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DIVISION COURTS.

OFFICERS AND SUITORS.

Clerks and Bailiffs—(Duties in Court).—In this number, we purpose noticing the chief duties ordinarily devolving upon officers during the actual sittings of D. C.'s, and furnishing forms for their guidance in the performance of these duties. We are indebted to one of the Clerks of the County of Simcoe for a paper issued by the Judge some time since for the information of officers, and finding it well adapted for the purpose for which it was designed, we take it as the basis of our present article. It is probable that in other Counties, directions for the conduct of proceeding may have been given, similar in substance if not in the same tangible shape. However that may be, we conceive officers will be pleased to have them set down in a form to which they can always refer for information. At the same time we would remark that it is entirely in the province of each Judge to regulate the form and mode of conducting business in open Court before him; as the old song goes, each may say, "I am Judge in my own little Court." Yet as much uniformity as possible is to be desired, and the principle that "Every thing should be done decently and in order" should be applied to the conduct of business in every Court. Some persons speak of this being a minor matter in small Courts; but may we not say that Division Courts are *not* small Courts, for "Justice makes them *great*."

"The speedy despatch of business" (says the paper before us) "is an important element in the Constitution of Courts of Summary Jurisdiction—to secure it business must be gone through on an uniform and regular system; where two or three hundred cases appear on the Cause-List, even half a minute *lost* in every case will protract a Court for hours,—to the great inconvenience of parties whose causes are entered low on the List,—which a proper economy of time would save, to be used in the more important business of hearing disputed causes.

"The ordinary routine business must be accomplished in the shortest possible time, and by proper attention on the part of the officers this may be speedily done. I would not have any indecent haste exhibited, nor should there, on the other hand, be *a single moment lost which discipline can save.* The public are disposed to form their opinion of an officer's efficiency mainly from what is seen of him in the public discharge of his duties; and next in value to competence seems public confidence in the officer's ability. Take pains, therefore," (Judge Gowan adds) "to prepare yourself for the business of the sittings, and you will be able to create a favorable impression on the public, and will have attended to my wishes and order."

We will suppose the affidavits of service of Summonses returnable at a Court all duly made, and the Summonses, each enclosing all the papers belonging to the case, put together in convenient bundles, of say 50 each,—the Judge's List properly prepared in the prescribed form, and all things necessary and convenient, arranged for opening a Court [1] on the day appointed.

All things ready, and the necessary direction being given by the Judge after he has taken his seat, the Bailiff opens the Court by proclamation in the following form, or to the like effect.—

Proclamation on Opening Court.

Hear ye! Hear ye! All manner of persons who have anything to do at this —— Division Court for the County of ——, let them draw near and give their attendance and they shall be heard.—God save the Queen.

It is usual and convenient in the first place to swear the Clerk and Bailiff respectively to the due execution of the Confessions severally taken before them, and officers should be prepared promptly to take the necessary oaths when called on to do so by the Judge.

This part of the business concluded, the Clerk takes up the Summonses in regular order; usually commencing with the "adjourned cases;" he names the plaintiff in the suit, Christian name and surname at length, and the Bailiff at once calls the party in a loud voice, three times; the Clerk then names the defendant, who is to be called in like manner.—The Bailiff should then inform the Court if the parties appear, using uniformly brief and

[1] It is necessary under existing circumstances for officers to resort to every expedient, in remote Divisions, to give the room occupied for a Court anything like a respectable appearance, and to suit the arrangements to the objects in hand.—the holding a Court in a decent and orderly manner, with as much comfort as possible to suitors, witnesses and officers. The economy which denies the means of supplying suitable convenience to an Inferior Court, while it extends it to Superior Courts, is not based on any correct principle; it is not economy: it is indefensible parsimony. We hope before long to see the matter of accommodation for the D. C.'s taken up by the Legislature: in the meantime officers must do the best they can towards convenient accommodation. In two or three of the Courts in the County of Simcoe, a moveable railing of a cheap description is put up in the room used, and really serves an excellent purpose. We will not attempt to set down the "specification," but perhaps one of the Bailiff's of these Courts might in our columns give a hint to his brother Bailiffs elsewhere that would be useful.

In Judge Gowan's instructions to officers is the following direction:—

"The following order of things in the Court-room arrangement should, when practicable, be observed. The Judge's seat to be so placed that he can be heard, when speaking in an ordinary tone, by the suitors assembled. The Clerk's place close to the Judge's seat, so that the books and papers may be arranged conveniently at his hand out of the way of being taken up or interfered with by others.—Directly facing the Judge, and sufficiently close to permit his readily hearing persons therefrom, a place should be enclosed wherein the parties and their witnesses may be free from pressure of the crowd, while their cause is being heard. The Bailiff's position should be close to the enclosure for parties. Should there be a jury case, seats are to be placed for the Jury convenient to the Judge's seat,—and whenever barristers or attornies attend on behalf of suitors, a place should be reserved for them from which they can conveniently confer with their clients."

explicit language,—thus, "*Neither party answers*," "*Plaintiff present, Defendant does not answer*,"—or "*Plaintiff does not answer, Defendant present*," or "*Both parties present*," as the case may be.

The Clerk in the meantime lays the Summons before the Judge, making any statement necessary, as that—so much has been paid into Court,—or the like. The Judge will either put aside the Summons or proceed with the case. The Summons in every case finally disposed of should be taken by the Clerk and put away in some appropriate place. The Summonses "put aside for the present" will of course remain by the Judge's hand till finally disposed of: the Clerk in this manner regularly goes through the List (unless otherwise directed), but when a suit has been settled, it will be unnecessary to call the parties; stating the number to the Judge, the Clerk should say "withdrawn,"—"settled,"—"not served,"—"paid," (as the case may be;) and when the defendant has confessed the action, in handing the papers to the Judge it will be proper to mention "confessed before Clerk," (or "Bailiff,") and if only one of several defendants has confessed the action, the Clerk should be careful to draw the Judge's attention to the fact.—"Officers must remember that their undivided attention must be given to the business of the Court, and will not therefore suffer parties to interrupt them or draw their attention from it: every one must wait his time.

"In the trial of disputed cases, both Clerk and Bailiff will be on the watch to see where their services may be necessary. Thus the Bailiff, on hearing from the parties the names of their witnesses, will call them,—will be ready, with good temper and at the same time with firmness, promptly to repress angry altercations between the parties,—improper interruptions, and disorderly conduct in every shape: and where a cause is *closed*, will prevent any interruption to the further business of the Court by at once removing the parties in the case to make room for those next in succession: a knowledge of this part of the Bailiff's duty will be best acquired by observation and practice; it will need as much discretion as temper on the part of the officer."

The Clerk should be ready during the course of the trial to administer oaths to parties and witnesses. In administering the oath, he should see that the witness complies with all the formal requisites: when sworn, he ascertains from the witness his name and informs the Judge thereof.

(TO BE CONTINUED.)

SUITORS.—In the last number we briefly considered the subject of Jurisdiction; the first and main consideration for a party desiring to bring an action in a D. C. being whether his cause of action comes within the jurisdiction given to these Courts. We now propose to notice the next point for consideration, viz.: Can the party sue, and can the intended defendant be sued in a D. C.?

As a general rule, D. C.'s are authorized to entertain and try all claims and demands "for or against any person or persons, bodies corporate or otherwise," and no privilege of any description whatever is allowed to any person to exempt him from the jurisdiction of these Courts. Executors and administrators are empowered to sue and be sued; and persons under the age of 21 years may sue for *wages* in the same manner as if of full age; but if the demand be for anything *but wages*, a minor must obtain the appointment of a friend to proceed in the suit for him, and to be answerable for the costs. Where the demand is against two or more persons, partners in trade or otherwise, jointly liable, and they happen to reside in different Division, or one of them cannot be found, the plaintiff may proceed against one or more of these who can be served, and need not serve the others with Summonses.

There is also special provision in the Act regarding promissory notes and other securities seized under execution or attached, enabling the Creditor to sue *in the name of the Defendant*, or in the name of any person in whose name the defendant might have sued for the recovery of the amounts secured or made payable thereby: and should it become necessary to sue on a Bailiff's Covenant for misconduct or neglect of the office, an action may be brought against the Bailiff and his sureties; or if the Bailiff has removed from the limits of the County, the action may be commenced and carried on against the sureties alone, or against any two of them.

For more full details on these several points, Suitors are referred to the 23rd, 27th, 28th, 59th and 90th secs. of the D. C. Act.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 64.)

Every allegation and statement in the Information or Complaint should be made conformable to the facts; but in cases governed by the practice, under 16 Vic. c. 178, any inaccuracy in the charge is now comparatively unimportant, the Statute named giving great latitude in this respect: the last proviso in sec. 1 is as follows:

"Provided also that no objection shall be taken or allowed to any Information, Complaint or Summons, for any alleged

fact [1] therein, in substance or in form, or for any variance between such Information, Complaint or Summons, and the evidence adduced on the part of the Informant or Complainant at the hearing of such Information or Complaint, as hereinafter mentioned: but if any such variance shall appear to the Justice or Justices present and acting at such hearing to be such as that the party so summoned and appearing has been thereby deceived and misled, it shall be lawful for such Justice or Justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day."

And the 8th section, as regards the immateriality of certain variances, enacts—

"That in all cases of Information for any offences or acts punishable upon summary conviction, any variance between such Information and the Evidence adduced in support thereof, as to the time at which such offence or act shall be alleged to have been committed, shall not be deemed material if it be proved that such Information was in fact laid within the time limited by law for laying the same; and any variance between the said Information and the Evidence adduced in support thereof, as to the place in which the offence or act shall be alleged to have been committed shall not be deemed material, provided the offence or act be proved to have been committed within the jurisdiction of the Justice or Justices by whom Information shall be heard and determined; and if any such variance, or any variance in any other respect between such Information and the Evidence adduced in support thereof, shall appear to the Justice or Justices present and acting at the hearing, to be such, that the party charged by such Information has been thereby deceived or misled, it shall be lawful for such Justice or Justices, upon such terms as he, or they shall think fit, to adjourn the hearing of the case," &c.

