DIARY FOR JUNE.

1. Friday New Trial Day Q.B.
2. Satur. Easter Term ends.
3. SUN... 1*st Sunday after Trinity.*
4. Mon ... Recorder's Court sits. Last day for notice of trial
10. SUN... 2*nd Sunday after Trinity.* [for County Court.
11. Mon ... *St. Barnabas.*
12. Tues.. Quarter Sess. and County Ct. sittings in each Co.
17. SUN... 3*rd Sunday after Trinity.*
20. Wed... Ascension of Queen Victoria, 1837.
21. Thurs. Longest Day.
24. SUN... 4*th Sunday after Trinity. St. John Baptist.*
27. Thurs. Sittings Court of Error and Appeal.
29. Friday *St. Peter.*
30. Satur. Last day for Co. Cl. fin. to rev. Ass. Roll. Last d. for Co. Ct. to equalize Roll of Local Municipal.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JUNE, 1866.

THE ACT FOR THE PROTECTION OF SHEEP.

A correspondent, whose letter we published in our last issue, asks a number of questions relative to the working of this act, which we now propose to discuss in the order in which he propounds them.

1. May the application—which the 8th section authorises the owner of any sheep or lamb that may be killed or injured by any dog to make to two Justices of the Peace in the municipality, (whose duty it shall be to inquire into the matter and view the sheep injured or killed, and who may examine witnesses upon oath in relation thereto)—be a verbal application or must it be in writing?

The section says nothing as to this: but it does say that the Justices may examine witnesses upon oath, and the statements of these witnesses — of whom the owner should be one, to prove his property, to shew the *bona fides* of the application, and to follow the requirements of the act, if for nothing else—should be reduced to writing and sworn to in the usual manner.

2. It seems imperative upon the Justices to view the sheep; and though this provision may lead to some trouble both in its interpretation and in its practical working, it is one that will prevent much fraud upon municipalities. The owner, though not bound to go to two of the *nearest* Justices, must go to two "in the municipality," and he will probably go to the nearest, who are not likely to be very far from the scene of action. If within a reasonable distance, and no other circumstances should prevent it, they would probably visit the place where the sheep was killed or injured, and thereby be in a better position to judge of the facts brought before them. But we do not at present think that it is absolutely incumbent upon them to visit the actual locality, as the statute can be complied with by the owner bringing the sheep or its remains to *them.* The time and place for the inquiry and view must, we imagine, be determined upon by the Justices in their discretion.

3. The Justices can, doubtless, compel the attendance of witnesses in such cases at such time and place as they may appoint for the inquiry and view. The form of the summons to compel such attendance may be in a form *similar* to (L. 1) in Con. Stats. cap. 102, though some slight alterations must be made.

This brings us to a further observation with reference to the answer to the first question, in connection with the means of evidence, and it is this; the owner must, owing principally to the fact of the presence of two Justices being required by the act, almost of necessity, make a preliminary application to the Justices, which we think should be on oath before one of them, for the purpose of having the time and place arranged where he could have the sheep inspected and the witnesses examined. He might, perhaps, it is true, take the sheep and witnesses with him to the Justices, and have the examination then and there; but there would be difficulties in this way of doing it; and the owner should, if possible, give notice to the owner of the dog of the intended application so as to obtain the benefit of the 9th section.

4 & 5. These questions may be considered together.

The question of measure of damages is always somewhat difficult, and it is almost impossible to lay down any general rule which would be considered satisfactory in all cases that are likely to arise under this act. The matter is left to the discretion of the Justices to find and certify "the number of the sheep or lambs killed or hurt, and the amount of the damages sustained thereby by the owner, together with the value of the sheep or lambs killed or hurt." Though this certificate is to contain the above facts, it does not follow that the owner can recover either from a municipality or from an individual the value

of the animal over and above the damages sustained *otherwise* than by the loss of or injury to such animal; this is clear both on principle and from the wording of subsequent sections. The question therefore is, what comes within the word "damage." The law does not, as a general principle, recognize either consequential or vindictive damages; and section 10 uses the words "damage" and "value of the sheep" as synonymous terms. The loose way in which these words are used will lead to much difficulty, but we think that the owner would be entitled to recover the value of the animals, if killed and their carcases rendered useless for any purpose; *or*, an amount which would compensate for such injury as may have been done to them, if only hurt in such a way that they were not permanently injured; *or*, if the sheep were killed and its carcase not rendered useless, such an amount as would compensate for the difference between the live animal and the value of the carcase, to the owner, if saleable or fit for use. That part of the above definition which speaks of the value of the dead animal is given more as a suggestion to get out of a difficulty as to its disposal if not destroyed so as to be unfit for some use, rather than a positiveopinion as to the legal effect of the words used in the statute. Whatever circumstances, whether of superiority in breed or in condition, and whether the sheep is intended for breeding from, or for butchers' meat, &c., which render the sheep more or less valuable, should certainly be taken into consideration—the damage being judged by the value of the animal to the owner, before its death, and such value to be determined rather by opinion of a *farmer* rather than that of a *butcher*. Prospective damages should not in general be allowed. More than this we cannot say. The time of the owner in prosecuting his claim cannot, we think, be charged for any more in this case than in any other, where he is prosecuting a suit in a court of law or seeking redress for an injury.

6. Our correspondent, we think, misconceives the purport of section 9. The certificate of the Justices, under any circumstances, is only *primâ facie* evidence of its contents, and not even that, if notice of the intended application be not given to the owner of the dog.

7 & 10. Of course if the municipality has no funds to pay the claims, the claims cannot be paid till funds are forthcoming, but they must be paid in the order in which they are presented. The balance should, we presume, be struck as in other cases. This is a difficulty, or rather an inconvenience, which cannot well be avoided.

8 & 9. The party injured can only recover from the municipality in case he cannot discover the owner of the dog doing the damage, or fails in recovering the value of the sheep from such owner. The act does not prevent an action from being brought against the aggressor, whether known or unknown to the aggrieved at the time of his application to the Justices, and we do not think that it would be any answer to such action for the defendant to say that the plaintiff had already received the amount of the damages from the municipality.

11. As to whether magistrates are entitled to any remuneration for services under this act, we should say that, however hard it may be upon magistrates to work for nothing, there appears to be no provision for the payment of any fees to them, either expressly or by implication. They must therefore it would seem, do their duty under this "without fee or reward," and as we trust they will also do it, "without fear, favour or affection."

We see that Mr. Wright has introduced a bill to amend this act. We have not however yet learned the import of it.

Our readers will scarcely expect an apology for the late appearance of this number. Matters of much greater moment have engrossed the time of many and the attention of all of us. Long may it be before a similar cause of excitement arises within our peaceful borders.

AN ACT TO AUTHORIZE THE APPREHENSION AND DETENTION UNTIL THE EIGHTH DAY OF JUNE, ONE THOUSAND EIGHT HUNDRED AND SIXTY-SEVEN, OF SUCH PERSONS AS SHALL BE SUSPECTED OF COMMITTING ACTS OF HOSTILITY OR CONSPIRING AGAINST HER MAJESTY'S PERSON AND GOVERNMENT.

[Assented to 8th June, 1866.]

Whereas certain evil disposed persons being subjects or citizens of Foreign Countries at peace with her Majesty, have lawlessly invaded this Province, with hostile intent, and whereas other similar lawless invasions of and hostile incursions into the Province are threatened; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1. All and every person and persons who is, are or shall be within Prison in this Province at, upon, or after the day of the passing of this Act, by warrant of commitment signed by any two Justices of the Peace, or under capture or arrest made with or without Warrant, by any of the officers, non-commissioned officers or men of Her Majesty's Regular, Militia or Volunteer Militia Forces, or by any of the officers, warrant officers or men of Her Majesty's Navy, and charged;

With being or continuing in arms against Her Majesty within this Province;

Or with any act of hostility therein;

Or with having entered this Province with design or intent to levy war against Her Majesty, or to commit any felony therein;

Or with levying war against Her Majesty in company with any of the subjects or citizens of any Foreign State or Country then at peace with Her Majesty;

Or with entering this Province in company with any such subjects or citizens with intent to levy war on Her Majesty, or to commit any act of Felony therein;

Or with joining himself to any person or persons whatsoever, with the design or intent to aid and assist him or them whether subjects or aliens, who have entered or may enter this Province with design or intent to levy war on Her Majesty, or to commit any felony within the same;

Or charged with High Treason or treasonable practices, or suspicion of High Treason, or treasonable practices;

May be detained in safe custody without Bail or mainprize until the eight day of June, one thousand eight hundred and sixty-seven, and no Judge or Justice of the Peace shall bail or try any such person or persons so committed, captured or arrested without order from Her Majesty's Executive Council, until the eighth day of June, one thousand eight hundred and sixty-seven, any Law or Statute to the contrary notwithstanding; provided, that if within fourteen days after the date of any warrant of commitment, the same or a copy thereof certified by the party in whose custody such person is detained, be not countersigned by a clerk of the Executive Council, then any person or persons detained in custody under any such warrant of commitment, for any of the causes aforesaid by virtue of this Act, may apply to be and may be admitted to bail.

