DIARY FOR FEBRUARY.

1. Wed. Last day for Co. Trea. to furnish to Ck of Mun. in Co's list of lands liable to be sold for taxes. Assessors to complete rolls, unless time ext.
2. Thur. Examination of Law Students for call to the Bar with Honors.
3. Frid. Examination of Law Stud. for call to the Bar.
4. Sat. Exam. of Art. Clerks for certificate of fitness.
5. SUN. *Septuagesima Sunday.*
6. Mon. Hilary Term begins. Articled Clerks going up for inter-examination to file certificate.
8. Wed. Inter-examination Law Students and Articled Clerks. New Trial Day, Queen's Bench.
9. Thur. New Trial Day, Common Pleas. Last day for setting down and giving notice of re-hearing in Chancery
10. Frid. Paper Day, Q. B. New Trial Day, C. P.
11. Sat. Paper Day, C. P. New Trial Day, Q. B.
12. SUN. *Sexagesima Sunday.*
13. Mon. Paper Day, Q. B. New Trial Day, C. P.
14. Tues. *St. Valentine.* Paper Day. C. P. New Trial Day, Q. B.
15. Wed. Paper Day, Q. B. New Trial Day, C. P.
16. Thur. Paper Day, C. P. Open Day, Q. B. Re-hearing Term in Chancery commences. Last day for service of summons for Co. Court, York.
17. Frid. New Trial Day, Q. B. Open Day, C. P.
18. Sat. Hilary Term ends. Open day.
19. SUN. *Quinquagesima Sunday.*
22. Wed. *Ash Wednesday.*
24. Frid. *St. Matthias.*
26. SUN. *1st Sunday in Lent.*
27. Mon. Last day for declaration County Court York.

The Local Courts'

AND

MUNICIPAL GAZETTE.

FEBRUARY, 1871.

GENERAL SESSIONS OF THE PEACE.

Jurisdiction in cases of Perjury.

Our attention has been called to the above subject by various articles that have lately appeared in our public papers, and by discussions that have taken place thereon. Upon looking into the matter, we are compelled to admit that it is a subject by no means free from doubt as to whether the Court of General Sessions of the Peace has power to try cases of perjury or not. We will endeavour, however, to give some idea of how the matter rests.

Our Act (Con. Stat. U. C. cap. 17) relating to General Sessions does not so much constitute a new Court, as continue and make valid the commissions and authority under which the Courts had been formerly holden, that is, prior to 41 Geo. III. It will be noticed that the County Courts, and some of the other Courts, have special acts, by which they were constituted Courts in Upper Canada; whereas, as mentioned before, Courts of Quarter Sessions were only confirmed and continued by the first act of our Legislature which specially refers to them. This being so, it becomes necessary to enquire under what authority were the Courts of General or Quarter Sessions in this country first held. We should say, by the act introducing the criminal law of England in this Province.

Now, our act respecting these Courts says nothing in reference to jurisdiction; in which case we must fall back on the English law, and ascertain what law governed the jurisdiction of Courts of General Sessions in England when the criminal law was introduced into this Province.

The Court of General or General Quarter Sessions of the Peace was established in England in the reign of Edward III, for the trial of felonies, and of those misdemeanors and other matters which justices of the peace, by virtue of their commission or otherwise, might lawfully hear and determine. The statute 24 Ed. III. cap. 1, states what offences may be tried by these Courts, and, after enumerating a large number of different classes of cases, goes on to say, "and to hear and determine all and singular the felonies, trespasses, &c., according to the law and statutes of England." There was some considerable doubt entertained as to what the words "felonies" and "trespasses" included, and what constructions ought to be placed upon them; but the authorities now seem to be agreed that, with the exception of *perjury at common law*, and *forgery at common law*, the Court of Quarter Sessions has jurisdiction of all felonies whatsoever—even murder (2 Hawk. P.C. cap. 8, sec. 63). It has been long ago settled that for perjury *at common law*, an indictment at the Quarter Sessions will not lie (see 2 Hawk. P. C. cap. 8, sec. 64; *R.* v. *Bainton*, 2 Str. 1088); but perjury *under the statute* 5 Eliz. cap. 9, is within the jurisdiction. In a case that came up before Lord Kenyon, C. J.: *R.* v. *Higgins*, 2 East. 5 (an indictment for soliciting a servant to steal goods from his master), it was argued that the case did not fall within the jurisdiction of the Sessions, but his Lordship said, "I am clearly of opinion that it is indictable at the Quarter Sessions, as falling within that class of offences which, being violations of the law of the land, have a tendency, it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction. Of this rule there are indeed two exceptions, namely, forgery and perjury;—why exceptions, I know not; but having been expressly so adjudged, I will not break through the rules of law." His Lordship, in referring

to the above exceptions, no doubt alluded to the *common law* offences, perjury under the statute of Elizabeth not having been decided to be without the jurisdiction.

Such being the state of the law when it was introduced into this country, has the jurisdiction of the Sessions been diminished or changed by any Provincial act?

But before going further, we may mention that the English law has been altered by Imp. Stat. 5 & 6 Vic. c. 38, s. 1, and the jurisdiction of the General Sessions greatly lessened. By that statute, among other crimes excepted from its jurisdiction, are the crimes of murder, perjury, subornation of perjury, forgery, &c.; but this statute having been passed long subsequent to the time when the English criminal law was introduced into Canada, does not affect our law on the subject. It may be said, from the fact of the crimes before mentioned being expressly excepted from the jurisdiction of the General Sessions, that the English Legislature considered that such crimes were not before then without the jurisdiction of these Courts; but this does not necessarily follow, as the law was very properly defined so as to prevent any doubt or uncertainty as to the jurisdiction.

If we, then, have no special enactment excepting these crimes, it would seem that, as regards them, the jurisdiction of General or General Quarter Sessions of the Peace still exists. The only act since the act first referred to (Con. Stat. U. C. cap. 17), bearing on the subject, is the act of 24 Vic. cap. 14, which abolishes the power of the Quarter Sessions to try treasons and felonies punishable with death. This act was, however, repealed by Dominion statute 32 & 33 Vic. cap. 36. The Dominion Act 32 & 33 Vic. cap. 29, sec. 12, withholds jurisdiction from the Sessions in cases of felony punishable with death, and libel; and cap. 21 withholds it in cases of fraud by agents, bankers, factors, trustees and public officers (*vide* sec. 92); and 32 & 33 Vic. cap. 20, in certain offences against the person, set forth in secs. 27, 28 & 29, withholds jurisdiction; so that, with these exceptions, the power of the Quarter Sessions is the same as before.

It will be noticed that the Act respecting Perjury (Dom. stat. 32 & 33 Vic. cap. 23, sec. 6), empowers the judge, &c., to direct that any person guilty of perjury before him shall be prosecuted, "and to commit such person so directed to be prosecuted until the next term, sittings or session of *any Court having power* to try for perjury." Now, the language of the English enactment 14 & 15 Vic. cap. 100, sec. 19, from which ours is taken, after providing that it shall and may be lawful for any judge, &c., to direct, &c., is as follows: "and to commit such person so directed to be prosecuted until the *next session of oyer and terminer or gaol delivery* for the county or district where," &c.; indicating that the jurisdiction over such cases in this country is not confined to the assizes only, as in England. From all which, we take the deduction to be, that in cases of perjury at common law, the Court of General Sessions of the Peace has no jurisdiction; in cases of perjury under the statute of Elizabeth (this statute relates to perjury by witnesses only) the Court has jurisdiction. In cases of forgery at common law, it has not jurisdiction: *R.* v. *Yarrington*, Salk. 406; *R.* v. *Gibbs*, 1 East. 173. As, however, the statute of Edward provides that if a case of difficulty arises upon the determination of the premises, that judgment shall in no wise be given unless in the presence of one of the justices of one or the other Bench, or of one of the justices appointed to hold the assizes, it is not at all probable that the justices sitting in General Sessions will take upon themselves to determine crimes of the more serious nature, but will exercise the power above given them of allowing such crimes to remain over for the judge holding the assizes.

We do not feel that we have arrived at a very satisfactory conclusion—certainly not at the generally conceived idea; but in view of the premises, we can form no other opinion on the matter.

It is not improbable that the jurisdiction of the Court of General Sessions will soon be fully settled by a decision of one of the Superior Courts of Common Law, as we understand a case was reserved lately by one of the County judges, upon the ground that he had doubts, and desired to have the opinion of the Court of Queen's Bench as to whether or not the Courts of General Sessions have jurisdiction in cases of forgery.

HASTY LEGISLATION.

Our attention has been called to this subject by one or two recent cases (*In re Mottashed and the Corporation of the County of Prince Edward*, 30 U. C. Q. B. 74; *In re Watts and In re Emery*, 6 C. L. J., N.S., 17) which may serve to indicate the importance of careful consideration before placing a new enactment upon our statute book, and the danger which exists, or may exist, if the ambition of our local Solons to do their part in making laws for the Province is not tempered and controlled by careful reflection.

