DIARY FOR SEPTEMBER.

1. Friday. Paper Day Queen's Bench. New Trial Day C. P.
2. Sat .... Paper Day Com. Pleas. New Trial Day Queen's B.
3. SUN ... 12*th Sunday after Trinity.* [Court sits.
4. Mon ... Paper Day Q. B. New Trial Day, Com. Pleas, Rec.
5. Tues... Paper Day Com. Pleas. New Trial Day Queen's B.
6. Wed.... Paper Day Queen's B. New Trial Day Com. Pl.
7. Thurs. Paper Day Common Pleas.
8. Friday .New Trial Day Queen's Bench.
9. Sat .... Trinity Term ends.
10. SUN ... 13*th Sunday after Trinity.*
12. Tues... Quarter Sessions & Co. Court sittings in each Co. Last day for services for York and Peel.
17. SUN... 14*th Sunday after Trinity.*
21. Thurs. *St. Matthew.*
22. Friday. Declare for York and Peel.
24. SUN ... 15*th Sunday after Trinity.*
29. Friday. *St. Michael.* Michaelmas Day.
30. Sat .... Last day for notice of trial for York and Peel.

NOTICE.

Owing to the very large demand for the Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.* •

The Local Courts'

AND

MUNICIPAL GAZETTE.

SEPTEMBER, 1865.

JUDGE SHERWOOD.

The Honorable George Sherwood, Q.C., has been appointed Judge of the County Court, for the County of Hastings, in the room of the late Mr. Smart. Mr. Sherwood was called to the Bar in Michaelmas Term, 1833, and is a Bencher of the Law Society. He was a member of the Executive Council, holding the office of Receiver General for several years. He will be a welcome addition to the ranks of the County Judges.

CONFESSIONS BY PRISONERS.

This question has been discussed in the late case of *The Queen* v. *Finkle*, and it is advisable that constables and others, having the custody of persons accused of any crime, should be conversant with the law affecting confessions by prisoners, and the effect of any inducement to confess held out to them.

The evidence of the prisoner's confession at the trial was first that of Jackson, the constable, who stated that after prisoner had been in a second time before the coroner, he stated there was something more he could tell. The constable asked what it was, but not to say what was not true. He said he went over to the house, got in at the window, and set the place on fire. Mrs. Finkle had told him to go over and get a note or paper, and if he could not find it he was to set the house on fire. The constable did not recollect that any inducement been had held out. The constable asked him if he wanted to go in and state that before the jury. He said he did. It further appeared that on the third day after he had been taken into custody, he told the coroner he wished to confess. The coroner said to him that anything he said might be used against him; not to say anything unless he wished—just the ordinary caution. He then made a second statement. He had only been absent a few minutes when he returned and made the last written confession, after the constable had informed the coroner of the prisoner's desire.

But it was shewn by the evidence for the defence that the prosecutor had offered direct inducements to prisoner to confess, promising to get up a petition in his favour, &c. When this appeared, the Judge, who tried the case, directed the jury to exclude the confession from their consideration, and all that the constable had said of it, and directed them to acquit the prisoner unless the other evidence satisfied them beyond reasonable doubt that the prisoner was guilty.

The general rule which has been laid down by text writers is, that "though an inducement has been held out by an officer or prosecutor, or the like, and though a confession has been made in consequence of such inducement, still if the prisoner be subsequently warned by a person in equal or superior authority that what he may say will be evidence against himself, or that a confession will be of no benefit to him; or if he be simply cautioned by the magistrate not to say anything against himself, any admission of guilt afterwards made will be received as a voluntary confession. More doubt may be entertained as to the law, if the promise has proceeded from a person of superior authority —as a magistrate—and the confession is afterwards made to the inferior officer; because a caution from the latter person might be insufficient to efface the expectation of mercy which had been previously raised in the prisoner's mind."

The statement made to the constable was *primâ facie* receivable in evidence, though

the court considered the more reasonable rule to be that "notwithstanding the caution of the magistrate, it is necessary to go further in the case of a second confession, and to inform the party that the first statement cannot be used to his prejudice; not merely to caution him not to say anything to injure himself. If, after the prisoner has been cautioned and his mind impressed with the idea that his prior statement cannot be used against him, he still thinks fit to confess again, the latter declaration is receivable." But if the Judge was satisfied that the promise of favour made by the prosecutor to the prisoner influenced him to make the confession, which was given in evidence, and continued to act upon his mind, notwithstanding the warning of the coroner, then he was right in telling the jury to reject the confessions.

PASSENGERS BY RAILWAY.

Railway companies are considered fair game in a general way, but they have their rights like other corporations, and there is an item of information with reference to the potency of the conditions on excursion and other tickets which it may be interesting to notice. The plaintiff in the case of *Farewell* v. *Grand Trunk Railway Company*, decided in the Court of Common Pleas, purchased a ticket which was stated to be a return ticket from Oshawa to Toronto and back, but it was specified that it was "good for day of date and following day only." The plaintiff proceeded to Toronto upon the ticket, but did not return for about six days after the time mentioned on the ticket had expired. He presented this ticket to the conductor on his return, who however refused to accept it, and upon the plaintiff refusing to pay his fare, the conductor put him off at the next station; whereupon the plaintiff brought his action. The question came up on demurrer to the pleadings and the court held that the ticket constituted a valid contract between the parties and that the terms of it were binding. The bargain was also thought to be a reasonable one and not prohibited by any law or statute. But though taking a ticket with an express stipulation upon it has the effect of making a special contract between the parties, the mere fact of buying and using one does not prove a contract or duty that the train will be at the station at the time the passenger expects it, or at the time a railway official says it will be. When therefore a passenger missed a train from incorrect information given him by a porter it was held to be essential to prove the contract by a time table. The ticket was, if anything, only evidence of a part of the contract, which should have been completed by the production of the time table in evidence. (*Hurst* v. *Great Western Railway Company*, 13 W. R. 950.)

The statute very properly provides that the conductor shall wear a badge of his office upon his hat or cap and shall not without such badge be entitled to demand fare or ticket, &c. And there is no doubt that if he (not wearing his badge of office) should put any person off the cars for refusing to pay fare &c., he, as well as the company, would be guilty of trespass. The statute however says nothing as to wearing the hat or cap on his head, or in any other conspicuous part of his person. *Quære* therefore as to the position of a refractory passenger if the conductor should wear the necessary badge, but keep his hat or cap in his pocket, or turn it inside out &c.

DIVISION COURTS ACTS, RULES AND FORMS.

Mr. O'Brien's book of practical and explanatory notes on the Division Courts Acts, Rules, &c., is completed, and is in the hands of the printer for publication. It comprises all the acts and portions of acts in any way affecting procedure in Division Courts, or the duties of Division Court officers; together with the Rules of practice and Forms, now we believe out of print, together with other forms of practical value; the whole being supplemented with numerous notes, which will doubtless be of great aid in elucidating and eventually helping to settle the practice of these now important courts.

The efforts of the Lower Canada section of the House of Assembly, to carry us back to the "dark ages" of commerce, are admirable for their persistency, if for nothing else. The oft repeated endeavour to limit the rate of interest upon money by Legislative enactment has again been made. Experience, argument, and public opinion, seem equally to fail in convincing a prejudiced and retrogressive party. They are even impervious to ridicule. We cannot but think that the common sense of the House will again prevail.

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

NEW TRIALS IN CRIMINAL CASES.—It is not desirable to grant rules *nisi* for new trials in criminal cases where there is no probability of their being made absolute, inasmuch as it is calculated to excite expectations not likely to be realized, and to raise doubts as to the promptness and certainty of punishment. (*The Queen* v. *Finkle*, 15 U. C. C. P. 453.)

MANSLAUGHTER—MASTER AND SERVANT—PROVIDING INSUFFICIENT FOOD AND LODGING—DOMINION AND CONTROL—MORAL RESTRAINT—DYING DECLARATION—EVIDENCE.—Upon an indictment for manslaughter it appeared that the deceased was a person of weak intellect, and that at a time when she was very bad, but when there was no evidence that she was under the impression of impending death, she made a statement to a witness, which, two hours afterwards, he took down in writing, putting questions to the deceased as he wrote, and that upon reading it over to her on the same night she made no observation. At eight o'clock on the night following, when she knew she was dying, the statement was read over to her by another witness, who made observations as he went on, and put questions to the deceased from the statement, sometimes in a leading form, all of which she answered. Upon being asked why she did not run away, she said her mistress locked the door, and with that exception made no alteration in the statement previously taken down. Upon objection for the prisoner that the statement above could not be read in evidence, upon the ground that it was not voluntary, but in answer to leading questions and was improperly obtained.

Held, that the question whether a dying declaration is admissible, is for the consideration of the judge who tries the case, but that the weight of it, is for the jury, and that the above was properly admitted.

The case for the prosecution was that the deceased, being the domestic servant of the prisoner, who kept a lodging-house, had died in consequence of insufficient food and unwholesome lodging provided for her by the prisoner, or of the combined effect of those things, and a course of ill-treatment.