In what is subjoined, then, respecting the technical requisites of an Information or Complaint, the operation of these sections is to be borne in mind, for it will be seen they render objections for alleged informalities inoperative, and cure any variance between the Information, Complaint or Summons, and the Evidence adduced; providing for the hearing being adjourned to some future day, should the defect or variance objected to be calculated to mislead or deceive the defendant. In cases not governed by the practice under the Act referred to, substantial defects and variance may be fatal to the proceeding. [2]

STATEMENT OF THE COMPLAINANT'S NAME, &C.—In general, the party injured is the proper person to go before the Magistrate and make the Complaint or lay the Information—but by the late Act, Complaint or Information may be laid or made by the complainant or informant in person, or by his Counsel or Attorney, or other person authorized in that behalf. [3] There are, however, particular Acts which expressly direct the Complaint to be made by *the party aggrieved*, and it is questionable if the provisions of the late Act over-ride them—but even when so directed under particular circumstances, the complaint may be laid by another party, (take the case of common assault, for example,[4]) as, when the offence is committed on a child, an idiot &c., the parent or friend of the party may take the necessary steps to bring the offender to trial; otherwise there would be a failure of justice, and any person who sees the assault may make oath to the fact.

[5] In cases where the Informant is entitled to a portion of the Penalty, where the proceedings are in the nature of a *qui tam* information, the information should not be laid by a person whose evidence is necessary to prove any part of the case, as his having a pecuniary interest therein might place him in a position of disability as a witness, or at all events, would affect the credibility of his testimony. [6]

The name of the prosecutor or complainant should be stated at length, together with his place of abode and calling, that the defendant may know with certainty by whom he is prosecuted, and so be enabled the better to prepare for his defence, whether on the ground of a wrong party prosecuting—want of proper parties—or of malice and falsehood in the prosecution—which, having the name of the party pursuing, may give the defendant an opportunity of knowing or facilitate to expose. Regularly, then, the informant's or complainant's name and description should be set out accurately in all cases.

ON THE DUTIES OF CORONERS.

(CONTINUED FROM PAGE 83.)

II.—PROCEEDINGS IN RELATION TO INQUESTS.

Upon the Jury being sworn, the Coroner makes entry in his book and proceeds to call over their

[1] There is an odd blunder here, the word "defect" doubtless should stand in place of the word "fact," and it is not improbable that it would be so read in construction; but the latter part of the proviso, coupled with a subsequent (the 8th) sec., would seem sufficiently ample to embrace and cure every variance that ought properly to be aided.

[2] Hence the necessity in new enactments for summary punishment of making the provisions of the 16 Vic. c. 178 applicable to proceedings under them to convict. There is a section in the English Act declaring that its provisions shall not extend to certain *specified* complaints, &c., and another repealing certain Statutes and parts of Statutes, *naming them*, inconsistent with the provisions of that Act. Had our Statute contained corresponding provisions it would have shut out many difficult questions that now are to be determined, as they arise, by judicial construction.

[3] 16 Vic. c. 178. sec. 9.

[4] 4th & 5th Vic., c. 27. s. 27, which runs thus: "That whenever any person shall unlawfully assault or beat any other person, it shall be lawful for any J. P., *upon complaint of the party aggrieved*, praying him to proceed summarily under this Act, to hear and determine such offence." &c., and as a general rule it has been considered, that when the whole penalty is given to the party aggrieved, he is to lay the complaint, or it must appear to have been laid with his sanction.

[5] See ante page 63 Note 4.

[6] See 16 Vic. c. 178, s. 14; see also the evidence Act, 16 Vic. c. 19.

The Proviso in the 1st section of the last-mentioned Act runs in these words: "Provided that this Act shall not render competent, or authorize or permit *any party* to any suit or *proceeding individually named on the Record*, &c., to be called as witnesses on behalf of such party, but such party may in any *civil* proceeding be called and examined as a witness, in any suit or action, at the instance of the opposite party." It will not therefore be safe to rest a case on the testimony of the informer, for the proceeding would appear to come within the Proviso, and he to stand in the position of "a party to the proceeding individually named on the *Record* (*the information*.)

names, one by one, in the manner common to all our Courts, first saying,—"Gentlemen of the Jury, you will answer to your names and say 'Sworn,' if you are sworn;" each Juror, then, when his name is called, simply makes answer "sworn."

The Coroner must next give a short charge, acquainting the Jury with the purpose of the meeting, thus:—

"Gentlemen,—You are sworn to inquire on behalf of the Queen, how and by what means H. H. came to his death. Your first duty is to take a view of the body of the deceased, wherein you will be careful to observe if there be any and what marks of violence thereon; from which, and a proper examination of the witnesses intended to be produced before you, you will endeavour to discover the cause of his death, so as to be able to return a true and just verdict on this occasion."

VIEWING THE BODY.

Necessity and reason for—It was formerly held necessary that the inquest should be held in the same place where the body was viewed [a]; but the body is now usually deposited in an adjoining room, where the Jury, under the Coroner's direction, adjourn, and make careful and minute examination. We have already stated that the jurisdiction of a Coroner is only *super visum corporis*; it is laid down also that the view of the body must be taken by the Coroner and Jury at one and the same time. In *Rex.* vs. *Tarrant*, K.B.M.T., 1819,[b] the following explicit language was used by the Court: "The inquisition of the death is to be taken on view of the body, and not otherwise; because, if the body be interred he may dig it up, if it can be found, in order to hold the inquest. If the body cannot be found, or the body is so putrified that a view would be of no service, then the inquest shall be taken by the Justices. Referring to the words of the Statute *de officio coronatoris*, it seems to us that the inquest cannot be holden unless the Jury and the Coroner be present together *super visum corporis*." The object of requiring the attendance of the Coroner and the Jury at the time the view is taken, is that the Jury may have the benefit of hearing such observations as the experience of the Coroner may suggest for their information.

Coroner's further charge, where necessary.—On returning to their Court-Room, to see that all are assembled the Jury are again called over, when the Coroner adds such further observations for their guidance as the examination of the body may have suggested. "Particular charges are not necessary, excepting in particular cases arising from the fact or in the course of the evidence, such as lunacy, *felo de se*, deodand, flight, forfeiture, &c. The deodand requires no other charge than of a value to be put upon what caused the death, and of whose property and in whose possession. As to the particular charge in case of a flight, which induces a forfeiture where the party charged is not forthcoming, it may be necessary to add something to the general charge, [c] as thus:—

Coroner's further charge.

"Your charge will be further to inquire in what degree the party charged is guilty, whether of murder or manslaughter, or of a killing in his own defence; if you find him guilty of murder or manslaughter, you are then to enquire what goods and chattels, lands or tenements, he had at the time of the act committed, or at any time since; if you find the fact to be only justifiable homicide, from inevitable necessity, or in defence of his own person, life, or property; or where a suspected person doth fly and resist the proper officer, and is from necessity slain because he could not otherwise be taken: this flight and resistance presume a guilt, and will incur a forfeiture; and therefore you are to enquire whether in either of the instances the party fled for it; and if you find he did fly for it this is a presumptive confession of the charge, and you are then to enquire of his goods and chattels, but not lands or tenements, in the same manner as if you had found him guilty."

AUTHORITY TO EXAMINE WITNESSES.

The Coroner has the power of summoning witnesses and compelling their attendance; and it is his duty to receive all such evidence as may be offered, not only on behalf of the Crown, but on the part of the person accused.[d] He must, however, reject the testimony of those who do not believe there is a God, or in a future state of rewards and punishments [e]; such evidence being valueless.

Summoning Witnesses.—As a general rule, the Coronor is enabled, either through the assistance of the friends and relatives of the deceased, or through a sense of duty on the part of those cognizant of facts in relation to the death, to have the necessary evidence in attendance at the opening of the Court; but where it is necessary to summon witnesses, the law has armed him with full powers. It would probably be a great saving of time were the Coroner to have the witnesses (whose names have been given in for that purpose) summoned by the Constable, immediately after notifying the Jurors. The Coroner should then prepare a Summons, under his hand and seal, and give same, with the copy for service, to the Constable:—

Summons to a Witness.

County of——— } To T. D., of the Township of ———, in
To Wit: } County of ———, Yeoman:

"Whereas I am credibly informed that you can give evidence on behalf of our Sovereign Lady the Queen, touching the death of H.H., now lying dead in the Township of ———, in the said County, these are therefore, by virtue of my office, in her Majesty's name, to charge and command you personally to be and appear before me, at the dwelling-house of N.N., in the Township aforesaid, on the —— day of ———, A.D. 18 , at the hour of ——— of the clock in the

[a] 2 Hawk, C. 9, s. 25. [b] 1 Chit. Rep. 745, S. C. 3 B. & A. 260.
[c] Keele, 214. [d] 1 Leach, C.C. 43. [e] 1 Phill. Ev. 19.

forenoon, then and there to give evidence and be examined on her Majesty's behalf before me and my inquest touching the premises: herein fail not, as you will answer the contrary at your peril.

Given under my hand and seal this ——— day of ———, A.D. 18 .....

A.B.. L.S.

Coroner.

At the time of service of copy of Summons on the Witness, the Constable must also produce and exhibit the original, taking care, however, not to let it pass out of his hands.

Compelling Attendance.—When the Witness refuses to obey the Summons served upon him, and is not in attendance at the Inquest, and his evidence is material, the Coroner must take summary measures to compel an immediate attendance. This is done by issuing a Warrant to arrest the party for contempt in not obeying the Summons, and giving it to a constable to execute.

Warrant for Contempt.