It is no doubt a grand thing to have one's name thus associated with the history of the country, and to know that a grateful posterity will refer to Smith's bill on the dog-tax, or Jones' act for regulating the procedure in the election of fence viewers, with a feeling of reverential awe for the genius which suggested and the comprehensive ability which created such stupendous enactments; but our legal records are not without warnings from which we may learn to dread the *misera servitus* that must always exist where *jus est vagum*, and we have suffered more than once or twice already from the evil effects of hasty legislation. "It is seldom possible," says Lord St. Leonards, "to understand a repealing act, unless we have a competent knowledge of the law repealed," and, we may add, it is never wise to incorporate new provisions into the body of our statute law without first considering well the existing enactments upon the subject to be affected, and their relations to the change proposed.

Especially is this the case at present, when these enactments must be sought for through the sixteen or eighteen volumes of statutes which, with the two volumes consolidated in 1859, embody the results of legislative wisdom during the past twelve years; and in our own Province the dangerous possibility is now rendered even less remote by the absence of a second chamber, which should correct and control the legislation of our House of Assembly.

One among the many instances to which we might refer in justification of these remarks is afforded by the Act of 32 Vic. c. 32 (Ont.), entitled "An Act respecting Shop and Tavern Licenses," which amends and repeals several prior statutes, and is itself amended by the Provincial Act of 33 Vic. c. 28.

It would be unjust to the honourable framer of this bill to suppose that he was unacquainted with the previous enactments upon the subject, and indeed the 30th section of the Ontario statute is borrowed almost *verbatim* from the 29th section of the Statute 27, 28 Vic. c. 18, the well known Dunkin Act of 1864.

It seems, however, not a little singular that the existence of the prior enactment should have been in the later one so completely ignored that it is not once mentioned, although several of its provisions are directly affected by the constitutional change of 1867, and others are practically repealed by the Act of 1868-9.

By the first section of the Act of 1864 it is provided, that "the municipal council of every county, city, town, township, or incorporated village shall have power to pass a by-law for prohibiting the sale of intoxicating liquors" therein, and the subsequent sections (2-9) regulate the form, mode of passing, and time of coming into force of such by-law. By the sixth section of the Ontario Act this power is transferred to the Police Commissioners in cities, and the approval of the electors, in the case of such a prohibitory by-law, is to be signified in the manner provided by 29-30 Vic. c. 51, the Municipal Act of 1866.

The 10th section of the Dunkin Act provides for the concurrence of neighbouring municipalities, and is not, it appears, repealed by the Act of 1868-9.

The 13th section of the prior act fixes the penalty for each offence at not less than $20 nor more than $50, and provides (sec. 17, subsec. 2), that when several offences are included in one complaint the maximum penalty imposable shall be $100. By section 22 of the Ontario Statute it is enacted that the penalty for selling without license shall be, for the first offence "not less than $20 besides costs, and not more than $50 besides costs," for the second offence, imprisonment with hard labour for a period not exceeding three months, and for a third or any after offence, imprisonment with hard labour for six months.

By the Dunkin Act the prosecution must be brought "by or in the name of the collector of inland revenue within whose official district the offence was committed, whenever he shall have reason to believe that such offence was committed, and that a prosecution therefor can be sustained," &c. (sec. 14, sub-

secs. 1 and 2). Under the later statute, "any person may be the prosecutor or complainant" in every case, and "the prosecutor or complainant shall be a competent witness" (sec. 25), even though entitled to a part of the penalty (sec. 27).

By the Dunkin Act it is provided that "every such prosecution shall be commenced within three months after the alleged offence," (sec. 15); by the Ontario Act this is altered, in prosecutions for selling without license, to twenty days, (sec. 25,) and to two months in some other cases, (sec. 26). (See *Regina* v. *Mason*, 29 U. C. Q. B, 434.)

Under the Act of 1864 the penalty is to be disposed of as provided in sec. 34, sub-secs. 1-3: under the Act of 1868-9 one-half goes to the prosecutor and the remaining moiety to the Treasurer of the Municipality in which the offence was committed (sec. 31).

Any prosecution for an offence under the Act of 1864 "may be brought before a Stipendary Magistrate or before any two Justices of the Peace for the county wherein, &c., or before a Recorder or Police Magistrate, or the Mayor of a town not having a Recorder or Police Magistrate, (sec. 14, sub-sec. 3). The analogous case under the later Act, is governed by sec. 26, which provides that prosecutions for selling liquor contrary to a prohibitory by-law may be brought and heard before any *one* or more Justices or before a Police Magistrate, though in prosecutions for selling without license two Justices are still required to form the tribunal (sec. 25).

Sections 26 and 28 of the Dunkin Act which provide for the summoning and examination of witnesses, are not repealed by the Act of 1868-9, and might therefore, it is apprehended, still apply to cases coming under section 6, sub-section 7 of the Ontario Statute.

Section 36 of the Act of 1864 provides that no conviction, &c., shall be removed by *certiorari*, &c., and takes away the right of appeal to the Sessions except in certain cases. The Act of 1868-9 (sec. 36) allows an appeal except on conviction of selling *without license* or for keeping a disorderly house.

Under the Act of 1864 no liquor was to be sold or drunk on the premises in any case (except by a traveller or *bonâ fide* lodger,) from 9 P.M. on Saturday to 6 A.M. on Monday, except for medicinal purposes (sec. 44). The Ontario Act changes the hour of closing on Saturday to 7 P.M., and omits the enabling clause as to travellers and *bonâ fide* residents (sec. 23).

In default of payment of penalty and costs, power is given to the convicting Justice or Justices under either Act to issue a distress warrant or to order imprisonment in the county gaol — under the Act of 1864 for three months, and under the Provincial Act for thirty days; but under the latter Act this can only be ordered after it has been preceded by a distress, (sec. 31,) whereas under the earlier Statutes power was given the Justices to imprison in many cases in the first instance (secs. 30, 31).

The provisions of the Dunkin Act as to the liability of parties who supply liquor to intoxicated persons or after notice, remain, it appears to us, unaffected by our Provincial Statutes, and the clauses of the latter as to cases of compromise or composition have no equivalent sections in the earlier enactment.

The written authority required by sec. 45 of the Dunkin Act to entitle constables to enter an inn, &c., is, by sec. 29 of 32 Vic. c. 32, and its amending section, 33 Vic., c. 28, s. 8, apparently rendered unnecessary; but it is not expressly dispensed with, and a question might fairly arise upon the construction of the two enactments.

We have, we trust, said enough to render apparent the evil effect of such hasty legislation as is disclosed by the preceding remarks, and of allowing such sweeping generalities as "all other Acts or parts of Acts which may be inconsistent with this Act," to take the place of a more definite enumeration of the Statutes intended to be repealed. We venture to think our legislators would better fulfil their duty to their constituents and to the country, if, instead of occupying themselves, at the expense of their constituents, with matters which had much better be left alone, they did the existing Statutes the honour of reading and inwardly digesting them, before attempting to make new ones, and throwing, as they have done, upon the Bench and the Profession, the almost hopeless task of selecting from such a crude mass of chaotic contradictions, the *disjecta membra* of a system of Canadian jurisprudence.

SELECTIONS.

HUMOROUS PHASES OF THE LAW.

(*Continued from page* 6.)

If there is not now, there some time will be, a special department in lunatic asylums for the treatment of lawyers who have become insane in the investigation of the law of charitable trusts and religious uses, and especially in the endeavor to ascertain what is at present the rule on these subjects in this state. I have too much regard for my own reason and that of my readers to attempt any analysis of the legal situation of these questions, but will offer a few suggestions upon them in a moral point of view, or rather a legal-moral point of view, for law and morals are so bound together that it is difficult to separate them.

Some philosophers teach that every human action, even if it have the semblance of charity, springs from selfishness. Thus, if I give a beggar a sixpence, it is not on account of the beggar, but because it confers pleasure on myself. This is a hard view of human nature, but has some plausibility. It could hardly be on this theory alone that a rich man impoverishes his family by giving his estate to found a church or an hospital. Some other influence must enter into the operation, such as fear. The churchmen have always had such powers of persuasion, that it has been found necessary to check them by legal restrictions. Poverty was inculcated to certain orders of monks, no doubt the better to fit them as beggars. At all events their begging has always been remarkably potent and attended by most remarkable responses. They have prevailed on moribund and wealthy sinners with as much certainty, if not by the same means, as the highwayman in the ballad on the coachman; who

> "Put an ounce of lead in his nob
> And *purwailed* on him to stop."

Swinburne, who is one of the most entertaining writers in the world, gives, in his treatise on wills, the case of a monk, who came to a dying gentleman, to make his will. The monk asked the gentleman if he would give such a manor and lordship to his monastery. The gentleman answered yea. Then if he would give such and such estates to such and such pious uses. The gentleman answered yea, to them all. The heir-at-law, observing the covetousness of the monk, and that all the estate would be given from him, asked the testator if the monk was not a very knave, who answered yea. And upon the trial, for the reason aforesaid, it was adjudged no will. The New York legislature may have read or heard of this scene, for in 1848 they enacted that no testamentary gift to any benevolent, charitable, scientific, or missionary society or corporation shall be valid, unless the will be executed at least two months prior to the testator's death; and, if he leave a wife, child or parent, the gift shall be valid to the extent of one-quarter of his estate, but no more. In 1860 the extent to which such bequests are valid was enlarged to one-half the testator's estate, and literary and religious associations and corporations included within those provisions. This would have been an awkward provision for the benevolent gentleman who should desire to leave money to *portion deserving old maids*,* and let his own daughters pine in single-cursedness for want of portions; and to the other person, with a nautical passion, who should yearn to set up a posthumous *life-boat*,† compelling his boys to "paddle their own canoe;" or to a third, who having been possessed in life by "the root of all evil," should, when death approached, contemplate bestowing his estate to plant a *botanical garden*,‡ leaving his daughters to fade as wall-flowers, and his sons, having sowed their wild oats, to go to seed in perjury; all of which testamentary schemes have been held to come within the definition of charitable. Such testators ought to remember and act upon the adage, "Charity begins at home."

