; and 13 & 14 Vic. ch. 15.

The objection is, that the defendants have wrongfully raised the street and side-walk in front of the plaintiff's house and premises, to his prejudice and injury, without a by-law authorizing or directing it. But the pleadings do not put in issue whether the defendants caused it to be done by a by-law or not. The declaration charges the defendants with having wrongfully raised the street or side-walk on which his house and shop abutted several feet higher than it was before, by means whereof his house, &c., were overflowed with water, to the damage of his business, health, &c.

The pleas deny the wrongful act alleged—that is, the raising of the street, to the plaintiff's injury, &c.—Bell v. Howard (7 C. B. 201), Torrence v. Gibbins (5 Q. B. 297.) They also deny so raising either the street or side-walk in fact; and the sixth plea alleges the street was within their jurisdiction, and below the proper level opposite the plaintiff's house; wherefore it became their duty to raise it, and they did so. The replication to the fifth plea is, that the defendants, of their own wrong, and without the cause alleged, committed the grievances on which issue is taken.

The cause or matter of excuse alleged—Barnes v. Hunt (11 East 455)—is, that the street being within their jurisdiction and below the proper level, and it being their duty to raise it, they did raise it—Rex. v. Holland (5 T. R. 619), Farr v. Hollis (9 B. & C. 331), Cane v. Chapman (5 A. & E. 647,) Seymour v. Maddox (16 Q. B. 328.)

The material points are therefore—First, whether the street was within the defendants' jurisdiction; and if so, second, whether it was below the proper level; if so then, third, was it as a consequence their duty to raise it?

They do not plead that, being empowered to make by-laws for making streets, &c., they made such a by-law on the occasion in question; but being charged as wrong-doers, they justify the act without relying upon any by-law. If the defendants cannot in cases of this kind plead the general issue per statute, and give the special matter in evidence under it—and it has not yet been decided that they can—the plaintiff would have been entitled to a verdict on the first issue, upon proving the wrongful acts alleged; he would be entitled to a verdict on the second and third issues on proving that the defendants did raise the street and side-walk as alleged, facts admitted at the trial; and a verdict on the fourth issue if possessed, &c., which fact was also admitted. The plaintiff was therefore nonsuited, because it was assumed that, however injurious to the plaintiff in the manner and form alleged, the defendants were justified in doing what had been done without any previous by-law to authorize it. Unless open to investigation under the general issue, I cannot say I think that fact in issue. The defence rested under the last plea, which does not allege or rely upon a by-law.

It appears to me the nonsuit should be set aside, because the plaintiff would be entitled to a verdict on the four first issues, if he proved his case *primâ facie*; and that the burthen of proof was on the defendants, as to the facts in issue under the fifth plea, which do not seem to have been admitted or proved.

As to the question that has been a guod, it may be material to consider it with a view to another trial or amended pleadings.

In addition to the powers conferred upon the defendants by the 12 Vic. ch. 81; the 13 & 14 Vic. ch. 15 enacted

that the right to use as public highways all roads, streets, and public highways within the limits of any incorporated town, &c. (subject to the exception therein made) should be vested in the municipal corporation of such town; and such roads, streets, and highways should be maintained and kept in proper repair so long as they should remain open as such, by and at the cost of such corporation; and if such corporation should fail to keep the same in repair, such default should be a misdemeanor, punishable by fine, &c.; and such corporation should be also civilly responsible for all damages sustained by any person by reason of such default, &c. Being thus the duty of the defendants to maintain and repair the public streets placed under their charge—and it is not suggested that the street in question is not one of them—they may perform such duties without a by-law to authorise, it being a duty obligatory upon them by the statute, at the peril of an indictment or a civil action for the culpable neglect of such duty. The by-laws are in many instances essentially necessary to justify or to render imperative that which was not so before, or to provide for raising the necessary funds, or to specify and define what was to be done, or for some purposes beyond the mere maintenance and repair of the streets, &c., and that by-laws are prudent even when not absolutely necessary, I think there can be no doubt.

It is not contended that the defendants might not have authorized the raising of this street to the extent that has been done through the medium of a by-law. It is contended, however, that, having done, or caused to be done, without a by-law, that which has operated as a nuisance to the plaintiff's premises, the defendants are responsible for the act and its consequences; and that if the work was not legally authorized upon common law principles, or by the statutes, irrespective of any by-law, or of the clauses empowering and authorizing them to make by-laws, they cannot justify that which caused the injuries to the plaintiff, and of which he complains, in the absence of a by-law.

The defendants contend that the action is not for doing what was done without a by-law, but for doing it at all, which is charged to have been wrongfully; and that if chargeable as wrong-doers, though not directed by them through a by-law or under seal, they may (confessing the act) justify it as being within the scope of their corporate powers and jurisdiction, without proving that such powers were exercised under seal or through a by-law—12 Vic. ch. 81, sec. 198; Arnold v. The Mayor, &c., of Poole (4 M. & G. 861). That they may shew it was their incumbent duty to do it; or if not, and only within their discretion in order to improve the street, that they may shew nothing more done than a by-law might have directed and authorized; and that therefore they are not amenable as tort-feazers. That they cannot be made liable to an action of this kind not for exceeding their powers, but merely for informally exercising their authority in the premises.

The general rule is stated to be, that corporations act and speak only through their seal—Ba. Ab. Corporations E; Mayor of Thetford's Case (1 Salk. 192, S. C. 3 Salk. 103), Dunston v. Imperial Gas Co. (3 B. & Ad. 125), Reid v. Leslie (12 Q. B. 938), Jackson v. Taylor (5 Ex. R 442), McLean v. Waters (8 C. B. 669), Arnold v. The Mayor, &c., of Poole (4 M. & G. 860-1)—which explains perhaps why by-laws are in relation to the subject matter mentioned in the 12 Vic. ch. 81, sec. 66, No. 1, and required to be sealed by sec. 198. But it is now well settled that corporations may be indicted or subjected to civil actions of trespass, or on the case for torts of various kinds arising from misfeazance or nonfeazance—Horn v. Ivy (1 Vent, 47,) Yarborough v. The Governor, &c., of the Bank of England (16 East. 6). Smith v. The Birmingham, &c., Gas Light Co. (1 A. & E. 526), Maund v. The Monmouthshire Canal Co. (4 M. & G. 452), Regina v. The Birmingham and Gloucester Railway Co. (3 Q. B. 223), Reg. v. Scott (3 Q. B. 543), Regina v. The Great North of England Railway Co. (9 Q. B. 315), Regina v. The Town Council of Lichfield (10 Q. B. 534-747), Farrell v. The Town Council of London (12 U. C. Q. B. R. 343);—and I doubt not corporations may become liable as tort-feazers for things done by their directions without by-laws, for which they would not have been so liable had such things been previously authorized thereby; and that they might incur such liability even for acts done in pursuance of a by-law where their powers and jurisdiction were therein exceeded, and injury and damage inflicted under it (a). At the same time I also think that cases may exist in which although a by-law would have been judicious and prudent, and the more regular course, the act may be justified without it. But, while I feel the force of the argument, that authority to make by-laws for specified purposes impliedly confers authority to do what by-laws may be passed to accomplish, still I do not think that the mere power to make by-laws does necessarily confer by implication equal powers to act without them, as many of the provisions contained in the 12 Vic. ch. 81, sec. 60, sub-secs. Nos. 1 to 19 illustrate. It must therefore depend upon circumstances.

My present impression is, that if the facts in this case shew that it became the defendant's duty, under the 13 & 14 Vic ch. 15, to raise the street, they would be justified; but that in the absence of a by-law they must rely upon the powers possessed by them expressly or incidentally, irrespective of the 12 Vic. ch. 81, sec. 60, No. 1; and that for any excess or negligence in the execution of the work producing consequential injury and damage to the plaintiff, they would be liable; although if a by-law had been made, legal in its provisions, they would not be liable for excesses or neglect in its execution, or for consequences prejudicial to the plaintiff, for which they would not have been liable if expressly authorized by the statute without any special by-law to do what the by-law directed to be done.