It appeared upon the evidence that the deceased was a person of low intellect, and who had lived for about eighteen months in the service of the prisoner; that during the whole of that time she had been very cruelly treated, badly lodged, and badly fed by the prisoner; that on the 21st of February, 1865, she had been taken to her aunt's by a person who was not called as a witness, and had died in the workhouse on the 27th of the same month from the effects of insufficient nourishment. But it also appeared that she was twenty-three years of age when she entered the prisoner's service; that she had acted rationally as a servant, and had occasionally gone out on errands; that in August her aunt had given the prisoner warning for her, but that, upon the prisoner saying that she had agreed to stay on, her mother and aunt had allowed her to do so; that she was about, and opened the door to a witness on the 13th of February, and that when she came to her aunt's on the 21st February she was on foot.

The judge, in summing up, drew the attention of the jury to the distinction between the cases of children, apprentices, and lunatics, under the care of persons bound to provide for them, and the case of a servant of full age, and directed them that if they were satisfied upon the evidence that the prisoner had culpably neglected to supply sufficient food and lodging to the deceased during a time when, being in the prisoner's service, she was reduced to such an enfeebled state of body and mind as to be helpless, or was under the dominion and restraint of the prisoner and unable to withdraw herself from her control, and that her death was caused or accelerated by such neglect, they might find her guilty.

Held, that the direction was right; but that the conviction must be quashed, for that it appeared that the proximate cause of the death of the deceased, for which only the prisoner on this indictment would be responsible, was the insufficient supply of food, and that the prisoner was not criminally responsible for that, as there was no sufficient evidence that the deceased had lost the exercise of her free will, and was unable to withdraw herself from her mistress's dominion and control. (*Reg.* v. *Charlotte Smith*, 13 W. R. 816.)

JUSTICE OF THE PEACE—CON. STATS. U. C., CH. 124, SECS. 1, 2—PLEADING.—Is an action against a justice of the peace for a penalty for not returning a conviction to the Quarter Sessions, it is no objection to the declaration that the plaintiff sues for the Receiver General, and not for her Majesty the Queen, inasmuch as suing for a penalty for the Receiver General, for the public uses of the province, is in fact suing for the Queen. Besides Con. Stats. U. C. ch. 124, authorize a party to sue *qui tam* for the Receiver General. *Held*, also, that the defendant, having actually convicted and imposed a

fine, could not except to the declaration on the ground that it did not show that he had jurisdiction to convict. It is not necessary, in averring a conviction, to shew that the complainant prayed the justice to proceed summarily. (*Bagley qui tam.* v. *Curtis*, 15 U. C. C. P. 366.)

ADVANCE UNDER CON. MUN. LOAN FUND ACT—DISCHARGE OF RAILWAY STOCKHOLDERS BY ACT OF PARLIAMENT—CONSEQUENT CLAIM FOR EQUITABLE RELIEF.—Where a township municipality advanced a large sum of money to a railway company, under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an act of the Legislature, passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent acts of the Legislature, which released the new corporations from the construction of the original line of road, until a new line had been constructed, and it appeared that there was no immediate prospect of such a result. *Held*, reversing the judgment of the court below, that the municipality was not released from their liability to the Crown. (V. C. Spragge *dissentiente.*) (*Norwich* v. *Attorney General*, 2 E. & A. Rep. 541.)

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

RAILWAY COMPANY — COMPENSATION FOR AN INJURY—EQUITABLE FRAUD.— A tradesman and his wife were passengers by an excursion train to which an accident occurred, and they received injury and were attended by a surgeon, and two others employed by the company, and they accepted and signed a receipt for £15 as compensation, but subsequently brought an action for £1,700, to which the company pleaded not guilty and set up the receipt. The plaintiffs then filed a bill alleging a fraud, by which they were induced to accept the £15, and asking a declaration that, under the circumstances, the payment was not a full compensation, and to restrain the company from relying on the plea of the receipt. A demurrer to this bill was overruled. (*Stewart* v. *The Great Western Railway Company and Saunders*, 13 W. R. 886.)

DAMAGES—CONTRACT OF SALE.—The loss of profit on a re-sale cannot be taken into calculation in estimating the damages which the original vendor is liable to pay for non-delivery; although the original contract was a contract for "forward delivery," and, in the place where it was made such purchasers are commonly followed by a re-sale, and are made with that view, and although such a re-sale has been actually made before the breach of the original contract by non-delivery. (*Williams* v. *Reynolds*, 13 W. R. 940)

RAILWAY—CONVEYANCE OF PASSENGERS—LIABILITY FOR PUNCTUALITY OF TRAINS—EVIDENCE OF CONTRACT OR DUTY—TIME TABLE—TICKET.—The Great Western Railway Company's line extends from C. to G., and from G. to N. the line belongs to other companies. By arrangements with these companies the Great Western Railway Company issues tickets from C. to N. The plaintiff took a ticket from C. to N., and he and another person stated in evidence that they knew that the train ought to start from C. at 4.34, and arrive at G. at 7.30, in which case the plaintiff would have gone by the 8.17 train from G. to N. The plaintiff was told by the station-master when he took his ticket that he would go through to N. by the train about to start, and he was also told afterwards by a porter that the train should start at 4.34. The train, owing to a break down, was late at C., and in consequence the plaintiff missed the 8.17 train from G.; and he could not proceed from thence to N. till the 8.17 train next day, and incurred various expenses and losses, for which he brought this action. The ticket was put in evidence on the part of the plaintiff, but the defendants' train bill was not. No evidence was given on the part of the defendants. *Held*, that the plaintiff could not recover, as there was no evidence of any breach of contract or duty on the part of the defendants. (*Hurst* v. *The Great Western Railway Company*, 13 W. R. 950.)

TRADE MARK—INFRINGEMENT—FALSE REPRESENTATIONS—COLOURABLE IMITATION—PROPERTY IN TRADE MARK.—The Court of Chancery will not protect a person in the use of a trade mark which contains false or misleading representations concerning the character of the goods to which it is applied.

Accordingly, where the purchasers of a manufacturing business, and of the right to use a trade mark, adopted and continued the use of such trade mark, which contained the name of the firm from whom they purchased, and statements and representations which had ceased to be true as regarded the article they manufactured. *Held*, that they were not entitled to relief against an infringment of such trade mark.

Observations as to the meaning of the expression "property" in a trade mark, and as to what amounts to a colourable imitation of a trade mark. (*Leather Cloth Co.* v. *American Leather Cloth Co.*, 13 W. R. 873.)

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

MASON v. MORGAN.

Injury by domestic animals—Trespass maintainble—Evidence of Scienter—Right of bailee or owner to recover—General verdict on two counts—Plaintiff not bound to elect.

Held,—affirming the judgment of the County Court, and *Blacklock* v. *Millikan*, 3 C. P. 34,—that trespass is maintainable against the owner of a bull which has broken into the plaintiff's close, and there killed his mare, defendant not being present or aware of the act.

Held, also, that upon a count in case, alleging defendant's knowledge of the bull's vicious propensity, the fact that he had at once admitted that his bull had done the injury, and offered the plaintiff $10, was properly submitted to the jury as evidence of such knowledge, with a caution, however, as to its weight, as in *Thomas* v. *Morgan*, 2 Cr. M. & R. 496.

The mare was in the plaintiff's field at the time of the accident, and had been put there by his father, who said he had given it to the plaintiff. Semble, that the right of property was immaterial, as the defendant, even if only a bailee, could recover its value against a wrong-doer.

The plaintiff having declared in one count for entering his close, and there destroying his mare, and in the other in case for keeping the bull, knowing his vice, &c., and having recoverd a general verdict, *Held*, that he was not bound to elect upon which count to take his verdict. *Hacke* v. *Adamson*, 14 C. P. 201, remarked upon.

[Q. B., H. T., 28 Vic.]

Appeal from the County Court of the United Counties of York and Peel.

The declaration contained two counts.

First count.—For that the said defendant broke and entered a certain close of the plaintiff, called and known as lot 31, in the 3rd concession of the township of Scarboro', in the County of York, and then and there, with a certain bull of the defendant, tore up, damaged, and spoiled the earth and soil of the said close, and also then and there with the said bull cut, gored, wounded, and killed divers, to wit, two horses of the plaintiff, then and there found and being quietly depasturing in the plaintiff's said close, and other wrongs did, to the plaintiff's damage.

Second count.—And whereas also the defendant wrongfully kept a certain bull of a fierce, wicked, and mischievous nature; and the said bull, whilst the defendant so kept the same, attacked, gored, cut and wounded two horses of the plainltiff whereby the said horses became sick, sore, lame, and disordered, and one of the said horses by means thereof died, and the plaintiff was put to great expense and loss in curing and taking care of the other of said horses.

Pleas.—1. To the first count, not guilty; 2. To the first count, that he did what is complained of by the plaintiff's leave; 3. To the second count, not guilty.