2. In cases where any person or persons have been, before the passing of this Act, or shall be during the time this Act shall continue in force arrested, committed or detained in custody by force of a warrant of commitment of any two Justices of the Peace for any of the causes in the preceding section mentioned, it shall and may be lawful for any person or persons to whom such warrant or warrants have been or shall be directed to detain such person or persons so arrested or committed, in his or their custody, in any place whatever within this Province, and such person or persons to whom such warrant or warrants have been or shall be directed, shall be deemed and taken to be to all intents and purposes lawfully authorized to detain in safe custody, and to be the lawful Gaolers and Keepers of such persons so arrested, committed or detained, and such place or places, where such person or persons so arrested, committed or detained, are or shall be detained in custody, shall be deemed and taken to all intents and purposes to be lawful prisons and gaols for the detention and safe custody of such person and persons respectively; and it shall and may be lawful to and for Her Majesty's Executive Council, by warrant signed by a clerk of the said Executive Council, to change the person or persons by whom and the place in which such person or persons so arrested, committed or detained, shall be detained in safe custody.

3. The Governor may, by proclamation, as and so often as he may see fit, suspend the operation of this Act, or within the period aforesaid, again declare the same to be in full force and effect, and, upon any such Proclamation, this Act shall be suspended or of full force and effect as the case may be.

4. This act may be altered, amended or repealed during the present session of parliament.

SELECTIONS.

THE TRIAL OF THE PIX.

The trial of the pix at the Exchequer (says Mr. Lawson*) is very ancient and curious, and though carried on in an open court is yet little known. The practice of summoning the court is as follows:—Upon a memorial being presented by the Master of the Mint praying for a trial of the pix, the Chancellor of the Exchequer moves His Majesty in council for that purpose. A summons is then issued to certain members of the Privy Council to meet at the office of the Receiver of the Fees in his Majesty's Exchequer at 11 o'clock in the forenoon of a certain day. A precept is likewise directed by the Lord High Chancellor to the warden of the Goldsmith's Company, requiring them to nominate and set down the names of a competent number of sufficient and able freemen of their company, skilful to judge of and present the defaults of the coins, if any should be found, to be of the jury to attend at the same time and place. This number is usually twenty-five, of which the Assay Master is always one. When the court is formed the clerk of the Goldsmith's Company returns the precept, together with the list of names; the jury is called over, and twelve persons are sworn. The following is the form of the oath as administered to a jury in March, 1847:—You shall well and truly, after your knowledge and discretion, make the assays of those

*Lawson's History of Banking. Effingham Wilson.

moneys of gold and silver, and truly report if the said moneys be in weight and fineness according to the Queen's standard in the Treasury for coins; and also if the same moneys be sufficient in alloy, and according to the covenants comprised in an indenture thereof, bearing date the 6th day of February, 1817, and made between his late Majesty, King George the Third, and the Right Hon. William Wellesley Pole. So help you, God." The above oath having been administered, the president gives his charge to the jury, that they examine by fire, by water, by touch, or by weight, or by all or by some of them, in the most just manner, whether the moneys were made according to the indenture and standard trial pieces, and within the remedies.

The jury then retire to the court room of the Duchy of Lancaster, whether the pix is removed, together with the weights of the Exchequer and Mint, and then the scales which are used on these occasions are suspended, the beam of which is so delicate that it will turn with the merest trifle, when loaded with the whole of the weights, 48lb 8oz. in each scale.

The jury being seated the pix is opened, and the money, which had been taken out of each delivery and deposited therein, inclosed in a paper parcel, under the seals of the Warden, Master, and Comptroller of the Mint is given into the hands of the foreman, who reads aloud the indorsement, and compares it with the account that lies before him. He then delivers the parcel to one of the jury, who opens it and examines whether the contents agree with the indorsement. When all the parcels have been opened, and found to be right, the moneys contained in them are mixed together in wooden bowls and afterwards weighed. Out of the moneys so mingled the jury take a certain number of each species of coin to the amount of a pound weighl for the assay by fire; and, the indented triapieces of the gold and silver of the dates specified in the indenture being produced by the proper officer, a sufficient quantity is cut from either of them for the purpose of comparing with it the pound weight of gold or silver which is to be tried, after it has been previously melted and prepared by the usual method of assay.

When that operation is finished the jury return their verdict, wherein they state the manner in which the coins they have examined have been found to vary from the weight and fineness required by the indenture, and whether and how much the variations exceed or fall short of the remedies which are allowed; and according to the terms of the verdict the master's *quietus* is either granted or withheld.

As far back as there is any record of these proceedings, to the honour of those gentlemen who have held the important office of Master of the Mint be it told, there has never been a deviation from the appointed standard of value. —*Bankers' Magazine.*

JUVENILE OFFENDERS.

When Dr. Watts wrote hymns for future generations of juveniles, and gave currency to the profound sentiment contained in the line—

"It is a sin to steal a pin,"

he never contemplated the punishment of such a sin committed by a child by any other human authority than that of the parent or guardian of the culprit. It is very true in theory that even such a fault as stealing a pin comes within the province of the law, and that, notwithstanding the well-know maxim *de minimis non curat lex;* but we must protest against the administrators of justice being called in to do the work of the schoolmaster, and take cognizance of offences which would be more properly dealt with by a birch rod or an "imposition."

From a report taken from the *Birmingham Daily Post* we find that a child, whose age is variously stated at nine, ten, and eleven years, and who is a scholar in Inkberrow Sunday School, was brought before the magistrates sitting in petty session at Redditch for stealing a penny out of the pocket of a fellow-scholar. The report runs as follow:—

The vicar, the Rev. G. R. Gray, who is chairman, of the bench of magistrates, being informed of the petty theft, after making some inquiries into the case, instructed the village policeman to take the girl to the lock-up which was done on Monday last. Substantial bail, we believe, was offered, but the Rev. Mr. Gray refused to accept it.

On the following Friday the case was to be heard, and we are left to suppose the child was kept in the lock-up for about four days until that time, and this would have been the case but that the compassion of the policeman moved him to take her out of the cell and keep her in his own house. Meantime some sympathizing friends had employed an attorney to defend the little prisoner. At the sitting of the bench were three justices to decide on this important prosecution, when, after it had been asserted that this was not a first offence, a statement which was denied on the part of the prisoner, the chairman said "he never intended to go on with the case, and he merely sent the child to the lock-up to punish her."

No evidence being produced the case was dismissed but the prisoner's advocate objecting to this mode of settling the question, she was again placed in the dock, and the case adjourned to a future day, bail being this time acepted.

At the adjourned hearing the magistrates unanimously dischargd the prisoner, in the belief that there was no felonious intent.

We have heard of nurses who indulge in the most reprehensible practice of threatening children with sundry and dire punishments for the purpose of inducing obedience to lawful commands, and among others a threat "to call the policeman" is not not uncommon, though we never heard of its being carried beyond a threat. Practical jokes, moreover, are sometimes carried too far, and this proceeding of the Rev. Mr. Gray appears to partake of the nature of both these improprieties. No information was

sworn, and no warrant issued for the arrest of the child; facts which stamp the proceedings with irregularity. We cannot but regard the use of the parish lock-up as a place to punish offences properly cognizable in Sunday-school as a grave error amounting to an abuse of his double power as clergyman and magistrate. The refusal to accept bail, while it confirms Mr. Gray's statement that he merely meant to lock the child up by way of punishment, shows clearly how untenable is the principle on which he acted. No magistrate—acting merely as a justice of the peace—would have thought of refusing bail in such a case, and if Mr. Gray cannot divest himself of the feelings of the schoolmaster when he takes his seat upon the bench, he ought not to sit there when such cases are brought before it.—*Solicitors' Journal.*

MAGISTRATES AND RAILWAY TRAVELLING.

Occasionally the decisions reported from courts of petty sessions are of an unaccountable nature, and appear to be founded upon that rough idea of equity, popularly so called, which is neither law nor justice. At times we read that an offence has been committed, and that some one is punished accordingly, but without any real proof that the one punished is the offender. At other times the law is strained to meet a case of moral culpability not within the contemplation of the law, and the machinery of justice has, ere now, been set in motion for the punishment of the offences of school children.* But as regards the metropolitan police courts, where the magistrates are men of legal training, it is rarely that we are called upon to comment adversely on the decisions they pronounce, and when this occurs, we no longer look upon it as trivial blemish, but a radical defect. Two summonses however, lately heard before Mr. Barker at the Clerkenwell Police Court, present the remarkable feature that the one for a punishable offence was dismissed, while the defendant was adjudged to pay a fine of ten shillings in respect of the offence charged in the other summons, which has been solemnly decided by the high authority of the Court of Queen's Bench not to be punishable.

The facts, as reported in the *Times*, are these:—Mr. Busby was summoned by the North-London Railway Company, first for having, with a ticket from Broadstreet to Islington, proceeded to Caledonia-road without paying an additional fare, and, secondly, for not having left the carriage at Islington. As regards the first charge, it was proved that Mr. Busby had refused to pay the extra fare, not because he had any intention to defraud the company, but because the fare was charged under a new regulation, which he objected to and wished to dispute.

Mr. Barker said that as the company did not press for the infliction of the full penalty he should not now enforce it. He should only convict on one summons, viz., that for not leaving the train on arriving at Islington, and for that offence he should order the defendant to pay a fine of ten shillings and the costs. The other summons would be dismissed. The defendant at once paid the money, and said it was a great injustice.