In the absence of a by-law directing and defining the work, I consider the defendants responsible, in the first place, to the same extent as commissioners of highways acting under and executing duties and powers assigned to them by statute, according to the decisions in England; and, in the second place, for neglect or misconduct in their workmen, or for mal construction of the work, causing damage to the plaintiff, for which such commissioners might not be liable. In the event of a by-law being made, I look upon the defendants as liable only so far as the by-law itself may be illegal on the face of it, or in what it directed to be done, but not for excesses, or for misconduct in its execution exceeding its provisions, and not contemplated or required thereby. Their responsibility would be limited to the by-law, and not be extended to its execution under contracts duly made in conformity therewith, however an additional responsibility might arise if the by-law was executed by the immediate officers and servants of the corporation, and the work was negligently and carelessly mismanaged by them in its performance (b). If in executing the works by the defendants through contractors, or by officers and servants of the corporation, excesses were committed, or the jurisdiction and powers exceeded to an extent such as rendered the defendants liable in such cases as Leader v. Moxon (3 Will. 461, S. C. 2 W. B. 924), and the remarks of *Gibbs*, C. J., in reference thereto in Sutton v. Clarke (6 Taunt. 43, S. C. 1 Mar. 429), Weld v. Gas Light Co. (1 Stark, 189), Roberts v. Reed (16 East, 216), Jones v. Bird (5 B. & A. 837, S. C. 1 D. & R. 497), Wilks v. The Hungerford Market Co. (2 Bing. N. S. 281), Brown v. Municipal Council of Sarnia (11 U. C. Q. B. R. 87), Farrell v. The Town Council of London (12 U. C. Q. B. R. 343), Brown v. Clegg (16 Q. B. 682), Ellis v. The Sheffield Gas Co. (18 Jur. 146, 22 Eng. Rep. 198), I think the defendants would be liable in like circumstances. My difficulty is,

(a) See 12 Vic. ch. 81, secs. 155, 14 Vic. ch 109, sec 35, sched. A. No. 21; 22 L. J. C. P. 61, 16 Eng. Rep. 442; 11 C. B. 867, 18 Jur 146, 22 Eng. Rep. 136

(b) See 22 L. J. C. P. N. S. 61; 16 Eng. Rep. 442; 12 U. C. Q. B. R. 343.

whether the facts may bring the case within such decisions as The Governor & Co. of the Plate Glass Manufacturers v. Meredith (4 T. R. 794), Sutton v. Clarke (6 Taunt. 29, S. C. 1 Mar. 429), Boulton v. Crowther [2 B. & C. 703, S. C. 4 D. & R. 195], The Grocers' Co. v. Doane [3 Bing. N. S. 34], Rex. v. The Bristol Dock Co. [12 East, 428], Boyfield v. Porter [13 East, 200], Kerby v. The Grand River Navigation Co. [11 U. C. Q. B. R. 334], Young v. The Grand River Navigation Co. [12 U. C. Q. B. R. 75], Matthews v. West London Water Works Co. [3 Camp. 403], doubted in Peters v. Clarson [16 Jur. 65, S. C. 21 L. J. C. P. 52, 8 Jur. 648, 7 M. & G. 548, 8 Eng. Rep. 479], in which, although the plaintiffs were injuriously affected and damnified by the works, there was no excess of authority, nor any culpable neglect in the execution thereof, nor any wilful, unnecessary, malicious, or oppressive abuse of the powers intrusted to those sought to be charged and made responsible in civil actions.

In the case lastly referred to, the defendants were by law authorized to do what they did in the *bonâ fide* execution of public duties, and therefore not responsible for unforeseen consequences injurious to private individuals. Upon the same principle it would seem to follow in the present case that so long as what the defendants did by their agents or servants was within the scope of their powers and duties under the statute or common law, without any special by-law on the subject, I think they would be in the like circumstances as the public functionaries in England, empowered to perform similar duties, and who were held exempt from actions of this kind.

The more immediate question at present is, whether the defendants incur liability when they exceed the powers so conferred or incidentally derived from those sources, but do not exceed what it is within their legislative jurisdiction to have authorized by a by-law; in short, whether it was within their authority to do what this declaration charges without a by-law to sanction it,—the declaration charging them with having wrongfully raised the street and side-walk, to the plaintiff's injury, not alleging negligence wilful or inadvertent, but complaining of the works *in toto* as wrongful, &c. Reduced to that point, I should think the declaration displayed a sufficient *primâ facie* cause of action; but I am not prepared to say whether, in the absence of a by-law, the facts would sustain the allegation of wrongfulness or not. Much may depend upon the state of the street and the nature of the repairs. It is not suggested that it caused a public nuisance, or that it was not a decided improvement of the street as a highway and beneficial to the public; and if so, it is manifest that the plaintiff has legal difficulties to contend with in establishing that the work was nevertheless wrongful generally, or wrongful towards him personally as a private nuisance to his property.

In the argument the principal stress was laid upon the want of a by-law as sustaining the charge of wrongfulness, as if that omission necessarily placed the defendants in the position of wrong-doers if the plaintiff proved the work injurious in its consequences to his house or lands. I do not think such an inference follows as of course, but that it must depend upon circumstances; for I am satisfied that, irrespective of any special by-law, the defendants may justify many things in relation to the maintenance and repair of the streets that mere volunteers could not do—Lord Lonsdale v. Nelson et al. [3 D. & R. 556].

I think the question must be, not whether it might have been authorized or legalized by a by-law, but whether it is illegal, or can be justified without one; and in considering such a question I do not think the power to sanction and direct improvements of the kind, when they infringe upon private rights through by-laws legally made, confers by implication the power to make them without by-laws—Hopkins v. The Mayor of Swansea [4 M. & W. 633], Gosling v. Veley [7 Q. B. 451]. The plaintiff might remonstrate against a by-law while in course of being passed, or he might appeal against it if illegal in its provisions: at all events, acting without it is not executing the powers imparted by the legislature in conformity with the forms and observances required. If then the acts complained of are justifiable irrespective of the 12 Vic. ch. 81, sec. 60, No. 1, the defence is open to the defendants under the fifth plea; if they are not, I do not think a justification can be sustained under that clause; for it only authorizes the making of by-laws for certain specified purposes, and does not confer the power to do the thing it so authorizes without them.

I am at present disposed to think it within the general and incidental powers of the defendants to maintain and repair and to improve the public streets of the town placed under their charge; and, in doing so, to raise or lower them, as may be found necessary, judicious, or convenient for the public use, not exceeding what is reasonably requisite and proper, and doing no unnecessary injury to the property of others, but using due care and precaution to avoid injury to the same. But if the work cannot be justified on such grounds, then, in the absence of any by-law, I think the defendants would be responsible to the injured parties.

I am not prepared to lay down any general rule touching the line of separation in matters of this kind, between cases in which a by-law may or may not be necessary. In my present impressions, cases of either kind may arise, according to the circumstances. Whatever is cast upon the defendants as executive duties, under the statutes, in relation to the maintenance or repair of the roads, or whatever is fairly included in those terms, they may do without a by-law: when not so, and it is only within their discretion in the exercise of their legislative powers, it would be otherwise. In the present case it may form a question to be decided by a jury when the facts are ascertained.

It is stated that the defendants directed the work in question by a resolution of the municipal council, but not sealed: if so, it would, I suppose, constitute an informal or imperfect by-law; and there is force in the argument that the statute 12 Vic. ch. 81, sec. 198 requires by-laws to be authenticated by the seal of the corporation, to confirm the act and for the purpose of legal proof, without their being entirely void to all intents and purposes if not so sealed and signed, &c. I suppose, however, that the seal would be deemed essential to the validity of a by-law when the occasion necessarily requires a by-law to be made. The safe and prudent course is for the municipality to act through by-laws whenever practicable, and not to rely upon general or incidental powers under circumstances in which the power to proceed thereby is expressly given, and when the omission to do so may lead to actions of the present kind.

I will merely add that, from what was said and took place at Nisi Prius, I am much disposed to think the acts complained of will be found justifiable without a specific by-law made in due form, but not so clearly as to feel justified in upholding the nonsuit. I should desire to learn the facts before I express a distinct opinion on the subject.

McLean, J.—I am still of opinion that the plaintiff cannot maintain this action, and that the nonsuit was right. When it was admitted, as it was upon the trial, that the street had been raised by the defendants in discharge of a public duty—a duty which by law they alone were authorized to perform—then, in my judgment the *mode* by which they had proceeded became wholly immaterial; nothing was done but what the law authorized and duty required the defendants to do, and whether that was done under the sanction of a by-law regulating statute labour, or by contract entered into with an individual sanctioned by a resolution of the council, the act was equally justifiable. The plaintiff appears to rest his right to