Those who build up great religious trusts, to the exclusion of family, should think upon the scripture: "If any provide not for his own, and specially for them of his own house, he hath denied the faith, and is worse than an infidel." If one were to believe all the clergy tell them, he must conclude that gifts to religion are the best pecuniary investments he can make in life. They tell us that the more money one gives away, the more money he will get in return. Now there are two objections to this argument of the church. First, it is a very sordid and mean appeal; and second, it is not true, in a pecuniary sense. "To him that *hath* shall be given." One should give to good objects according to his means, but let him not be urged by any such appeal to make an extravagant or disproportionate donation, however deserving the object. Let him not be seduced by those convenient blank forms of testamentary gifts, which the great religious publishing houses put forth on the covers of their publications. No matter how pure a man's motives, he has no right to ignore the claims of blood. It is possible that he may be absorbed by religious zeal to such an extent as to deny the faith which he would advance, and in his efforts to convert the heathen, he may become worse than an infidel.

When a man is about to die, he ought to forgive his enemies, but occasionally we find a will perpetuating the testator's spite and sense of earthly injuries. Such was Dr. Rowland Williams' recent will. The testator was a contributor to the famous volume of "Essays and Reviews," published in England some years ago, and author of the article therein entitled "Bunsen's Biblical Researches," on account of which he was prosecuted before the court of Arches, convicted and sentenced to suspension for one year—a sentence afterwards

* Stat. 43 Eliz. ch. 4.
† *Johnson* v. *Swan*, 3 Madd. 457.
‡ *Townley* v. *Bedell*, 6 Ves. 194.

revoked. He was once professor in the College of St. David's, Lampeter, South Wales, but having some difficulty with the faculty, he exiled himself to a neighboring town, where he died, leaving in his will £50 to the town of Lampeter, one-third of the income of which is perpetually to be given to the town crier "for making proclamation once a year about midsummer, on a market day, that I, Rowland Williams, never consented to the election of George Lewellin to a scholarship in this college, but in this as in other things I was foully slandered by men in high places; because I loved righteousness and hated iniquity; therefore, I died in exile; but while unjust men permitted me, I kept both the needy student by his right, and defended the alms of the altar of God." It remains to be seen whether this direction will be executed. Should it be approved, it would become a bad precedent, for scores of men might adopt the same peculiar expedient for perpetuating their censure, and it would thus result in a *crying evil.* Market day alone would not suffice, nor midsummer's heats, but every day, Sundays not excepted, summer and winter, would be vocal with the uncherubic officials, who continually would cry.

The last thing that is done to a man is to build a monument over his remains. A few thoughts on bequests for such purposes will form a fitting close to this paper. The topic has been suggested to my mind by the testament of a distinguished soldier, recently deceased, in which there is a bequest of $50,000 for a mortuary monument. It has been held that the erection of a monument to perpetuate the memory of the donor is not a *charitable* purpose: *Melick* v. *President of the Asylum*, 1 Sack. 180. The question arises, is such a bequest to be applauded, even if sustained in courts of law? Can it answer any useful purpose? Is it not a monument to the testator's vanity? A monument at Thermoyplæ or Bunker Hill, commemorating a great event, and erected by a grateful people, incites the beholder to patriotism. A monument to an individual, even, provided it springs from the gratitude of others, is an appropriate offering. But is it not better to leave the erection of such a monument to that grateful people or those mourning relatives? Of course I am speaking of very costly erections. How is such a bequest defensible in morals, when Lazarus, with his sores unhealed, may lie at the foot of the costly pile, and houseless wretches may cower under its shelter to escape the north wind? Let the great equestrian statue be set up, then; it will only serve to remind the moralist of posthumous pride that goes on horseback, while living poverty hobbles a-foot.

On reading the foregoing it strikes me that it is not strictly "humorous." It sounds more like a sermon. But a sermon on legal matters is a humorous idea, and it may go for what it is worth, as humorous or serious.—*Albany Law Journal.*

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

INSURANCE — ASSIGNMENT OF POLICY — EVIDENCE OF ASSENT BY COMPANY—SECOND INSURANCE—PROOF OF NOTICE.—In an action on a fire policy, issued to the plaintiff, the declaration alleged an assignment of the policy and of the property insured to one M., and by M. to B. & P., with the assent of defendants, before the loss, and that the plaintiff sued as trustee for B. & P. The second plea denied the assignment to B. & P., and defendants' assent thereto. The third plea set out a condition that notice of any other insurance should be given, so that a memorandum thereof might be endorsed on the policy, otherwise the policy should be void; and alleged another insurance effected by B & P., without notice given or endorsed. To this the plaintiff replied that notice of such insurance was duly given to defendants.

As to the second plea, it appeared that the assignment to M. had been assented to by A., a sub-agent, at Oil Springs, of P, the defendants' agent at Sarnia (defendant's head office being at Montreal); and a memorandum was also endorsed by P. that the loss, if any, should be paid to M. only. A. had effected the insurance with the plaintiff, and he swore that he was aware of the intended assignment by M. to B. & P., and drew it out, after speaking of it to C., defendants' inspector, who told him to use the same form as in the assignment to M.: that B & P. purchased the property, which was then kept by the plaintiff as a temperance house, it being part of the bargain that the policy should be assigned, though the assignment was not completed for some months after the conveyance of the property. B & P. opened a bar, for which an extra premium was charged by the company, and paid through A. to P. and by P. to the head office.

Held, Morrison, J., dissenting, that there was evidence of assent by the defendants to the assignment to B. & P., so as to sustain a verdict for the plaintiff on this plea.

As to the third plea, another insurance was proved, effected by B. & P., after the assignment to them, with another company. There was contradictory evidence as to whether any notice of this was given, but it was, at all events only a verbal notice given to P, and not endorsed on the policy, which was not produced at the time. *Held*, Richards, C.J., dissenting, that this could not support the plea, for such a notice should have been given to the company, or to some officer who had power to act upon it by

cancelling the policy, which P. was not shewn to have had.—*Hendrickson* v. *The Queen Insurance Co.*, 30 U. C. Q. B. 108.

BANK CHEQUES.—*Held*, that the holder of a bank cheque cannot sue the bank for refusing payment, in the absence of proof that it was accepted by the bank, or charged against the drawer.—*The National Bank of the Republic Plaintiff in Error* v. *Rees J. Millard*, S. C. U. S.—*Chicago Legal News.*

BILLS AND NOTES.—Action on a bill of exchange accepted by J. and indorsed by the defendant. Plea, that the defendant did not indorse. The plaintiff and defendant were partners in a speculation; the defendant sold goods to J., who gave him the bill in payment; he indorsed it, handed it to the plaintiff, and asked him to try to obtain payment from J. *Held*, that to charge the indorser there must be an intent to stand in that relation, and that the above facts supported the plea denying the indorsement.—*Denton* v. *Peters*, L. R. 5 Q. B. 475.

CONTRACT.—The defendants issued the following circular: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of E., and which will be sold at a discount in one lot. Payment to be made in cash. The tenders will be received and opened at our office," &c. The plaintiffs made the highest tender, but the defendants refused to accept it. *Held*, that there was no contract to sell to the person who should make the highest tender.—*Spencer* v. *Harding*, L. R. 5 C P. 561.

The defendant, a merchant at Liverpool, sent to the plaintiffs, commission merchants at Mauritius, an order for sugar at a limited price, viz., "You may ship me 500 tons; . . . fifty tons more or less, of no moment, if it enables you to get a suitable vessel . . . I should prefer the option of sending vessel to London, Liverpool or the Clyde; but if that is not compassable, you may ship to either Liverpool or London." He also sent a telegram, received at the same time with the letter, "If possible, the ship to call for orders for a good port in the United Kingdom." The plaintiffs could obtain only 400 tons of sugar at the price fixed by the defendant, and they shipped this to London, where the defendant refused to receive it. Before the plaintiffs made any further purchase of sugar, they received a letter from the defendant countermanding his order. At Mauritius it is generally impossible to purchase so large a quantity of sugar from one seller, and it is generally necessary to purchase it at different times and in different parcels. *Held*, that the defendant meant to buy an entire quantity of 500 tons (fifty tons more or less), to be sent in one vessel; and that a smaller quantity being sent, he had a right to refuse to accept it. (Montague Smith, J., and Cleasby, B., dissenting). (Exch. Ch.)—*Ireland* v. *Livingston*, L. R. 5 Q. B. 516; s. c. L. R. 2 Q. B. 99; 1 Am. Law Rev. 694.

EASEMENT.—The plaintiff was in possession of certain land, upon which he built copper works, under an agreement with the defendant for a lease. There was an understanding between them that, so long as the plaintiff was a good customer of the defendant's canal, he might use the surplus water for the copper works. *Held*, that such an understanding was not the foundation of an equitable right to the use of the water.—*Bankart* v. *Tennant*, L. R. 10 Eq. 141.