County of ——— } To the Constables of the Township of
To Wit. } ———, in the County of ———, and to all other her Majesty's Officers of the Peace in and for said County.—Whereas I have received credible information that T.D., of the Township of ———, in the County of ———, can give evidence on behalf of our Sovereign Lady the Queen, touching the death of H.H., now lying dead in the Township of ———: and whereas the said T.D. having been duly summoned to appear and give evidence before me and my Inquest touching the premises, at the time and place in the said Summons specified, to wit at the dwelling-house of N.N., in the Township aforesaid, on the ——— day of ———, A.D. 18 , of which oath hath been duly made before me, hath refused and neglected to do so, to the great hinderance and delay of justice. These are therefore, by virtue of my office, in her Majesty's name to charge and command you, or one of you, without delay to apprehend and bring before me, one of her Majesty's Coroners for the said County, now sitting at the Township aforesaid, by virtue of my said office, the body of the said T.D., that he may be dealt with according to law: and for your so doing this is your warrant.

Given under my hand and seal this ——— day of ———, A.D. 18 .....

A.B. L.S.

Coroner.

Penalty for Refusing to Give Evidence.—Should the Witness, after being arrested and brought before the Coroner and Jury, from stubbornness or other cause, refuse to give evidence and be examined, it only remains for the Coroner to issue his Warrant of committal. Happily such cases are of rare occurrence, still it is in this way sometimes attempted to defeat the ends of justice, and the Coroner is necessitated to put the law in force.

Warrant for Committal of Witness.

County of ———, } To the Constables of the Township of
To Wit. } ———, in the County of ———, and other her Majesty's Officers of the Peace in and for the County aforesaid, and also to the Keeper of the Gaol in said County.—Whereas I heretofore issued my summons, under my hand, directed to T.D., of the Township of ———, in the County of ———, requiring his personal appearance before me, then and now one of her Majesty's Coroners for the said County, at the time and place therein mentioned, to wit, at the dwelling house of N.N., in the Township aforesaid, on the ——— day of ———, A.D 18 , to give evidence and be examined on her Majesty's behalf touching and concerning the death of H.H., then and there lying dead, of the personal service of which said summons oath hath been duly made before me; and whereas the said T.D. having neglected and refused to appear pursuant to the comtents of the said Summons, I thereupon afterwards issued my Warrant, under my hand and seal, in order that the said T.D., by virtue thereof, might be apprehended and brought before me, to answer the premises; and whereas the said T.D., in pursuance thereof, hath been apprehended and brought before me, now duly sitting by virtue of my office, and hath been duly required to give evidence and be examined before me and my inquest on her said Majesty's behalf, touching the death of the said H.H. Yet the said T.D. notwithstanding, hath absolutely and wilfully refused, and still doth absolutely and wilfully refuse to give evidence and be examined touching the premises, or to give sufficient reason for his refusal, in wilful and open violation and delay of justice. These are, therefore, by virtue of my office, in her Majesty's name to charge and command you, or any one of you, the said Constables and Officers of the Peace in and for the said Township and County, forthwith to convey the body of the said T.D. to the Gaol of the County of ———, at the Town of ———, in the said County, and him safely to deliver to the Keeper of said Gaol: and these are likewise, by virtue of my said office, in her Majesty's name, to will and require you, the said Keeper, to receive the body of the said T.D. into your custody, and him safely keep until he shall consent to give his evidence and be examined before me and my Inquest, on her Majesty's behalf, touching the death of the said H.H, or until he shall be from thence otherwise discharged by due course of law; and for so doing this is your Warrant.

Given under my hand and seal this ——— day of ———, A.D. 18 .....

A.B.. L.S.

Coroner.

The Statute 13 & 14 Vic. c. 56, also provides, as in the case of Jurors, that if any person having been summoned as a witness to give evidence upon an inquest shall not appear, he shall be subject to a fine as therein declared. Such proceeding, however, not to interfere with the power already vested in Coroners for compelling appearance of witnesses, or punishing for contempt of Court in not appearing and giving evidence: the third section declares:—

III. And be it enacted, that if any person having been duly summoned as a Juror or Witness to give Evidence upon any Coroner's Inquest, shall not, after being openly called three times, appear and serve as such juror, or appear and give evidence on such inquest, every such Coroner shall be empowered to impose such fine upon any person so making default as he shall think fit, not exceeding twenty shillings; and every such Coroner shall make out and sign a certificate, containing the name, residence, trade or calling, of such person so making default, together with the amount of the fine imposed, and the cause of such fine, and shall transmit such certificate to the Clerk of the Peace in the County in which such defaulter shall reside, on or before the first day

of the Quarter Sessions of the Peace then next ensuing for such last mentioned County, and shall cause a copy of such certificate to be served upon the person so fined, by leaving it at his residence, within a reasonable time after such inquest; and all fines and forfeitures so certified by such Coroner shall be estreated, levied and applied in like manner, and subject to the like powers, provisions and penalties, in all respects, as if they had been part of the fines imposed at such Quarter Sessions. *Provided* always, that nothing herein contained shall be construed to affect any power now by law vested in any Coroner for compelling any person to appear and give evidence before him on any inquest or other proceeding, or for punishing any person for contempt of Court, in not so appearing and giving evidence or otherwise.

(TO BE CONTINUED.)

U. C. REPORTS.

GENERAL LAW.

IN RE McAVOY AND THE MUNICIPALITY OF SARNIA.

By-law to prohibit absolutely the sale of liquors, &c.—Approval of electors.

By-laws for prohibiting the sale of spirituous liquors, &c., &c., under 16 Vic. ch. 181, sec. 4, require to be submitted to the electors, [illegible] adopted and approved of by a majority of all the qualified municipal electors of the municipality, not merely by a majority of those who may attend at the meeting called to consider such by-law.

Where the by-law which provided for calling such meeting assumed that the approval of the majority of the voters present would be sufficient: *Held*, that it was nevertheless proper to move against the then proposed by-law, after it had been passed on such approval, and not against that which laid down the improper course of proceeding.

Vankoughnet, Q.C., obtained a rule nisi on the Municipality of the Township of Sarnia, to shew cause why a by-law passed by them, intituled "A By-law to repeal the first four sections and part of the fifth section of by-law No. 33, intituled 'A By-law for the limitation and regulation of taverns and temperance hotels in the township of Sarnia, and for preventing absolutely the sale of wine and brandy, or other spirituous liquors, ale, or beer by retail, within the municipality of Sarnia,'" or the said by-law, with the exception of the first section, should not be quashed with costs, on the grounds that the municipal council had no jurisdiction to pass such a by-law, or any portion thereof, excepting the first section; and that the said by-law, excepting the first section, is on the face of it illegal, and does not shew that it had been approved of by the majority of the electors; and that it was not, before the final passing thereof, approved of and adopted; and on grounds appearing on the face of the by-law, and on the affidavits and papers filed.

The by-law complained of was numbered 48, and was passed on the 8th of November, 1853.

It repealed certain clauses of a previous by-law, No. 33. The second section enacted "that there shall be no license issued for the sale of intoxicating liquors in any house of public entertainment, and that no wine or brandy, or other spirituous liquors, ale or beer, shall be sold by retail within the limits of the municipality of the township of Sarnia." The third section was, "that if any person shall sell any wine or brandy, or other spirituous liquors, ale or beer, by retail, within the said municipality, to any person, he shall forfeit and pay a fine of not less than one pound and not more than five pounds, for every such sale; and in default of payment, or for want of sufficient distress, shall be imprisoned for a term not exceeding twenty days;" and the fourth section directed "that the by-law shall come into force on the 1st of January, 1854, except as to licenses already granted, and not yet expired."

It appeared that there were 290 qualified electors in the municipality.

On the 6th of September, 1853, a by-law was passed for determining the manner of ascertaining the adoption and approval of a majority of the qualified electors of the then proposed by-law (that now moved against); and this by-law provided that there should be a general meeting of the qualified municipal electors, to be held at a time and place named in it, at which meeting the reeve, or, in his absence, some member of the council, should preside: that the only question to be determined at such meeting should be whether *the majority of the municipal electors present thereat* did or did not approve of the said by-law: and directions were given as to the mode of proceeding at the election: and it was enacted that, at the close of the poll, the person presiding should count the yeas and nays, and ascertain and certify to the council whether *the majority* was for the approval or disapproval of the by-law.

The meeting was held as directed by the by-law, and the by-law No. 48, the one now complained of, was passed on the 8th of November, 1853, upon a certificate, dated the 7th November, signed, not by the presiding officer, but by the clerk of the council, as secretary of the meeting, to the effect that the meeting was held as directed by the by-law for that purpose: that the reeve presided: that the draft of the by-law was read to the meeting, and the question of approval or disapproval put to them by the reeve, and that the reeve did then and there declare his opinion that *the majority of the municipal electors present thereat* was for the approval of the by-law; which decision was not appealed from.

The by-law respecting the taking the vote had provided for the declaring the proposed by-law approved of, when no poll was demanded, as seemed to have been the case here.

It was sworn in an affidavit made by the clerk, who gave this certificate, that he attended the meeting, and that there were less than twenty of the municipal electors of the township of Sarnia present thereat.

Leith shewed cause, and cited Rex. v. Bower, 1 B. & C. 492; Rex. v. Monday, 2 Cow. 531; Rex. v. Varlo, 1 Cow. 248; Rex. v. Grimes, 5 Burr. 2598; Rex. v. Bellringer, 4 T. R. 823; Gosling v. Veley, 16 L. J. (Q.B.) 209, 211; Oldknow v. Wainwright, 1 W. Bl. 29; Regina v. Hirons, 7 A. & E. 962.

Vankoughnet, Q. C., contra, cited Pierce v. Bartrum, 1 Cow. 269; Shaw v. Pope, 2 B. & Ad. 465; Elwood v. Bullock, 6 Q.B. 383; Woolley v. Idle, 4 Burr. 1951; Rex. v. Devonshire, 1 B. & C. 610.

ROBINSON, C.J., delivered the judgment of the court.

Giving due weight to what has been decided in England in the cases cited by Mr. Leith, respecting the sufficiency, upon common law principles, of a majority of those present at a meeting to bind the whole body, we must in this, as in other similar cases, where there is a statutory provision upon the subject, determine what is the intention and proper construction of the language used by the legislature.