recover on an alleged fact that though the street was raised under the sanction of the defendants acting in their corporate capacity in behalf of the public, yet as it was not done in pursuance of any by-law, that it was therefore illegal. Now I do not admit the correctness of this conclusion, and I am unable to see that the only mode of proceeding to be adopted in such cases must necessarily be by by-law. I can imagine that where statute labour is to be applied to a particular piece of road, or where some provision is necessary to regulate the time and manner of doing statute labour, a by-law may be essential; but I can see nothing to prevent any town council from carrying out any improvement on any highway or street within its jurisdiction by contract with any individual who may agree to make it. It is quite competent for a council to get plans and estimates of any intended improvements including the raising or levelling of particular streets, and, when such are obtainable, to give out contracts for doing the work according to such plans and estimates. A by-law in such a case would be superfluous and unnecessary, and cannot therefore be considered essential in law. It is true that under the 61st section 12 Vic., ch. 81, the inhabitants of the town of Peterborough and the towns similarly situated are severally declared to be a body corporate, with the same corporate powers as the inhabitants of villages incorporated under that act, except in so far as such powers may be by that act increased, lessened, or modified: and when the corporate powers conferred on villages are referred to, we find that they are authorized to *make by-laws* for the opening, constructing, making, *levelling*, *pitching*, *raising*, lowering, repairing, planting, improving, preserving and maintaining *any new or existing highway, street*, square, sidewalk or other communication within the jurisdiction of the corporation. Then, by the 59th section it is declared that the municipality of every village shall have all *such powers*, duties and liabilities within such village, as the municipality of any township shall have in respect of such township. It becomes necessary then to refer back to the 2nd section of the act, in which the corporate powers of townships are defined, and there we find among other things, that the township municipalities have the power of "making and entering into such contracts as may be necessary for the exercise of their corporate functions." Will it be said that a by-law is in all cases necessary before a contract can be entered into? I think it is not so; but that whenever the council decide upon a particular piece of work and the manner in which it is to be done, and the price to be paid for it, they may by a mere resolution direct a contract to be entered into under the seal of the corporation, and such contract will be binding and valid in law, quite as much as if the formality of passing a by-law under the corporate seal had been previously gone through. If then a formal by-law is not in all cases necessary to enable a corporation to proceed with works under their control, I cannot see that the want of such a by-law can make such corporation liable for doing what they may do without it. It certainly does seem to me that it would be rather absurd to hold that an act lawful in itself shall be deemed unlawful because done without all the *formalities* which some might deem necessary but which common sense would pronounce to be superfluous.

The cases which were cited by the counsel for the plaintiff on the argument (21 Eng. Rep. 198, 6 Taun. 29, 7 Q. B. 960, 4 T. R. 794) do not seem to me to help him in any respect; they only shew that where there is a contract to do an *unlawful act* the employer is liable for any injury arising from the act. The act in this case was not unlawful, for it was a duty thrown by law on the defendant-, which they were bound to discharge.

The case recently decided in this court as to the right of the Corporation of the city of Toronto to construct a sewer, by which another corporate body, the City Water Works Company was injured, seems to me to be decidedly in point in this case, and in fact to govern the decision; in that case the mode of doing the act was not questioned, but the *right* to do it; and in the case of Brown v. The Township Municipality of Sarnia, it was held that the defendants need not shew that they proceeded to do by by-law what the law authorized them to do, and several cases in our own courts establish that where parties have authority by law to do specific acts they cannot be held responsible for any injury arising from the performance of such acts. The plaintiff's declaration alleges the *raising of the street to be wrongful* on the part of the defendants, but being sanctioned by law it must be regarded as *rightful*.

On these grounds, therefore, I am of opinion that the rule *nisi* in this case must be discharged with costs.

RICHARDS, J.—I concur in the judgment of the learned Chief Justice that the nonsuit should be set aside, and a new trial had between the parties.

I am also very much disposed to go the length he does as to the necessity of a by-law to justify the acts referred to by him, even where the legislature has authorized the municipality to make by-laws for these purposes by 12 Vic., ch. 81, and other acts.

As, however, it is not absolutely necessary in this case that any decision on the point should be given, I refrain from expressing a decided opinion. In other respects I concur in the judgment of the Chief Justice.

Per Cur.—Rule absolute.

TO CORRESPONDENTS.

C. M.—Your question is one of *general* Law, and therefore not properly of the class to which answers are given in this Journal. However, we would direct your attention to an article which appeared in the last number and the case reported at page 224, vol. 1. The point is a difficult one: we can only say it would be *safer for the Sheriff to seize, under the circumstances put, and* if possible to have the question determined on an Interpleader proceeding. It is probable the difficulty will be got over by an act of the present session.

A LAW STUDENT.—Some of the allusions in your letter are rather unhappy, and we must decline inserting it. Your proposal, however, to establish a Club "for putting cases and disputing points" is a good one: a Society of this kind and composed of Law Students exists in Toronto: we would advise you to procure a copy of its Rules.

C. A.—Many thanks for matter sent: we would be glad at any time to receive more—please condense as much as possible. The A B case we would be glad to have a brief report of, *but have you examined* Wood vs. Wood (4, Q. B. 397): it bears on the point—was the money "set aside and marked as the property" of A?

H.—You will see that although we take higher ground there is no difference in principle. The subject comes in a more forcible shape as *presented*. Your matter has been drawn from in more than one instance. Touching the *work spoken of, a reference to cases would be indispensable. We have two* offers now. The matter just received will appear as a communication in our next. Our best thanks are yours.

C. R.—We assume your note is intended for publication, and the forms it refers to we will endeavor to supply. The delicate matter before referred to, you will have seen was not left untouched.

S. J.—You are right: it has been laid down as the duty of a Grand Jury "if they believe a prisoner *morally* guilty, to find a Bill and give the Court an opportunity of deciding the point as to *legal* guilt. See C. C. C. vol. 5, page 229.

R. B.—We willingly receive cases from any County, if sent to us by reliable parties.

C.—We have some place the paper containg the case to which you refer. It was decided under the *old* Act.

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THE LAW JOURNAL.

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THE ADMINISTRATION OF JUSTICE IN THE LOCAL COURTS.

Every one must at once admit, that if we view the whole establishment of the country—the government of the King and the other estates of the realm; the entire system of administration, whether civil or military; the vast establishments of land and naval force by which the State is defended; our foreign negotiations, intended to preserve peace with the world; our domestic arrangements, necessary to make the Government respected by the people; our fiscal regulations, by which the expense of the whole is to be supported—all shrink into nothing when compared with *the pure, and prompt, and cheap administration of Justice throughout the community.* I will, indeed, make no such comparison; I will not put in contrast things so inseparately connected: for all the establishments formed by our ancestors and supported by their descendants, were invented, and are chiefly maintained, in order that Justice may be duly administered between man and man.

THIS great truth was advanced by Lord Brougham, in his celebrated speech on the state of the law, in the House of Commons, A.D. 1828. Under the sanction of such high authority, we claim attention for a few remarks in reference to *the efficient administration of Justice in the Local Courts of Upper Canada.*

We do not pause to determine whether the question proposed for notice has the ingredient of policy or expediency to commend it; the *administration of Justice*, in all its bearings, involves considerations of profound importance; and it would be a fundamental error to substitute *policy* for *duty*—*expediency* for *right.*

That profound and accomplished Jurist, Lord Brougham, was not one of those persons who exhibit defects without suggesting a remedy—who merely lament and declaim; he went thoroughly into every subject he examined, and submitted definite propositions for effecting the legal reforms he urged. His enquiries furnished a solid foundation for after improvements; and he has lived to see most of his suggestions carried out.

One of the important reforms he proposed was, the institution of Courts of Local Jurisdiction, on a uniform plan, and presided over by competent Judges; not only for every shire in England, but, as in the Saxon times, even for smaller districts. The bill which he introduced in 1833 [1] formed the model for our own Local Courts and those *now* existing in England.

There was a strong feeling, at home, against a tribunal wherein only one Judge presided; and, until of late years, almost every matter in the Superior Courts at Westminster was determined in full Court, to the great obstruction and delay of business therein: but modern Acts committed to a Court holden before a single Judge (one of the puisne Judges sitting apart) most extensive powers for the determination of important questions of law and fact, and vastly enlarged the Jurisdiction in *Chambers.* It is difficult to understand how objections could have so long prevailed, when it is remembered that at *nisi prius* only one Judge presided; and the same in Equity and Ecclesiastical Courts: frequently deciding upon most important and difficult questions. Experience in the usefulness of this new jurisdiction, we may assume, greatly aided in breaking down opposition to "single seated justice," for in 1846 cheap and speedy justice was secured to the English people in the resuscitation of the County Courts, improved by a simple procedure, and made effective by a learned and independent judiciary. Thus, what Lord Brougham urged long before, was, after the struggle of years, and in despite of the difficulties and conflicting interests which surrounded the question successfully carried out. *What the people of England gained in* 1846, *the Parliament of Canada granted to us just five years before!* No doubt fewer difficulties obstructed action, but the Upper Canada system of Local Judicature, District (County) and Division Courts, was worthy of the accomplished Statesman and Lawyer by whom it was devised. Let us trace the history of Local Courts in Upper Canada, and we will see that from the first the institution was favored in the country, and has steadily progressed to the condition in which we now find it.