FOREIGN ENLISTMENT.—The 59 Geo. III. cap. 69, sec. 7, enacts that if any person in His Majesty's dominions shall, without leave of His Majesty first obtained, "equip, furnish, fit out or arm" any vessel to be employed "in the service of any foreign prince, state or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people," as transport or store-ship, or to commit hostilities against any prince, state or potentate with whom His Majesty shall not be at war, the vessel shall be forfeited. An insurrection existed in Cuba; at Nassau the Salvador was supplied with provisions and water; various munitions of war were shipped, and with eighty passengers on board she sailed to Cuba; the passengers were landed, and erected a battery; while there, seeing a Spanish man-of-war passing, they abandoned the vessel, but as the man-of-war passed without seeing them, they took charge of her again. The vessel was seized on her return to Nassau. *Held*, that there was a fitting out or arming, within the meaning of the act; and that the vessel was employed in the service of insurgents, who formed part of the province or people of Cuba.—*The Salvador*, L. R. 3 P. C. 218.

FRAUDULENT CONVEYANCE.—1. A. made a voluntary settlement of certain property, after which he had not the means to pay his debts. *Held*, that the settlement could be set aside at the suit of a subsequent creditor; because, although there was no actual intent to defraud or delay creditors, that was its necessary effect.—*Freeman* v *Pope*, L. R. 5 Ch. 538; s. c. L. R. 9 Eq. 206; 4 Am. Law Rev. 707.

2. A trader conveyed all his property to secure the payment of a debt of £450, and a further advance of £300. Seventeen months afterwards he became bankrupt. *Held*, that the conveyance was not fraudulent under the 13 Eliz cap. 5, nor impeachable under the Bankrupt laws.—*Allen* v. *Bonnett*, L. R. 5 Ch. 577.

MASTER AND SERVANT.—H. was foreman, porter and superintendent of the defendants' station yard; he gave the plaintiff into custody on a charge of stealing the company's timber; the plaintiff was brought before a magistrate and discharged; he was then in the employ of the defendants, but was soon after discharged. *Held*, that H. had no implied authority to give a person into custody, and there was no evidence of a ratification of his act by the defendants.—*Edwards* v. *London and North Western Railway Co.*, L. R. 5 C. P. 445.

NEGLIGENCE.—1. The plaintiff was passing along the highway under a railway bridge of the defendants, when a brick fell and injured him. A train had passed just previously. The brick fell from the top of a perpendicular brick wall, upon which the bridge rested on one side *Held*, that this was *prima facie* evidence of negligence on the part of the defendants. (Hannen, J., dissenting)—*Kearney* v. *London, Brighton & South Coast Railway Co.*, L. R. 5 Q. B. 411.

2. The defendant was part owner of a steamer, which ran from M. to L. Passengers went on board a hulk in the harbour at M., where they obtained their tickets, and upon the steamer's coming up, descended by a ladder to the main-deck, from which they got on board the steamer. The hulk did not belong to the owners of the steamer, but was used by them by agreement with the owner, for the purpose of embarking passengers. The plaintiff, in descending the ladder, fell down a hatchway, close to its foot, which had been negligently left open. *Held*, that the defendant was liable, on the ground that the defendant had held this out as a place for passengers to embark, and also on the ground that there was a contract to use due care for the plaintiff's safety during the journey from M. to L.—*John* v. *Bacon*, L. R. 5 C. P. 437.

3. A train of the defendants' drew up at a station so that the last carriage, in which B. was a passenger, was in a tunnel which terminates at the station, and not at the platform. The name of the station was called out by a porter, and B. immediately got out, though it was dark, and fell on the rails. *Held*, that there was no evidence of negligence on the part of the defendants.—*Bridges* v. *North London Railway Co.*, L. R. 5 C. P. 495, n. (5).

4. A train on the defendants' railway drew up at a station so that the carriage in which the plaintiff was a passenger was opposite to the platform at a part where it curved back, leaving an interval of two feet between the carriage and the platform. The name of the station had been called, and the plaintiff stepped out and fell between the carriage and the platform. *Held*, that the conduct of the plaintiff amounted to contributory negligence, and that a non-suit should be entered.—*Prayer* v. *Bristol and Exeter Railway Co.*, L. R. 5 C. P. 460, n. (1).

5. A train of the defendants', in which the plaintiff was riding, overshot the platform, so that the carriage in which he was sitting was opposite to the parapet of a bridge beyond the platform, the top of which in the dusk looked like the platform; the porter called out the name of the station, and the plaintiff, having got out upon the parapet in the belief that it was the platform, fell over and was injured. *Held*, that there was evidence of an invitation to alight at a dangerous place, and evidence of negligence of the engine-driver, in not stopping at the platform.—*Whittaker* v. *Manchester and Sheffield Railway Co.*, L. R. 5 C. P. 464, n. (3).

TESTAMENTARY CAPACITY.—A testator was subject to two delusions, one that a man, who had been dead for some years, pursued and molested him, and the other that he was pursued by evil spirits, whom he believed to be visibly present. It was admitted that at times he was so insane as to be incapable of making a will. *Held*, that the existence of a delusion compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.—*Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.

RAILWAY CO.—RIGHT TO MAINTAIN EJECTMENT AGAINST—DESRIPTION OF LAND.—The defendants in 1851 staked out their railway across the land in question, and in 1853 deposited their plan in the office of the clerk of the peace, and laid the rails and built their station on the land, which was then vested in the Crown; but this was without the consent of Her Majesty, under C. S. C. ch. 66, sec. 11, sub-sec. 31, and they had taken no other proceedings to obtain a right to the possession. In 1854 the Commissioners of Public Works, under 13 & 14 Vic. ch. 13, conveyed the land to the plaintiffs by deed, in which the railway was referred to as a proposed line, and for fourteen years after defendants continued thus to use the land with the knowledge of and without any interference by the plaintiffs: *Held*,

that the plaintiffs could not maintain ejectment, but must seek for compensation under "The Railway Act."

A description of land in a deed, after running to a point two chains from a line with the east side of the Port Colborne Guard Lock, proceeded "thence south half a degree east 25 chains, more or less, always at a distance of two chains from a line with the east side of said Guard Lock, to the northern limit of said lot 27," thence, &c. The course should have been north instead of south, and the effect of it as written was to go away from the northern limit of the lot and exclude the land in question. *Held*, that the course might be rejected, and a line two chains from the east side of the lock be adopted as the course to be taken in order to reach the northern limit of the lot.—*The Corporation of the County of Welland* v. *The Buffalo and Lake Huron Railway Co.*, 30 U. C. Q. B. 147.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Bankruptcy.—H. being about to enter the service of a gas company, G. agreed with him to indemnify the company, and H. agreed that, if G. should receive notice of any default under the guarantee, it should be lawful for G. to take possession of any goods, &c., of H.; and in case G. should be called upon to make any payment under the guarantee, it should be lawful for G. to sell the goods, &c., at discretion. The event provided for in the contract happened, and G. took possession of the goods of H., who had in the meanwhile committed an act of bankruptcy, of which G. had no notice. The 12 & 13 Vic. cap. 106, sec. 133, enacts that "all contracts, dealings and transactions" made with the bankrupt *bonâ fide* before the date of the *fiat* or filing of a petition for adjudication, shall be valid, notwithstanding any prior act of bankruptcy committed without notice to the person dealing with the bankrupt. *Held*, that what was done was a "transaction" protected by the statute.—*Krehl* v. *Great Central Gas Co.*, L. R. 5 Ex. 289.

Intruding Officer—Liability of, for Fees of Office.—*Held*, that the legal right to an office confers the right to receive and appropriate the fees and emoluments legally incident to the place.

That where a person has usurped a place belonging to another, and received the accustomed fees of the office, an action for money had and received will be sustained at the suit of the person entitled to the office against the intruder.

That an officer's commission is evidence of the title, but not the title; that the title is conferred by the people, but the evidence of the right by the law.

That the appellee having received his commission as sheriff without a resort to fraud, he should be required to account only for the fees and emoluments of the office received by him after deducting the reasonable expenses incurred therein, and that if he had intruded without pretence of legal right, then a different rule should be applied.

That he should be charged from the time of entering upon the duties of the office, and not from the time the justices of the circuit court found him not entitled to the office.

That this being an equitable action, it should be governed in this respect by the same rules that would have obtained, had this been a bill for an account instead of an action for money had and received.—*Mayfield* v. *Moore*, S. C. Ill., —*Chicago Legal News*.

Burden of Proof.—Refreshments for Travellers.—C., a licensed victualler, was charged under 11 & 12 Vic. cap. 49, sec. 1, with unlawfully opening his house for the sale of wine and beer, during prohibited hours on Sunday, otherwise than as refreshment for travellers His hotel adjoined a railway station; eight men were seen there, six of them having a glass of beer each, and two a glass of sherry each; four of them were strangers, and four were residents of the town. A train stopped at the station in a few minutes and seven of the men went by it, and one returned to the town, having come to see a son off by the train. There was a notice in the room that refreshments were supplied, during prohibited hours, only to travellers, and C. had given directions to the waiter not to give out refreshments without first asking the parties whether they were going by the train; but the waiter had failed to ask two of the men the question. *Held*, that the burden of proof was upon the informer, and there was no evidence that C. knew that any of the men were not travellers, nor evidence of an intention to break the law.—*Copley* v. *Burton*, L. R. 5 C. P. 489.