At the trial the defendant was allowed to add a plea denying the plaintiff's property. The evidence shewed clearly that the injury complained of was done by the defendants' bull, which had got into the plaintiff's field, as it was alleged, by defects in the defendant's fence. It was proved that the defendant more than once admitted that he had no doubt his bull had committed the injury, and that he had offered the plaintiff $10. He mentioned this offer to a magistrate who was endeavouring to effect a settlement between them, and said he would have done more if it had not been for a summons he had in his hand. The only evidence as to property was given by the plaintiff's father, who said, "I gave the mare to the plaintiff: I left her with three others on the plaintiff's place: I told the plaintiff that when the mare foaled, if she turned out a good mare, I would give it to him. That was all that took place about giving the mare to the plaintiff."

A verdict having been found for the plaintiff, a rule *nisi* was obtained for a new trial, or to arrest the judgment, which, after argument, was discharged. The objections taken, and the points decided, are fully stated in the following judgment given in the court below.

HARRISON, Co. J.—This was an action for the loss of a mare which was in the plaintiff's field, and which was gored by defendant's bull, which broke into the field from the defendant's close, as was alleged, from defect of fences. The declaration contained two counts. 1st, a count in trespass *quœre clausum fregit*, alleging the injury to the mare as damage; and 2nd, a count in case, alleging a *scienter* by defendant. At the trial it was contended that no action was maintainable on the first count, because trespass would not lie, and the case of *Beckwith* v. *Shoredike* (4. Burr. 2092) was relied on; and that the action in the second count failed, because there was no sufficient proof of *scienter* by the defendant. A further issue was raised that there was no proof that the mare was the property of the plaintiff, as affecting the damage on the first count, and the gist of the action on the second.

I overruled the objection that trespass was not maintainable, and so directed the jury; but as there might be said to be some ambiguity in the evidence on the question of property, I allowed a plea denying the plaintiff's property to be put on the record, and left that question, as well as the question of *scienter*, to the jury, who found for the plaintiff on both counts. The plaintiff had refused to elect on which of the two counts he would take the verdict, as it was objected he was bound to do by the defendant.

On the motion in term the same objections were urged, and were those only relied on. On the first point I thought I was bound by the decision in *Blacklock* v. *Millikan*, (3 C. P. 34,) and the cases there cited, to hold that trespass was maintainable in the present case, and that the case in Burrow was not an authority against the position. I ought to mention that I found that the doctrine held by Mr. Chief Justice Macaulay appeared to be recognised in most of the text writers on the subject. I consider, therefore, that the plaintiff had a right of action on the first count.

As regards the second point, I had the case of *Thomas* v. *Morgan* (2 C. M. & R. 496) before me when I charged the jury. I told them that the prompt and direct admission by the defendant that his bull had done the injury, and his offer of recompense, were proper evidence for them to consider whether the defendant knew anything

of the propensity of the animal, and I accompanied that statement with the strong observation mentioned in that case, although the admission in the present case appears to be much stronger than that in *Thomas* v. *Morgan*. I thought, therefore, the jury having found for the plaintiff, he was entitled to retain his verdict on the second count.

As to the third point, the plaintiff's property in the mare, the defendant relied on the expressions of the father of the plaintiff, who was called as witness. He said he gave the mare to plaintiff, and in cross-examination he said, "when the mare was foaled, he had said he would give her if she turned out well, and that was all that took place." This might be equivocal, and so I thought it a proper question for the jury. They appeared to think that as the plaintiff had the mare at three years old in his own field, the expressions used had reference to a promise to give, made when the mare was a colt, which had been subsequently carried into effect; and having found for the plaintiff on this point, I had no reason to be dissatisfied with the finding.

On the fourth point, whether the plaintiff was bound to elect one of the two counts, if my conclusions be correct, he had a good cause of action on both, and technically they were distinct, the one for an injury to his close, with a damage to his personal property, and the other for a distinct injury to the latter. Substantially, perhaps, there was only one wrong complained of, but then the plaintiff only got damage in respect of that, and so I could see no objection to the finding a general verdict on both counts, as would have been the case if either of the two counts had not been for any cause maintainable, in which case, of course, there should have been a new trial.

I therefore, upon the whole case, discharged the rule *nisi* for a new trial.

From this judgment the defendant appealed, on the following grounds:

(To be continued.)

COMMON PLEAS.

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

The Chief Superintendant of Education in re Hogg v. Rogers.

School Trustees—Power to levy school rate at any time.

Under the acts relating to common schools, school trustees may *at any time* impose and levy a rate for school purposes: they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll.

[C. P., E. T., 1865.]

This was an appeal from a judgment of the Judge of the Fourth Division Court of the county of Grey. The action was trespass against the defendant, a collector of school rates for Union school section number one, in the township of St. Vincent, for unlawfully seizing and detaining a horse, the property of the plaintiff. The warrant under which the seizure took place was under the seal of the corporation of the school trustees of Union school section number one, in the said township of St. Vincent. It was dated February 22, 1864. Annexed to the warrant was a rate bill or list taken from the assessment roll of St. Vincent for the year 1863, dated February 20, 1864, but endorsed, Rate bill 1863. Plaintiff refused to pay the rate, whereupon defendant seized the horse upon the premises assessed. About four or five days afterwards, plaintiff paid the amount for which he had been assessed, and the horse was restored to him. The learned judge held that the trustees ought to have waited for the making and completion of the assessment roll for 1864, before issuing their warrant to the collector to levy the rate, and that the collector receiving in February a warrant for the collection of such a rate based upon the assessment roll for 1863, the year preceding, was not legally authorized to execute such warrant; that the only roll which a township collector is authorized to receive and act upon is the roll made up, finally revised and certified, and delivered to him on or before the 1st October in the year in and for which the taxes mentioned in the roll are to be collected, and the collector's power under his roll ceases on the 14th December following, unless prolonged by express by-law or resolution of the county council; and that a school collector has no greater power than a township collector, and must proceed under the same restrictions as to time and authority in the exercise of his duties. He therefore directed a verdict for plaintiff.

From this judgment the Chief Superintendent of Education in Upper Canada appealed. The case was first set down in the paper in Michaelmas term last, when *Hodgins* appeared for the appellant, and cited Con. Stats. U. C., ch. 64, sec. 27, sub-secs. 2, 11, 20; secs. 83, 109, 125; *Craig* v. *Rankin*, 18 U. C. C. P. 186; *Vence* v. *King*, 21 U. C. Q. B. 187; *McMillan* v. *Rankin*, 19 U. C. Q. B. 356, *Gillies* v. *Wood*, 13 U. C. Q. B. 357; *Chief Superintendent of Schools re McLean* v. *Farrell*, 21 U. C. Q. B. 441; *Doe* v. *McRae*, 12 U. C. Q. B. 525; *Doe re McGill & Jackson*, 14 U. C. Q. B. 113; *Spry* v. *Mumby*, 11 U. C. C. P. 285.

On a subsequent day during the same term, *D. A. Sampson* appeared for the respondent, and the case was on his application allowed to stand over till the following (Hilary) term when he again appeared, and cited *Timon* v. *Stubbs*, 1 U. C. Q. B. 347; Rob. & H's. Dig. "Notice of Action." *Haight* v. *Ballard*, 2 U. C. Q. B. 29; *Donaldson* v. *Haley*, 13 U. C. C. P. 81; *Bross* v. *Huber*, 18 U. C. Q. B. 282; *Dunwich* v. *McBeth*, 4 U. C. C. P. 228; *Wilson* v. *Thompson*, 9 U. C. C. P. 364; Con. Stats. U. C., ch. 64, secs. 10, 16, sub-secs. 4, 34; ch. 49, sec. 13.

Hodgins, contra, cited *Newbury* v. *Stevens*, 16 U. C. Q. B. 65.

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

The sole question in this case is, whether school trustees have authority in any year, before a copy of the revised assessment roll of that year has been transmitted to the clerk of the municipality, to impose and levy a rate for school purposes, upon the assessment roll of the preceding year.

The learned judge in the court below has taken great pains to review the common school acts in his judgment, but with great deference to his opinion, we have been unable to adopt his conclusions.

We think the error into which he fell arose from making the analogy between municipalities and trustees, and township collectors and collectors under warrants of trustees identical, thus restricting the common school acts by acts not necessarily affecting them.

It is clear that school trustees may themselves or through the intervention of the municipality, provide for the salaries of teachers and all other expenses of the school, in such a manner as may be desired by a majority of the freeholders and householders of the section at their annual meeting, and shall levy by assessment upon taxable property in the section such sums as may be required; and should the sums thus provided be insufficient, they may assess and collect any additional rate for the purpose; and that any school rate imposed by trustees may be made payable monthly, quarterly, half-yearly or yearly, as they may think expedient.

Many of the requirements of a school admit of no delay. The peculiar provisions respecting teachers demand great promptness in the payment of their salaries: repairs to school houses must be made when required. These may be sudden and unexpected. To oblige trustees, or those entitled to payment, to wait till the rolls of the year were made up, would be productive of great inconvenience, and if the law had been less clear than it is, we should not have felt justified in putting a stop to a practice which has, we learn, hitherto obtained, unless on grounds admitting of no doubt.