In the year 1792, in the first session of the first Parliament of Upper Canada, the principle was enunciated by the Legislature, That the institution of Local Courts for the more easy recovery of small debts, was necessary "to contribute to the conveniency of the inhabitants of the Province"; and Courts were accordingly established. Their constitution was subsequently amended, and their powers were gradually enlarged. In 1841 they numbered about 180 Courts, presided over by nearly 1100 lay Judges [Commissioners], and possessed a

[1] Many years before, the subject was recommended to Parliament, by influential persons on both sides of politics. Sir Robert Peel introduced a bill to effect its accomplishment, when a Minister of the Crown; and in 1830, Lord (then Mr.) Brougham obtained leave to bring in a bill; and in the debate which took place on the occasion, a concurrence in the general views of the mover was expressed by all the leading speakers on both sides—but, from the early prorogation of Parliament, and other circumstances, the measure was allowed to drop. The bill of 1833 differed from the former only in some of its details, and was pronounced by some of the leading journals of the day, one of the most important reforms which had yet reached the civil jurisprudence of the country. The preamble recited:—"*That the means should be afforded to the people of this realm of having their suits tried as speedily and as near their own homes as may be, whereby expense, vexation and delay, may be avoided,*" &c.

jurisdiction to the amount of £10 C'y. District Courts were also established at an early period, with a jurisdiction more extended as to locality, and larger in amount and subject matter. In these Courts the proceedings were more formal, and they had the advantage of professional assistance, though the Judge was not necessarily a Lawyer. District Courts, in themselves valuable, presented also a home arena for County Members of the Profession, and more than one of our Judges commenced his career in them: [under the present constitution of County Courts, they form an admirable school for the local Bar.] The jurisdiction of the District Courts was also from time to time enlarged, and their practice improved. Thus we see Upper Canada always favoring a system of Local Courts, Courts of Request and District [County] Courts. The former scattered over the whole country, for the summary disposal of small debts and claims—the latter, having jurisdiction over a District [County] for the determination of cases of sufficient difficulty or importance to require more deliberate investigation, and an assisting bar.

The rapid and almost unparalleled progress, in population and in all the elements of wealth, which nearly half a century had developed in Upper Canada, produced not only a vast increase in litigation, but new complications and entanglements of rights; and the constitution of the Local Courts, however well suited to an infant society, were found inadequate to the requirements of a more mature and rapidly progressing state. Many and great complaints were made of the incompetency of these tribunals—of their defective constitution and procedure: moreover, abuses, if not corruption, had crept in; and they no longer commanded respect or answered the objects of their creation.[2]

In 1841, the subject was taken up by Parliament, and sound and comprehensive enactments were passed to remedy the existing defects. The 4 & 5 Vic., ch. 8, altered and amended the laws regulating the District Courts; the Practice was improved; the Judges were thenceforth *required* to be Barristers, and residents in their Districts; they were assigned a maximum salary of £500, but were still allowed to practice in other Courts. Another Act of the same Session abolished the Courts of Request, and provided for the separation of every District in Upper Canada into Divisions, each Division constituting a Court, with a resident Clerk and Bailiff; the Judge of the District Court presiding over the several Division Courts in their respective Counties, and a cheap and speedy procedure was traced out. The Jurisdiction in both Courts as to amount, remained substantially as before; but since 1841, they have been more than doubled in amount, and subject matter, and at the present day they embrace the great bulk of the law business of the country.[3]

Without going into any detailed examination of the progress of these Courts since 1841, we may refer to some of the most important provisions.

By an Act of 1845, an appeal from the District Courts was given, and provision was made for the trial in them of Issues and Assessments from the Superior Courts at Toronto—the Judges were *prohibited from practicing in any Court of Law or Equity*; and the tenure of office was assimilated to that of the Inferior Court Judges in Great Britain. And by this and subsequent acts, additional powers were conferred on the Judges of the County Courts, and the practice and proceedings of these tribunals were assimilated to the Superior Courts.

In addition to the Common Law powers of County Courts, a new and extensive jurisdiction in Equity was conferred in 1853; thus placing them in the same relation to the Court of Chancery as they already stood to the Superior Courts of Common Law.

Furthermore, the County Judge presides in two other Courts besides the County and Division Courts, viz.: The *Quarter Sessions*—a Criminal Court having cognizance, with some few exceptions, of the various crimes which are prosecuted by indictment, and also jurisdiction in matters of appeal; and the *Insolvent Debtors' Court*—a Court distinct in its nature and objects from any of those referred to.

Nor are the duties of the County Judge confined to the business of his several *Courts*. It would neither conduce to speed nor cheapness if every matter of practice in the Superior Courts was necessarily to be disposed of at Toronto. We find, therefore, the Legislature making provision (A.D. 1849) in relation to matters which might be conveniently disposed of in the several counties, viz.:—applications for time to plead reply or rejoin—for particulars of demand and set-off—for summonses and orders to compute in cases pending in the

[2] "Against the conduct" (we quote from Parliamentary Papers of 1840 Rp Public Department) "of many individual Commissioners; against the legality of their proceedings, as exceeding their jurisdiction; against the justice of their decisions on particular cases; and against the costs allowed and adjudged by them, many and great complaints have been made. A considerable number of such complaints have from time to time been preferred to the Executive Government, in some instances charging the Commissioners with corruption and partiality, in others with ignorance and incapacity. In some cases the conduct or decisions of the Commissioners have been brought in question before the Supreme Tribunals, in others the Executive Government have made the best investigation in their power into the circumstances. A proceeding, however, which is found alike inconvenient and unsatisfactory; but in the great majority of cases, the parties who felt themselves aggrieved have gone no further than to express their dissatisfaction." &c., &c.

"The most common sources of complaint have been, that the Commissioners have entertained suits not legally within their jurisdiction. That they do not command that degree of respect which would enable them to preserve necessary order and decorum in their proceedings," &c.

The conclusion arrived at was, that the Court of Requests should be abolished, and that Division Courts should be established, to be presided over by the District Judges. "In connection with this alteration, and in order to secure its success the Committee would earnestly advise that no person should hold the situation of Judge of a District Court who is not a Barrister of at least three years standing; and that he be a resident in the District for which he is Judge. They are also of opinion that the revision of the system of Practice, at present in force in the District Courts, might be advantageously made at the same time, with the proposed changes in the Courts of Requests."

These recommendations were carried out, and given effect to, by the Acts of 4 & 5 Vic.

[3] Besides the ordinary jurisdiction of these Courts, there is a superadded jurisdiction in Suits against Justices of the Peace, in actions for taxes under certain circumstances—in the question of ownership of property seized (to any amount) and in School Matters (with an appeal). These last "Interpleaders" and "School Actions" require the most careful and laborious investigation, and it often happens that a Judge is engaged one or two whole days in taking the evidence, &c., in such a case, and that without professional assistance of any kind.

Courts of Queen's Bench and Common Pleas—and the County Court Judges were required to hear and determine such applications in the same way as the Judges of the Superior Courts sitting in Chambers: and in 1853 additional powers were given in relation to payment into Court, allowance of bail, security for costs, and admission of documents in evidence.

No doubt it was for the same reason—that matters in relation to local administration might be promptly and inexpensively disposed of at home, instead of being sent for determination to the metropolis, (where, by a fiction of law, Justice, until latterly, was supposed *only* to reside)—the offices of the County Judge were brought into requisition under various recent enactments.[4] Very *factotums* are they, as a brief glance at these Statutes will show; and moreover many of their powers are of a nature where a right decision may run counter to local or other prejudices, and produce hard feelings against an officer, who performed with decision the duties enjoined upon him by law, and the oath that he has taken—to act in his office without fear, favour, or malice.

Duties made incident to the Office of County Judge.

In respect to the guidance and direction of Magistrates.

The Legislature, anxious for the safe guidance of Magistrates, has, by the Justices' Protection Act, thrown upon County Judges the very grave and responsible duty of considering and adjudicating upon the legality of any Act to be done by Justices in reference to which they are in reasonable doubt.

The provision requires, that upon an affidavit of the facts the County Judge, &c., shall issue a rule calling before him the Magistrate and the party to be affected by such Act, and upon examining into the matter determine what should be done, awarding costs as may seem meet: and the Magistrate is protected *in doing anything required of him by the County Judge's order.* "This simple means, not attended with much expense, conduces" (in the language of the Act) "to the advancement of justice,—renders more effective and certain the performance of the duties of Justices, and gives them protection."

No small share of knowledge is necessary for the right exercise of this guiding power, and the labour and trouble incident is very obvious.

In respect to Bailing on Criminal Charges.

The Act to regulate the duties of Justices respecting indictable offences, contains a valuable provision: it requires the County Judge, on proper grounds being shewn, to admit to bail any accused person, whatever the offence may be, short of Treason and Murder. Before that law, prisoners committed in any part of U. C. were compelled to apply to a Judge *in Toronto* for an order to Bail. Justice to accused parties demanded facilities for local application, and the discretionary power given, we admit, could not safely be vested in other hands: but the exercise of it brings no small labour to the County Judge.

In respect to the custody, maintenance and cure of Lunatics.