Statute.—1. The 6 & 7. Wm. IV. cap. 37, enacts that bread shall be sold by weight, and in case any baker "shall sell or cause to be sold bread in any other manner than by weight," such baker shall pay a fine. H. was a baker, and in making a 3½ lb. loaf, used to put 4 lbs. of dough into the oven, but did not weigh it after baking. Six of such loaves sold by him, were found to weigh on an average not more than 3½ lbs. each. Upon these facts he was convicted. *Held*, tha

the conviction was right, the bread never having been weighed.—*Hill* v. *Browning*, L R. 453.

2. By 3 Geo. IV. cap. 126, sec. 41, if any person shall leave upon any turnpike road any horse, cattle, beast or carriage whatsoever, by reason whereof the payment of any tolls or duties shall be avoided or lessened, he shall pay a fine. S. was driven by his coachman in a waggonette more than a quarter of a mile along a turnpike road to within about 140 yards of the turnpike gate, and he then got out and walked through the gate to a railway station, which was about 100 yards beyond; the waggonette was driven back by the coachman. *Held*, that "leaving" a carriage, in the sense of the statute, did not mean "quitting" it, and that the conduct of S. was not within the statute.—*Stanley* v. *Mortlock*, L. R. 5 C. P. 497.

ONTARIO REPORTS.

QUEEN'S BENCH.

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

McKAY v. BAMBERGER ET AL.

Sale for Taxes—Lands in cities—C. S. U. C. ch. 55.

Under Consol. Stat. U. C., ch. 55, the chamberlain and high bailiff in cities had power only to sell the lands of *non-residents* for arrears of taxes.

A sale in 1865, of land belonging and assessed to a resident, was therefore held invalid.

[30 U. C. Q. B., 59.]

Trespass to land situate in the city of Hamilton.

Pleas —Not guilty; and land not the plaintiff's. Issue.

The cause was tried at Hamilton in the fall of 1868, before the late Mr. Justice John Wilson.

The plaintiff claimed under a deed, dated 30th November, 1865, from James McCracken, high bailiff of Hamilton, to the plaintiff, as purchaser of the land in question for arrears of taxes.

The warrant to the high bailiff to sell, granted by the city chamberlain, was dated the 29th of July, 1865.

A verdict having been found for defendants,

In Michaelmas Term, 1868, *John Read* obtained a rule *nisi* for a new trial.

A question arose as to the sufficiency of the description of the land sold, but this part of the case is omitted, as the judgment proceeds upon another point.

In this term, *Fenton* showed cause. The sale for taxes was made in 1865, under Consol. Stat. U. C. ch. 55. The chamberlain and high bailiff of Hamilton had no power to make a sale for taxes of the land in question, for they could only act as to the lands of non-residents, and this land was not of that class: sec. 138. By the Act of 1866 such officers have more authority in these respects than they had before it.

M. O'Reilly, Q. C. supported the rule. By Consol. Stat. U C., ch. 55, sec. 168, the chamberlain and high bailiffs of cities have the like powers as the treasurer and sheriff of counties have in counties. If the powers of chamberlains and high bailiffs be restricted to the sale of non-resident lands, the question then is, what are non-resident lands. Are they not unoccupied lands, or lands not resided upon? See secs. 6, 19, 22, 23, 168, 177, 179, 180, 183, 185. The Statute contemplated all lands of the like nature which could be sold in counties being sold in cities.

WILSON, J., delivered the judgment of the Court.

It was contended the sale by the chamberlain and high bailiff was illegal, for that they were enabled by the Consol Stat. U. C., ch. 55, sec. 158, only to fund, collect and manage the taxes due to their cities on the lands of non-residents, and not to sell the lands of residents at all.

Section 75 of the Act of 1853, which is the one consolidated by section 168 referred to, shews this more plainly than the one which was substituted for it. The *collecting* would authorize the sale by the city of the non-resident land, which, as well as other lands, counties may sell.

This lot in question was not non-resident land. Both occupant and owner were assessed for it, and both of them resided in Hamilton. The city could not, in 1865, sell this land, under the Consol. Stat. U. C. ch. 55. By the Act of 1866, 29–30 Vic. ch 53, sec. 172, cities have the like general powers in selling land for arrears of taxes, whether on resident or non-resident lands, which counties have; but this sale was made before that Act was passed, and at a time when cities had not such a power.

The rule will be discharged.

Rule discharged.

SNELL AND THE CORPORATION OF THE TOWN OF BELLEVILLE.

Municipal Corporations—Regulations of markets—Sale of meat.

A By-law of a town for the regulation of the market enacted—That only butchers and persons occupying shops or stalls in the market, or in two specified wards of the town, for the sale of fresh meat, should sell or expose in any less quantity than by the quarter: that such butchers and persons might so sell at these places, but not otherwise; and that no person should sell any fresh meat in the town except in the market stalls or such place as the council should appoint, not less than 400 yards from the market, and within certain specified limits in the two said wards.—*Held*, valid.

2. That no person should buy, sell, or offer for sale any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed in the town, until the seller had paid the market fees, or obtained a ticket from the collector of market tolls, as provided in a by-law referred to, and before a specified hour of the day: that no person should forestall, regrate, or monopolize any of the articles mentioned, within the town; and that before noon no butchers' meat, fish, hay, or straw, should be bought or sold in the town except at the market and in the shops or stalls in the two said wards. *Held*, valid, under the powers given by the Municipal Act of 1866, sec. 296, sub-sec. 9, and sub-sec. 10 as amended by 33 Vic. ch 26, sec. 6, O, and sub-sec. 11.

3. That before 10 A.M. no huckster or runner within the municipality, or within one mile of its limits, should purchase any meats, fish, or fruit brought to the public market. *Held*, bad, as not confined to those *living* within the municipality or a mile therefrom; and *Quære*, whether it should not exclude persons buying for their own use, not to resell.

4. That every person selling meat or articles of provision by retail, whether by weight, count, or measure, should provide himself with scales, weights and measures, but no spring balance, spring scale, spring steelyards, or spring weighing machine, should be used for any market purpose. *Held*, valid, under sub-sec. 10 above mentioned, and Consol. Stat. U. C. ch. 58.

5. That persons offending against the by-law should, on conviction by a magistrate, be fined not less than $1 nor more than $20, and in default of payment be imprisoned for not less than two nor more than twenty

days, which fines should be applied to the uses of the municipality. *Held*, that leaving the fine in the magistrate's discretion was clearly authorized by sec. 209; but that it was invalid for not awarding a moiety of the fine to the informer, under sec. 211.

Held also, that market regulations made by the council might be quashed as orders or resolutions, under sec. 198.

By these regulations it was provided that any person wishing to sell fresh meat in quantities less than a quarter in a shop or stall in either of the two wards above mentioned, should apply to the market committee, stating the annual sum above $40 which he was willing to pay for a certificate authorizing him to sell for a year. *Held*, bad, both by the general law, and as opposed to sec. 220 of the Act of 1866. It was also provided that persons obtaining certificates should give a bond with sureties to obey the by-laws relative to the sale of fresh meat at stalls and shops where it was sold. *Held*, good, for that it applied of course only to valid by-laws.

[30 U. C. Q. B., 81.]

In Hilary Term last, *Harrison*, Q C, obtained a rule calling on the town of Belleville to shew cause, on the first day of Easter Term following—

1. Why the first clause of by-law No. 217 should not be quashed, with costs, for illegality —the same being in excess of the powers of the corporation, or unreasonable, or otherwise illegal.

2. The second clause of the same by-law was moved against; but this it appeared had been repealed on the 17th February, unknown to the applicant, before the rule *nisi* was moved.

3. Why the third clause of the same by-law should not be quashed, with costs, for illegality —the same assuming to restrain the sale of the articles therein first enumerated unless a certain fee be paid, thus in effect levying a tax on all such sales made within the town, and prohibiting all persons before the hour of twelve o'clock noon from purchasing or selling butchers' meat, fish, hay, or straw, except at the public market places, and in the stalls or shops in Coleman ward and Baldwin ward, and prohibiting hucksters or runners, before the hour of ten o'clock in the forenoon, within the municipality, or within one mile of the outer limits thereof, from purchasing meats, fish, or fruits, brought to the public market: or,

4 Why the fourth clause of the same by-law should not be quashed, with costs, for illegality —the same making it obligatory upon every person selling meat, or any articles of provision [illegible] whether by weight, count, or measure, in the town, to provide himself with scales, weights and measures for the town, and providing that no spring balance, spring scales, spring steelyards, or spring weighing machine, shall be used or allowed to be used for any market purpose; or,

5. Why the fifth clause of the same by-law should not be quashed, with costs, for illegality, in this, that the by-law does not itself fix and determine the punishment, but delegates the same to be fixed and determined within certain limits by the discretion of the convicting Justice; and because it provides in general terms that all fines shall be applied to the uses of the municipality, and no moiety thereof in any case to go to the informer or prosecutor; — and on grounds disclosed in affidavits and papers filed.