Now the Court of Queen's Bench has decided, after solemn argument (*Eastern Union Railway Company* v. *Fren*, 24 L. J. M. C. 68,) that the simple fact of a passenger not quitting a train at the station for which he had taken his ticket is not an offence unless done with intent to defraud. And their Lordships, in another similar case (*Dearden* v. *Townsend*, 10 Sol. Jour. 50), went so far as to declare that a bye-law which attempted to make this an offence, irrespective of fraudulent intent, would be void. The question of fraud appears to have been negatived by the dismissal of the first summons, and even if the defendant had been requested to leave the carriage at Islington and refused (which was not alleged) there could be no ground for inflicting a fine. Upon the summons which was dismissed the defendant might, perhaps, with justice, have been ordered to pay the extra fare as well as the costs, though on the evidence, even in that case it seems rather to have been a *bonâ fide* dispute as to liability, and therefore ground for a civil action merely, than a criminal offence. Travelling without a ticket is no offence if done without any intent to defraud, and in the case in question it seems to us that the infliction of a fine was not only a deliberate violation of the law as laid down by the Court of Queen's Bench, but an arbitrary and unjust proceeding, contrary alike to natural equity and common sense.—*Solicitor's Journal.*

* These are defects naturally to be looked for in the administration of justice by so large and so unrestrained a body as the magistracy of England, and are perhaps of rarer occurrence than might reasonably be anticipated.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSOLVENCY—"RASH AND HAZARDOUS SPECULATION."—A country banker accepted to a large amount bills drawn upon him by a person who failed to remit other good bills according to his agreement, without any security whatever. He afterwards became bankrupt.

Held, that his insolvency was attributable to rash and hazardous speculation, and that his order of discharge was properly made conditional on the setting aside part of his subsequent earnings for the benefit of his creditors.—*Ex parte Braginton*, 14 W. R. 593.

INSOLVENCY—BANKRUPT—DEBTS CONTRACTED AFTER ADJUDICATION, BUT BEFORE ORDER OF DIS-

CHARGE—PROTECTION FROM ARREST — "CREDITOR"—The protection from arrest, given to a bankrupt by statute 12 & 13 Vic. c. 106, s. 112, does not extend to an arrest made by a creditor whose debt was incurred between adjudication and order of discharge.

The word "creditor" in that section means a creditor who could prove in the bankruptcy.—*In re Poland*, 14 W. R. 599.

RECEIVING STOLEN GOODS—JOINT RECEIPT—If A. & B. are jointly indicted for receiving stolen goods and it is proved that A. separately received the goods from the thief, and that B. received them from A., both may be convicted under 24 & 25 Vic. c. 96, s. 94.—*Reg.* v. *Rearden et al.*, 14 W. R. 663.

LARCENY AS BAILEE—The prisoner, a carrier, was employed by the prosecutor to deliver in his (the prisoner's) cart a boat's cargo of coals to persons named in a list, to whom only he was authorised to deliver them. Having fraudulently sold some of the coals, and appropriated the proceeds.

Held, that he was properly convicted of larceny as a bailee within 24 & 25 Vic. c. 96, s. 3.—*Reg.* v. *Davies*, 14 W. R. 679.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

RAILWAY COMPANY — BILL OF EXCHANGE — POWER TO ACCEPT.—The plaintiffs, as indorsees, sued the defendants, a railway company, as acceptors of a bill of exchange.

Held, that the defendants had no power to accept a bill of exchange, and were not liable in this action, they being a coporation created for the purpose of making a railway, and the accepting of a bill of exchange not being incidental to the object for which they were incorporated.

Held, also, that the defence was properly raised by a plea denying the acceptance of the bill.—*Bateman* v. *The Mid-Wales Railway Company*, 14 W. R. 672.

INFRINGEMENT OF TRADE MARK — Long use of a trade mark gives such a property in it to the owner that another person cannot adopt the same device even though it be his family crest.—*Standish* v. *Whitwell*, 14 W. R. 512.

PROMISSORY NOTE—PAYEE.—A note was made payable to the trustees of a chapel "or their treasurer for the time being."

It was *held*, that this did not make the payee uncertain, and that the document was a promissory note within the statute of Anne.—*Holmes* v. *Jacques*, 14 W. R. 584.

CONTRACT—DRUNKENNESS—DURESS.—A contract unreasonable in itself, entered into by an habitual drunkard when in a state of excitement from excessive drinking almost amounting to madness, with a person who at the time had him in complete subjection, will be set aside. It is not necessary in such a case to prove actual madness. —*Wiltshire* v. *Marshall*, 14 W. R. 602.

ACTION FOR CALL ON SHARES—MISREPRESENTATION.—Where a person has been induced to take shares in a company on the faith of representations contained in their prospectus, which afterwards turned out to be false, he will be entitled to an interim injunction to restrain proceedings at law to enforce a call.—*Smith* v. *R. R. S. Mining Co.* 14 W. R. 606.

NEGLIGENCE—UNFENCED HOLE—INNKEEPER—GUEST.—The plaintiff went to a public-house by appointment to meet a friend, and, as his friend had not arrived, walked into the parlour, and there fell through a hole in the floor, which was being repaired. As far as appeared, his only object in coming to the house was to meet his friend. In an action against the landlord for negligence in not fencing the hole, and in which the plaintiff alleged that he was in the house as a guest, the jury found for the plaintiff

The court refused a rule to nonsuit the plaintiff which was asked for on the ground that there was no evidence, either of negligence on the part of the defendant, or of the plaintiff being in the house as a guest.—*Axford* v. *Prior*, 14 W. R. 611.

CONTRACT—LIQUIDATED DAMAGES.—The plaintiff, a builder, contracted with the defendant to do certain repairs and alterations to a house, to be completed within a specified time, "subject to a penalty of £20 per week that any of the works remained unfinished" after the stipulated periods.

Held, that the sum of £20 per week was in the nature of liquidated damages, and could be deducted by the defendant without proving the loss he had actually sustained by reason of the delay.—*Cruz* v. *Aldred*, 14 W. R. 656.

DISTURBANCE IN CHURCH—CHURCHWARDENS.—A disturbance created by an attempt to take possession of seats in a church which had been allocated to other persons by the churchwardens is not an offence under the Toleration Act, where no malicious design is alleged; nor is it a misdemeanour involving a breach of the peace, and entitling a magistrate to act on view.

Semble, that the churchwardens might have expelled the person creating the disturbance, doing no more.—*King* v. *Poe*, 14 W. R. 660.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

THE LAW SOCIETY OF UPPER CANADA v. THE CORPORATION OF THE CITY OF TORONTO.

Taxes paid under mistake of fact—Right to recover back—C. S. U. C. ch. 55, sec. 61.

The plaintiffs had for several years appealed from the assessment of their property to the Court of Revision, who had decided against them, and from thence to the County Court judge, who had reduced it about one-third, on the ground that a large portion of their building was occupied by the courts. In 1864, the same assessment being repeated, they appealed to the Court of Revision, who said they would consult the City Solicitor, and that the plaintiffs need not appear again. The plaintiffs' solicitor was told by the clerk of the Court of Revision that no judgment had been given, and found none in the book where their decisions were entered. The collector, in October, called upon the plaintiffs' secretary, who, supposing all was right paid the sum assessed. The mistake having been discovered in the following year.

Held, that they might recover it back, for the Court of Revision not having determined the appeal, the roll, as regarded the plaintiffs, was not "finally passed" within sec. 61 of the Assessment Act, so as to bind them. *Hagarty*, J., dissenting, on the ground that the return of the roll unaltered as regarded the plaintiffs' assessment, was in effect a decision against them.

A person seeking to recover money paid under a mistake of fact is not now bound to shew that he has been guilty of no laches; the only limitation is that he must not waive all enquiry.

[Q. B., H. T., 1865.]

The declaration contained the common money counts and an account stated.

Pleas—Never indebted, and payment.

The case was tried at the assizes for York and Peel, in January, 1866, before *Morrison*, J.

The action was brought to recover back from the city the sum of $432, which had been paid to the collector for one of the wards of the city under the following circumstances:

The assessor for John's Ward left the usual assessment paper at Osgoode Hall for the plaintiffs, by which the plaintiffs were assessed for Osgoode Hall, and the land attached thereto at the annual value of $1,920. A similar assessment had been made of the same property for some years preceding, against which an appeal had been made in each year on behalf of the plaintiffs to the Court of Revision, who had decided against the appeal, which was then carried before the judge of the County Court, who had reduced the assessment about one-third, on the ground that a large portion of the building was used and occupied by the three superior courts for the administration of public justice.

On becoming aware of the assessment of 1864 the plaintiffs' solicitor appealed to the Court of Revision, and appeared before them to sustain his objection on the 25th of May, 1864. He was told they would consult the city solicitor. He objected to any delay in deciding, but they gave no judgment then, and he was told he need not appear again. He watched the matter, and enquired two or three times of the clerk of the Court of Revision, who stated to him that no judgment had been given. He also examined the book in which entries were made of the decisions of the Court of Revision, but found no entry of the decision of this appeal, and there was none up to the time of the trial. The object of this watching was to carry the appeal before the judge of the county. After the time for appealing had passed, the solicitor told one of the members of the Court of Revision the situation of the case, and thought no more of the matter.