The generol principle is, that levies for municipal purposes shall be made upon the revised assessment of the year in which they are made. It is true that one rate for the year is only struck by the municipal authorities; but suppose a sheriff got an execution either at the suit of the crown or of a municipality in the month of January, would he be justified in delaying to levy until the revised assessment roll of that year was completed, and a certified copy given to the municipality?

So if the requirements of a school section created a necessity for levying a rate, would the trustees be excused from performing their duty by saying we must wait till the assessment roll of the year is completed before we can act? The obvious answer would be, there is the last revised assessment roll; it is available for all purposes until the new one is made.

On reading the 86th section we find that no township council shall levy and collect in any section during one year more than one school section rate, except for the purchase of a school site or the erection of a school house, and no council shall give effect to any application of trustees for the levying or collecting of rates for school purposes unless they make the application to such council at or before its meeting in August of the year in which such application is made.

But the 12th sub-sec. of sec. 27 authorises the school trustees to employ their own lawful authority as they may judge expedient for the levying and collecting by rate all sums for the support of their school, for the purchase of school sites, and the erection of school houses, and for all other purposes authorised by the act to be collected.

It is to be noted, that the legislature did not confer on the trustees the power to apply to the township council at any time they chose to levy rates; but at or before its meeting in August, and then only for one rate, except *for the purchase of a site*, or the *erection of a school house*. Suppose a second rate for a site or a school house were applied for in a part of the year from January to August, would not the council be bound to levy it? During this period there would be but the existing roll to use for the assessing of this rate.

The restriction to one rate, and the exceptions in regard to the rates authorised to be levied by the municipality for school purposes, lead us to infer that when the trustees chose to exercise their own authority to levy, they were not restricted, and might levy oftener than once for the payment of teachers, and for the other purposes mentioned in the 27th section.

In the case of an arbitration between the trustees and a teacher, the arbitrators may levy, but the trustees are bound to do so; for by the 23 Vic. cap. 49, in case they wilfully refuse or neglect, for one month after publication of award, to comply with or give effect to the award, they shall be held personally responsible for the amount awarded, which may be enforced against them individually by the warrant of the arbitrators. But if they are thus bound at any time to exercise their power to levy, it must necessarily be done upon the existing assessment roll. None of the authorities cited touch this question as raised; but looking at the scope of the acts relating to common schools, the duties imposed upon trustees, the exigencies of schools, and the powers conferred upon trustees to levy rates, we are of opinion that trustees are not restricted to making one levy, but may levy at any time as need requires it; and may use, and can only use, the last existing revised assessment roll for imposing the required rate. The appeal will therefore be allowed.

Appeal allowed.

COMMON LAW CHAMBERS.

(*Reported by* ROBT. A. HARRISON, ESQ., *Barrister-at-law.*)

IN RE ANDREW SMITH.

Canadian Foreign Enlistment Act, 28 *Vic. cap.* 2—*Sufficiency of warrant—Powers of police magistrates.*

Held, 1st, That a warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under the recent statute 28 Vic. cap. 2, averring that on a day named, "at the town of Chatham, in said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeding: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c., sufficiently showed jurisdiction.

Held, 2nd, That the direction to take prisoner "to the common gaol at Chatham," the warrant being addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," was sufficient.

Held, 3rd, That the warrant as above set out sufficiently contained an adjudication as to the offence, though by way of recital.

Held, 4th, That the words "to enlist to serve" do not show a double offence, so as to make a warrant of commitment bad on that ground.

Held, 5th. That the offence created by the statute was sufficiently described in the warrant as above set out.

Held, 6th, That the warrant was not bad as to duration or nature of imprisonment.

Held. 7th, That the amount of costs was sufficiently fixed on the warrant of commitment.

Held. 8th, That there is power to commit for non-payment of costs.

Held. 9th, That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either.

[Chambers, May 13, 1865.]

This was an application for the discharge of the prisoner from close custody, under writ of *habeas corpus*.

The prisoner, as appeared by return to the writ, was confined in Chatham gaol, on two charges under the Foreign Enlistment Act.

Prior to the receipt of the writ, the gaoler had received two additional warrants by the committing magistrate, the first two being open to grave objections. All the warrants were returned.

The convictions were had before Mr. McCrae, police magistrate for the town of Chatham, under the late Canadian act 28 Vic. cap. 2.

Each warrant averred that on a day named, "at the town of Chatham, in the said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," &c.; and then proceeded: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c.

James Paterson for the crown.
J. B. Read for the prisoner.

HAGARTY, J.—Mr. Read objects, first, that it was not shown that the police magistrate was acting within his jurisdiction. The warrant shows that the charge was made at the town of Chatham before Mr. McCrae, police magistrate for said town, and that the attempt to enlist was made at Chatham; and it professes to be given under the magistrate's hand and seal at Chatham. It cannot possibly intend that the magistrate acted in any way except in his jurisdiction, in the presence of these objections.

Secondly, that the directions to take prisoner "to the common gaol at Chatham" is insufficient.

The warrant is addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," and I think a direction to the said constables to convey him "to the common gaol at Chatham aforesaid," is quite sufficient.

Thirdly, that the conviction is only recited, and the warrant does not contain a direct adjudication in itself.

I think the warrant sufficiently clear from objection on that ground. The conviction itself, if produced, would be worded differently, and would express directly and not by way of recital the adjudication of the magistrate: (See *In re Allison*, 18 Jur. 1055.)

Fourthly, That "enlist to serve," shows a double offence, when "enlisting," or "serving" is sufficient.

I see nothing in this objection.

Fifthly, That the offence is not sufficiently described.

The statute declares that "if any person, &c., shall hire, &c., or attempt, &c., to hire, &c., any person or persons, &c., to enlist or to enter or engage to enlist, or to serve or to be employed in any warlike or military operations in the service of, &c., any foreign prince, state, &c., either as an officer, soldier, sailor or marine, or in any other military or warlike capacity." The words in the warrant are, "to enlist to serve *as a soldier* in the army of the United States of America, contrary to the statute," &c., omitting the words "in any warlike or military operation." On the best opinion I can form on this point, I think the warrant is good against this objection. I think the words "to enlist to serve as a soldier in the army of the United States of America," comes within the act. The word "army" does not occur in the act, but it seems to me that it is impossible to serve as a soldier in the army without serving as a soldier in some warlike or military operation. It is made an offence to serve as a soldier in any warlike or military operation, or in any other military or warlike capacity. I think to serve as a soldier in the army comes within the words of the statute. Mr. Read urged that the statute pointed to serving in actual hostile operations. I do not think it is so limited, but that it covers attempts to procure soldiers here for the army of a foreign state, at peace as well as at war. I think serving as a soldier in the army must come under either alternative, as a warlike or a military operation.

Sixthly, That the commitment for the further time beyond the six months, is not to be at hard labour, as the six months are declared to be.

I think the act does not require this. After speaking of six months at hard labour, it continues, "and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid," without adding "at hard labour" for such further time.

Seventhly, That adjudication is in addition to the $4 50 for costs; for all costs and charges of commitment, and conveying him the said Andrew Smith to the said common gaol, amounting to the further sum of $1.

This, I think, sufficiently fixes the amount in a warrant of commitment. As to the power to commit for such costs, the statute creating the offence merely says "may be condemned to pay a penalty of $200 with costs." I find provisions in our law for ordering payment in summary convictions, as in section 62, chapter 203, Consolidated Statutes of Canada, where, after ineffectual attempt to levy penalty and costs by distress, the committing justice may direct imprisonment, unless the sum adjudged be paid, and all costs of distress, "and also the costs and charges of the commitment, and conveying the defendant to prison, if such justice think fit so to order, the amount thereof being ascertained and stated in such commitment." I cannot therefore say that under a statute inflicting a penalty "with costs," the costs of conveying defendant to prison may not lawfully be added. In one of the cases there is no imprisonment awarded, only the penalty and costs, and imprisonment if they be not paid. Mr. Read urges that the statute requires both the imprisonment and money penalty to be awarded, and "that may be condemned to pay," and "may be committed to gaol," mean "must be condemned" and "must be committed." As I read the statute I think it was intended to allow both fine and imprisonment, or either, and that it was not compulsory to award both. I think it a harsh

intendment, that in an act so worded it is compulsory to award imprisonment. As to the words "such further time," I do not think that they necessarily show that there must be a previous award of imprisonment as a substantial punishment.

I have examined the case of *In re Slater and Wells*, decided under Con. Stat. C., cap. 105, sec. 16, reported in 9 U. C. L. J. 21.

I am not wholly free from hesitation on this warrant, but on the whole I think it is sufficient, and that I am not bound to read such a document with the extreme severity of construction insisted on by the applicants.

I direct the prisoner to be remanded.

If dissatisfied with my view, he is not without a remedy by application elsewhere.*

ELECTION CASE.

(*Reported by* R. A. HARRISON, ESQ., *Barrister-at-law.*)

THE QUEEN EX REL. FORD v. COTTINGHAM.