And why the regulations for the government of the market and meat stalls of the town should not be quashed, with costs, for illegality, the same providing for and making it necessary to have certificates or licenses for the sale of fresh meat, and the giving of bonds conditioned to abide by all the regulations and by-laws of the municipality in force at the time of entering into the bonds, and all by-laws and regulations which may thereafter be passed relative to stalls and shops, whether the same be legal or illegal, or valid or invalid, and being calculated to deter persons giving such bonds from moving against illegal or invalid by-laws or regulations; and on grounds disclosed in affidavits and papers filed.

The by-law was passed on the 14th February, 1870, and the provisions complained of were as follows:—

"1. (*a*) That only butchers or persons occupying shops or stalls in the public markets, or in Coleman ward or Baldwin ward, for the sale of fresh meat as hereinafter provided, shall sell, or expose for sale, any fresh meat in any less quantity than by the quarter. (*b*) And butchers having stalls in the public market, and all persons occupying said stalls or shops in Coleman ward or Baldwin ward, for the sale of fresh meat, may sell fresh meat in any less quantity than by the quarter. (*c*) And butchers and all persons occupying said shops or stalls for the sale of fresh meat in Coleman ward or Baldwin ward, shall not expose fresh meat for sale or sell fresh meat in any other place in Bellville than in the market stalls and said stalls or shops in Coleman ward or Baldwin ward, except by the quarter. (*d*) And that no butcher or other person shall cut up or expose for sale, or sell any fresh meat in any part of Belleville, except in the stalls in the public market, or at such other places as the standing committee on public markets may appoint, not less than four hundred yards from the public market, and within the following limits in Baldwin ward and Coleman ward, &c., [setting out the limits.]

2. (1) That no person shall buy, sell, or offer for sale, any game, fish, poultry, eggs, butter, cheese, grain, vegetables, or fruits, exposed for sale or marketed within the town of Belleville, until the seller has paid the market fees required by By-law No. 161, or has obtained a ticket from the collector of tolls of the market of the town of Belleville, as provided for in the 27th section of by-law No. 161, and before the hour of nine o'clock in the forenoon, during the months of June, July, and August, and ten o'clock during the rest of the year. (2) No person shall forestall, regrate, or monopolize any market grain, meats, fish, fruits, roots, vegetables, poultry, and dairy products, within the town of Belleville. (3) Provided always, that before the hour of twelve o'clock, noon, no butcher's meat, fish, hay or straw, shall be bought or sold by any person in any part of the town, except at the public market place, and in the said stalls or shops in Coleman ward and Baldwin ward, as hereinbefore mentioned; (4) and further, that before the hour of ten o'clock in the forenoon, no huckster or runner within the municipality, or within one mile of the outer limits thereof, shall purchase any meats, fish, or fruits, brought to the public market.

4 That every person selling meat or articles of provision by retail, whether by weight, count, or measure in the town of Belleville, shall provide himself with scales, weights, and measures for the said town; but no spring balance, spring scale, spring steelyards, or spring weighing machine, shall be used or allowed to be used for any market purpose.

5. That any person offending against this by-law, or any of its provisions, shall, upon conviction thereof before any magistrate of the town of Belleville, be fined in a sum not less than one dollar nor more than twenty dollars, to be levied on his, her, or their goods or chattels, and in default of such goods or chattels to be sent to the common gaol of the County of Hastings for any period not less than two days nor more than twenty days, which fines shall be applied to the uses of the municipality of the town of Belleville.

6. That this by-law shall come into effect immediately after the passing thereof.

[L S] (Signed) ALEX. ROBERTOON, *Mayor.*"

The following were the regulations in question: "*Regulations for the Government of the Market Stalls and Meat Stalls of the Town of Belleville.*"

1. That any person or persons wishing to sell or vend fresh meat in quantities less than a quarter in a shop or stall in Coleman ward or Baldwin ward, shall, before the first day of March in each year, make application in writing to the chairman of the market committee, stating the annual sum he or she will pay in addition to the sum of forty dollars to obtain a certificate from the proper authority, authorizing the holder of the certificate to expose for sale and sell fresh meat in one stall in Coleman ward or Baldwin ward, for the term of one year from the first day of March in the year in which the certificate is obtained.

2. The market committee shall, on the first day of March in each year, or so soon thereafter as practicable, examine the tenders which shall have been received by the chairman of the market committee, and accept any of the said tenders that said committee shall deem it advisable to accept, and shall at once notify the person or persons whose tenders have been accepted of said acceptance.

3. The person or persons whose tender shall have been accepted shall immediately, upon being notified as above mentioned, give to the market committee the names of two responsible persons as sureties for the due performance of the conditions of the bonds hereinafter mentioned.

4. In case the market committee deem the said sureties good and sufficient, the person or persons whose tenders shall have been so accepted shall, with said sureties, enter into a bond with the treasurer of the town conditioned for the payment of the sums so tendered in fifty-two equal weekly payments, and to abide by all the regulations in force at the time of entering into the bond relative to the sale of fresh meat in said stalls or shops in Coleman ward or Baldwin ward, and all other by-laws and regulations which may be hereafter passed and enacted in Belleville, relative to said stalls or shops."

In this term, *Kerr* shewed cause. The by-law is not sufficiently proved. The affidavit alleged to be the proof of it is not annexed; it refers to it merely as the exhibit A. The by-law restricts the sale of meat to the market, and to two other places in Belleville. This the council had power to do: Municipal Act of 1866, sec. 296, sub-secs. 6–14: *Kelly and The City of Toronto*, 23 U. C. Q. B. 425. The case of *Fennell and The Town of Guelph*, 24 U. C. Q. B. 238, is not against the previous decision. The later case related to other articles being affected by the by-law than the statute gave control over. The Ontario Act, 31 Vic. ch. 30, sec. 32, amends some of the sub-sections of sec. 296, by extending them; and so also does the 33 Vic. ch. 26, secs. 5, 6; and both of these apply to the present by-law, which was passed on the 14th of February. The by-law No. 161, referred to in the third section of the present by-law, should have been produced, for without it does not appear what the fee is which is complained of. A fee, by section 296, sub-sec. 15, may be imposed on vehicles in which any thing is exposed for sale or marketed, and if an act may be prohibited or regulated, it may be allowed or regulated by the imposition of a fee. Sec. 296, sub-sec. 10, as re-enacted by 33 Vic. ch. 26, sec. 6, expressly allows a fee to be charged. As to the prohibition to buy or sell before 12 M., except at the public markets and in the authorized places in the two other wards, that is clearly within the powers of the council, who have power to regulate, and in some cases to prohibit altogether. As to hucksters, &c., see sec. 296, sub-sec. 12, and 31 Vic. ch. 30, sec. 32. The by-law does not say hucksters, &c, *living* within the municipality, &c., but it must mean that. The prohibition of spring weighing machines is clearly within the power of the council. The 5th sec. of the by-law is not bad, because a discretion is left to the Justice to impose a fine within certain limits: Municipal Act of 1866, sec. 209, sec. 246, sub-secs 6, 7, 8. As to the whole of it being made payable to the municipality, it may be read as if the moiety only should be so applied. As to costs, if part only of the by-law should be quashed, see *Patterson and the Corporation of Grey*, 18 U. C. Q. B. 189.

Harrison, Q C., supported the rule. The first section of the by-law confining the sale of fresh meat to butchers and to the occupants of shops or stalls in the public market, or in Coleman ward in Baldwin ward, is bad. It is contrary to the Act of 1866, sec. 220, which prevents the council from giving any person an exclusive right of exercising any trade in the municipality. There is a great difference between prevention and regulation:—*Harrison* v. *Godman*, 1 Burr. 12; *Pierce* v. *Bartrum*, Cowp. 269; *James* v. *Tutney*, Cro. Car. 497; *The Master, &c., of Gunmakers* v *Fell*, Willes. 384; *McLean* v. *St. Catharines*, 27 U. C. Q. B 603; *Pirie and the Corporation of Dundas*, 29 U. C. Q B 401. The by-law is bad, for not reserving the moiety of penalties to the informers, by the Act of 1866, sec. 211. The market regulations must be an order or resolution, under sec. 198, and may be set aside. The license or fee of $40 imposed on the butchers or persons who get the licensed shops or stalls in Coleman and Baldwin wards are wholly unwarranted, and even if warranted they would be and are unreasonable. The provision is directly opposed to sec. 220.

WILSON, J., delivered the judgment of the Court.

It appears section 2 of the by-law was repealed on the 17th of February, unknown to the applicant, before the rule *nisi* was moved.

The fourth section requires every person selling meat or articles of provision by retail, whether by weight, count, or measure, to provide himself with weights, scales, and measures; and it prohibits spring scales, &c., for any market purpose.

The Consol. Stat. U. C. ch. 58, enables the councils of towns to appoint an inspector of weights and measures, who is to test, and, if correct, to stamp the same. That act assumes (sec 16.) that "every storekeeper, shopkeeper, miller, distiller, butcher, baker, huckster, or other trading person, and every wharfinger or forwarder," will be furnished with weights and measure; for while the Statute enables all such weight and measures to be stamped, if required to be so by the owner, and enables the inspector (sec. 17) to "enter any shop, store, warehouse, stall, yard, or place where any commodity is bought, sold, or exchanged, weighed, exposed, or kept for sale, or weighed for conveyance or carriage," to examine the same, and (sec. 18) to forfeit them if "not stamped, or if they are light or unjust," and subjects persons having incorrect weighing machines in their possession, or who refuse to produce their weighing machines for examination, or who obstruct the inspector in his duty, to penalties; it contains no provision making it obligatory on any of these persons to have weights or measures at all.