The question here arises under the statute 16 Vic. ch. 184, sec. 4, which provides for submitting to the electors of the municipality the question whether a by-law shall pass which is intended absolutely to prohibit the licensing of any inn or house of public entertainment to sell wine or spirituous liquors by retail, or to prohibit altogether the selling of wine, brandy, or other spirits, or ale or beer by retail, within the municipality.

There are other statutes, such as 16 Vic. ch. 22, and ch. 181, secs. 6 & 7, which provide for a reference to the electors before any by-law for certain purposes shall pass. They are not closely alike in their provisions; ch. 22 making the result depend on the majority of votes of those present at the meeting to be convened, while the other statute, ch. 181, requires evidently that the proposition must be approved of by a

majority of those residing within the municipality who are qualified to vote at elections, or it cannot be passed. We have no doubt that the legislature, having reference to the questions to be determined, did intend to make the difference which they have done in these two cases.

The provision in ch. 184, upon which we are now called to decide, is not so explicit in its terms in regard to what it demands, as either of the other two statutes which we have mentioned. But we have no hesitation in determining that it does make it necessary that a majority of the qualified electors of the municipality should concur, and that a vote of a majority of those present at the meeting, unless it amounts in numbers to a majority of the electors both present and absent, will not suffice.

The 4th clause of ch. 184, provides, that no such by-law as is therein mentioned "shall have force or effect, unless, before the final passing thereof, it shall have been adopted and approved by *a majority of the qualified municipal electors of the municipality* (to be ascertained in such manner as shall be determined by a by-law to be previously passed for that purpose.)"

Where the legislature have meant, as in ch. 22, that a majority of those present at the meeting shall decide the question, they have said so in express words. Here they have not said so, but have required that there shall be the assent of "a majority of the qualified municipal electors of the municipality."

Judging from the words used in the clause before us, we cannot say that the legislature meant to place it in the power of any meeting, however small, convened at a part of the township however remote from the bulk of the population, to determine whether, not merely all the other inhabitants of the township, but all who might have occasion to sojourn in it or travel through it, should be able to buy a glass of beer. Such a meeting might be less numerous than the council itself, and the legislative body might in such a case be binding all their constituents under the sanction of a reference made to a number of voters less than the number of members of the council who concurred in passing the by-law. It is not likely that the legislature intended that; and the language they used certainly imports otherwise, and, as we think, very plainly.

It is true that the by-law under which the approbation of twenty electors was obtained, out of the two hundred and ninety residing in the township, does assume that it will be sufficient to ascertain what is the opinion of the voters who attend the meeting, and the certificate which forms the foundation of this by-law does accordingly comport with the by-law in stating that the majority of the municipal electors present at the meeting was in favor of the proposed by-law, but the statute of the province says that the approval must come from the majority of the qualified municipal electors of the municipality.

Where the two provisions conflict, we must be governed by the statute. It was objected that even in this view of the case it was necessary to have moved, in the first instance, to quash the by-law which laid down the improper course of proceeding; but that was passed only for the occasion of that meeting, and is spent. It would be an idle act to move against it; and being illegal on the face of it, it could never form a good legal foundation of the by-law afterwards passed. We make the rule absolute with costs.

Rule absolute.

THE CHIEF SUPERINTENDENT OF COMMON SCHOOLS FOR UPPER CANADA, APPELLANT, IN A CAUSE OF THE TRUSTEES OF SCHOOL SECTION NO. 2, IN THE TOWNSHIP OF MOORE, *v.* WILLIAM MCRAE.

Alteration of school section—Election of new trustees.

An alteration of the boundaries of a school section under 13 & 14 Vic. ch. 48. sec. 18. subsec. 4. does not make it necessary to call a school section meeting and appoint new trustees.

The trustees in this case proceeded to collect the rate by action instead of by warrant, as provided by 13 & 14 Vic. ch. 48. sec. 12. subsecs. 2. 7. 8; and *semble* per *Draper, J.* that the appeal might have been dismissed on this ground; but the objection was waived.

This was an appeal from the Division Court of the County of Lambton.

The action was brought by summons bearing date the 16th of May, 1854, issued out of the First Division Court of the county of Lambton, to recover £1 7s. 11d. for the causes stated in the plaintiff's statement of claim (which statement by the judgment returned appeared to have been for school assessments for 1851, 1852, 1853. The statement itself was among the papers, and was, for 1851, for support of school, $1.52.: for 1852, for support of school, $1.12½.; for 1853, for support of school, $1.47., and for the same year 1853, for special assessment for building school-house, $1.47.

It appeared that on the 11th of March, 1850, the Municipal Council of the township of Moore passed a resolution that the following school sections were recommended by the Rev. Geo. Salter, and unanimously adopted by the council. Section No. 2, commencing at No. 19, front concession, running east to 19, 4th concession inclusive: then north to 19, in the 6th concession, inclusive: then west to the river St. Clair; thence to the place of beginning.

On the 17th of June, 1851, a by-law was passed by the same municipality, confirming the resolution of 11th March, 1850, and as to this section No. 2, enacting "Section 2nd to commence at No. 19, front concession, inclusive, running east to 19, 4th concession, inclusive: thence north to 19, 6th concession, inclusive; thence west to the river St. Clair; thence south to the place of beginning."

The defendant was a resident in school section No. 2, as defined by the resolution of 11th March, 1850, and the by-law of 17th June, 1851.

The evidence of George Wright, given in the court below, as follows:

George Wright, sworn, says he was one of the trustees of above section in 1850, '51 and '52. The section elected trustees in 1851. Put the necessary notices up himself. The regular annual school meetings were called on notices put up for that purpose in '51 and '52 by himself. There were only six or seven opposing these alterations. None made at the meetings. There was but one meeting (annual) in 1850; did not at any meeting see defendant there; does not recollect receiving any notice of limits, &c., from the township clerk. There was no change of number, but a part taken off the north and parts added to east and south sides. Read a written notice of alteration from Mr. Salter, the township superintendent.

The defendant waived all objections as to the method of proceeding, but objected, first, that the requisites of the 13 & 14 Vic., ch. 48, sec. 18, subsec. 4, had not been complied with in passing the by-law of 17th June, 1851; and secondly, that the section No. 2, as altered, constituted a new section, and therefore new trustees should have been elected, as provided by 13 & 14 Vic., ch. 48, secs. 4, 5, 6, which was not done.

As to the first objection, the learned judge held that the court below had no power to enquire whether the township proceeded legally in passing the by-law or not; but that upon the second objection the defendant was entitled to succeed, and on that ground a non-suit was ordered.

The Chief Superintendent appealed from this decision under the provisions of 16 Vic. 185, sec. 24.

ROBINSON, C. J.—The facts of this case are not stated with distinctness, but we are left to glean them from the evidence and documents as we can.

I infer from them that McRae lives in section 2, and that he is sued in the Division Court for not paying school rates imposed for that section. There is no paper annexed to the summons shewing the claim, though such minute of claim is referred to as if annexed. The question which we are asked to adjudge upon is, whether an alteration made in school section 2, by taking a part from it, and adding to it what formed part of another section, *constitutes* the section No. 2, so altered, a *new section* within the meaning of the 18th clause of 13 & 14 Vic., ch. 48, sec. 3, and made it necessary to call a school section meeting, and to proceed therein as in the 4th and 5th clauses of the act is directed, before any rates for such altered section could be imposed; or whether, as the Chief Superintendent of Schools contends, the trustees chosen for the section before its alteration did not continue in office for that section in its altered state as before, and had power to impose rates, without the necessity for a new election of trustees, as at a first meeting for a new section.

I cannot say that I am certain I have succeeded in picking out the facts, but as I understand them I think there was no necessity for any school section meeting, or new appointment of trustees for the section 2, on account of the alteration that had been made in its limits, and that the judgment of non-suit given in the Division Court should therefore be reversed, and judgment given for the plaintiffs in the cause.

I do not see on the face of the papers submitted why the trustees did not proceed to collect the rate in this case by warrant. I see no authority for proceeding by action except where the person rated resides out of the section. However, there is no appeal on this point, and what has been done may be right in that respect, though the foundation of the proceeding is not explained.

DRAPER, J.—It is nowhere shewn what were the boundaries of school section No. 2, prior to the 11th of March, 1850; that a section No. 2, existed before the 11th of March, 1850, appears from the fact stated in the evidence of Geo. Wright, that he was a trustee in 1850, in which year he says there was only one meeting (I presume for the election of school trustees) which was the annual meeting, and according to the 12 Vic., ch. 83, sec. 21, must have been on the second Tuesday in January of that year. Wright's evidence further goes on to state that the change made in 1850, was the taking off part from the north and adding a part to the east and south sides of section No. 2. Now it appears to me that this was the alteration of a school section, so far as the evidence shews. It is not shewn to have been a new division of the township into school sections: it certainly was not the union of two or more sections; and therefore only the third alternative provided for by the 18th section of 12 Vic. remains; namely, the alteration. If therefore we can assume that an alteration of the school section could be made by resolution, then this alteration made on the 11th of March, 1850, was expressly confirmed by the statute 13 & 14 Vic. ch. 48, and the appeal must be sustained. If it were necessary to rest the decision upon this point, however, I should require further consideration before concluding that the powers conferred for common school purposes on the Municipal Council do not require to be exercised by by-law. But it is not necessary to rest on that ground. In June, 1851, a by-law was passed, almost in the words of the resolution of the preceding year, and the provisions of that act equally bring me to the conclusion that this is an alteration of a school section and no more, according to the evidence submitted. I think the learned judge held rightly in the court below, that the regularity of the proceedings preparatory to that by-law were not a subject for his enquiry. He took it, and I think properly, as it stood before him. It was within the power of the township council by the 18th section, subsec. 4, of the 13 & 14 Vic., to make such an alteration, and they have done it in the way that is free from doubt as to the due execution of the power, *i.e.* by by-law. That an *alteration* involves a change of parties from being members of one school section by transferring them into another is quite clear from a part of the proviso to the 4th subsection of section 18, "that the inhabitants transferred from one school section to another shall be entitled, for the common school purposes of the section to which they are attached, to such a proportion of the proceeds of the disposal of the school house or other common school property as the assessed value of their property bears to that of the other inhabitants of the school section from which they shall have been separated." This language expressly applies to the disposal of school property not required in consequence of the "alteration or union of school sections." In my opinion, therefore, confining my attention to the statute 13 & 14 Vic., ch. 48—(the 16 Vic., ch. 185, does not affect the question)—the evidence in this case shews only an alteration of an existing school section, not the formation of a new one; and therefore, as there were three trustees in the section No. 2, elected according to law, before this by-law, they continued to be trustees after it. The judgment of non-suit is therefore wrong. The plaintiffs should recover for the school rates for 1852 and 1853. As to those for 1851, treating the alterations to have been made by the by-law of June, 1851, sub-section 4 of section 18 of 13 & 14 Vic., ch. 48 provides "that any alteration in the boundaries of a school section shall not go into effect before the 25th day of December next after the time when it shall have been made." The rate bill is headed thus: "Rate-bill of persons liable to school fees in section No. 2, in the township of Moore, for nine months, commencing 21st January and ending the 30th November, 1851; and it is issued with a warrant to levy, addressed to the collector on 2nd September, 1851. Now, as I understand, the defendant only became a resident of school section No. 2, by force of the alteration. It seems to follow that he would not be liable for the rate imposed prior to the 25th of December, 1851, as the alteration made by the by-law of June in that year could not take effect earlier.