By the Act for the confinement of dangerous lunatics, it is made the duty of County Judges, with the aid of medical men to enquire into the case of prisoners being insane, and to certify the fact in order to their removal to the Lunatic Asylum; also, to issue a warrant for the confinement of dangerous lunatics, (sending where necessary to their "place of settlement,") and to cause the property of such lunatics to be seized and sold, or the annual rents of their lands to be received to pay the charges incident to the moving, keeping, and curing such lunatics. Further, to ascertain "by the best legal evidence that can be procured under the circumstances" (a large, and in improper hands, a dangerous power) "of the present legal disability" of prisoner lunatics, their place of legal settlement and their circumstances—to adjudicate thereon, and if there be property sufficient, to order payment of the expenses, &c., thereout as before said—and in case of Lunatics generally, under age—those who have parents or guardians able to maintain them, the Bursar and Superintendent of the Lunatic Asylum may periodically apply to the Judge of the County Court to enforce payment of maintenance: the Judge is to to issue a rule calling on the parents or guardians to shew cause, and if satisfied of their ability to maintain the lunatic may issue an execution for the amount of maintenance money due: and if the lunatic has property of his own, the Judge may also inquire into the matter, and order payment out of his estate.

In respect to the formation of Jury Lists.

In every position demanding trust, the County Judges are made available, and we find them under the Jury Act in the not very enviable position of presiding for days over the Ballot-box, in receiving and certifying Jury Books, determining the number of Jurors necessary for the Judicial business of the County, drawing the ballots, hearing objections, taking evidence if required, canvassing and transferring names to the proper rolls.

In respect to Lands taken by Railroad Companies and Municipal Corporations.

By the general Railway Act of 1851, very extensive powers are given, if the owners of lands required are absent or unknown. The County Judge may cause the compensation for loss to be estimated. He has also various duties where the amount of compensation is disputed, and, if necessary, he is to issue his warrant to put the Railway Company in possession of the land sought, and "to put down any resistance or forcible opposition" thereunto. Several special Railway Acts also have clauses enjoining certain duties on County Judges: and duties somewhat similar devolve under the Municipal Amendment Act, where lands may be taken by a Corporation, and there is no person capable of conveying, the County Judge appoints some fit person to act in respect to the property who is thereby authorized to contract, sell or convey.

In respect to the trial of controverted Elections for School Trustees, &c.

Under an Act of last Session, County Judges are required

[4] It is remarkable, of the many acts which annex duties to the office of Co. Judge, there is scarcely one which provides for payment of fees in aid of the fee fund, and yet many of the duties assigned are of a private character, or for the benefit of individuals or Corporations. This is a palpable injustice to the Suitors in the Local Courts; for the expenses of these Courts are paid mainly by the contributions of the Suitors in the shape of fees: at present the Courts are nearly self-supporting, and in a short time will be wholly so: why should a machinery supported by ordinary suitors be placed *free of charge at the disposal of others*. If every duty cast on the Co. Judge had a fee annexed, it would so swell the fee fund that the Legislature might reduce the expense of procedure. Properly speaking, the general funds of the County, if not wholly, ought at least in great part to bear all the expenses of the establishment of Courts of Justice: but at least in common honesty the services of the Judge, whose salary is now almost wholly paid out of the fee fund, should be shared *on condition* that those who have his labours should contribute to the fund. Let us not be misunderstood: we would not have any extra fees imposed for, or be taken by the Judge: that would be foreign to every right and safe principle—but that the fees for extra services go to the general fund, that the poor suitor may have justice done him at the lowest possible rate, for he also contributes, like others, to the Consolidated Revenue of the Province.

to receive and invesrigate complaints respecting the mode of conducting the Elections of Common School Trustees, to confirm or set aside and appoint a new Election, and order payment of the costs of the contest: such investigations are most difficult, troublesome and perplexing, and the necessarily large powers to determine as the Judge shall deem "right and proper," and even to impose a fine to £25 on the Returning Officer disregarding the law, or acting partially, could only be entrusted to those whose learning and Judicial experience give assurance of due and discreet administration. And in the provision for the protection of the Common School Fund against embezzlement and dishonesty, the wrongful holding of books, money, &c., is made a misdemeanour, and the County Judge is authorised to call the party before him to hear and adjudicate upon the complaint, and if his order in the matter be not obeyed, to commit the party to the common gaol, "there to remain without bail or mainprise until said Judge shall be satisfied" that his order has been obeyed.

In respect to the trial of contested Municipal Elections, and the revision touching the qualification of Voters for Members of the Legislature.

Amongst the most important chamber duties of the County Judges is the determination of the validity of Municipal Elections, under the Municipal Act of 1853. They are to order the issue of *quo warranto* summonses, calling the parties before them, and to proceed in a summary manner to hear and determine the validity of the Election—to cause the person improperly returned to be removed, and the person who ought to have been returned admitted in his place—or in case of no valid Election, to order a new Election to supply the vacancy, or if objections apply to all the Members of a Corporation, to remove all, and to award costs in the proceeding, as well as issue process to the Sheriff to enforce the decision.

These, we say, are very important powers in every respect. For the questions to be determined not only include most difficult matter of law and application, involving important civil rights, the very formation of our Municipal institutions, but in such matters there is generally an ingredient of local or political prejudice requiring judgment and firmness, which learning and independence alone can give, in order to proper adjudication on the merits.

And of the same character is another duty imposed by the Elective Franchise Act (of 1853) which requires the County Judge, on appeal from the Court of Revision, to determine the qualification of voters for the Legislation. This will in time become a very arduous duty: in England there are salaried officers, termed "Revising Barristers," appointed specially for such duties alone.

In respect to appeals on Assessments from the Courts of Revision.

The difficult and important functions of Assessors (who are not always very competent persons) and the varied interests these functions affected, rendered necessary a provision for the relief of persons aggrieved by a wrongful act of the Assessor. We accordingly find, by the Assessment Act of 1853, that complaints on this head may be tried by a Court of Revision, composed of Members of the Municipal Corporation of the locality, and that parties dissatisfied with the decision of the Court of Revision may appeal therefrom to the County Judge, whose decision is final. Under the provision the Judge is required to appoint a Court for the hearing and trial of the matter of appeal, if necessary he may adjourn such hearing, and transmit his decision, when made to the Clerk of the Municipality, who is to amend the Roll according to the Judge's decision. Hearings of the nature referred demand full investigation, involve many nice questions, and are generally hotly contested.

We have not deemed it necessary to refer to many duties of a minor nature, nor to those which the Judge has an option in assuming—such as swearing in public officers—visiting schools—approving security—acting in the audit of public accounts, &c., &c., but the above is a somewhat formidable list, though we have probably not enumerated all the collateral duties of the office—for the public are hard task-masters, and County Judges are most convenient functionaries in matters requiring trained men—men of independent position, to administer on sound principles, and in every separate locality; but enough has been set out to show, that between the ordinary business of the several Courts, and the extra duties which recent statutes have cast upon them, more than ordinary abilities and attainments are required in a County Judge for the firm and efficient discharge of duties so onerous and responsible.

Having now given a brief sketch of the ordinary and collateral duties of the County Judge, we may observe of the Local Courts system of Upper Canada, that its great merit lies in the combination of the advantages of local tribunals, and the benefits of centralization—with co-ordinate powers—jurisdiction the same—procedure uniform—even in the Division Courts a party competent to conduct his case in the Court for one locality is equally competent in any other Court elsewhere: and the judgments and orders of each Court may be enforced by the others. Public feeling and common sense favors the principle of combining cheapness and speed with soundness in the administiation of the law: and the manifest aim of recent legislation at home and here is to bring Justice, as it were, "to every man's door." To recede would be impossible: the public have tasted some of the fruits of *Local* Administration, and more will be asked—more given.

It will be borne in mind that County Judges sit alone; and in a great variety of cases determine, not only the law but the facts of the case, without a jury, in most cases without professional assistance: that cases involving the most intricate and difficult points daily come before them for adjudication, and in many instances without appeal: that, in fact, almost every question which may arise before the Superior Courts, may arise also in the Local Courts, and require to be there determined.

The life of the laws, says Lord Bacon, lies in the due execution and administration of them!

With the present important and varied objects of ordinary jurisdiction committed to County Judges—with the jurisdiction in respect to cases in the Superior Courts—with the multiform and highly responsible collateral duties made incident to their office; and in view of these duties being increased, it is of infinite concern to the public at large, that

upright, able and learned men, should be *courted* to accept the office, and that none other should be appointed.

County Judges (in the words of a personage who has favored us with a communication on the subject) should be men of character and standing—lawyers of experience; industrious, hard-working, deep-thinking, pleading men: men who have steadiness, independance, and force of character—who are under the guidance of good feeling, influenced by proper impulses, and who have an interest in the common weal; prepared to stand up against improper local influences, personal and party prejudices—looking and pointing others to a standard, and that the right, as the rule for the actions and judgments of all men.