Assessment roll—Conclusive as to property—Franchise to be favored—Residence—Onus of proof—Con. Stat. U. C. cap 54, s. 75 and 97, sub-sec. 9.

Held, that the revised assessment roll is as to property qualification binding and conclusive as to the several persons therein rated.

Held also, that the inclination of the courts is to favor the franchise.

Where the votes of householders were attacked as not being householders resident for one month next before the election, and the fact of non-residence was not clearly shown, the votes were sustained.

[Common Law Chambers, March 1, 1865.]

Hector Cameron, on the 6th of February, 1865, obtained a writ of summons in the nature of a *quo warranto*, directed to the defendant, to show by what authority he exercised the office of councillor for ward number one of the township of Emily, and why he should not be removed from the same, and the relator declared duly elected in his place.

The statement of the relator set forth that he had an interest in the election as a candidate for councilman, and the objections were—1st. That the election was not conducted according to law, the returning officer having refused to administer the oaths of qualifications required by the statute to certain persons who voted, although duly requested by the relator so to do. 2nd. That the defendant did not receive a majority of votes of persons duly and legally entitled to vote thereat. 3rd. That he, the relator, received a majority of legal votes polled, and was duly and legally elected.

The application was supported by the affidavit of the relator, which stated that the returning officer refused to administer the oaths required by law to John McNeily and Alexander Shannon, two electors, who voted for the defendant, and having refused to administer the oaths to these electors, he considered it useless to ask the returning officer to administer the oaths to others of the voters to whom he had objections. That he was advised and believed that the votes of twelve persons whom he named, including the two above named, and all of whom voted for the defendant, were bad and ought to be struck off. 1st. John McNeily, who voted in place of his son, who in truth was the person assessed, and whose name was on the roll. 2nd. Wm. Clarke, who although assessed in ward number one, for a shop, resided in ward number four, using only the shop for his business during the day. 3rd. Thomas Baldwin, who was not assessed on the last assessment roll, in respect of real property, but only in respect of personal property, and only occupies a house as a squatter supposed to be on the road allowance. 4th. Robert White, a like objection. 5th and 6th. Wm. and James Anderson, who were jointly assessed as freeholders, but he had reason to believe that they are not freeholders. 7th. Jas. Balfour, also assessed as a freeholder, but he believed that he had no interest in the property assessed. 8th. David Balfour, same objection. 9th. Matthew Larmer, assessed as a householder, the defendant being landlord, but relator was informed that the premises are a school-house and belong to the trustees of the school section. 10th. Alex. Scott, assessed as a householder, and to the best of relator's knowledge had no interest in lot as tenant or proprietor, nor did he live on the lot; he being a miller in the employment of defendant, and the house for which Scott was assessed being occupied by another. 11th. Wm. Cottingham, assessed as a freeholder, but relator believed he had no deed for the lot and no interest in it. 12th. Alex. Shannon, assessed as a householder, objected to as not residing in Emily for two months next before the election, being then residing at Port Hope. The relator further stated that the returning officer, although he (the relator) required him to administer to Alex. Shannon each of the oaths required by law, the returning officer only administered that portion of the bribery oath whereby Shannon was made to declare that he had not been bribed directly or indirectly at the election.

The relator, in support of the application, filed affidavits of other parties referring to each of the votes objected to, and testifying to the grounds alleged by the relator against the legality of the votes.

C. S. Patterson shewed cause, reading and filing, on the part of the defendant, several affidavits.

Gabriel Balfour, the returning officer, testified to a list of votes attached to his affidavit as being the one used at the election, and which was sworn to by the clerk of the municipality as a correct list of the voters for the ward, taken from the last revised assessment roll of the township. That the said list was used by him at the election, and was seen and handled by both the candidates and other electors and referred to by them, and that no objection was made to it. As to the voter, John McNeily, when he tendered his vote the relator, or some one on his behalf, asked the returning-officer to swear him as being the person assessed, it being alleged that it was his son whose name was on the assessment roll, when the assessor being present explained that it was the voter who was assessed, and that the objection was then withdrawn and the demand to swear him waived. He stated that he was also

* Prisoner subsequently obtained from Practice Court, returnable in full Court of Queen's Bench, a rule *nisi* on the Attorney-General to show cause why a writ of *habeas corpus* should not be issued, with a view to the revision of the above decision of Mr. Justice Hagarty; but the court, holding that the judge in Practice Court had no jurisdiction to grant the rule *nisi*, declined to express an opinion on the several points decided by Mr. Justice Hagarty.—EDS. L J.

asked to administer the oath to Shannon, as to his residence in the municipality; that he put the book into Shannon's hands, and was about administering it, having read over the oath preparatory thereto, when the relator or those acting with him insisted on the officer administering the whole oath or series of oaths in section 97, subsec. 9, of the Municipal Act, including that which referred only to the case of a new municipality, and that it was not from any unwillingness, but only from the excessive demand that the oath was not administered to Shannon.

John McNeily, referred to, swore that he was the person who voted for defendant, and that he is the person who was assessed on the last assessment roll. That his son, also named John McNeily, who resided with him was not assessed.

James English, the assessor of the township for 1864, swore that John McNeily the elder was assessed and not his son. He also swore that the voters Robert White and Thomas Baldwin, who were respectively assessed at $35 and $45, were so assessed for the respective houses occupied by them, and that he placed their assessments in the column for the value of personal property under the impression that householders were not rated as for real property, marking each assessment with the word "house," indicating that it was in respect of the said houses that they were assessed. A copy of so much of the last revised assessment roll as related to the persons who voted in ward No. 1 was put in, and which was sworn to as being true and correct by the clerk of the township.

Thomas Baldwin swore as to having voted for defendant, being assessed on the last revised roll as a householder. That the house in which he resided was a part of lot six in the first concession. That he had resided there for eleven years past as tenant to one David Balfour, and that he paid $18 rent a year and had done so for the last eleven years.

MORRISON, J.—With reference to the alleged misconduct of the returning officer in the case of John McNeily, it is I think disposed of by the returning officer's affidavit as well as the affidavit of the assessor and the voter himself, which places it beyond dispute that the elector was entitled to vote.

Then as to the case of Shannon, the relator swears that he required the returning officer to administer each of the oaths required by law to the voter as he states, to test the truth as to the place of residence of Shannon prior to said election, as well as other matters connected with his right to vote. What the other matters were that the relator refers to is not stated. When I look at the explanation given by the returning officer and the series of oaths enumerated in sec. 97, subsec. 9, I am rather led to think that the relator's object was merely to annoy the voter and not for any *bona fide* object, and we can well understand when a candidate resorts to such a proceeding that confusion and misunderstanding as to the circumstances will likely arise. I notice that the relator swears that in consequence of the returning officer refusing to administer the oaths to McNeily and Shannon he considered it useless to administer the oaths to others against whom he had objections, but by the copy of the poll book filed by the relator it appears that Shannon was the ninety-fourth person who voted, ninety-eight being the whole number, and of the last four, two voted for the relator.

Under the 75th clause of the Municipal Act, the electors of every municipality. &c., shall be the male freeholders thereof, and such of the householders thereof as have been resident therein for one month next before the election, who are natural born subjects, &c., of Her Majesty, of the full age of twenty-one years and *who were severally rated on the revised assessment rolls* for real property in the municipality, &c., held in their own right as proprietor or tenants. With regard to nine of the votes objected to by the relator, viz., number three to eleven inclusive, on account of the voters not having a property qualification, it appears that they are all rated on the last revised assessment roll, and were returned and entered in the list delivered to the returning officer.

Mr. Patterson, on the part of the defendant, objected to going behind the assessment roll, contending that the roll itself as to the property qualification is binding and conclusive. It is very apparent upon a reference to the various clauses in the municipal and assessment acts, both of which statutes are intimately connected with and depending upon the enactments of the other, that every care has been taken by the legislature to ensure a true and correct assessment and rating of property. Provision has been made for giving to the assessment rolls full publicity, and the right of objection by any elector to any matters appearing therein; among others, "if any person has been wrongfully inserted on it," and a mode of procedure is laid down affording ample opportunity to hear and determine all complaints and to revise all errors, &c., with a view to accuracy and finality, and we cannot but suppose that one of the objects of the legislature was to ascertain and determine who was entitled to vote. The 61st sec. of the Assessment Act enacts that the roll as finally passed &c., shall be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be amended in appeal to the judge of the county court.

A consideration of the 75th clause of the Municipal Act, declaring who are entitled to vote with the 9th sub-sec. of the 97th clause, which enacts what oaths shall be administered to electors, provisions being only made in the latter for matters *dehors* the assessment roll, in my judgment, strongly evince that the intention of the legislature was to make the roll conclusive as regards property qualification, and this view is strengthened by the words at the end of the 9th sub-sec., enacting that no enquiry shall be made of the voter, excpet with respect to the facts specified in the oaths.

No case was cited to me on the argument supporting the view taken by the relator's counsel, and I am not disposed, were it open for me to do so in the absence of anything to give effect to objections leading to the obvious inconveniences which would necessarily arise if held good. Were I do so in my judgment one of the most important objects of our municipal system would be defeated. I am therefore of opinion that the objections made to the nine votes referred to are not valid and ought not to be allowed.