The judgment in this case was given in the court below on the 23rd of June, 1854. The notice of appeal was given, as appears, on the 10th of July following. According to 16 Vic. ch. 185, section 25, the matter ought to have been set down for argument "in the *next term*," i.e. in Trinity. This seems to have been done, but too late for argument last term.

The only point I entertain any doubt upon is whether this appeal might not have been dismissed upon the ground that the statute 13 & 14 Vic. ch. 48, section 12, sub-sections 2, 7, 8, provides specific means for collecting all school rates with the exception contained in sub-section 9, which in express terms authorizes the school trustees to sue for and recover by their name of office the amounts of school rates and subscriptions due from persons residing *without* the limits of their school section and making default in payment. This objection was not however taken on the argument.

BURNS, J.—I think the judge has taken quite a mistaken view of the effect of the 3rd and 4th subsections of section 18 of 13 & 14 Vic. ch. 48. The 3rd subsection gives the municipal council of the township power to form portions of the township, where no schools have been established into school sections, and in such case the proceeding to elect trustees is to take place under the provisions of the 4th section. This case does not come within that provision. Then under the 4th subsection the municipal council has power to do two things—first, to alter any school section already established; secondly, to unite two or more school sections. It is only in the case of two or more school sections being united that the provisions of the fourth section of the act is brought into operation. A mere alteration of the boundaries does not require a new election of trustees. A union of two or more sections might take place at any period of the year, and then it would be required to have a new election, which the fourth section of the act provides for. In the case of an alteration of the boundaries, the fourth subsection declares that such

alteration in the boundaries shall not go into operation before the 25th of December next after the same shall have been made. This evidently contemplates that no new election is necessary upon a mere alteration of the boundaries. It was contended on the argument that there should have been evidence before the judge below that the people of the school section desired the alteration. I do not think such evidence required. So long as the by-law of the township council remained *de facto*, it was unnecessary for the trustees of the school to prove it to be correct *de jure*. In proceedings by the trustees of the school section it must be assumed that all preliminary matters were performed.

Appeal confirmed.

Regina ex rel. Swan *v.* Rowat.

(Reported by C. Robinson, Esq., Barrister-at-Law.)

Qualification of candidate—Right of returning officer to refuse a candidate whose qualification does not appear—Entitling papers preceding summons—Nomination of candidate by non-resident of township.

The relator in this case, on being proposed as a candidate for township councillor, was opposed as not having a requisite qualification therefor. The returning officer therefore refused to accept him as a candidate, and returned the other candidate as duly elected.

Held, that on moving to set aside the election, the relator should shew clearly that he was duly qualified *at the time of election* to be such candidate.

Held, also, that affidavits and papers, on motion and rule, for a summons, in the nature of a *quo warranto*, are bad if entitled in a cause.

Semble, That the party nominating a candidate need not be entitled to vote.

The summons in this case issued in Hilary Term last. The grounds on which it issued, and on which the relator moved to set aside the election, are fully set forth in the judgment.

On the 2nd March *Cosens* appeared for the defendants; he objected—

1st. That the affidavits and papers preceding the issuing of the summons were wrongly entitled, being, "In the matter of The Queen on the relation of William Swan *vs.* James Rowat," whereas they should only have been entitled in the court. He referred to The King q. t. *vs.* Cole, 6 T. R. 640; The King *v.* Almon, in note to same case; and to The Municipality of Augusta *vs.* Municipality of Leeds, &c. 1 Prac. Rep. U.C., No. 2, p. 121.

2nd. That the affidavit of D'Alton McCarthy was sworn before the partner of agent of relator's attorney: he referred to Rex. *v.* Justices of Shrewsbury. 2 Barnardiston, 272.

3rd. That relator did not show that he was qualified at the time of the election to be a candidate for the office of township councillor.

4th. That he had acquiesced in the election, and could not now move against it—citing The Queen *v.* Greene, 2 G. & D. 24; The Queen *v.* Hiorn. 7 A. & E., 962; and Reg. ex rel. Mitchell *v.* Adams, 1 Cham. Rep.

5th. As to the returning officer, that neither the original nor the copy served on him was directed to him; being, in fact, directed to nobody—and that consequently all proceedings against him must be set aside, such writ, &c., being a nullity. He however appeared for him, but contended that the appearance could not waive the nullity. He referred to Tomsom *v.* Browne, And. 16; Hinton *v.* Stevens, 4 Dow, 286.

H. Eccles, in reply, contended that the appearance waived the irregularity in the writ, &c., to returning officer.

That the affidavits proposed to be filed on behalf of defendants were wrongly entitled, being "The Queen ex rel. Swan *v.* Rowat & Mackay," whereas the proceedings are against defendants, not jointly but separately.

That the qualification of relator sufficiently appears in his affidavits filed, to make a *primâ facie* right to be a candidate for the office in question.

Richards, J.: The writ calls on the dft. to shew by what authority he claims to use, exercise, or enjoy, the office of township councillor for the first ward of the township of Flos, in the county of Simcoe.

The objections may be thus stated—that at the last election for a township councillor for the said ward, held at the dwelling-house of Sarah Davenport, in the first concession of the said township, on the 1st January last, dft. and relator were both nominated as candidates for the said office; that relator is rated on the assessment roll of the township for rateable real property lying within such ward, sufficient to qualify him as a candidate for the said office, and demanded a poll. That the returning officer refused to grant such poll, or to permit him to be put in nomination as such candidate, or to take votes on his behalf, stating that he, the returning officer, objected to relator, and illegally declared dft. duly elected.

The second ground of objection is substantially mentioned already, viz., that the returning officer refused to grant a poll, and to receive votes at such election, thereby depriving the electors of the ward of the privilege of voting.

Third—that defendant was proposed by one Peter Cleland, who resided in Medonte, and was not entitled to vote or take part in the said election. The relator verifies his statement with the usual affidavit that he believes the reason and grounds of the statement to be well founded.

The relator's own affidavit, sworn on the 2nd Feb., states that he *resides* upon and *is* the *owner* of lot No. 52, in the second concession of Flos; that he was assessed for the year 1854 *upon the said place* for £175; that his name was entered upon the *assessment roll* of the township for that amount—£125 being for *real estate* held in his *own right*, and the residue, £50, for personal property; that he was proposed and seconded for the office of township councillor for the first ward of the said township of Flos; that Peter Cleland, of Medonte, not being a voter within the said ward, desired the returning officer not to receive him as a candidate, stating that relator had no *title* to his land, and that he could not, even if he were elected, qualify for the office; that he, relator, strongly remonstrated with the returning officer, and formally demanded a *poll*; that the returning officer *disregarded* his remonstrance, and demand of a poll, at the instigation of the said Peter Cleland, who is the son-in-law of George McKay, the returning officer. That the returning officer stated he *objected* to William Swan, and declared James Rowat duly elected. That relator thereupon solemnly protested against the proceedings as illegal.

The affidavit of John Oswald Swan, said to be a nephew of relator, sworn on the second of February, states that he knows relator, who *is* the *owner* and *occupier* of a farm of one hundred acres of land in the first ward of Flos; that he attended the election on the first of January for a councillor for that ward. After the opening of the poll, Peter Cleland, not being a resident of or voter in the township, proposed dft. for councillor for the said ward, and John Dunn seconded him; that Gideon Richardson, a resident freeholder of the said ward, proposed relator, and that he, deponent, being also a resident freeholder of the said ward, seconded him. That Peter Cleland desired the returning officer not to receive the nomination of relator, as his title to his farm was not good, and he could not qualify. Relator then formally demanded a poll, when said Cleland addressed returning officer as follows: "Mr. Returning Officer, as there is no opposition, you can stand up and declare James Rowat duly elected," which the returning officer immediately did, saying that he objected to the relator, and would not receive him.

The affidavit of Gideon Richardson, sworn on the same day, states that he was assistant assessor for the township of Flos for 1854; that he and Archibald McIntosh assessed the property of the relator, in the first ward of the township,

lot No. 52, in the second concession O.S.; that he was rated with rateable real property, held in his own right, in said ward, at £125, and for personal property at £50, in all £175; and that relator was placed on the assessment roll of the township for that amount; that there are not more than twenty persons on the assessment roll qualified according thereto, to vote for councilman for said ward; that he was present at the last election for councilman for the said ward; that Peter Cleland, of the township of Medonte, son-in-law of the returning officer, not being a resident of the ward or township, proposed dft. as a candidate for the office, and John Dunn seconded him; that he, deponent, proposed relator, who was seconded by John Oswald Swan; that relator then *formally demanded a poll*, when the returning officer, without replying to him, said "I object to William Swan, and declare James Rowat duly elected." He distinctly heard relator object to the whole proceedings as illegal, and protest against the election of the dft.