In October, 1864, the collector called upon the secretary of the plaintiffs at Osgoode Hall, and presented to him the ordinary paper shewing the amount of rate imposed on the plaintiffs The secretary presumed the charge ($432) was right and paid it. The clerk of the Court of Revision to whom the appeal was made in May, 1864, stated that no decision had ever been given, and said he had made out the collector's book from the assessment roll as it stood at first and as appealed against.

In the following year (1865) the assessment was again appealed against, but the Court of Revision on being informed of the decision of the judge of the County Court acquiesced in it, and reduced the assessment accordingly. The plaintiffs' solicitor then for the first time learned what the secretary had paid in 1864. He wrote on the subject on the 29th of June and on the 29th of July, but got no answer. On the 2d of Aug., 1865, he wrote to the mayor, saying an action would be brought, and referring for the facts of the case to his letter of the 29th of June. Still no answer. He wrote again on the 13th of October to the Chamberlain, but could get no satisfaction; and so this action was brought in November following.

The defendants' counsel objected that the plaintiffs could not recover, as it appeared that the assessment roll had been finally passed, under sec. 61 of the Assessment Act: that the payment by the secretary was voluntary, and therefore the money could not be recovered back.

Leave was reserved to the defendants to move to enter a nonsuit, and the plaintiffs had a verdict for the sum claimed.

McBride obtained a rule, calling on the plaintiffs to shew cause why a nonsuit should not be entered on the following grounds:—1. That the roll under which the money was paid was finally passed by the Court of Revision for the city, for the year 1864, and no appeal was made therefrom to the judge of the County Court; and that moneys paid to the defendants by virtue of said roll cannot be recovered back, notwithstanding any defect or error in or with regard to such roll. 2. That the payment of the moneys was voluntary, and made with a full knowledge of the facts, or it was a payment, if made in ignorance of the facts, yet accompanied by such

laches as disentitled the plaintiffs to recover the same back.

Anderson shewed cause, referring to *Marriot* v. *Hampton*, 2 Sm. L. C. 256; *Bell* v. *Gardiner* 4 M. & Gr. 11.

The Court differing in opinion delivered their judgments *seriatim*.

HAGARTY, J.—The Court of Revision did hear the plaintiffs' complaint against the assessment. They did not, it is said, expressly make any decision of the appeal. The statute says they shall determine the matter and confirm or amend the roll accordingly. The roll, as a matter of fact, was finally passed by them and certified by the clerk, under sec. 61, the plaintiffs' assessment remaining unchanged. The doubt I feel is whether this final passing and certifying of the roll must not be held to have been, as it was in effect, a decision adverse to the plaintiffs' appeal. Then the section says the roll so passed shall bind all concerned, notwithstanding any default 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 county judge. Sec. 59 provides that all the duties of the Court of Revision shall be completed and the rolls finally revised by them before the 1st of June. Sec. 63 allows an appeal to the county judge, a notice being given within three days after the decision. Then, under sec. 64, the clerk produces the roll "passed by the Court of Revision."

It seems to me that when the Court of Revision, after hearing a complaint, finally pass the roll, leaving the assessment complained of unaltered, they decide against the complaint. When they decide on finally passing the roll, leaving the plaintiffs' assessment unaltered, do they not decide against him? His being thrown off his guard and rendered less watchful in consequence of something said to him, is another matter.

In the case before us all damage to the plaintiffs could be easily avoided. The complaint was heard on the 25th of May. Complainants knew that by law the roll must be finally revised by the 1st June, a few days after the hearing. They could have appealed to the county judge within three days from passing the roll. There is also a power given by sec. 62 to the Court of Revision, before or after the 1st of June, and with or without any notice, to receive and decide on any petition from any person who, by reason of gross and manifest error in the roll as finally passed, has been overcharged more than twenty-five per cent.

Whatever may be the practice of these courts of revision as to making lists of particular complaints and entering a special adjudication in each, the statute does not seem to require it. The direction is merely that after hearing the complaint the court shall determine the matter, and *confirm* or *amend* the roll accordingly. They need not decide it in complainant's presence. If they accept his complaint of overcharge, they must of course alter and amend the roll; if their view be adverse to him, they leave the roll unaltered, and finally pass it in that state. I feel great difficulty in saying that the latter course is not a determining of his complaint. It may be very inconvenient, but is it unlawful?

If the appeal to the county judge should take place whilst the roll is still before the Court of Revision as each case is decided, then I at once concede that there must be an independent adjudication on each case. But it is not so.

A number of persons come before the court complaining of overcharge, and asking to have the amount stated in the roll reduced. Out of, say, fifty appeals the court accede to the cases made by twenty applicants, and then, under the statute, the amount in the roll is altered accordingly. As to the remaining thirty persons they are heard, and nothing is then decided. The court may remark to some parties that they will further consider it, to others that they will consult their solicitor. They may do so or may not, as they please. The same day, next day, or at some subsequent day, they direct the clerk to certify the roll as finally passed, and he so certifies it, leaving the thirty applicants' assessment unaltered. This seems to me a statutable rejection of the appeals.

Nor do I see how the fact of the clerk swearing that in fact no particular consideration was given to any one or more of the appeals after the day of hearing can affect the act. The whole point seems to me to be, has the roll been altered, or has it been confirmed in its original state. I have no right to prescribe any particular form of confirmation, when the very act of passing and certifying the roll to all intents and purposes necessarily leaves the first amount unaltered and confirmed; in other words, unless the court, after hearing the appellants, alter the roll before finally passing it the appeal fails, and the first assessment stands. The alteration is the active result of the appeal: the non-alteration or passing the roll without alteration, is the opposite result, equally indicative of the judgment or decision of the appeal.

The plaintiffs then are aware, or we must assume them to be aware, that the roll must be finally passed by a specified day. When passed, their assessment, reduced or left unreduced, must be in it. They must know that all appeals therefrom are heard by the county judge, who must do all his part by the 15th of July. It was just as easy for them to enquire from the clerk if the roll were finally passed and certified, as to ask if their claim was disposed of. After all appeals to the county judge are heard and known to be finally disposed of, and the general assesment of the city, necessarily including this case, reduced or confirmed, and when I think the plaintiffs should be held bound to understand their position, in the month of October, they are shewn by the collector the usual schedule of their taxes, headed "as settled finally by Court of Revision," and then pay the amount. I have been unable to bring myself to the conclusion that money so paid can be recovered back.

DRAPER, C. J.—The only question requiring consideration is whether by the Assessment Law the plaintiffs are concluded from denying the finality of the assessment roll as to their liability to the amount and value of their property, liable to taxation for the year 1864.

The right to recover back the money paid is, I think, clear, if this difficulty be surmounted. In *Townsend* v. *Crowdy* 8 C. B., N. S. 493. Williams, J., observes, that at one time the rule that money paid under a mistake of facts might be recovered back was subject to the limitation that it must be shewn that the party seeking to recover it back has been guilty of no laches.

But since that time the case of *Kelly* v. *Solari* 9 M. & W. 54, it has been established that it is not enough that the party had the means of learning the truth if he had chosen to make an enquiry. The only limitation now is, that he must not waive all enquiry. Nearly all the cases on the subject are collected in *Holland* v. *Russell*, 4 B. & S. 14.

Then as to the Consol. Stat. U. C. ch. 55. After creating the Court of Revision to try all complaints in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum, it provides (sec. 60, sub-sec. 1) that any person complaining (among other things) as having been overcharged, may give notice to the clerk of the municipality, who is to post up a list of complaints, with an announcement when the court will be held to hear them (sub-sec. 3), and shall give certain prescribed notices. The court, after hearing upon oath the complainant and the assessor, and any witness adduced, "shall determine the matter, and confirm or amend the roll accordingly" (sub-sec. 12); and (sec. 61) "the roll as finally passed and certified by the clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any 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, which appeal is given by sec. 63; and certain prescribed notices having been given, "the judge shall hear the appeals, and may adjourn the hearing from time to time, and defer the judgment thereon at his pleasure, so that a return can be made to the clerk of the municipality before the 15th of July," and his decision is conclusive; and when after this appeal the roll shall be finally revised and corrected, the clerk of the municipality shall without delay transmit to the county clerk a copy thereof.

The appeal to the county judge cannot take place until the Court of Revision has decided upon the appeal to them, and their determination on each appeal to them is a part of the duty imposed upon them by sub-sec. 72 of sec. 60, and the performance of that duty must necessarily precede any confirming or altering the roll. It would be a singular construction of the powers of the Court of Revision, upon any appeal made to them by a ratepayer, which would enable them to withhold giving a decision and yet to confirm the roll as prepared by the assessor as if no appeal had been made. Nevertheless, that appears to be the result of the contention of the defendants.

I think it is more consistent with the expressed intention of the act to hold that an appeal made to the Court of Revision must be determined in some way: that to abstain from determining is no determination; and that such withholding or abstaining from a determination, and then finally passing the roll as if no such appeal had been made, is not a "defect or error committed in or with regard to such roll."