If men meeting such requirements are not readily to be found, let them be diligently sought for as occasion may require. The Upper Canada Bar, not inferior to that of any other country in the Queen's dominions, comprises such in its ranks. Offer these men inducements to withdraw from a field where labor and talents are more appreciated and better rewarded than in the public service; and let aptitude for the office be the governing principle in every judicial appointment, and the right material may be had.

And what are the inducements that should be offered for relinquishing a lucrative profession—a calling not less honorable than that of County Judge?—First, a remuneration in proportion to the trust and labor of the office, and at least on the same scale of remuneration which talent commands in the counting-house and the bank.[5] Give the Judges sufficient "to support them in that station of life in which it is right on every ground they should move and act," with something over to save against the day when infirmities leave them unable to work—or provide a retired allowance on such a contingency.

What would the charge amount to? A mere nothing; for suitors in the Local Courts contribute to, nay, almost pay the whole charge of the establishment, and the fund is increasing: but if it did cost the Province a few thousand dollars in providing for the administration of Justice—what then? *that* should ever have the first claim on the public revenue; and the benefits of *Local* administration are most sensibly felt. The labours of the County Judge are but partially known—they are not confined to the time spent in Courts, nor to the labours of the road (the latter most trying on any constitution) they compel him to forego many advantages; to relinquish many comforts of social life.

Second, make them free from mere Executive dependency. Place them beyond the fear of popular clamour. Give them—as Judges have in free countries elsewhere—a tenure dependent on fitness and good behaviour. Let the pledged faith of the Legislature, above all things, be sustained; and neither expediency, nor the difficulties of any isolated case, be a warrant to violate it.

Does the Act of 1846, which *altered* the tenure changing it from "good behaviour" to "at pleasure" present the office in a favorable aspect to the bar? We are bold to say that it was an unwise act—a pernicious and dangerous precedent. It gave instability to the office—it humbled the Judges to the dust—it prostrated them to the feet of any dominant power of the day. What avail is the argument that *practically* the tenure is the same; it may be so—doubtless it is so now, but the principle is wrong—the door has been opened, and who can foresee the results?

If it is urged that what one legislature can do another can undo, because no legislature can bind its successor—we ask, Is this position sound and safe, when tested by reason and justice? The Judges of the Superior Courts, for example, now hold office during good behaviour, and have the guarantee of Parliament for a retired allowance. This is a contract between the legislature and the judiciary. Can the legislature annul their own compacts? Can they, for instance, annihilate the public debt? By their laws they have given to the Judges a right which no subsequent law can justly take away. A compact is made,—the legislature are bound by it; they have promised and must keep faith. Establish the contrary doctrine, and what follows? The whim of the moment becomes the law of the land; and under it every wrong may find shelter. What was done by the Act of 1846, respecting County Judges, might be done to-morrow respecting the Judges of the Superior Courts.—the latter have no better guarantee than the former, the good faith of Parliament—should the principle ever be adopted of legislating merely to show power.

But the Act of 1846 was evidently passed hastily, and we have little fear that the precedent will be followed. But should that precedent be allowed to remain? What is the nature of the tenure we have been speaking of?—*good behaviour*—to act with justice, integrity and honor, and to administer justice, speedily and impartially, is good behaviour—if a Judge acts contrary, it would be misbehaviour; what more can be required.

We again repeat, it was an unwise act to make the County Judges dependents for their office on mere "pleasure," taking from them the guaranteed tenure during fitness and good behaviour—for all the arguments in favor of a fixed tenure apply with perhaps greater force to them than to the Judge of the Inferior Courts, being brought, as they are, into direct personal contact with litigants, being Judges both of the law and the facts involved in a case—being Judges, also, of a Criminal Court, and in every way more exposed to the shafts of personal or party rancour, &c.

[5] A *further* supply of competent Judges, at the present rate, need not be expected, though present incumbents must needs take what they get.

It would be a waste of space to argue for that which has been *practically* admitted from the time of the Stewarts—long since recognized by the British Parliament, and now universally carried out in every Court of Justice at home—a fixed judicial tenure—but we cannot forbear a few brief quotations, showing the views of great lawyers and statesmen in the neighboring Republic, on "the servile situation of holding the office of Judge at will and caprice."

No more will you see in the administration of Justice those men whose acquirements and talents have called them to eminence at the bar. They will never consent to be the sport and tools and victims and factions. * * * Even mediocrity in the profession will not leave ease and dignified independence for a seat of precarious duration. * * * You must resort to the dregs of the law—to the pests of social life, where you may find impudence without science, zeal without judgment, self-sufficiency without moral principle. * * *

A new way to get rid of a Judge without affecting his independence—touch not the Judge, but slip the office from under him. * * * If the proposed law obtains, they may be put down without trial, to save a miserable farthing. * * *

The Judges hold their office (during good behaviour) for this reason. They are not the depositories of the high prerogatives of Government, &c. They depend entirely on their talents, which is all they have to recommend them: they cannot, therefore, be disposed to pervert their power to improper purposes. What are their duties? To expound and apply the laws. To do this with fidelity and skill requires a length of time. The requisite knowledge is not to be procured in a day. These are the plain and strong reasons, which must strike every one; for the tenure by which Judges hold their office—and they are such as will eternally endure, wherever liberty exists. * * *

I would make the Judges independent of every power on earth, while they behaved themselves. The essential interests—the permanent welfare of society, require this independence—not on account of the Judge, that is a small consideration—but on account of those between whom he is to decide.

If all that is quoted be not applicable to our institutions, the leading principles at least are true, in every country and at all times.

Having now examined one important point—the necessity for an able Judiciary, and the inducement that should be held out to men whose acquirements and talents have called them to eminence at the bar, in connection with the office of local Judge—we proceed to the minor consideration, the rights and claims of the present Judges to increased consideration—other points are involved in the previous consideration—and that on a single ground, as general grounds have been before set down.

In 1841 the maximum salary was fixed at £500. Judges were then allowed to practice, and had only the duties of their *Courts* to perform. They have since been deprived of the right to practice (a proper regulation in itself, though by it many of the Judges lost an increase equal to their salaries), and have, as shown, had numberless additional duties added to the office; duties not contemplated by the legislature at the time the salary was fixed. Their salaries are not now in conformity to the value of the articles of life—the cost of everything is now much increased.

The value in kind of £500 in the present day, £300 would have fully represented in 1841. So if there be applied this test of value, the sum of £700 would be a very inadequate representation of the £500, the original salary.

Their position, then, claims favorable consideration, and their remuneration ought to be made commensurate with their standing and responsibilities, and equal to the necessities of the day. The question is—Would it be just and right to do so? Public opinion, expressed through the leading journals, has declared that it is (the Government admits it), and it is respectfully submitted that we have sustained this declaration by *proofs*.

The legislature must pronounce the verdict, and this matter of *tenure* and *remuneration* may, we feel assured, be confidently trusted to their wisdom and justice.

THE HONOURABLE JAMES BUCHANAN MACAULAY.

It would ill become the only Law Periodical in Upper Canada to remain silent on the retirement of Mr. Chief Justice Macaulay; and yet there is little left for us to say. The public address of the Profession, and the sentiments expressed at the Banquet given by them to the venerated Judge, emphatically declare their profound regret in the severed connection: nor could even the youthful aspirants be kept back from addressing the venerable Magistrate, in terms dictated by a remembrance of his uniform and encouraging kindness towards them. The learning and purity of the Bench immediately concerns the people; "it lies near the foundations of public liberty." "Few Judges have possessed in greater abundance the qualities which inspire confidence and exact respect," and the public did not allow the retiring Chief, whom "men of all parties looked up to as a pattern of judicial purity," to retire from the Bench, which he occupied for twenty-seven years, without the unanimous tribute of public respect he so well deserved.

In him the public have lost an able and upright Minister of Justice, and the Bar a Judge whose kind and courteous bearing encouraged the most timid, and before whom the more practiced advocate found himself at home.

We dare not attempt even a *brief review of Judge* Macaulay's learned expositions of the Law; that must remain for abler hands: and the record of the Courts wherein he presided present ample monuments for science to examine and enjoy.

Uniting an ardent love of justice with diligence and learning; patient and urbane on the Bench; even those whom his reasoning failed to convince

have never "doubted his honesty, or denied that they had a fair hearing."

He no longer adorns the judicial station—he has earned immunity from toil—he has *sued out his writ of ease*—leaving only *pleasing* recollections of his judicial career: he carries with him into the retirement he has sought, the more than kind wishes of those with whom his *learned* labours were shared—of the Bar of his native country, and the "warm approbation of all by whom sound learning and sterling integrity are prized and honoured."

THE LAW AND PRACTICE OF THE DIVISION COURTS.

This work has been undertaken, and we ask particular attention to the subjoined notice, and would take it as a favour if those County Judges, who have retained notes of their decisions, would forward them to us with a view to their being embodied in the proposed treatise.