On reading these affidavits the Court considered that the returning officer was a necessary party to the proceedings, and ordered him to be summoned.

On the 2nd March the dft. appears by Mr. Cosens, who takes the preliminary objection that the papers and affidavits on which the summons was obtained were wrongly entitled, being "In the matter of the Queen on the relation of William Swan *v.* James Rowat," whereas they should only have been entitled in the Court,—referring to The King q. t. *v.* Cole, 6 T. R. 640; The King *v.* Almon in note to same case; In re. the Municipality of Augusta *v.* Municipality of Leeds, &c., 1 Prac. Rep. No. 2, p. 121.

That the affidavit of D'Alton McCarthy, proving the acknowledgment of the recognizance of bail, was taken before Mr. Carroll, the partner of Mr. Eccles, the agent of the relator's attorneys.

That the relator does not now shew he is qualified—he merely states that his name appears on the assessment roll; whereas the statute requires that he should be rated in his own name in the *collector's* roll for £100 real property and upwards, and that, at the time of the assessment and of the election, he should be seised of such property, in his own right, or that of his wife, as proprietor.

That he did not shew the returning officer that he was qualified, and that he acquiesced in the objection taken to him, and cannot now move against dft's election.—The Queen *v.* Greene, 2 G. & D. 24; Reg. ex rel. Mitchell *v.* Adams, 1 Cham. Rep. 203; The Queen *v.* Hiorn, 7 A. & E. 962. Mr. Cosens, in addition, objects as to McKay, the returning officer, that the *summons* is not directed to him,—Tomsom *v.* Browne, Andrews, 16; Hinton *v.* Stevens, 4 Dow. 286,—and wishes me to decide on the preliminary objection, before he enters appearance for him. I decline deciding now, and state he must act on his own suggestion as to whether it is advisable for him to appear or not. I understand he appears. when Mr. Eccles contends his appearance is a waiver of the irregularity as to the summons not being directed to the returning officer.

Mr. Cosens proposes filing the affidavits referred to hereafter, and in addition to the grounds mentioned, contends that under the facts disclosed, relator really concurred in the election of dft., and by his conduct led him and all others there present to suppose that he withdrew from the contest on the ground of disqualification, and did not demand a poll, and that no one offered to vote for him; and that it clearly appears that the application is not made with the view of unseating dft., but to influence in some way an action at law relator contemplates bringing against some other person.

Mr. Eccles, contra, objects that the affidavits handed in on behalf of dft. are wrongly entitled, viz.: "The Queen on the relation of William Swan against James Rowat and George McKay," whereas the proceedings are not against these parties jointly, but a separate proceeding is taken against each.

He further contended that relator's qualification is shewn by the affidavits filed, that the collector's roll is a copy of the assessment roll, and when that was handed to the returning officer, that would shew that relator was rated as a freeholder to a greater amount than £100, and that was all he had to look to, and that his business was to have taken the votes and let the other party who objected to relator's qualification move to set aside the election, if they felt disposed to do so; that the affidavits shew a poll was demanded, and if the Judge required the original collector's roll, it could be sent for. The affidavit of dft., sworn to on 22nd July, states that he went to the place of election, intending to vote for the relator; that he found that he had been proposed himself; that almost immediately after entering the place of election he heard the returning officer ask relator if he had his deed; he did not hear the previous conversation. Relator pushed a paper towards the returning officer, and remarked that was his title. Dft. did not know the contents of the paper, and took no further notice of the conversation between them, and within a quarter of an hour after the demand of the deed by the returning officer, he declared dft. duly elected; that he has since taken his seat as such councillor, and continues in the office simply because he was informed, and believes it was, and still is, his duty to do so.

On the 19th February inst., he asked relator why he was contesting his election, and had had him served with a writ for that purpose. Relator replied he had no wish or idea of contesting the election, no desire to remove deponent from his said office, and no wish to be returned as councillor himself; that he desired to punish Peter Cleland for observations he said Cleland had made concerning his character, as dft. understood, at the time of the election; and that relator's attorney had told him he must go on with the opposition to dft's election, as it would tend to strengthen the other action, either brought or to be brought, against Cleland, for observations on relator's character; that he, dft., never took any steps to be elected to the office; that his election was unlooked for and unexpected; but having been, as he believes, returned to the said office *bonâ fide* by the returning officer, he considers he is justified in retaining the same.

The affidavit of Peter Cleland, sworn to the 23rd Feb'y, states that he is a freeholder in the township of Flos, that he was rated on the collector's roll of the said township for 1855, in respect of rateable real property, to £112 10s.; and besides that he is, and was at the time of the election, the owner of the S. ½ of No. 47, in the first concession O. S. of Flos, and that all the property is under cultivation. That he was reeve of the said township for the year 1854, and held that office at the time of the township election; that he was present at the election and proposed dft.; and when relator was proposed, and the returning officer was about to put down his name as a candidate, he Cleland objected that relator was not qualified to be elected, believing, as he still believes, that he was not seized of real property as required by the statute, though since the election he has heard that relator has acquired the requisite legal title to qualify him, but that he has acquired it only since such election—that on the objection being made to relator's qualification, the returning officer did demand of him if he had any proof of such his qualification, thereupon he handed a paper which he Cleland understood was a lawyer's letter, although he was ignorant of its contents, but objected to the returning officer receiving it as evidence of relator's qualification; that the returning officer did not consider such letter evidence of relator's qualification; that no remonstrance was made by relator, or any person for him, or on his behalf, against the said objection by Cleland, no attempt made by or for relator of any kind to overcome the objection; nothing further was done by him or on his behalf to prove his qualification, or to press, or proceed with his election; there was no demand of a poll made by the relator, or for him; and he, deponent, seeing no further step of any kind taken by or on behalf of relator to proceed with, or effect his election, con-

sidered that relator felt that the objection made was fatal, and that it being well founded it was useless for him, relator, to press his election; thereupon he addressed the returning officer, stating, as there was no opposition he could declare dft. duly elected. The deponent considering relator had withdrawn his claim in fact, and that in consequence there was no opposition to defendant.

The affidavit of Robert Richardson, sworn to on the 2nd March, states that he is the brother of Gideon Richardson, whose affidavit on the part of the relator has been already referred to; that on the evening of the 1st of March, 1855, he asked his brother, the said Gideon, if he had made an affidavit, and sworn that relator had formally demanded a poll at such election, and that George McKay, the returning officer, had then refused the same? That he replied there must be a mistake somewhere; that if he had made such an affidavit, it was under a mistaken idea of the contents of it, and in ignorance that such affidavit contained such an assertion; for that he, the said Gideon, had never heard a poll demanded on the occasion of the said election by any one; that he had only intended to swear, and only understood he had sworn, to the fact that relator was not accepted as a candidate at such election, by the returning officer.

The affidavit of George McKay, the returning officer, sworn to on the 22nd Feb'y, states that as he was about putting down the name of relator as a candidate for such election, when Peter Cleland, his son-in-law, then reeve for the township of Flos, objected to relator's nomination, on the ground of want of qualification, he not being seized or possessed at the time of the election of real property as required by the statute; that thereupon he demanded some proof of his qualification; the only proof offered by relator being a letter addressed to him by a third party unconnected with the election, which he did not consider as at all likely to substantiate relator's qualification, and on which he did not consider himself justified in acting—said paper being objected to as not being evidence of any qualification, by the said Cleland; that no request was made by the relator or any other person for him to receive or act upon said paper, further than said relator handing it to him and remarking—there is my title; no remonstrance was made by or on behalf of relator to the objections of Cleland, and that nothing occurred or was said or done to lead him, the said returning officer, to believe that relator did not submit to the objections of Cleland; that *neither* the relator nor any body on his behalf or otherwise *did demand a poll or tender any votes* for or on behalf of the relator, and that had any such been demanded he would not have considered it within his power to refuse the same, but would undoubtedly have granted it; that he did not state that he objected to relator, and did not object to him of himself, but considered and believed that it was his duty to entertain, and give effect to the objections of Cleland, unless said objections were removed by or for relator, or unless a poll was demanded; that he was not then aware of any objections being made to dft., that no protest was made to him by any person whatever against his declaring dft. duly elected. Cleland said: "Mr. Returning Officer, as there is no opposition, you can stand up and declare James Rowat duly elected;" that seeing no opposition, and being made aware of none, he declared dft. duly elected, and that he then did so believing, and he still believes, he was acting rightly in the discharge of his duty, and to the best of his knowledge and ability.

The relator claims that he was qualified as a *freeholder* to be elected; that qualification under the tenth section of 16 Vic. ch. 181, may be expressed as follows, using substantially the words of the statute so far as they relate to freeholders: "No person shall be qualified to be elected a township councillor who shall not be a freeholder of such township *at the time* the *assessment* was *taken*, and *at the time* of *such election* seized of real property, held in his own right or that of his wife as *proprietor*, which shall be rated *in his name* on such collector's roll to the amount of £100 *or upwards.*"

The relator, sworn on the 2nd Feb'y, 1855, states in his affidavit that he resides upon and *is* the owner of lot No. 52, second con. of Flos. It does not appear from any of the affidavits or papers filed that he was such owner at the time of the assessment or the election; and one of the affidavits filed on behalf of the dft. states the belief of the party making it, that relator was not the owner at the time of the election, but that since that time he has obtained a title to it. It does not appear to me that relator shews a sufficient qualification at the time of the election; and if his right to set aside the election is to depend on the case he makes out of his own qualification, he must fail. It is contended, however, that as it appears from the assessment roll that relator was rated as a person duly qualified, a *primâ facie* qualification is made out, and the returning officer should have received votes for him. I think the proposition as a general one correct, and I do not wish that anything I may say in this case should induce returning officers to suppose that I consider that they have the authority to reject any resident of the township, who appears properly assessed and rated as a candidate. He should receive him as a candidate, and if he is returned, and his election *contested*, and it appears on investigation that he is not duly qualified, his election will be set aside, and if, after proper notice given of the want of qualification, the electors perversely voted for him, their votes would be held as thrown away, and the duly qualified person would be entitled to the seat. If a majority of the electors had voted for relator, and the returning officer had then refused to return him for want of qualification, and had declared the dft. duly elected, who thereupon took his seat, and discharged the duties of the office, I do not think the Court would permit the dft. to set up relator's want of qualification in answer to his claim to the office. But after he took upon himself the duties of the office, that might be made a ground for setting aside his election, and ousting him from his office. The Court would not permit a returning officer after receiving a candidate, afterwards to turn round when he had a majority of votes, and declare he was not duly qualified.