Even if the want of a determination had arisen from accident or oversight, I should incline to this conclusion; but where the facts tend to establish that it was not overlooked, and no explanation of any kind is even suggested, I feel compelled to decide that no ratepayer can be thus deprived of his appeal and at the same time be bound by the assessment complained against. It may happen, as was pointed out on the argument, that a ratepayer under such circumstances would escape paying anything for that year, but conceding, without adjudging, that such a consequence must follow, it is the omission of the Court of Revision which causes it, in neither confirming or correcting the roll *quoad* his appeal. As to his assessment they have done nothing, and as to him, therefore, they have not passed the roll so as to bind him, though the other portions of the roll may be held to be final and conclusive.

I think this rule should be discharged.

My brother Hagarty's judgment has not changed my opinion. The Court of Revision, according to the evidence, had an established course of procedure in disposing of appeals from the assessor's entries on the roll, for they had a book kept in which all their decisions on such appeals were entered, and it is sworn there is no entry of any such decision on this appeal. And, further, their own clerk has sworn that no such decision was ever pronounced. When it appears that a similar assessment had been made for some years preceding, and that the Court of Revision had invariably upheld the settlement and decided against the appellants, on which the judge of the county had been appealed to, and had uniformly, on a clear intelligible principle, decided that the assessment was wrong, and had reduced it accordingly, I think that I am warranted in holding that the evidence of the clerk and of the non-entry of a decision is decisive that this appeal of the plaintiffs never was determined. I did not understand their counsel on the argument to suggest even that he should succeed on this ground, though he argued strenuously that the circumstances under which the money was paid deprived the plaintiffs of any right to recover it back. I think in this case the whole weight of evidence establishes the negative proposition—namely, that the Court of Revision did not determine this appeal at all; or, put affirmatively, that, whether designedly or no, they withheld a decision. I cannot, in the face of the facts as I understand them, hold that by the pure force of the words of the statute the Court of Revision, by doing absolutely nothing, have confirmed the assessor's roll.

Morrison, J.—I entirely agree with the judgment of the learned Chief Justice. I have merely to add that, in my opinion, when a person assessed appeals against the assessment a duty is imposed upon the Court of Revision to try the complaint, and the appellant is entitled to the opinion and decision of the court on the matter appealed against before he can be made liable to any taxes arising from the assessment, and until it is determined one way or the other, the assessment against the appellant is in effect withdrawn from the roll. I cannot assent to the view urged by the defendants, that if a matter appealed has not been decided by the court in fact, it is nevertheless by implication of law decided and determined by the clerk certifying the roll as passed: in other words, that the Court of Revision has given its decision, although in truth the court after hearing the appeal refused or neglected to determine it. The whole tenor of the provisions relating to the Court of Revision and its proceedings is, in my opinion, against such a construction; and if such was the intention of the legis-

lature, I cannot help thinking that apt words would have been used to indicate it.

Although this court will not direct in what manner the Court of Revision should promulgate its determination, it manifestly appears by the 63rd section that legislature intended it should be done in some way analogous to the course adopted by other courts, so that the appellant (in the words of the statute) if dissatisfied with the decision may appeal therefrom, and give the three days' notice thereafter to entitle him to the appeal to the county judge. If the defendants' contention be right as to a decision by implication, the 63rd section should have further provided for the notice in that case being given within three days after the roll being finally passed. It may be said, that it is a hard case if a rate-payer can escape taxation by the neglect of the Court of Revision; but it would be a still greater hardship if a person wrongfully assessed is made liable to pay taxes through the neglect, wilful or otherwise, of the court.

If the law is defective, it is for the legislature to provide the remedy. Were we to hold that what the defendants contend for is right, it would, in my judgment, open the door to a system of procedure in those courts liable to abuse and productive of injustice to appellants, and which in effect would shift the labor and responsibility to the county judge, compelling parties aggrieved to give two sets of notices of appeal and to incur costs—matters never contemplated by the legislature, except in appeals against actual decisions of the Court of Revision.

As the statute in some respects admits of different constructions, and the matter is one which annually affects all persons of property, it is to be hoped that measures will be taken to render the intention of the legislature plain to the members of the Court of Revision, a body who are continually changing, and who cannot be expected to be conversant with the expounding of statutes where the intention is not clearly expressed.

Rule discharged—*Hagarty*, J., dissenting.

THE QUEEN v. THE COURT OF REVISION OF THE TOWN OF CORNWALL.

Assessment—Court of Revision—Six days' notice of appeal to—Waiver—C. S. U. C. ch. 55, *sec.* 60—*Mandamus.*

An elector served the clerk of the municipality with notice that several persons had been wrongfully inserted on the assessment roll, and others omitted, or assessed too high or too low, and requesting the clerk to notify them and the assessor when the matters would be tried by the Court of Revision. On the 22nd of May the Court met, when it was objected for the parties named that six days' notice had not been given, but only five. The Court then adjourned until the 30th, directing proper notice to be given, which the clerk omitted to do, and in consequence they refused on the 30th to hear the appeal, and finally passed the roll. On application for a mandamus to compel them to hear and determine the matters,

Held, that they were right, the six days' notice being imperatively required by the act; and that the appearance of the parties by their counsel to object to the want of such notice was not a waiver of it.

Semble, that, if this were otherwise, the proper course would have been a mandamus to the Mayor to summon the Court of Revision, under sec. 55 of the Assessment Act.

[Q. B., H. T., 1866.]

In Trinity Term last *M. C. Cameron*, Q. C., obtained a rule for a mandamus nisi, directed to the Court of Revision for the municipality of the town of Cornwall, commanding that court to hear and determine the complaint of Wm. Cox Allan, an elector and councillor of the town of Cornwall, against the assessment and non-assessment of the persons mentioned in certain notices served by the relator on the clerk of the municipality on 13th of May last, and filed on this application.

The affidavit of the relator set out that he was an elector, &c.: that on the 13th of May last he served the clerk of the municipality of the town of Cornwall with four notices in writing, signed by himself, copies of which were attached to the affidavit filed.

The first notice complained that 77 persons named therein were wrongfully inserted in the assessment roll for the year 1865, and it requested the clerk to notify the parties and the assessor of the time when the matters would be tried by the Court of Revision. The second notice complained that 37 persons therein named had been omitted from the roll. The third notice complained that 21 persons therein named had been assessed too low; and the fourth notice complained that 13 persons named therein were assessed too high. The three last also requested the clerk to notify the parties, as stated above in the first notice.

On the 22nd of May the Court of Revision, consisting of John S. McDougall, Donald McMillan, John Hunter, Andrew Hodge, and John McDonald, met at the Town Hall, the relator being present and prepared to prove the truth of the matters of appeal notified by him to the clerk: that Messrs. John B. McLennan and Jacob F. Pringle, Barristers, appeared on behalf of the persons mentioned in the notices of appeal, and objected that as the parties had not six days' notice before the 22nd of May, the court had not then jurisdiction to hear the appeal. And the relator's affidavit stated as a fact that the notices were only given five days before the 22nd of May: that the assessor was present and made no objection: that the Court of Revision refused to hear the appeal on the ground taken by the counsel for the parties: that when the court adjourned on that day, the chairman announced that new notices should be given to the parties and the assessor, and that there was time enough to give such new notices for the 30th of the same month, when the appeals should be heard on that day: that on the 30th the court met: that the relator was present, and was ready to proceed, but that the clerk announced to the court as a fact that he had not given the new notices, and the court refused to hear the appeals, and directed the clerk to endorse upon the assessment roll a certificate that the roll had been finally revised, which the clerk did.

Mr. Bethune, the relator's solicitor, made an affidavit corroborating the relator's affidavit, and setting out that the five persons named above constituted the court of Revision.

During last Michaelmas term the Court of Revision made a return to the writ as follows:—

In the Queen's Bench.

The return of the Court of Revision of the corporation of the town of Cornwall to the annexed writ of mandamus nisi.

"We, the said Court of Revision, do make the following return to the said writ:—

"We cannot, as we are by the said writ commanded, try and determine whether James P. Whitney," &c., &c., "or any of them has or have been wrongfully placed upon or inserted in

the said assessment roll, or whether the said William Fontain," &c., &c., "or any of them, have or has been wrongfully omitted from such roll; or whether the said James McDonald (Athol)" &c., &c., "or any of them, have or has been assessed at too high a sum upon such roll; or whether Oliver King," &c., &c., "or any of them, have or has been assessed at too low a sum; nor confirm and amend the said assessment roll: because the said complaints in the said writ mentioned have never been submitted to us in manner and form as is required by the Consolidated Statutes of this Province respecting the assessment of property in Upper Canada, and chaptered 55, it appearing to us at our meetings held on the 22nd and 30th days of May last, for the purpose of trying all complaints against or appeals from the said assessment roll, and of finally revising the same, that no notices or no sufficient notices had been served on James P. Whitney and the other persons aforesaid; as required by the said statute, and that we therefore decided that by reason of the insufficiency of the said notices we had no power or jurisdiction to try and determine the said complaints, and because the said complaints against or appeals from the said assessment roll having failed on account of the want of proper notice, and no other complaints against the said assessment roll or appeals therefrom having been submitted to us, and the time allowed us by the said statute for revising the said assessment having then elapsed, the said assessment roll was on the 30th day of May aforesaid finally revised by us and certified by the clerk of the corporation of the said town of Cornwall, as required by the said statute. And because the judge of the County Court of the United Counties of Stormont, Dundas and Glengarry, on the said complaints in the said writ mentioned being duly submitted to him by way of appeal from our said decision in respect to the said appeals, after having heard counsel upon and duly considered the said appeal, decided that owing to the insufficiency of the said notices he had no power to reverse our said decision. We further return, as we believe the fact to be, that the proceedings taken by us in respect to the said assessment roll were regular and in accordance with the requirements of the said statute, and we could not have taken any other course or decided differently than as aforesaid in respect to the said complaints against or appeals from the said assessment roll without contravening and disregarding the said statute, as we were and still are of opinion that the wording of the said statute is imperative. And we have now no power, and we humbly submit that we should not be compelled by the peremptory order of this honourable court, to try and determine the said complaints, or again to revise the said assessment roll.