NOTICE.—With the hope of making the work I propose to undertake—*A Treatise on the Law and Practice of the Division Courts*—as complete as possible. I am anxious to embody in it, or otherwise note the judicial interpretation which the several Clauses of the Statute in relation to those Courts have from time to time received from the County Judges. I would therefore feel obliged by receiving, through the Editors, short notes of decisions on the construction of the Statutes or Rules The most convenient form would be similar to head notes in the Printed Reports. I assume that the Judges will not be unwilling, by this means, to give to each other, and to the Profession, the benefit of their examinations. I will be most happy to receive cases, or any suggestions, that may be sent for the consideration of the matter I have undertaken.

Hodgson vs. Municipal Council of York and Peel, and Rex. ex rel, Swan vs. Rowat. In the January Number we omitted to credit to Q. B. Reports, vol. 13, pages 268 and 340.

Our apologies are due for the delay in the appearance of the February Number of the *Law Journal*. Our readers will perceive that a more than usual amount of matter (and that of the most important nature) has been inserted, which has caused such delay. The crowded state of the columns in this Number prevents the insertion of Remittances received.

DIVISION COURT.

(Reports in relation to)

First Division Court, County of Essex,—A. Chewitt, Judge.

HALFORD v. HUNT.

Jurisdiction—unsettled account—balance.

Plaintiff claimed a balance of £15 13s. 10d. on lumber, to amount of £61 1s. 10d., delivered to defendant in August, September and October, in teamload—and understood to be paid for as delivered: this balance not being paid, plaintiff stopped delivering—60 pieces of 12×12—and sued for balance on amount claimed (in the words of 22 and 26 sec's of Act) not exceeding £25.

Defendant objected that contract was *entire* to deliver all in a week from 26th of August—but that was not proved, indeed, delivery and payments were going on till October, though defendant suffered something from delay, allowed for in judgment.

But defendant's principal objection was want of *jurisdiction*, as it was an *unsettled account*, in greater amount than £50. (26 sec.) as follows:—Charles Hunt to Abraham Huxford, Dr.:—

1855.—To 135 joists, 8 feet long, 1½12.			
" 245 " 12 " "			
" 105 " 10 " "			
" 95 " 14 " "			
Amount at £30 per M.....	£60	8	0
To 18 joist, 12 feet long, 1½12.			
" 2 " 14 " "			
" 12 " 10 " "			
Amount at £30 per M.....	3	13	0
Credit.....	£61	1	10
By Cash.....	18	7	2
Balance on summons and account, of claim,	£15	13	10

His HONOUR.—This is not an *unsettled* account over £50, as the greatest amount that plaintiff stated as furnished altogether, and at different times, and part paid for, nearly as delivered, was £61 1s. 10d. Plaintiff gives credit in all for £18 7s. 2d. cash, which, under 26 sec., by plaintiff's deliberate account in favour of defendant, *settles* this amount down to at least £15 13s. 10d., being the balance claimed under 23 and 26 sec. Plaintiff can *prove no more*, though he might *get less*, and leaves it no longer an *unsettled* account over £50: but is in truth and in fact *a settled* account to a less amount than either £50 or £25—the balance claimed not being a sum over £25 *requiring* to be *abandoned*.

It is true plaintiff might have to give evidence of larger amount than £50 delivered—the credit still shewing the balance claimed; and if plaintiff proved the receipt of less lumber, or defendant proved payment of more in monies worth or cash, it would reduce the balance claimed still more. Hill v. Swift, and Graham v. Burgess, U. C. L. Journal, 53, 1. 5, takes this view:—Though these plaintiffs did not *abandon* a *surplus in time*, but it shews the principle relied on, there abandonment was unnecessary. Mr. Justice Burns in Toronto Gas Company v. Peters, December, 1846, and Jordan v. Mann, November, 1846, in the Home District Court, (reported in the *Colonist*,) went fully into the question, and came to the conclusion that the balance claimed, as reduced by payments, is the true criterion of the jurisdiction, because *payments* are within plaintiff's knowledge, and he must credit them or not, at his own risk, otherwise he could sue in the Superior Court, and though *payment* were proved, reducing claim below jurisdiction, plaintiff still gets certificate, which, as a general rule, he could not obtain, though there may be exceptions, Mears v. *Gilbertson*, Mich., 7 Vic. But when reckoned by a *cross demand*, as on set-off, &c., when plaintiff could not know that it would be pleaded, as defendant might bring cross action, certificate would be allowed. The test in this case is, if this action on this account and claim as here set out had been brought in County Court, would plaintiff be entitled to *certificate*? I think not.

But when plaintiff's account £50 is unsettled, there being no act of plaintiff ever *abandoning* the surplus over £50 or over £25, or giving credit for payments in money or *moneys* worth, or the fair and *true amount* of a cross *demand* in defendant's favour reducing it; and the plaintiff's demand is yet to be ascertained, and which might happen to be proved to an amount over £50—or if the cross demand (if any) on set off, &c., is also not ascertained, on which also enough might be proved to reduce plaintiff's demand to an amount over £25 or even *under it there would, I think*, be unsettled accounts to amounts over £50, which might or might not be reduced to an amount of £25 or under, and would either way be a case for the Superior Court, and on which certificate might be granted: see cases mentioned in Burns' Judgment and Judge Gowan's in Cameron v. Thompson, U. C. L. Journal, 9.

This is supported by the wording of 13 sec., on set off, viz:—"Or if the defendant's demand after *remitting any portion thereof he may please* do not exceed £25, the Court may give judgment for the defendant for the balance found in his own favour."—*so it would appear that if* defendant's *demand*, on sett off, were over £25, or even £50, if he remits enough so as not to exceed £25, it would be a valid sett off, and permanently to shew amount remitted; he must state the full amount, as the 13 sec. makes judgment a discharge, not only of the amount of sett off, but the amount by which such claim *of defendant exceeded £25, to be evidence against this* remitted amount being put in suit thereafter, and if this course is permitted on defendant's sett off, it is not too much to say it was so intended on plaintiff's claim requiring the full amount for same reasons, which seems to be the meaning of the Legislature, and the construction *put on it by the Courts*—see also the 61th sec., which goes still further in support of the views expressed.

Judgment for plaintiff for £8 3 0.

First Division Court, County of Lambton,—C. Armstrong, Judge.

STOCKDALE v. WADE AND BRADY.

Levying Taxes—duration of Collector's authority—whose goods liable to seizure.

The defendant was collector of taxes, for the city of Ottawa, for 1854. The house occupied by the plaintiff was assessed against A. Barks as owner, and Connelly as occupant. The latter, after the assessment roll was made out and returned, removed from the premises to another house in the vicinity, leaving the taxes unpaid. The plaintiff entered, and the collector Wade directed Brady his bailiff, to seize and sell a sleigh, the property of the plaintiff, on the 28th of February last, which was accordingly sold.

HIS HONOUR.—The plaintiff contends that his property was not liable, as his name is not on the roll, and as the owner and occupant against whom the property was assessed, were both resident within the city, and that even if his property was liable, the collector's authority had expired on the 14th December, and was not extended.

As to the last objection, I shall first dispose of it—as if it were sufficient there would be little use in examining into the other points.

The Assessment Act of 1853 requires the collector to return their rolls by the 14th of December, but provides that the *County Council* may extend the time to the 1st of March, so that if there were no other Act I should hold that the collector's authority in this case had expired at the time of the seizure, as it does not appear that the County Council took any action with regard to the return of the rolls. But 3rd sec. of the Act of 1854, 18th Vic., cap. 21, enacts that in any case where a collector of *any municipality* may have heretofore failed or omitted, or may hereafter fail or omit to collect, the taxes mentioned in his collector's roll, or any portion thereof, by the 14th of December, or by such other day in the year for which he may have been, or may heretofore be appointed by the Municipal Council of the County, it shall and may be lawful for the Council of such municipality to authorize and empower by resolution the said collector, or any other person in his stead, to continue the levy and collection of such unpaid taxes in the manner and with the powers provided for by law for the general levy and collection of taxes. Provided always that nothing herein contained shall be held to alter or affect the duty of the collector to return his collection roll, or to invalidate or otherwise affect the liability of the said collector or his sureties in any manner whatsoever.

It appears that on the 5th of February last, a resolution of the city in the following words was passed:—"Moved by Alderman McGillivray, seconded by Alderman Mairs, 'That the several collectors for the past year for the late town of Bytown, be, and are hereby authorized and empowered to continue the levy and collection of all unpaid taxes for the year 1854, in the manner and with the powers provided by law for the general levy and collection of taxes.'"