It is impossible, however, for such persons to be without weights and measures, "where," in the language of the Statute, "any commodity is bought, sold, or exchanged, weighed, exposed, or weighed for conveyence or carriage," so that it is no great stretch of authority to say that persons selling meat or articles of provisions by retail, by weight, count, or measure, shall have such weights and measures, when the council has authority to regulate the sale of so many articles, and the weighing or measuring (as the case may be) of grain, meat, vegetables, fish, hay, straw, fodder, wood, and lumber, lime, shingles, laths, cordwood, coal, and other fuel, farm produce of every description, small ware, and all other articles exposed for sale, and to impose penalties for light weight, or short count, or short measurement in anything marketed.

We do not think this an enactment in excess of the powers of the council. Nor is there any reason to say that the prohibition of the use of spring balances, &c., is beyond their power either.

It is well known that these springs become affected by use, and by the change in temperature, so as not to remain true; and while nothing is alleged against the reasonableness of this exclusion, we should not look for difficulties to raise against the by-law.

That clause is not interfered with.

The fifth section has been impeached on two grounds: firstly, because it leaves in the discretion of the convicting magistrate to impose a fine varying from $1 to $20, and imprisonment from two to twenty days, while it is said the sum and the time should have been absolutely fixed by the council: and, secondly, because the fines are to "be applied to the use of the municipality," thus excluding the informer from his moiety under the Act of 1866, sec. 211.

The first of these objections is not tenable, for the Act of 1866, sec 209, enables the magistrate to "award the *whole* or *such part* of the penalty or punishment imposed by the by-law *as he shall think fit*," a provision no doubt made in consequence of the opinion expressed in *Fennell* and *The Corporation of Guelph*, 24 U. C. Q. B. 238.

Even if the law had not been altered, we should have declined, as the court did in that case, to interfere with the by-law on that ground.

As to the second objection to these clauses, we think it must prevail. The moiety of the informer's share of the penalty should be preserved to him. Under the by-law as it stands, he gets no share; and it may damp the energies of a class of people who are supposed by the Legislature to be necessary, and to good service, if the reward which stimulates them to action is taken away. That part of the fifth section must be quashed.

There remain now the 1st and 3rd sections to be considered. [The learned Judge here read the first section, dividing it into paragraphs (*a*), (*b*). (*c*) and (*d*), as at page 83, which was not done in the original.]

This long section is somewhat in the form of Acts of Parliament as they used to be drawn, having all the materials accumulated into one clause, while it consists of different cases, and each case is to have a different legal action on it.

Coode, in his very valuable work on "Legislative Expression," p. 42, says: "There can be no doubt that the more strictly each clause is limited to one class of cases, one class of legal subjects, and one class of legal actions, the better."

The first and second divisions of the section are substantially the same, the second being the complement of the first; and the question is, has the Council the power to enact that only butchers and persons occupying stalls in the market, and those having the licensed shops or stalls in Baldwin or Coleman wards, shall sell or expose for sale in the municipality fresh meat in a less quantity than by the quarter?

2. The next question is, has the Council the power to restrict the privileged persons in the previous part of the section from selling or exposing for sale fresh meat except by the quarter in any other part of the municipality than in their said stalls or shops?

And thirdly, has the council the power to prevent butchers and others from cutting up, exposing for sale, or selling fresh meat in any other part of the municipality, than in the stalls in the market, or in such other places as the committee may appoint, not less than 400 yards from the market, and within certain specified limits?

As to the first question, we think, as the council has full power to regulate the *place* of selling butchers' meat, they may restrict it to the public market and to the shops or stalls provided for the purpose beyond the market. That has been expressly settled by the Court in *Kelly* and *The Corporation of Toronto*, 23 U. C. Q. B. 425, and re-affirmed in *Fennell and the Corporation of Guelph*, 24 U. C. Q. B. 238.

As the council may require the sale of all butchers' meat to be at such places, there can be no harm in allowing it when it is by the quarter to be sold anywhere else.

This by-law is, in effect, a declaration that butchers' meat, less than the quarter, shall not be sold elsewhere in the municipality than at the market and specified stalls, and to that extent it is clearly maintainable.

The second question is answered by what has been said as to the first. The council has undoubtedly the power to say that those who are

privileged to sell by less than the quarter at the at the specified places shall not be entitled to sell out of these places otherwise than by the quarter; that is, when they sell out of such places they shall be on the same footing as other persons.

The third question has also been answered by what has been said. *Kelly and The Corporation of Toronto*, 23 U. C. Q. B. 425, is directly in point. The first section of the by-law is therefore valid.

The third section of the by-law is as follows: [The learned judge here read sec. 3, dividing it into four parts, (1), (2), (3) and (4), as at part 84, the original being in one paragraph only.]

The 9th sub-sec. of sec. 296, Consol. Stat. U. C., ch 51, enacts that the council shall have power to pass by-laws "for preventing or regulating the buying and selling of articles and animals exposed for sale or marketed;" and the 10th sub-section, as amended by 33 Vic. ch. 26, sec. 6, Ontario, gives power also to pass by-laws "for regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small ware, and all other articles exposed for sale; and the fees to be paid therefor."

The power to *prevent* or regulate the buying and selling of articles exposed for sale or marketed is more extensive than the Legislature could probably have intended to give, and would, if literally exercised, cover almost any enactment.

All the articles mentioned in the first part of this section of the by-law are certainly "articles" within the 9th section of sec. 296. The by-law relates to the buying and selling of them; so does the statute; and the by-law says that these articles shall not be bought or sold or marketed until the seller has paid the market fees required by by-law No. 161.

The power to prevent the buying or selling of these things, and the power to regulate the buying and selling, includes, we think, the power to impose a reasonable fee for the buying, and selling, and marketing.

The 10th sub-section relates to the selling, not the buying; but if the *seller* can be restrained from selling till he has paid the market fee, it is not a very unreasonable thing to say also that people shall not buy. There can be no sale without a purchaser; and the fee is put on the seller, not on the buyer, and no penalty is put on either.

Now this 10th sub-section expressly provides for "the fees to be paid therefor," and it applies to a great number of articles specially named, and to "all other articles exposed for sale." The ticket of the collector and the hour of the day, are also within the power of the council to provide for.

The first part of the by-law is valid.

The second part of the third section of the by-law repeats as to forestalling, &c., the obsolete English provisions enacted in sec. 296, sub-sec. 11, and does nothing more.

The third part of the section is also clearly within the two sub-sections already referred to.

The fourth part of the section, we think, is bad, because it prevents hucksters or runners within the town, or within a mile of it, buying certain things brought to the market till after ten in the morning; that is, it prevents *the buying* in the town, or within a mile of it, while the Statute authorizes the preventing those only *who live* within the town, or within a mile of it, from buying in the town: *McLean and The Corporation of St. Catharines*, 27 U. C. Q. B. 603.

That branch of the third section must be quashed. The rest appears to be valid.

It may be a matter for consideration in re-enacting this clause as to hucksters, butchers, and runners, notwithstanding the generality of the 12th sub-sec. of the Statute, whether the by-law should not be so worded as not to exclude those persons from buying for their own use or the use of the family for consumption, or when not to be resold. See the section so modified in 24 U. C. Q. B. 238.

The section of the market regulations which has been objected to is as follows: "That any person wishing to sell fresh meat in quantites less than a quarter in a shop or stall in Coleman or in Baldwin wards, shall, before the first of March in each year apply in writing to the chairman of the market committee, stating the annual sum he or she will pay, in addition to the sum of $40, to obtain a certificate from the proper authority authorizing the holder of the certificate to expose for sale and sell fresh meat in one stall in Coleman ward, or in Baldwin ward, for one year from the first of March of the year in which the certificate is obtained."

This provision is certainly bad by the general law, and is directly against the 220th section.

The portion of it contained in section 4, as to the person who may get the certificate giving a bond with sureties to obey the by-laws relative to the sale of fresh meat, and to stalls and shops where the same is sold, we do not think to be objectionable. It applies, of course, to valid by-laws, and does not bind the obligor to the observance of anything illegal; nor is it contrary to public policy, in hampering the free action of a member of the municipality from moving against any corporate abuse, usurpation, or illegality.

There is a question of much importance as to these regulations, whether they can be moved against as an order or resolution of the council, under sec. 198 of the Act of 1866.

It appears to us these regulations are within the meaning of these terms. They are operative, and they are so by reason of the being the order of the council.

The clause we have adverted to, and which has been complained of, is not a mere matter of detail, and of market or police routine. It is a serious order and direction, that every applicant for authority to sell fresh meat in the two named wards shall specify the amount of fee he is willing to pay for the license he asks for; and if this be not an order or resolution, it is difficult to say what can be one.

The affidavits show these regulations were reported to and received and adopted by the council.