All which we humbly submit as our reason and excuse for not trying and determining the said complaints, as by the annexed writ we are commanded.

Dated this 18th day of November, A.D. 1865.

By order of the said court.

(Signed) JOHN MACDONALD,
Chairman of the said Court of Revision.

In the same Michaelmas term, on motion of Mr. Kerr, counsel for the relator, a rule *nisi* was granted calling upon the Court of Revision to shew cause why the return should not be quashed, on the following grounds :—1st. The return sets forth that the complaints were not heard, and that at the same time they were decided, and that the judge of the County Court refused to revise such decision. 2nd. That the return states that no notice or sufficient notice was given, and admits that notice to the clerk was given, which was all the notice required. 3rd. That the return sets forth that the time had elapsed for revision of the roll when the same was revised. 4th. The return does not shew what notice was given, or its nature, but simply it appeared to the court the notices were insufficient;—and to shew cause why a mandamus absolute should not issue, &c.

During the same term *C. S. Patterson* shewed cause, citing *In re the Judge of the County Court of Perth and J. L. Robinson*, 12 U. C. C. P. 252; *The Queen* v. *The Mayor of London*. 13 Q. B. 30; *The Queen* v. *St. Saviour's, Southwark*, 7 A. & E. 925; *Regina* v. *Justice of Yorkshire*, 13 Jur. 447; *Regina* v. *Payn*, 3 N. & P. 165; Tapping on Mandamus, 372.

M. C. Cameron, Q. C., and *Kerr* supported the rule, and cited *The Queen* v. *The Mayor of Rochester*, 7 E. & B. 928; *In re. Justices of York and Peel ex parte Mason*, 13 U. C. C. P. 159; *Rex* v. *The Mayor of York*, 5 T. R. 66; *Rex* v. *The Mayor of Lyme Regis*, 1 Doug. 79.

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

The substantial question raised by this application is whether the ground submitted by the defendants for not hearing and proceeding to the trial of the matters complained of by the relator: viz., that due notices were not given to the parties in accordance with sub-sec. 10 of sec. 60 of the Assessment Act, was a sufficient and valid reason.

By sec. 58 it is provided that at the times or time appointed the Court (of Revision) shall meet and try all complaints in regard to persons being wrongfully placed upon or omitted from the roll, or being assessed at too high or too low a sum. By sub-sec. 2 of sec. 60, if a municipal elector thinks that any person has been assessed too low or too high, or has been wrongfully inserted on omitted from the roll, the clerk shall, on his request in writing, give notice to such person, and to the assessor, of the time when the matter will be tried by the court, &c; and by sub. sec. 7 the clerk shall prepare a notice according to the form therein set out for each person: and the 8th and 9th sub-sections provide the mode by which the clerk shall effect service on residents and non-residents; and by sub-sec. 10, it is enacted that every notice required by those sub-sections "shall be completed at least six days before the sitting of the court."

It appears that the court met on the 22nd of May, and it was then objected by counsel for the parties, and was admitted, that the six days' notice had not been given, the fact being that only five days' notice had been given. The court gave effect to the objection and declined to hear the matters of complaint; and the court before it adjourned announced that it would again meet on the 30th of May: that in the mean time new notices could be given, there being sufficient time for that purpose, and that the appeals would then be heard. It does not

appear that the relator in the interim took any step with a view of having new notices served, but he attended the court on the 30th, when the court, being informed that no notices had been given, decided that it had no jurisdiction to try the matters; and the roll was finally revised under the 59th section.

We cannot say that the decision of the Court of Revision is erroneous. It was argued on the part of the relator that the neglect of the clerk, or a failure by him in the performance of his duty, ought not to have prevented the complaints being heard, and that all that was incumbent on the relator was to make a request, under sub-sec. 2, to the clerk. Upon an examination of sec. 60, and its subsections 2, 7, 8, and 10, which bear on this application, we find that they are all imperative by force of the Interpretation Act, and when we consider the object of the complaints made by the relator, we cannot overlook the plain words of the statute. The legislature clearly intended that in all cases of objection by third parties, a notice of complaint must be given to the party complained against at least six days before the sitting of the court at which it is to be heard, and that such notices should be prepared and given in due time by the clerk.

It was also argued that as the parties by their counsel appeared before the Court of Revision, they waived any objection to the notice, and that the court should have proceeded to hear and determine the complaints. At first we thought there was something in the argument, but after a good deal of consideration we do not think we are at liberty to decide, in the face of a plain enactment which declares that six days' notice at least shall be given, that because a party appears to state that he has not had the notice required by the statute, that in that case five or a less number of days is sufficient, and to hold that his protest of not having notice is a waiver of it, and that, in a proceeding the object of which is to deprive him of a franchise or right, or to make him liable to taxes or to increase them.

If the parties complained against did not appear on the 22nd May, it would have been the duty of the court, before proceeding *ex parte*, under the 13th sub-section, to have ascertained whether due notice had been given to the respective parties, and if it appeared that only five days' notice had been given it would hardly be contended that the court could have heard the appeals; and surely, if their counsel appeared to notify the court of the want of notice, they should not therefore be placed in a worse position. The language of the act is plain and unambiguous. If the mode of proceeding provided by the statute is insufficient or inconvenient or open to abuse, the remedy is with the legislature. For this court to say that five days' notice or any less number is sufficient, would be to assume a legislative authority.

By the 171st section of the Assessment Act, if the clerk refuses or neglects to perform any duty required of him by the act, for every offence he shall forfeit $100; and by the 173rd section if he wilfully omits any duty required of him by the act he shall be guilty of a misdemeanor, and liable to a fine of $200 and imprisonment. As Lord Denman said in *King* v. *Burrell* 12 A. & E. 467 these are "wise and prudent provisions to secure the due execution of the act, by officers whose duty it is to learn their duty, and to do it accordingly."

We are therefore of opinion that the rule should be discharged, as the defendants in our judgments properly decided that they could not hear and determine the matters of appeal and complaint.

If the relator had made out a case for our interference, and it appeared that the want of the remedy would be injurious to the municipality, we are not prepared to say that a mandamus to the Court of Revision would be the proper proceeding, for by the 59th section of the statute it is enacted that all the duties of the court which relate to the revising of the rolls shall be completed, and the roll finally revised by the court, before the 1st of June in every year. Here they were finally revised on the 30th of May. The proper course, we think, would be found to be a mandamus to the Mayor to summon the court to meet (under the authority given him by the 55th section) with a view to hear and determine the matters complained of, due notices being first given to the respective parties.

Rule discharged, with costs.

ELECTION CASE.

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

REG. EX REL. ROSS v. RASTAL.

Statement of relator's interest—Disqualification—Costs.

The statement of a relator in a *quo warranto* matter alleged that he had "an interest in the said election as a voter," and his affidavit stated that he had voted "at said election, but not for said William Rastal."

Held, that the relator's statement and affidavit were sufficient, and that his interest sufficiently appeared.

The defendant granted a lease to the corporation for five years, which lease, together with the premises therein mentioned, and the benefit therefrom, he conveyed to R. S. Rastal a few days before the election. The assignment was, however, encumbered with a condition to refund the consideration money on certain contingencies, and no reversion was conveyed by the assignment.

Held, the defendant was disqualified, and a new election was ordered, with costs to be paid by the defendant and the relator.

[Common Law Chambers, February, 1866.]

This was a *quo warranto* summons calling upon the defendant to shew by what authority he exercised the office of one of the council for the village of Kincardine, and why he should not be removed therefrom.

The statement of the relator alleged that he had "an interest in the said election as a voter." In his affidavit annexed to the statement referring to himself as the relator, he deposed to a search for Rastal's declaration of qualification as councillor for said village of Kincardine for the year 1866; a copy of that declaration was annexed to the affidavit, dated 15th January, 1866, in which Rastal, the defendant, swore to being qualified for the office for 1866, "to which he has been elected." The relator's affidavit then proceeded to declare his interest in the said election as a duly qualified voter, and that he voted "at said election, but not for said William Rastal."

The affidavits shewed that Rastal did on 14th December, 1863, grant a lease to the corporation of certain property for five years from December 1863, at a yearly rental of $40, with the usual covenants, and that this lease is still in full force.