The only votes objected to remaining to be dis-

posed of are those of Clarke and Shannon, who are objected to as being non-residents. With regard to Clarke it is known that he is assessed for property in two wards—No. 4 and the one in question; in the latter that he is assessed for a shop in which he carries on his business, being there during the day, while it is said that he sleeps and resides in the house of a family named English in the 4th ward, and that he is entitled to vote in that ward and consequently he is not entitled to vote in ward No. 1. It is not alleged that he voted in ward No. 4. The question of residence is a good deal discussed in *Reg. ex. rel. Forward* v. *Bartell*, 9 U. C. C. P. 533, and in the cases therein cited. What is meant by residence is by no means a clear settled point. From the affidavits filed on the part of the relator, I cannot ascertain distinctly the facts of Clarke's position. It is not stated whether Clarke has a family or under what circumstances he sleeps in the house referred to, or whether he has done so for any period, or was he there at the time of the election. Earl, J., in 7 El. & B. p. 9, says:—"The fact of sleeping at a place indeed by no means constitutes a residence, though on the other hand it may not be necessary for the purpose of constituting a residence in any places to sleep there at all." I see nothing to satisfy me that the voter had a right to vote in ward No. 4, and considering as Richards, C. J., remarks, in the case *Reg. ex. rel. Forward* v. *Bartell*, above cited, the inclination of the courts is to hold in favor of the franchise, I will hold that the vote is valid.

It is not necessary to dispose of the remaining vote, for if bad, which I think it is, the defendant would still have a majority of one, which would enable him to retain his office.

I am of opinion, therefore, that the office of councillor for ward number one of the township of Emily should be allowed and adjudged to the defendant, and that he be dismissed and discharged from the premises against him, and do recover his costs of defence.*

Reg. ex rel. Chambers v. Allison.

Con. Stat. U. C., cap. 54, ss 75, 97, sub-s. 9—Con. Stat. U. C., cap. 55, s. 60, sub-s. 2, and s. 61—Qualification of municipal electors—Sufficiency of rating — Conclusiveness of roll —New point—Costs.

The franchise right not to be lost to any one who really is entitled to vote, if it can be sustained in a reasonable view of the requirements of the statute.

The rating of electors under s. 75 of the statute is sufficient if in the surnames of the electors, although the Christian names be erroneous.

Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified.

So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified.

"Thomas Sanderson" was held to be *idem sonans* with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating.

And *held*, that the assessment roll, as to the qualification of municipal electors, is conclusive.

[Common Law Chambers, March 9, 1865.]

The relator, in his statement, complains that Samuel Allison hath not been duly elected, and hath unjustly usurped the office of councillor for Ward No. 2 in the Township of Caledon, under William Ward, No. 72 and 95 in the said poll book, to whom objection was made, on deponent's behalf, at the time of the said election, when their votes were tendered thereat, were not, nor was either of them, as deponent was informed and verily believed, freeholders and householders in said township at the time of the said election, but young men living with their father, Edward Ward, on property belonging to their father, Edward Ward; that Alex. Falkner, No. 96 on said poll book, to whom objection was made on deponent's behalf at the time of the said election, when his vote was tendered thereat, was not at the time of the said election named on the last revised assessment roll for the said Township of Caledon; that Thos. Sparrow, No. 130 on the said poll book, to whom objection was made on deponent's behalf at the said election, when his vote was tendered thereat, was not as deponent was informed and verily believed, either a freeholder or householder in said township, but a resident of the adjoining Township of Chinguacousy; that each of the persons above named to whom objections were made as above mentioned voted for his opponent; that said objections were made at deponent's instance and on his behalf by Thomas Manton, who acted for him at the said election.

An affidavit of Thomas Manton in corroboration of the foregoing was also filed on the part of the relator.

Robert A. Harrison, for the relator, referred to Con. Stat. U. C., cap. 54, s. 75, s. 97, sub-s. 9; Con. Stat. U. C., cap. 55, s. 60, sub-s. 2, and s. 61, and in the first placed argued that the assessment roll was conclusive. In this view he concluded that three persons, Thomas Anderson, Wilson Williams, and Alexander Faulkner, who voted for defendant, were not on the roll—the names Thomas Sanderson, Wilson Wilson, and Simond Faulkner, intended to represent them, not being a sufficient rating to entitle them to vote. But should the roll not be conclusive, he argued that ten other persons, whose names are given in the relator's affidavit, though properly rated, were shewn not to be in truth qualified, and so in either view he contended the relator was entitled to the seat.

D. McMichael, for defendant, admitting that the roll was conclusive, argued that Thomas Anderson was sufficiently rated as "Thomas Sanderson," William Wilson as "Wilson Wilson," and Alexander Faulkner as "Simond Faulkner." Section 75 of the Municipal Institutions Act as to the rating of electors, not like s. 70 as to the rating of candidates requiring a rating in their own names. He filed affidavits made by Thomas Anderson, William Wilson, and Alexander Faulkner, in which they swore they were qualified electors, and intended by the rating "Thomas Sanderson," "Wilson Wilson," and "Simond Faulkner." But should the rule not be conclusive, he objected to several persons who voted for relator, and who, though regularly rated, were not really qualified.

John Wilson, J.—The Con. Stat. U. C., cap. 55, s. 19, directs that the assessor shall prepare an assessment roll, in which after diligent enquiry he shall set down, according to the best information to be had, the name and surname in

* The ruling on the principal point decided as to the conclusiveness of the assessment roll was subsequently sustained by Mr. Justice Adam Wilson in two cases, viz., *Reg. ex rel Johnson* v. *Price*, and *Reg. ex rel. Milligan* v. *Johnson* (not reported); and by Mr. Justice John Wilson, in *Reg. exrx. Chambers* v. *Allison* (to be reported)

full, if the same can be ascertained, of all taxable parties resident in the municipality who have taxable property therein.

Sec. 60, sub-s. 1, enables any person complaining of an error or omission in regard to himself, as having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, to give notice in writing to the clerk of the municipality that he considers himself aggrieved for any or all of the causes aforesaid.

The Court of Revision, after hearing upon oath the complaint, shall determine the matter, and confirm or amend the roll accordingly, s. 60, sub-s. 12.

The roll, as finally passed by the Court and certified by the clerk, as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the judge of the County Court, s. 61.

Then the Con. Stat. U. C., cap. 54, sec. 97, sub-s. 2, requires the clerk of the municipality to deliver to the returning officer who is to preside at the election for the same or every ward thereof, a correct copy of so much of the last revised assessment roll as contains the names of all male freeholders or householders rated upon the roll in respect of real property, with the assessed value of the real property for which every such person is so rated.

By the 75th section the electors shall be those who among other things were rated on the last revised assessment roll for real property in the municipality.

Persons to be elected as members of a council are those who have freehold or leasehold property rated in their own names on the last assessment roll of such municipality, s. 70.

Sec. 97, sub-s. 9, declares that the only oaths to be required of any person claiming to vote, and appearing by the last revised assessment roll to have the necessary property qualification are, among others, that he is the person named in the last revised assessment roll.

Philip Chambers, the relator, and Samuel Allison, the defendant, were candidates at the last election for the office of councillor for Ward No. 2 in the Township of Caledon.

The list of votes furnished to the returning officer contained three names which gave rise to this contention—Thomas Anderson, Wilson Wilson, and Simond Faulkner, each in respect to qualification entitled to vote.

There were in fact no persons thus named resident in the ward; but Thomas *Sanderson* came and said he was named as Thomas *Anderson* in the list, and the returning officer allowed him to vote for Samuel Allison, and recorded his vote in his proper name, he having taken the oath at the election as directed in the statute. He now swears that he was the person rated as "Thomas Anderson." The relator's counsel argues that the two names when written are in no way alike, but I think they when pronounced are *idem sonans*, and are not distinguishable unless a pause is made between the name and surname. *William* Wilson came also and said he was named in the list as *Wilson* Wilson, and the returning officer allowed him to vote for Samuel Allison, and recorded his vote in the proper name, he too having taken the prescribed oath at the election. He now swears that he was the person named and described in the assessment roll as "Wilson Wilson." *Alexander* Faulkner came in the same way and said he was the person named on the roll as *Simond* Faulkner, made the same statements, took the same oath, was allowed to vote for Samuel Allison, and had his vote recorded in his own name. He now swears he was the person intended under the name of Simond Faulkner.

It is not denied that these men were qualified to vote, but it is contended they are not on the last assessment roll or voters' list, as required by the statute, and that the returning officer ought not to have taken their votes. The defendant Allison had at the close of the poll 68 votes including these three, and Chambers, the relator, had 66 votes. Allison was declared elected, and took his seat as councillor. But if these three votes are struck off, Allison, for whom they voted, will have but 65 votes, while the votes for Chambers will be 66, who will thus be entitled to take his seat as councillor instead of Allison, who in this view has usurped the office.

I think the franchise ought not to be lost to any one really entitled to vote if his right to it can be sustained in a reasonable view of the requirements of the statute.