Without for a moment entertaining the idea that market regulations can generally be moved against, and that this court is to revise them on motion or otherwise, we nevertheless feel that to the extent already alluded to in this case they may and can properly be quashed.

We have not considered it necessary to say anything of the reasonableness or unreasonableness of the by-law in confining the sale of fresh ment to the market and to the two specified places in the other wards, because there is contradictory evidence on the subject which cannot well be reconciled, and because the municipal council, the most popular representative body in the country, is undoubtedly the best and the safest judge as to what will meet the public wants of the community in that respect. It is especially a local and a popular question, and can generally be best settled where these special influences have the most weight.

We see nothing in this case which leads us to think that any injustice has been done by the council to Mr. Snell or to anyone else, nor any thing which satisfies us why the council has declined to entertain and give effect to the application of Mr. Snell, which was so largely signed and so respectably supported, and about which there has certainly been some degree of public irritation felt.

It is imposrible to interfere on the ground of the present arrangement being unreasonable. It does not seem to be so. It is simply a matter of local reform and agitation to be redressed by local means.

The result is, that the rule as to the by-law will be discharged so far as relates to the first and second sections, the second section having been repealed before the rule was moved for; the 3rd section, excepting the latter portion of it, relating to hucksters and runners; the 4th section; and the 5th section, excepting that part of it relating the application of the penalties;—and that the rule as to the regulations will be discharged, excepting as to that part of the first section which requires the payment of any sum of money to obtain a certificate authorizing the holder of it to sell fresh meat in Coleman or in Baldwin wards, in Belleville, with costs to be paid by the applicant as to such parts of the rule and application as he has failed to sustain. And that the rule will be absolute setting aside or quashing the said by-law as to that part of the third section which relates to hucksters and runners; and as to that part of the fifth section which relates to the application of the penalties; and as to that part of the said regulations which requires the payment of any sum of money for obtaining a certificate to authorize the holder of it to sell fresh meat in Coleman or in Baldwin wards in Belleville, with costs to be paid by the municipal corporation as to such part of the rule and application as the applicant has maintained.

Rule accordingly.

GENERAL SESSIONS OF THE PEACE, COUNTY OF SIMCOE.

Before J. A. ARDAGH, Esq., *Deputy Judge, Chairman.*

IN RE CHARLES C. WEBSTER AND OTHERS.

31 Vic. cap. 66—Affidavit of residence—Certificate of Justices—Oath of allegiance.

[Barrie, Dec. 19, 1870.]

This was an application to prevent certificates of naturalization being issued by the Court of General Sessions of the Peace for the County of Simcoe, to Charles C. Webster, John W. Fisher and B. F. Kendall, under the provisions of the Dominion Act 31 Vic. cap. 66.

The grounds of opposition were—

1. That the time of residence is not stated in the affidavit of residence.

2. That the certificates of the justices of the peace, read on the first day of the Court, do not show that the requisite oaths of allegiance have been taken by the applicants.

3. That initial letters only are used in the headings of the affidavits, and not the full names of the applicants.

ARDAGH, D. J.—As to the first ground, the contestant insists that affidavits of residence having been filed with the Clerk of the Peace, they must be considered as open to objection by any person contesting the granting of the certificates.

The act requires (by section 3) that every alien now residing in any part of this Dominion, and who, after a continued residence therein for a period of three years or upwards, has taken the oaths of residence and allegiance, and procured the same to be filed of record as thereinafter prescribed, so as to entitle him to a certificate of naturalization as thereinafter provided, shall thenceforth enjoy the rights of a natural-born subject.

Now, it will be noticed that no provision is made for filing of record the affidavits of residence and allegiance; the only thing required to be filed of record is the certificate of residence. Section 5 provides that this certificate shall be presented to the court on the first day of some general sittings thereof, and shall be read in open court; and that if the facts mentioned therein are not controverted, nor any other valid objection made to the naturalization, such certificate shall be filed of record on the last day of such general sittings. Here it will be seen that the mere lodging of the certificate is not to be considered as a filing thereof, such filing taking place only upon the order of the court on the last day of its sitting.

Again, the only certificate spoken of is one of residence alone (except, indeed, that mentioned in section 6, to which allusion will be made presently); and this appears from section 4, subsection 3, which provides that a justice of the peace, on being satisfied by evidence produced that the alien has been a resident of Canada for a continuous period of three years or upwards, and is a person of good character, shall grant to him a certificate setting forth that such alien has taken and subscribed the said oath, &c.

Section 5 of the act prescribes the mode of procedure, and enacts that such certificate (that is, in our opinion, the certificate of residence only) shall be presented to the court in open court on the first day of some general sitting thereof, and thereupon such court shall cause the same to be openly read in court

From this we take it that the only thing before the court, and the only thing they are bound to take notice of, is this certificate of residence. Behind this we cannot go, nor have we authority to enquire whether the evidence upon which it was granted was sufficient. We must presume that the justice who granted it saw that the act was complied with. The mere production of *an* affidavit, appearing to have been made by the applicant, is not necessarily conclusive that no

proper affidavit was made before the justice granting the certificate; and further, the court is not called upon to listen to or take notice of any affidavit, not being authorized thereto by the act.

Section 5 then goes on to say, "And if, during such general sitting, the facts mentioned in such certificate are not controverted, or any other valid objection made to the naturalization of such alien, such court, on the last day of such general sitting, shall direct that such certificate shall be filed of record in such court."

Here, then, we must enquire if the facts mentioned in such certificate (read on the first day of the court) are controverted or not. It is not attempted to be shown by the contestant that the alien has not taken and subscribed the oath of residence, but merely that he has made *an* affidavit which does not conform to the act. This, we think, is not such a controverting of the fact of residence as to form a bar to the granting the certificate mentioned in section 6, in the face too of the certificate of the justice saying the oath of residence has been made, and further, that a residence of seven years has actually been proved before him.

2. As to the second objection. In no place do we find that the justice is to state that the applicant has taken the oath of allegiance. Subsection 3 of section 4 prescribes what sort of certificate is to be given, and only alludes to one of residence; and section 9 again speaks of a certificate of residence only as the one to be read by the Clerk of the Peace.

3. As to the third objection. We know of no law requiring the exclusion of initial letters in the heading of affidavits. The courts of law and equity, we believe, have made such a rule, but it refers only to matters and suits in these courts.

Therefore the court determines, that as none of the facts mentioned in the three above certificates are contravened, nor any valid objection made to the naturalization of the above named Charles C. Webster, John W. Fisher and B. F. Kendall, and as it is against public policy that such certificates should be refused, except upon good and sufficient grounds, that such certificates should be filed of record under the provisions of said act.

We have alluded above to the certificate to be granted by the court under section 6. A difficulty here presents itself. The form given recites the reading of a certificate that the alien has complied with the requirements of the act, that is, amongst other things, that he has taken the oaths of residence and allegiance. In no place, however, do we see any provision for such a certificate. As stated above, the only certificate to be read is that mentioned in section 5, and that says nothing whatever about the oath of allegiance. In consequence of this, and inasmuch as the third section enacts that the oaths of residence and allegiance required by section 4 shall be filed of record before the alien shall be entitled to a certificate of naturalization (but without saying when the same are to be made, or when or where they are to be filed), the Clerk of the Peace is hereby directed not to file the certificate read before the Court, nor to issue the certificates mentioned in section 6 until the said oaths are duly filed of record with him.

REVIEWS.

SCIENTIFIC AMERICAN. Munn & Co., New York, U. S.

We publish in another place the prospectus of this very interesting and instructive journal.

It occupies a space filled by no other periodical, keeping us *au courant* with all that takes place in the scientific and mechanical world, containing information which can nowhere else be obtained. The plates given in it are admirably executed, and are an evidence of the enterprise of the publishers.

A witness with a Bardolphian nose coming in Dunning's way, he said to him, "Now, Mr. Coppernose, you have been sworn, what do you say?"

"Why, upon my oath," replied the witness, "I would not exchange my copper nose for your brazen face."

He was remarkably ugly. A client of his once inquired for him at a coffee-house; the waiter did not know such a person.

"Go up stairs," said the client, "and see if there is a person there with a face like the knave of clubs; and, if so, tell him he is wanted."

The waiter went up and at once found Dunning.

A tedious preacher had preached the assize sermon before Lord Yelverton. He came down smiling to his lordship after the service, and, expecting congratulation on his effort, asked, "Well my lord, how did you like the sermon?"

"Oh, most wonderfully," replied Yelverton, "it was like the peace of God, it passed all understanding; and, like His mercy, I thought it would have endured forever."

Erskine was counsel in a suit brought to recover the value of a quantity of whalebone, and found one of the witnesses so stupid as not to know the difference between *thick* and *long* whalebone. Driven to desperation, he at length exclaimed, "Why, man, you do not seem to know the difference between what is thick and what is long. Now, I will explain: you are a thick-headed fellow, but you are not a long-headed fellow." Being counsel for the defendant in the case of *Robinson* v. *Tickell*, he opened his speech to the bench with "Tickell, my client, the defendant, my lord," when the judge interrupted, "Tickell him yourself, brother Erskine, you can do it better than I." Having gained an important suit for a coal mining company whose counsel he was, they invited him to a splendid dinner given in honor of the victory. Called on for a toast, he gave: "Sink your pits, blast your mines, dam your rivers."