I think the Act referred to gave the Municipal Council of the city more authority as to their collectors than the Act of 1853 gave to the County Councils, for they could not extend the time for collectors to return their rolls beyond the 1st of March. Whereas the Act of 1854 empowers the council of a municipality to continue the authority of their collectors indefinitely. And so long as Wade was a collector for the city, he possessed the power to act under the resolution above mentioned, although I think the resolution would have been more correct had a limit or particular day been fixed upon which the collector should return his roll. It was argued that the proviso to the 3rd sec. of the Act of 1854, contemplates that the collector should still return his roll by the 14th of December or 1st of March at the furthest, but that construction of the proviso would be in opposition to the apparent meaning of the clause, which clearly refers to collectors who may have failed, or may hereafter fail, to return their rolls either on the 14th December or on any other day fixed by the County Council; in fact, the Act gives to the City Council entire control over their collectors as to the time of making their returns and paying over monies collected, but nothing more. The duties of collectors, that is upon whose property they may levy taxes, and what steps they shall take when the have levied, are regulated by Statutes, and chiefly by the Act of 1853, 16th Vic., cap. 182.

The collector's roll is founded upon the assessment roll. Now the 7th sec. of the Assessment Act of 1853 directs assessors how to proceed, and says that when the owner of land, occupied by another, is resident in the municipality, and known, (to the assessor, I suppose,) it shall be assessed in the name of and against both owner and occupier, and the taxes thereon may be *recovered* against such owner or occupier, or from any *future owner or occupant*, saving his recourse against any other party.

The 14th sec. directs the collector how he is to proceed on receiving his collection roll, and the next clause, his duty and authority in case a party's taxes be unpaid for 14 days after proper demand made, and says that in such case he may levy the same with costs by distress and sale of the goods and chattles of the party who ought to pay the same, or of any goods and chattles in his possession, wherever found, in the township, village, town, or city in which he is the collector, and at any time after one month from the *date* of the delivery of the roll to him, he may make distress of the goods and chattels which he may find on the *lands* of non-residents, and no claim of property, lien or privilege therefrom, shall be available to prevent the sale or the payment of taxes and costs out of the proceeds thereof. It may be said that the party who *ought* to pay is either the owner or occupant assessed; but then the Statute says they may be recovered against any future owner or occupant. It is true, the collector may follow the owner or occupant assessed into any township or place within the county to which the party may have removed after being assessed.

The most ample powers are given to collectors by these clauses of the Statute, and the 45th sec. even goes so far as to say that the taxes accrued or to accrue upon any land, shall be a special lien on such land, having preference over any claim, lien, privilege, or encumbrances of any party except the Crown, and shall not require registration to preserve it. It must be observed that the word land means houses as well as lands on which there are no houses.

If the future owner or occupant of a house means any party who may be found in possession of it after assessment, and during the existence of a collector's authority, then I think the plaintiff was such occupant, and his property or goods and chattels therefore liable to seizure and sale for the taxes assessed against the land occupied by him, and that the collector being authorized by the resolution of the council was not a trespasser or guilty of any wrong in seizing and selling the sleigh in question.

I accordingly non suit the plaintiff, and order him to pay the defendants their costs in 15 days.

APPOINTMENTS TO OFFICE, &c.

The Honourable WILLIAM HENRY DRAPER, C. B., one of the Justices of Her Majesty's Court of Queen's Bench, to be Chief Justice of Her Majesty's Court of Common Pleas in Upper Canada.—[Gazetted 7th February, 1856.]

The Honourable ARCHIBALD McLEAN, one of the Justices of Her Majesty's Court of Common Pleas, to be one of the Justices of Her Majesty's Court of Queen's Bench in Upper Canada, with precedence from the 26th December, 1837.—[Gazetted 7th February, 1856.]

JOHN HAWKINS HAGARTY, Esquire, one of Her Majesty's Counsel in Upper Canada, to be one of the Justices of Her Majesty's Court of Common Pleas in Upper Canada.—[Gazetted 7th February, 1856.]

SHERIFFS.

JAMES HALL, Esquire, to be Sheriff of the United Counties of Peterborough and Victoria.—[Gazetted 9th February, 1856.]

NOTARIES PUBLIC IN U.C.

RICHARD HUTCHISON GARDINER, of Bayfield, Gentleman, to be a Notary Public in Upper Canada.—[Gazetted 26th January, 1856.]

ANTHOTY LA COURSE, of Lindsay, Esquire, to be a Notary Public in Upper Canada.—[Gazetted 16th February, 1856.]

ASSOCIATE CORONERS.

WILLIAM C. SHAW, Esquire, M.D., to be an Associate Coroner for the County of Wentworth.—[Gazetted 9th February, 1856.]

JAMES A. PARK, Esquire, M. D.; GEORGE BINGHAM, Esquire, M. D.; and JAMES CARROLL, Esquire, to be Associate Coroners for the County of Oxford.—[Gazetted 15th February, 1856.]

FRANCIS OWENS, Esquire, Surgeon, to be an Associate Coroner for the County of Wentworth.—[Gazetted 15th February, 1856.]

WILLIAM P. OSBORNE, Esquire, to be an Associate Coroner for the County of Norfolk.—[Gazetted 10th February, 1856.]

HOTCHKIN HAYNES, Esquire, M. D., and FRANCIS W. IRWIN, Esquire, to be Associate Coroners for the United Counties of Huron and Bruce.—[Gazetted 10th February, 1856.]

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF ELGIN.

Judge of the County and Division Courts, D. J. HUGHES, St. Thomas.

First Division Court—Clerk, Simon Newcombe, Vienna; *Bailiffs*, Fordyce W. Atkins, and Allan Marr, Vienna; *Limits*—The Township of Bayham.

Second Division Court—Clerk, William Campbell, Aylmer; *Bailiff*, Peter Springsted, Aylmer; *Limits*—The Townships of Malahide and South Dorchester.

Third Division Court—Clerk, James Farley, St. Thomas; *Bailiff*, Peter L. Spann, St. Thomas; *Limits*—The Township of Yarmouth, and greater portion of the Township of Southwold.

Fourth Division Court—Clerk, William Harris, Iona; *Bailiffs*, James McBride, Aldborough; and James Philpott, Iona; *Limits*—The Township of Aldborough, and a small portion of the West part of the Township of Southwold.

COUNTY OF OXFORD.

Judge of the County and Division Courts, ——McQUEEN, Woodstock.

First Division Court—Clerk, George W. Whitebread, Woodstock; *Bailiff*, Hugh McKay, Woodstock;—*Limits*, Town of Woodstock, Townships of Blandford, East Oxford, East Zona, and that part of North Oxford East of Lot 16, and so much of West Oxford as lies East of Lot 7, to the Stage Road, then on the North side of said Road to whence it intersects the Township of East Oxford.

Second Division Court—Clerk, Jeremiah Cowan, Princeton; *Bailiff*, Thomas Cowan, Princeton; *Limits*—The Township of Blenheim.

Third Division Court—Clerk, Donald Matheson, Embro', West Zona; *Bailiff*, Asa Hullock, Embro', West Zona; *Limits*—The Townships of West Zona and East Nissouri.

Fourth Division Court—Clerk, James Burr, Norwichville; *Bailiffs*, William B. Searls and Solomon Vennings, Norwichville; *Limits*—The Township of Norwich.

Fifth Division Court—Clerk, David Caufield, Ingersoll; *Bailiffs*, Moses Tripp and Reuben Carroll, Ingersoll; *Limits*—So much of North and West Oxford not included in First Division, Village of Ingersoll, and that part of the First Concession of Dereham West of Middle Town Line.

Sixth Division Court—Clerk, Charles Hawkins, Dereham; *Bailiff*, David Elliott, Dereham; *Limits*—That part of the Township of Dereham not included in the Fifth Division.

COUNTY OF NORFOLK.

Judge of the County and Division Courts, —— SALMON, Norfolk.

First Division Court—Clerk, Abraham P. Rapelje, Norfolk; *Bailiffs*, Aaron S. Barber, and Nathan Pegg, Norfolk; *Limits*—Town of Norfolk and Township of Woodhouse.

Second Division Court—Clerk, Oliver Blake, Waterford; *Bailiffs*, Philip Beemer, and John Masacar, Waterford; *Limits*—The Township of Townsend.

Third Division Court—Clerk, John H. Dodge, Windham Centre; *Bailiff*, Thomas Tate, Windham Centre; *Limits*—The Township of Windham.

Fourth Division Court—Clerk, Thomas Jenkins, Delhi; *Bailiff*, L. Cook, Delhi *Limits*—The Township of Middleton.

Fifth Division Court—Clerk, William Hewitt, Vittoria; *Bailiff*, Daniel Shearer, Vittoria; *Limits*—The Township of Charlottesville.

Sixth Division Court—Clerk, Andrew McLennan, Port Rowan; *Bailiff*, John Smith, Port Rowan; *Limits*—The Township of Walsingham.

Seventh Division Court—Clerk, Thomas Chamberlin, Houghton Centre; *Bailiff*, Frederick H. Fick, Houghton Centre; *Limits*—The Township of Houghton.

† *Vide* observations *ante* page 196, Vol. I. on the utility and necessity for this Directory.