It was clearly intended that persons resident within the municipality, and properly qualified, should have the right to vote for municipal officers; but it is equally clear that it was intended that no one should vote whose name and qualification were omitted from the roll, for in these respects the Court of Review has express power to correct the roll, and impliedly, I suppose, has the right to correct an error in the name of any one who requests it.

The assessor is directed upon diligent inquiry to set down according to the best information the name and surname in full, if the same can be ascertained, and only those who have been rated on the last revised assessment roll are entitled to vote. There is a distinction in the words of the 70th section respecting those who are candidates for office and of the 75th section regarding who are voters only. In the former section those only who are rated "in their own names" on the last assessment roll can be candidates, but in the latter one those may vote who are rated on the last revised assessment roll.

Now were these men rated on the last assessment roll and returned in the list furnished to the returning officer? They swear they were; but this does not answer the question. Let us see what is to be done in rating them. The assessor is to make diligent enquiry. He asked we may assume of the first voter, What is your name? He answered, Thomas Sanderson; but if the whole name is pronounced without pause or peculiar emphasis it sounds as much like Thomas Anderson as Thomas Sanderson. It was written, I infer, Thomas Anderson, and the peculiarity of it is that if it had been repeated by the writer it afforded no means of correction. Questions of *idem sonans* have usually arisen in the spelling of names, but this is an instance of it in pronouncing them, and the duty of the officers was to set down the name on inquiry, and the duty of the person to be assessed to answer it if so asked *viva voce*, and he could not tell except by inspection whether it was right or wrong.

When written they have no resemblance, but quite otherwise when spoken.

As to Wilson Wilson instead of William Wilson, or, as it should be written in the list, Wilson William, the suggestion is offered which is at least plausible, that as the surname is usually written first, the assessor having written the name first forgot for the moment that he had done so, and wrote it again as if he had written the surname first. The name is right beyond question.

As to Faulkner it is not suggested how "Simond" was written for "Alexander," but suppose in both cases that no surname had been written, and the surname only appeared on the roll, would either of them have been the less rated because his christian name did not appear? and would either be in reasonable fairness less entitled to his franchise, when it was not even doubted that he was the man, and had the qualification which gave it to him?

It has been argued that because the 61st section of cap. 55 declares that "the roll as finally passed by the Court (of Review), and certified by the clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. Every person should examine it after it after it has been put up for inspection, to see that it is right in every respect. This would no doubt be prudent, for its omission may deprive a man of his franchise who neglects it; but I may safely say that if men trust, as most men do trust, that a public officer does his duty, I cannot lay down a rule so strict as to require suspicious vigilance regarding the acts of such officers. I know, we are so constituted that even when we intend to be very careful, and suppose we are acting scrupulously so, we fall into mistakes caused, perhaps, by the over anxiety to avoid it.

I think, under all the circumstances, the first voter was rated by a name *idem sonans*, and the last two by their names, although the surnames were wrong. I think it would be carrying the rule to an extreme at variance to one's sense of right to hold that because a man's surname was not right in every respect he should be deprived of his right to vote, when his neighbours as well as himself knew he was in right of his qualification entitled to vote.

The case, however, is presented in another point of view, namely, that the returning officer had no right to put any name on his poll book which was not on his list, and that he did put on his poll book the names of three voters whose names were not on the last list furnished by the clerk to him.

This is more plausible than sound, for it is the same proposition as the one first discussed, "That if the voters' names on the list do not correspond with the names as given when they come to vote, they have not been rated at all, and have no right to vote.

If the returning officer in the honest discharge of his duty had rejected these votes, he could not have been fairly charged with misconduct or indiscretion; nor can he be so charged in doing what he did.

He no doubt conscientiously felt that they were the voters who had the franchise, and he very probably knew they lived on the land in right of which they claimed to vote, and I approve of his conduct, for if he had adopted the first alternative he might have been denying a positive right, while by adopting the latter he left the right to be questioned before the proper tribunal.

For what he did he may have known that he had a precedent in the practice of our own courts analogous to his own procedure. In jury lists the jurors are designated by the numbers of their lots, but the names and surnames are frequently found wrong. They come when called, and say their names are not right, and on its being ascertained they are the persons intended, the names are corrected, and they are then taken to be the jurors retained.

Some of my learned brethren have decided that we shall not go behind the assessment roll and constitute ourselves a Court of Review. I concur with them, and in this matter I am not infringing upon their decision. I hold only that in this case these men are upon this list so as to entitle him to vote although not correctly named thereon.

My order is in favor of the defendant, but as the points are new, without costs.

Order accordingly.

INSOLVENCY CASES.

(*Reported by* HENRY O'BRIEN, *Esq., Barrister-at-Law.*)

WILLSON v. CRAMP.

Insolvent Act of 1864, *sec.* 3, *sub-sec. i.—Voluntary assignment not under act—Act of insolvency—Subsequent writ of attachment—Which to prevail.*

Where an insolvent debtor, subsequently to the coming into force of the Insolvent Act of 1864, makes an assignment to trustees for the benefit of creditors, not however under, or pretending to be under the Act, and upon which as an act of insolvency, proceedings are afterwards taken under the Act, such an assignment is void as against the assignee in insolvency.

[June 8th & 20th, 1865.]

On the 11th January, 1865, J. D. Mackay, then being insolvent, made an assignment to Thomas Cramp and Andrew Milroy, two of the defendants, for the benefit of creditors upon certain trusts, which assignment was not and did not purport to have been made under the provisions of the Insolvent Act of 1864.

Proceedings were subsequently taken under the Act, and an attachment issued upon the ground that this assignment was in itself an act of insolvency, and that the estate of J. D. Mackay became liable to compulsory liquidation. One William Powis was appointed official assignee of the estate, but upon his death the present plaintiff, another official assignee, was appointed in his place. As this was the first case of the kind, the defendants, Cramp and Milroy, refused to hand over to the plaintiff the books of account and property of the insolvent's estate, without the direction of the court. Upon this the plaintiff filed a bill against Cramp and Milroy, and David and John Torrance, creditors of Mackay, setting out the facts and charging that the defendants Cramp and Milroy would, unless restrained by the injunction of the court, proceed to sell the said property and collect the debts due to the estate: that the said assignment hindered and obstructed the plaintiff in the collection of the said debts, and that the said assignment is by reason of its having been

registered in several counties wherein the lands belonging to the said estate are situate, and for other reasons, a cloud upon the title of the plaintiff, and that the defendants David Torrance and John Torrance and Thomas Cramp were co-partners in business, and were the largest creditors of the said James Daniel Mackay, and were *cestuis que trustent* under the said deed, and for that reason made defendants to this suit. The plaintiff therefore prayed that the said assignment to the said Thomas Cramp and Andrew Milroy might be declared to be void as against the plaintiff, and that the said Thomas Cramp and Andrew Milroy might be ordered to deliver up to the plaintiff all the books of account, vouchers, deeds, papers and documents, and all the goods and chattels belonging to the said estate, and to convey to the plaintiff the lands and premises conveyed to them by the said Mackay, and that the said Thomas Cramp and Andrew Milroy might be restrained by the order and injunction of this honorable court from intermeddling with the said estate and effects and from collecting the debts due to the said Mackay, and from retaining the possession of any of the goods and chattels belonging thereto, and from selling or disposing of any of the property real or personal, and that they might account to the plaintiff for such portion of the said property as had been converted into money and pay the same to the plaintiff.

The answer of the defendants admitted the matters of fact stated in the bill, and submitted to the judgment of the court as to whether the assignment to Cramp and Milroy was or was not void.

The cause came on for hearing on bill and answer.

Roaf, Q. C., for the plaintiff.

Blake, Q. C., for the defendants, Cramp and Milroy.

S. H. Blake, for David and John Torrance.

MOWAT, V. C.—The question argued in this cause was whether an assignment for the benefit of creditors, on which, as an act of insolvency, proceedings are afterwards taken in insolvency, is void as against the assignees appointed under the act.

I am clear that it is. I think this apparent from the whole scope of the act. It is impossible to suppose that when the legislature made such an assignment an act of insolvency, it was intended that the assignee appointed under the act should receive none of the property of the insolvent, and that notwithstanding their appointment the estate of the insolvent should be administered by the trustees whom the insolvent had himself chosen to name. Such a construction would render futile the enactment which makes such an assignment an act of insolvency and would practically deprive the creditors of the advantages which the statute gives them, for the winding up of the estate of an insolvent debtor. If in addition to the clear evidence of the intention of the legislature, which the scope and object of the act supply, a direct enactment declaring such assignment invalid against assignees under the act were necessary, I think sec. 8 contains enough for this purpose. Take for example the third sub-section of that clause which expressly renders null all contracts or conveyances made and acts done by a debtor with the intent fraudulently to impede obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors or any of them, and which have the effect of impeding, obstructing or delaying the creditors or of injuring them. The deed of assignment impedes and obstructs creditors in those remedies which the Insolvency Act affords, and on this ground similar clauses in the English Bankruptcy Act, 1 Jac. 1, ch. 15, sec. 2, and 6 Geo. IV. ch. 16, sec. 3, were decided in England to include voluntary assignments for the benefit of creditors: *Stewart* v. *Moody*, 1 C. M. & R. 777. As Lord Ellenborough observed in *Simpson* v. *Sikes*, 6 Maule & Selwyn, 312, "such a deed subjects the debtor's property to distribution without the safeguards and assistance which the bankrupt laws provide."