By an assignment produced, executed 29th December, three or four days before the election, the defendant bargained and sold to one R. S. Rastal for $160 the premises comprised in the lease, together with the lease and all benefit thereunder, to hold for the residue of the term, and other the estate, right of renewal, if any, and other the assignor's interest therein, subject to the payment of the rents and observance of the lessees covenants. It stated that the lease was already subject to an "endorsation" made by defendant to one Hopkins, living in the United States, and that if that endorsation had the effect of preventing the assignee from collecting the rents during the residue of the term, then the defendant agreed to refund the consideration paid, or such part as assignee could not collect on account of any act of lessor. The lease was stated therein to be in the hands of Hopkins' agent.

By the lease the corporation covenanted to pay rent and taxes, and to repair and keep up fences, and that lessor might enter and view state of repair, and would not sublet without leave, and leave in good repair, and not carry on any business to create a nuisance. Proviso for re-entry on breach of covenant by lessor for quiet enjoyment.

S. Richards, Q.C., shewed cause, and objected that the above statements by the relator might mean *any* election; that the relator cannot himself prove this; that the relator's interest did not sufficiently appear, and that as far as the disqualification by means of the contract was concerned, that the defendant ceased to have any interest in the contract by reason of the assignment of the 29th December.

C. Robinson, Q.C., supported the summons, and urged that the statement was sufficient, and that the interest of the relator sufficiently appeared, and that Rastal was disqualified as having an interest in a contract with the corporation.

HAGARTY, J.—I think on examining the papers that the statement is made with reasonable clearness, and also that the relator's affidavit to establish his right to interpose is sufficient.

No reversion is conveyed by the assignment referred to. It is a strangely drawn instrument, not of common occurrence. It would doubtless authorize the assignee to receive the rents. But the defendant remains bound under his original covenant in the lease to the corporation, and this personal liability remains unaffected by the assignment whatever may be its true effect. If so it is difficult to see how he can be held to be any other than a person having an interest in a contract with the corporation.

I think I am bound to hold that the defendant is disqualified, and must be removed from office and a new election had.

As to costs I would be reluctant to compel him to pay them if it were not that I cannot help feeling that he became a candidate knowing perfectly well that a question might arise as to this lease, and the time and manner of the assignment on which he relies raise an impression not wholly favourable to him.

I think he must pay the relator's costs.

COMMON LAW CHAMBERS.

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

LOCKART v. PHALIRA GRAY—POTTAGE GARNISHEE.

Con. Stat. U. C., cap. 19, *secs.* 176, *&c.* — *Statute of Anne—Claim by landlord to rent, on execution against tenant—Division Court bailiff—Attachment of debts.*

Where an execution creditor has under the statute of Anne paid rent demanded by a landlord upon an execution against the goods of his tenant upon the premises of the former, and the sheriff levied as well for the rent as the execution debt, the sheriff becomes the debtor of the execution creditor for both sums and liable to him in an action for money had and received.

And so under the Division Courts Act, the bailiff of a Division Court would in a like case, also be liable, and therefore the execution money in his hands might be attached as a debt due to the execution creditor, to satisfy the demand of another execution claimant against him

Semble, that money in hands of a Division Court bailiff may be attached.

[Chambers Jan. 26, 1866.]

The facts of this case were that Pottage, as bailiff of the 6th Division Court of York and Peel, had, in or about October 1864, certain executions in his hands as such bailiff, to be executed against the goods and chattels of one Albert Gray, a son of Phalira Gray above mentioned. When the bailiff seized under these writs, Phalira Gray claimed the goods as her own. An interpleader was thereupon tried in the Division Court, which was determined against her.

After the decision she gave notice to the bailiff that she claimed $200 for one year's rent, due to her by her son Albert Gray in respect of the premises upon which the goods had been seized. The sale of Albert Gray's goods took place in February, 1865.

Albert Gray denied owing his mother Phalira any rent at all. The bailiff denied that he sold for the rent claimed, and said he was served with the notice claiming rent before the sale, but that at the time of the sale, Phalira still claimed the goods as her own, and did not claim for rent at all. Affidavits were filed on each side.

It was admitted that the bailiff received notice of such a claim before he did sell.

C. McMichael, on behalf of the garnishee, Pottage, referred to the statute of Anne, and argued that rent even after it was due (which is said to have been the case here, if there was such a claim as rent at all) could not be attached in the hands of the bailiff or sheriff, because it was said the landlady could not sue for it as a *debt* owing to her by the bailiff or sheriff, her only remedy against the officer being for selling without leaving a sufficiency of distress upon the premises to satisfy the year's rent, and that as the landlady could not sue in such a case for a debt, the judgment creditor could not attach the moneyin the officer's hands.

Blevins, for the judgment creditor, contended that however, the law may be under the statute of Anne, it is different under the Division Court Act.

A. WILSON, J.—The question is whether there is such a difference as that contended for by the judgment creditor; if there be not, this application must fail.

The statute of Anne provides, "that no goods upon lands which are leased, shall be liable to be taken in execution unless the party at whose suit the execution is sued out, shall, before the removal of the goods from the premises, by virtue of the execution, pay to the landlord all such sums as shall be due for rent at the time of tak-

ing the goods by virtue of the execution, provided the arrears do not amount to more than one year's rent, and if they do, then the party at whose suit the execution is sued out, paying the landlord one year's rent, may proceed to execute his judgment as he might have done before the act; and the sheriff, or other officer is hereby empowered and required to levy and pay to the plaintiff, as well the money so paid for rent, as the execution money."

The Division Court Act provides, (sec. 176), that so much of the statute of Anne, as relates to the liability of goods taken by virtue of an execution, shall not apply to goods taken in execution under the powers of any division court. But the landlord of any tenement in which any such goods are so taken, may, by writing under his hand stating the terms of holding, and the rent payable for the same, and delivered to the bailiff making the levy, claim any rent in arrear, then due to him, not exceeding in any case the rent accruing due in one year.

Sec. 177. In case of any such claim being so made, the bailiff making the levy shall distrain as well for the amount of the rent, claimed and the costs of such additional distress as for the amount of money and costs for which his warrant of execution was issued.

Sec. 180. No execution creditor under this act, shall satisfy the debt out of the proceeds of the execution and distress, or of execution only when the tenant replevies for the distress, until the landlord who conforms to this act, has been paid the rent in arrear for the periods hereinbefore mentioned.

Under the statute of Anne, it has been decided that an action for money had and received will not lie by the landlord against the sheriff for money made by the sheriff when he has an execution against the tenant's goods, and sells for enough to satisfy the rent as well as the execution.

This statute does not empower the sheriff to sell for, or on behalf of the landlord, it excuses the sheriff from selling at all when rent is claimed, until or unless the execution creditor shall pay the rent, and then it empowers the sheriff to sell for his benefit as well for the rent as for the execution money; while under the Division Court Act, the bailiff sells for, and on behalf of the landlord as upon a distress, and the creditor is not to be paid his debt until the landlord has been paid his rent.

It is true that under the statute of Anne, neither the sheriff nor the execution creditor, before levy, actually pays the landlord his rent, yet the sheriff sells for enough to satisfy both rent and execution money; but in strictness the sheriff cannot be called upon as a debtor by the landlord to pay over the rent; the remedy must be in another form.

In case the execution creditor has under the statute of Anne paid the rent, and the sheriff under the express terms of that act, does levy for the plaintiff as well the rent as the execution money, I concieve there is not the slightest doubt that the sheriff becomes a debtor to the execution creditor so paying such rent as well for the rent as the execution debt which he levies, and makes for him and under his express direction, and by the authority of the statute and of the writ.

In such a case, the creditor might sue the sheriff for money had and received, and so it would seem to follow that this money may be attached as a debt due to this execution debtor to satisfy a demand of another execution claimant against her.

I think that the present judgment debtor, Mrs. Gray, the landlady for whom the rent was made —assuming it to have been made for her—has a claim for debt against the bailiff, and could maintain an action against him for money had and received in respect of this rent, and therefore the claim is one which can be attached to satisfy her judgment debts.

It was not argued before me whether money in the hands of the bailiff could or could not be attached. I see it laid down in the practice that it is attachable; and I see no reason or principle why it should not be, and I do not therefore feel this to be a difficulty in my way.

As before stated, the two facts of rent being due at all, and whether the sheriff sold for it, and made it, are strongly disputed. As I cannot determine these points, and have not sufficient information before me if I desired to do so, I must therefore order that the judgment creditor may proceed against the garnishee under the 291st sec. of the C. L. P. Act.

Costs to abide the result of that proceeding.

ENGLISH REPORTS.

COURT OF EXCHEQUER.

HARDING v. HALL.

Distress—Bailiff—Right to sell for expenses.

A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is then withdrawn, has no right to go on and sell for his expenses.

[April 18, 1866, 14 W. R. 646.]

This was an action for the conversion of two horses and a waggon, and the question in dispute was whether they were the property of the plaintiff, or had passed to the defendant by a valid sale.

The case was tried before Pigott, B., at the last Staffordshire assizes. The plaintiff was the father-in-law of one Barton, and took a bill of sale of Barton's effects, including the property in question. Barton's landlord also put in a distress for rent, and the bailiff who distrained seized the goods in question with other goods on the premises. The bailiff held the goods on behalf of the landlord, and also of the plaintiff, as the bill of sale creditor. The attorney, who acted both for the plaintiff and for the landlord, then paid out the landlord, and directed the bailiff to withdraw on behalf both of the landlord and the plaintiff. A dispute then arose as to the fees payable to the bailiff, and whether he was entitled to double possession-money or not. The bailiff thereupon removed the horses and waggon, and sold them to pay his fees and expenses. The defendant became the purchaser at the sale. The learned judge directed the jury that the bailiff had no right to sell, and a verdict was found for the plaintiff, with leave to move to enter a verdict for the defendant if the bailiff had power to sell.