But in this case the main ground urged against the election is that the returning officer refused to allow a duly qualified person to be a *candidate*. As I have before remarked, the relator has failed to shew that he was *then* duly qualified. The affidavits filed on the part of the dft. tend strongly to the conclusion that relator was conscious of the defect of his qualification, and therefore virtually withdrew his pretensions. The fact sworn to on the part of the relator of a poll being demanded on his behalf is as clearly contradicted by the affidavits filed on the part of the dft., the returning officer expressly stating he would not have refused it had it been demanded. It does not appear that any votes were tendered or recorded for either candidate: looking therefore to the facts as they are presented for consideration, it does not appear to me that relator has sufficiently shewn his qualification so as to warrant the ousting of the dft.

I had thought of requiring further affidavits to shew in a more satisfactory manner whether relator was duly qualified at the time of the election or not, but the preliminary objection as to the entitling the affidavits seemed to me to be fatal to the relator's application, and I therefore considered that it would be useless to investigate further a question which in the end would be found not necessary to decide in order to dispose of the case.

In Cole on *quo warranto*, p. 181, he states the affidavits should be entitled "In the Queen's Bench" (without more), and the authorities given by him are—Rex *v.* Jones, 1 Stra. 301; Rex *v.* Cole, 6 T. R. 640.

In Archbold's Crown Practice, 130, it is stated as to affidavits for motion and Rule for quo warranto they must be intituled

"In the Queen's Bench" only, and not in any cause. In re. Municipality of Augusta *v.* County Council of Leeds and Grenville, 1 Practice Cases, U. C. p. 121, where the affidavits applying for the Rule were entitled "In re. complaint of ——— *v.* ———. The Chief Justice of the Court of Queen's Bench, in giving the judgment of the Court, says—"As to entitling the affidavits, the applicant must take his chance of their being held regular after cause shewn. The cases shew that if entitled as in a cause (before rule nisi granted) as The Queen *v.* ———, they should be rejected." The case in 6 Term Reports may probably be considered the leading one as to this point. In accordance with these authorities I feel bound to rule for the dft. on the point raised.

It does not appear to me that there is much force in the objection that defendant was proposed by Peter Cleland, who was not at the time a qualified elector. As to the question of his interest in the township, it is quite manifest that it is much greater than that of many of the qualified electors, he being a freeholder and rated on the assessment roll, but disqualified from voting in consequence of residing in another township. The nomination after all is the mere introduction of the candidate to the electors; their assent or approval constitutes the election; and I am not aware that it it is necessary that the person who proposes should be an elector at the time.

On the whole, therefore, I consider that the dft. is entitled to the said office, and that the summons should be dismissed. Inasmuch, however, as the dft. succeeds partly on the technical ground taken by him, and the conduct of the returning officer, in improperly rejecting the relator as a candidate has caused the difficulty, I think I shall best exercise the discretion given me by the statute, by declining to give costs to any of the parties.

(In the Insolvent Court for the Co. of Elgin.—D. J. Hughes, Judge.)

IN RE. F. MILLER.

*An alleged insolvent debtor in close custody for debt over £100, under mesne process.**

An expression of opinion has been asked from me with regard to this person now in gaol at Sandwich, on behalf of whom a petition was presented to me some time ago, and an application made for an *ad interim* order, under 8th Vic. c. 48 (the debtor having resided in this county for the twelve months next preceding the time of presenting the petition), but refused on account of various objections to the petition, and on account of the insufficiency and informalities of the notice and petition; and who, it is alleged, was a trader up to the period of his imprisonment, and owing debts amounting to more than £100.

I think a County Court Judge, acting in this Court, could not place so liberal a construction upon the intentions of the Legislature, either before or after the expiration of the Bankrupt Act, 7 Vic. c. 10, as to hold that the provisions of the Insolvent Debtor's Act could apply for the relief of persons who were originally excepted from its provisions by express enactment, as being traders within the meaning of the Bankruptcy Act now expired. The Bankrupt and the Insolvent Debtor's Acts, 7 Vic. c. 10, and 8 Vic. c. 48, were only temporary in their duration; the former was allowed to lapse by effluxion of time, the latter has been continued by various statutes passed since—and those continuing enactments (except 14 & 15 Vic. c. 116) do not in anywise extend its original provisions, altho' the Bankrupt Act (which was intended for the relief of a class of debtors not provided for by the Insolvent Act) had in the meanwhile expired.

By the stat. 14 & 15 Vic. c. 116, the original statute 8 Vic. c. 48 *is* extended, and relief is afforded to a certain description of persons not originally provided for; had the Legislature ever intended that by the expiration of the Bankrupt Law traders of all kinds should be allowed to take advantage of the original act, I cannot help thinking it would have been so expressed when some of the continuing statutes, and especially when 14 & 15 Vic. c. 116 were passed- I think, too, that a Judge has no right to construe the intention of the Parliament beyond the provisions of its own direct expression, especially when the subject seems to have been considered if not reviewed by its own act for extending the provisions of the first statute.

The Insolvent Act requires the form and substance of the Petition to be framed in accordance with a schedule presented, and expressly enacts that if the petition be not framed according to that schedule, it shall be dismissed. That form of petition requires to be inserted "*at full length*" *the name, address, and quality of the petitioner, and also the trade or business, or (if more than one) the trades or businesses which he carries or has carried on, during his twelve months' residence within the district of the Court.*" In setting all these matters forth, I apprehend it would be indispensible for him to shew that the business or trade he carries or has carried on are not such as would exclude the Court from its jurisdiction over him; for if he be of a "*quality*" described as a trader within the meaning of the expired Bankrupt Act, he would clearly, in my opinion, not be entitled to relief as an insolvent debtor within the meaning of 8 Vic. c. 48.

On the whole, I think it would be stretching the intention of the Legislature to an unreasonable length to say that it was intended for the Insolvent Law to apply to all persons, traders or not, when express reference is made to a bankrupt law then in existence but since expired, and when certain traders are expressly excluded from its provisions—it would be tantamount to construing an intention in the Legislature (negatively expressed by not continuing the Bankrupt Law), long after the Statute was declared to be in force, and making reference to another existing law, because that other law had been allowed to lapse. I think whatever the intention of the Legislature was, was expressed at the time the law was passed; and in order rightly to construe that intention, we must duly consider all the circumstances that existed at that time.

I am aware that I differ to some extent from a learned Judge (who is much my senior) in the opinion I now venture to deliver, and I have therefore approached the subject with much diffidence, and should not now (perhaps needlessly) have given this opinion, had not the debtor been represented as being about to prepare and present another petition, and incur an additional outlay of money in advertising, &c., and subjecting himself to the delay of remaining longer in gaol.

I think there is no existing relief provided by 8 Vic. c. 48, either by express enactment or by any reasonable intendment, for traders owing debts amounting to more than £100, unless they were traders before the passing of the expired Bankrupt Act, but excluded from its provisions unless they come within the scope and meaning of 14 & 15 Vic. c. 116.

*It is not in our power at present to review this case, but we hope to be able to do so at a future day, after we have seen other decisions which we understand have been given, adverse to Judge Hughes' view, on the point involved in the above case.—*Ed. L. J.*

MUNICIPAL CASES.

(Digested from U. C. Reports.)

From 12 Victoria, chap. 81, inclusive.

(*Continued from page* 91.)

BY-LAWS.

1. *Alteration of Roads—By-Law of Municipal Council.* 12 Vic. c. 81, secs. 31, 189.

A Municipal Council in passing a by-law for the alteration of an old road, described the point of commencement of the new road as being "*about eight chains* south of N.W. corner,

&c." The Court held that in the absence of any ground for exceeding or coming short of the *eight chains*, the road was to commence at a point *eight chains* south, &c., and that the objection of the uncertainty of the point of departure of the road was not an objection sufficiently strong to warrant them in setting aside the by-law; but

Held, That the by-law was bad for not assigning *any width* to the new road, and it was therefore set aside, but without costs.

In re Smith and Municipal Council of Euphemia. 8 U.C.B.R. Rep. 222.

II. *Municipal Corporation Act; Power of Court to Quash By-Laws—Notices—Orchards.* 12 Vic. ch. 81, secs. 155, 192.

Under the 155th and 192nd clauses of the 12 Vic. ch. 81, this Court has the power of quashing a by-law, not only for some illegality appearing upon the face of it, but also where as a matter of fact the by-law has been made in such a manner as, it is enacted by sec. 192, it shall not be lawful for any Municipal Corporations to make it.

In this case, under the facts mentioned in the affidavits, as stated below, the Court refused to quash a by-law for changing a road, on the ground, 1st, That notices had not been put up as the Act requires; and 2ndly, That the applicant had not given his consent to the road passing through his orchard.

Corporations should be careful to preserve proof of regular notices, by affidavit of persons employed to put them up.

Semble, That the trees constituting the orchard were planted there merely to obstruct the change of the road, which would bring the case fairly under the prohibition contained in the 41st clause.