The assignment in question also attempts in some respects to put the debtor's property under a different course of application and distribution among his creditors from that which would take place under the insolvency law: *Dutton* v. *Morrison*, 17 Ves. 199. Thus it does not give the priority secured by the Insolvency Act to the clerks and other employees of the insolvent.

Decree for plaintiff.

CORRESPONDENCE.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—A., residing in the First Division of a county, has a good action against B., living in the Tenth, the Division in which the cause of action arose. A. perceives that by suing B. in the Third Division, which adjoins the Tenth, it will be almost as convenient for the defendant B., the distance to the two courts from his (B.'s) residence being about the same; and that it will be much more convenient for him (A.), and that it will save his witnesses (two in number) twelve miles travel each, *i. e.*, twelve miles each way. He accordingly applies to the judge of the County Court under the 72nd sec. of the Division Court Act, upon affidavit, for leave to sue in the Third Division, setting forth the facts as above stated, according to the form prescribed by the 20th General Rule of Practice. The judge, however, refuses to grant the order, on the ground that the affidavit must show, *that the court for the Third Division is nearer to the defendant's (B.'s) residence, than the court for the Tenth.* He also holds that the application must be made under the 1st section of the statute 27 & 28 Vic. cap. 27, and not under the 72nd section of the Division Courts Act, Con. Stat. U. C.; and that under the former section it is necessary for the affidavit to show, that the Third Division Court, is *nearest* to the defendant. And the question has arisen, is this decision correct?

With all due deference to the learned judge's decision, I think the position untenable, on the following grounds:—first, the enactment 27 & 28 Vic. cap. 27, sec. 1, authorizes a party to sue another in the Division Court *nearest* to the defendant's residence, irrespective of where the cause of action arose, without any order whatever (as I understand it) on the part of the judge, giving him leave to do so. And, consequently, it appears to me impossible to hold that any leave is necessary under such circumstances. Hence, the conclusion inevitably arrived at is, that under whatever other enactment an application of the kind could be made, it would be improper and unnecessary to apply for leave from a judge to do that which the statute 27 & 28 Vic. cap. 27, expressly authorizes parties to do.

The Act is remedial in its character, intended, as it would appear, to do away with the necessity of applying to the judge for a special order, where the plaintiff desires to sue the defendant in the Division Court *nearest* his residence. But not in its effect repealing the 72nd sec., where convenience and economy, under its provisions, might be gained.

Second, the application, in my opinion, is properly made under the 72nd sec., which seems exactly to provide for cases like the present. The preamble of the clause, announces its intention, which is, to render the procedure in the Division Courts "*more easy and inexpensive to suitors;*" and the clause itself gives the judge power to authorize by special order a suit to be tried in "*any division in his county, adjacent to the division in which the defendant resides.*" The 20th General Rule of Practice then prescribes the form of affidavit, which may also be made on oath to the same effect, *viva voce*, at any sittings of the Court, and on which the special order may be obtained. This power of making an order, upon such an affidavit and under such circumstances, is vested in the judge by the Legislature, for the wise and beneficent object of lessening the expense of suits; and wherever the provisions of this section apply, although the judge may withhold his consent; for the statute is *permissive*, not *compulsory*, it would appear to be the duty of the judge to grant it, being satisfied of the desirability of the order.

Third, that the Act of 27 & 28 Vic. cap. 27, is an extension of the provisions of the 72nd sec. of the Division Court Act, and does not abrogate them, is drawn from the reading of the 3rd sec. of the new Act, the first and second sections of which are to be construed as part, incorporated with and inserted after, the 71st section of the Division Court Act.

If these reasonings be just, I think the following inferences are fairly deducible:—first, that it is not necessary to shew in the affidavit, that the court in which the cause is sought to be tried is the *nearest* to the defendant's residence, if it is plainly shown, that it would *lessen the expense of the parties* to have the causes tried in *that* court. 2nd, that the application is properly made under the 72nd sec. of Division Court Act; and that it would be improper to apply for an order under the 1st sec. 27 and 28 Vic. cap. 27.

By giving your opinion in the above case in your valuable paper, you will much oblige me and perhaps put right some who, like me, may be misled by the same views.

Yours respectfully,

LECTOR LEGUM.

[The 72nd section of the Act enables a judge to consider the convenience of the intended plaintiff as well as the intended defendant. The terms used being obviously designed to include both, viz.:—"place of residence of certain parties," "such parties," "inexpensive to suitors;" and the form given shews the broad view taken by the judges. In the case put we think that an order might well have been made under sec. 72.

The 27 & 28 Vic. cap. 21, does not repeal section 72. It has, however, (to use the words of the writer of "The Law and Practice of the Division Courts," a gentleman of high attainments and large experience) "to a great extent left the provisions of sec. 72 of little practical value, but there are yet cases not covered by that Act in which sec. 72 may be brought into play with a view to convenience and economy in procedure."* In our judgment, the case as put by our correspondent is one of the kind.

In bringing an action under 27 & 28 Vic., no leave of the judge is necessary. The plaintiff enters the suit of right, but he must be prepared, if necessary, to shew at the trial that the tribunal is the one nearest to the defendant's residence.—EDS. L. C. G.]

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* 1 L. C. G. 85.

To the Editors of the Local Courts' Gazette.

Gentlemen,—For the past nine years, as Division Court Clerk I have followed the practice of my predecessor, in sending through the "Post Office" all summonses and transcripts on judgment to the respective clerks of outer Divisions, for service, &c., on defendants resident in this county, but not in this Division, and up to this date without complaint from any of the defendants—recently, however, several of these outer Division Court Clerks have declined acting on the transcripts, on the grounds of the illegality of such proceeding. Certainly I am aware that neither the "Division Courts" Act of 1850 nor the "Rules" framed by the judges, contain any provisions expressly authorising clerks to issue transcripts to outer Division Court Clerks; but the "Division Courts" Act of 1850, was intended by its wise and thoughtful framers, as a medium through which the middle and lower industrial classes might obtain a *cheap expeditious* and *just* settlement of their disputes, and as far as this Division Court is concerned, the sending transcripts of judgments against defendant's residing out of this Division, through the post office, to outer Division Court Clerks to authorise their bailiff to enforce the writs, has been on that principle.

In future, in similar cases, my proper course, I presume, will be to hand the execution to the bailiff of this court for enforcement, and the result I fear will be complaint, on account of the extra costs—as for instance—the defendant resides in a distant part of the county, say, 60 or 70 miles, the bailiff on arrival finds he will be compelled to make a seizure, advertise, and sell; now if the amount of judgment is small, the costs of court and the bailiff's fees will necessarily be more than double or treble the amount of claim. Again, the bailiff on reaching the defendant's place of abode cannot find any thing legally seizable, consequently he will be compelled to return his execution with "*Nulla Bona*" endorsed thereon, and therefore, not entitled to any fee for his loss of time or travelling expenses.

In such cases could the bailiff legally deputise the respective outer Division Court Bailiff to enforce the writ for him and make the return.

As cases against defendants residing in outer Divisions in this county are of frequent occurrence in this Division Court, may I hope through the medium of your valuable columns for information as to the proper practice for Division Court Clerks to pursue in such cases.

Your obedient servant,

A Subscriber.

[The above well written communication, points more to what the law *ought* to be than what it *is*. There is a defect, the evils of which are pointed out by our careful correspondent, and might be remedied by a slight alteration in the act. We do not think a bailiff has power to appoint a deputy, though he may in certain cases call in assistance.—Eds. L. J.]

To the Editors of the Local Courts' Gazette.

Sirs,—Your opinion as to the meaning of the following wording contained in 28 Vic. ch. 22, sec. 1, viz.: "Every person so offending shall incur a penalty of not less than ten dollars nor more than fifty dollars, with costs." Does the act not mean that the fine and costs shall not exceed fifty dollars, and that they must exceed ten dollars.

Or would a fine of fifty dollars and costs, say ten dollars, making sixty dollars in all, be legal?

Yours, &c., J. P.

Port Rowan, Aug. 25, 1865.

[The penalty is distinct from the costs. The *fine* must be for any sum between ten dollars and fifty dollars. The *costs* are over and above and have nothing to do with the "penalty." The words, "with costs," being the magistrates authority for imposing any costs at all. —Eds. L. C. G.]

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JAMES KEITH GORDON, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

COLUMBUS H. GREEN, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.

CORNELIUS VALLEAU PRICE, of Kingston, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

DANIEL McCARTHY DEFOE, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

TO CORRESPONDENTS.

"Lector Legum"—"Subscrizer"—"J. P."—under "Correspondence."