H. Matthews now moved accordingly—There is no direct authority upon the question. But a sheriff may sell for his poundage, although ordered to withdraw by the execution creditors, *Alchin* v. *Wells*, 5 T. R. 470; Watson on Sheriffs, 83. And the case of a bailiff is analogous.

[POLLOCK, C B.—The bailiff and the landlord are but one person; the sheriff and the creditor are two.] The sheriff can only levy his expenses by statute; and the right is given for the benefit of the creditor, not the sheriff, so that the cases are not analogous.

POOLLOCK, C. B.—We are all of opinion that there ought to be no rule in this case. The question arises thus; The landlord gave his bailiff an authority to distrain. The bailiff does so, and takes the horses and waggons. Before more is done he receives notice from the landlord that the rent is paid. After that it is clear that he had no authority to sell, and therefore the defendant has no title.

MARTIN, B.—I am of the same opinion.

BRAMWELL, B —I am of the same opinion. The bailiff had no right to sell, for his authority was withdrawn. As to the case of *Alchin* v. *Well*, Mr. Matthew's argument is, first, that the sheriff has a right to sell under these circumstances; and secondly, that the case of a bailiff is analogous. But *Alchin* v. *Wells* fails to establish the first of these positions. It only decides that the Court would not actively interfere against the sheriff by ruling him to return the writ: not that he was not a trepasser, or had any right to sell. And I think it clear that he had none. But, at any rate, a bailiff is a mere agent for a principal, and must look to his principal for his remuneration. It would be absurd, when the landlord may distrain in person, if his employing a bailiff should make any difference. The defendant therefore, has no title.

PIGOTT, B.—I was clearly of opinion at the trial that the bailiff had no right to sell; and I think so still.

Rule refused.

CHAPMAN v. GWYTHER.

Warranty—Sale of a horse.

A horse was sold on a warranty in the following terms:—"C. bought of G. a brown horse, six years old, warranted sound, for the sum of £180, also a bay horse five years old for the sum of £90, warranted sound,
"Warranted sound for one month. "Signed, G."
The bay horse showed no signs of disease during the month after the date of the warranty, but subsequently a latent disease developed itself.
Held, that the warranty was only to continue in force for one month, and that no complaint having been made within the month there was no breach of the warranty.
The vendee paid vendor for the horse in question by a cheque to order endorsed as follows:—"This cheque is received by me for a brown gelding, price £180, also a bay gelding price £90, both of which animals I warrant sound for one month from date of delivery."
The vendor endorsed the cheque, but his signature was not under the warranty.
Held, that the endorsement on the cheque by the vendor was not a signature of the warranty endorsed thereon.
[Q. B., May 5.]

This case was tried before Blackburn, J, at Swansea Spring Assizes—verdict for plaintiff.

This was a rule to show cause why the verdict should not be set aside, and a nonsuit entered on the ground that on the true construction of the contract of the warranty there was no evidence to show any breach of contract.

Hawkins, Q C., *H. Matthews* and *J. Macrae Moir* now showed cause. They cited *Bywater* v. *Richardson*, 1 A. & E 508; *Mesnard* v. *Aldridge*, 3 Esp. 271; *Buchanan* v. *Parnshaw*, 2 T R. 745.

Giffard, Q.C., and *B. T. Williams*, in support of rule.

BLACKBURN, J.—This rule must be made absolute. We are all agreed which of the two writings was the contract. The indorsement of the cheque is only evidence of the original bargain, but the original contract of June 5 being produced we go by that. The real question raised is as to the meaning of the words "warranted sound for one month." Is the meaning that the horse was warranted sound and warranted to continue so for one month, which would be a very unlikely contract to make; or that "one month" is a qualification of the warranty. We are of opinion that the meaning is that the warranty was only to continue for one month, and that if no complaint was made in the one month there was no breach of the warranty. Warranted for one month means one month is the time during which complaints can be made.

MELLOR, J.—I am of the same opinion. At first I thought that the warranty was not sufficiently limited, but we must not take the words in the abstract, but as they are used in those transactions. The true interpretation of them is, that you shall have a month's time—I do not intend unlimited time for you to make complaint.

LUSH, J.—I am of the same opinion. The intention of the defendant was not to extend, but to limit, the time. If he had written merely "warranted sound," then damages might have been claimed at any time. This warranty means, if there is any dispute about this horse, it must be determined in a short time. It is a compendious way of putting it, but a class expression. That being the intention, are the words sufficient to express it? To the words "warranted sound for one month," we must supply other words—viz., "The warranty shall only continue in force for one month." The endorsement on the cheque has no effect.

Rule absolute.

CORRESPONDENCE.

Assessment—Appeal—Costs of serving notices—Bailiff of Division Court—Mileage—Several warrants of attachment—Bailiffs' duties.

TO THE EDITORS OF THE LOCAL COURTS GAZETTE.

GENTLEMEN,—In case a municipal elector feels himself aggrieved on account of some errors or omissions in the assessment roll, when returned by the assessors, and gives notice to the township clerk of his intention to appeal to the Court of Revision from such assessment, in order that he may have it corrected; and the clerk causes a notice (in the usual form) of such appeal to be served upon the parties appealed against, by hiring some person to serve such notices. Who is liable for the payment for serving such notices, is it the appellant, the municipal corporation, or is it the duty of the clerk to do it himself or to pay the person he may engage to make the

service. See Con. Stat. U. C. cap. 55, sec. 60, sub-secs. 2, 7 and 8.

2nd. Supposing a Division Court clerk should issue a summons to a defendant in the usual form, and also at the same time issue a warrant of attachment against the goods of same defendant. Both papers are given to the bailiff, he proceeds to execute them by making a seizure of the goods under the warrant of attachment, and at the same time serves the summons either personally or by leaving it at the defendant's last place of abode in the country (as the case may be), is the bailiff entitled to mileage on both the summons and warrant, or is he entitled to one mileage only, or in other words, the mileage actually travelled with both papers.

3rd. The bailiff makes a return of the warrant of attachment in due form, with appraisement of goods seized, and within thirty days one or more warrants of attachment are issued in favor of other plaintiffs to enable them to obtain a share of the goods so seized: in such a case would it be necessary for the bailiff to go through the form of seizing again the same goods and making a return with appraisement under each of the warrants, the same as in the first instance (thereby making more costs), or would the first seizure and return answer for all purposes required.

A SUBSCRIBER.

May 17th, 1866.

[1. It is made the duty of the clerk to cause the notice to be served, and he ought to be paid for his services by the Council. But there is an evident omission in the act, in not requiring that the party appealing should pay the expense of serving the notice. The Court of Revision does not appear to have any power to award costs to either party.

2. It is the common practice to charge mileage on both, and such is also the practice in sheriffs' offices generally. The tariff does not say anything which throws any light on the subject. Though the practice is in favour of the charge, the principle upon which mileage is allowed would seem to be against it.

3. The bailiff might give notice of the second or subsequent writ to the Clerk of the Division Court, if the goods are in his possession, and it would, perhaps, be advisable to perform some manual act of seizure under such writ; but a second appraisement does not seem necessary. In the bailiff's return to the writ, the act of seizure and the previous appraisement should be set forth.—EDS. L. C. G.]

By-law—Imposing toll on non-residents only.

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Can a township municipality legally pass a by-law imposing toll on non-residents using a road constructed in and at the expense of said township for the purpose of assisting in the repairing of said road, and exempting the residents of the township in which the road is situated, it having been originally built at the expense of said township. As this is a matter of public interest, and about which different views seem to prevail, I trust you will kindly favor with a reply in the next number of your very valuable Journal, and much oblige, gentlemen, your most obedient servant and subscriber,

THOMAS MATHESON.

Mitchell, June 2, 1866.

[We do not think the by-law, as stated by our correspondent, valid.—EDS. L. J.]

OBITUARY.

At Goderich, on the 19th instant, ROBERT COOPER, ESQ., Judge of the County Court for the United Counties of Huron and Bruce, aged 44.

APPOINTMENTS TO OFFICE.

NOTARY PUBLIC.

JAMES WATT, of Oil Springs, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted May 19, 1866.)

CORONERS.

JOSEPH A. FIFE, Esquire, M.D., to be an Associate Coroner for the County of Peterborough. (Gazetted May 5, 1866.)

GEORGE BRANT, of the village of Smithville, Esquire, to be an Associate Coroner for the County of Lincoln. (Gazetted May 5, 1866.)

TO CORRESPONDENTS.

"A SUBSCRIBER"—"THOMAS MATHESON"—Under "Correspondence."

GRAMMAR may, no doubt, sometimes render assistance to law by helping to the construction, and thereby to the meaning of a sentence; but grammar, with reference to a living and therefore a variable language, is perhaps more difficult to deal with than law, and the rules of legal construction are far more certain than the rules of grammatical construction. To resort to grammar where law fails, is frequently to decide *ignotum per ignotius*: (*Pollock, C. B.*, 31 L. J., N. S., 85, Ex.)