In re Lafferty *v.* Municipal Council of Wentworth and Halton. 8 U.C.B.R. Rep. 232.

III. *Quashing of By-Law of Municipal Council for the Appropriation of Money for Roads—Entitling of rule nisi.* 12 Vic. c. 81. sec. 41.

A by-law passed by the Peterboro' Municipal Council, under the provisions of our Act 12 Vic. ch. 81, sec. 41, 11th and 16th heads, appropriating £600 from the county funds of the county of Peterborough, to be expended on certain roads within the said county, in such manner as may be deemed most proper by the commissioners appointed for that purpose, &c., is illegal, as exceeding the authority given to the council, and the rule nisi for quashing it must be made absolute.

The entitling of the rule to quash the by-law of a Municipal Council need not be The Queeen *v.* The Council, but as "in the matter of A.B. and the Municipal Council of the County of ——."

Per Cur. It would be attended with great public inconvenience if the Courts, in exercising their legal control over the powers given to Municipal bodies, were to look in a captious spirit at the by-laws of the several municipal bodies, and were to require that everything necessary to establish their validity should appear upon the face of them.

In re Conger and the Peterboro' Municipal Council. 8 U.C.B.R. Rep. 349.

IV. *Right of Township or County Councils to sue for a Local Debt due to old District Councils.* 12 Vic. ch. 81, secs 175 and 176.

Under the 175th and 176th clauses of the 12 Vic. ch. 81, the Township Councils, and not the *County* Councils, are entitled to receive monies due to the old District Councils, where the debt is due to the *locality*, as for making roads in a township, &c., and

Held, per Cur.: That in this action the money sued for, belonging to the Township Council, and not to the County Council, the plaintiff's (the County Council) must be non-suited.

Municipal Council of the U. C. of Northumberland and Durham *v.* Bull and Meyers. 8 U.C.B.R. Rep. 375.

V. *Trespass—Pleading—Justification under By-Law of Municipal Council—Demurrer.* 12 Vic. chap. 81; 13 & 14 Vic. ch. 64.

Trespass *quare clausum fregit.*—The dfts justified under a by-law passed by the Municipal Council of the township of King, under the authority of which they alleged that they entered for the purpose of opening a new road, laid out on pltf's land.

The 3rd and 4th pleas, which are set out in substance in the statement of the case below, were demurred to—among other causes: *Because* the Municipal Council had no power to establish a public road or highway. *Because* the plea did not aver any notice by the said Corporation before making the said by-law, as required by the Statute. *Because* the plea did not aver the laying out of the said road by a road surveyor, nor sufficiently describe the said road where it ran, or at what point it commenced and where it terminated; and *because* there is no averment that any by-law was made under which the said surveyor assumed to survey, lay out, &c. *Because* the plea did not aver that the said road did not run through any garden, &c., of the plt., and for want of averment of consent of owner in writing. *And because* there is no averment of a reasonable time having been allowed plt. to open the said road, after the passing of the said by-law before the dfts committed the said trespass.

Held per Cur: That the Municipal Corporation had power to open new roads through any person's land, *under the restrictions in the Statute.*

Held also, that no notice of such road was necessary, the word opening being omitted in 12 Vic. ch. 81, sec. 192; and that 13 & 14 Vic. ch. 64, could not apply to this by-law.

Held also, that the plea was bad in not directly averring that the surveyor had laid out a road through the plt's land, which he reported on 27th July, and that such road went through and over the *locus in quo*, and that the council confirmed that road.

And semble that it would not be sufficient for a surveyor to lay out a road through a man's land of his own accord, and then to report it to the council to entitle the council to establish it as a road, but that the surveyor must first act in consequence of a proper application or order.—*Semble also* that a by-law cannot be good which authorizes a road through a man's land without stating where it enters or what course it takes: and that the reference to the surveyor's report, without annexing it to the by-law, nor even averring that it is remaining among the records of the council, is not sufficient.—*Semble also*, that the *plea* should have averred that the road was so laid out as not to run through or encroach upon any dwelling-house, &c., though it is not necessary that this should appear on the face of the by-law.—*Semble also*, that the mere passing of a by-law should not be considered as *ipso facto* the opening of a road, but merely as authority to open it in a proper manner and after reasonable time given to all parties. That the plea is defective for neither stating that this was wholly a new road, nor, (*supposing it not to be so*) that notice was given as would then be requisite.

But *quære*, whether averment of notice would be necessary in any case. *Held also*, that the by-law was bad for referring proprietors to private parties for compensation, which they

had no power to do,—and because it directs a passage under the road to be made by parties whom they have no means of compelling to do so.

Held also, that a party is not necessarily restrained by 155th sec. from bringing an action till the by-law has been quashed—for some of the objections would prevail, even though the by-law were perfectly legal.

Dennis *v.* Hughes & al. 8 U.C.B.R. Rep. 444.

VI. *By-Law—Tax on Dogs for Improving Streets.* 12 Vic. c. 81, sec. 31, heads 31, 32.

A Municipal Council, under 12 Vic. c. 81, sec. 31, head 31, has not power to appropriate the revenue arising from a tax imposed on the owners of dogs in only a part of the township, to the improvement of the public streets, and to other purposes within the limits of such part of the township.

In re. Richmond *v.* The Municipality, &c., of Leeds and Landsdowne. 8 U.C.B.R. Rep. 567.

VII. *Pleading—Who proper Plaintiff and Defendant.* 12 Vic. ch. 78, secs. 6, 20, 37; ch. 81, secs. 174, 175.

The testator having been appointed by the finance committee of the District Council to collect the Wild Land Tax: *Held*, That his representatives were liable to the council for money received by their authority, and not paid over.

Where, subsequently to the commencement of the action, one of three united counties had been set off from the other two, *Held*, that the Municipal Council of the three united counties were the proper plffs to bring the action.

The Municipal Council of Lincoln, &c., *v.* Thompson & al.; Exrs Poynter. 8 U.C.B.R. Rep. 615.

VIII. *Authority of Judge in Practice Court.—Construction of* 12 Vic. ch. 81, sec. 155.

A Judge in Practice Court has no authority to entertain an application for quashing the by-law of a corporation.

As to titles of city corporations under 12 Vic. c. 81, "Corporation of Toronto" insufficient to designate the Corporation of the City of Toronto.

By 12 Vic. ch. 81, sec. 155, corporations have *not less than eight days* to answer a Rule for quashing any of their by-laws. Therefore a rule granted and served on the first Saturday in Term is not returnable within that Term. 9 U.C.B.R. Rep. 181.

IX. *Statute Labour or Tax in lieu thereof.* 13 & 14 Vic. c. 67, sec. 22. (a.)

The Municipal Council of a village have authority to impose the performance of statute labour, or a tax in lieu thereof, only on those inhabitants who are not otherwise assessed.

In re. Exrs R. Dickson *v.* The Municipal Council of the village of Galt. 9 U.C.B.R. Rep. 257.

X. *Repeal of By-Law, pending application to quash same.*

When a Municipal Council, on being served with a Rule nisi, repealed the by-law complained of, they were still obliged to pay the costs of the application.

In re. Coyne *v.* The Municipal Council of Dunwich. 9 U.C.B.R. Rep. 309.

(a.) See 16 Vic. c. 182, s. 35 et seq.

XI. *Excess of Powers of Municipality in By-Law to Contract Debt.* 12 Vic. c. 81, secs. 177, 178.

The Court refused a rule nisi to quash by-laws of a Township Council, on the ground that having passed by-laws to contract a loan, they had exceeded their powers in afterwards modifying the said laws: it appearing that such alterations could not affect the security of creditors.

Or, on the ground that the said by-laws were passed at a special meeting called by a member of the council, and not by the Town Reeve, or other authorised officer.

And semble, with respect to the last objection,—that it is doubtful whether the Court has authority under 12 Vic. c. 81, sec. 155, to quash a by-law for an irregularity in the manner of its being passed, though they might hold it void if relied upon in support of something done under it: and that if they should entertain a motion to quash a by-law on account of an irregularity in passing it, it would rather be under the principles of the Common Law.

In re. Hill and The Municipal Council of the Township of Walsingham: 9 U.C.B.R. Rep. 310.

XII. *Application for Mandamus to Pass By-Law.* 12 Vic. c. 81, secs. 30, 31, 38, 175.

K. was employed in 1848, by the trustees of school section No. 4, in the township of Sandwich, acting under a by-law of the District Council, to furnish materials for and to erect a school-house in that section. Part of the money was paid to him on account, and for the balance he brought an action against the trustees, and recovered judgment. Finding no property of theirs on which to levy, he applied in 1850 to the Municipal Council of the township, who passed a by-law imposing a rate to satisfy his judgment: this by-law was afterwards repealed before the money had been collected.

It appeared that under the original by-law of the District Council, the rate for erecting the school-house had been levied, and the part not paid over to K. had been handed by the Secretary to the Treasurer of the trustees, who absconded; and that K. was in possession of the school-house, and retained it for the money due him.

Under these circumstances, *the Court held* that the Township Council were not liable, and discharged a Rule for a mandamus to them to pass a by-law for raising money to satisfy the claim.

Semble also, That if the applicant were entitled to recover, an action would lie against the council, and therefore no mandamus should go.

Kennedy *v.* The Municipal Council of the township of Sandwich. 9 U.C.B.R. Rep. 326.

XIII. *Execution by Corporation of Lease—Estoppel of Lessees.*

A declaration in covenant stated that by indenture made between the plaintiffs and the defendants, the plaintiffs demised to the defendants the tolls authorised by law to be received upon a certain turnpike road, for the term of one year; that the defendants covenanted to pay a certain rent therefor: and *that by virtue of the said demise the defendants entered and were possessed for the term so then granted.* Breach, non-payment of the rent.

Held, on demurrer, that the defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent, and that the non-execution by the lessors, under such circumstances, was no defence.

And that they were also estopped from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise.

Held, also, that a plea that the said indenture was not signed by the plaintiffs, or by any agent of theirs authorised in writing, was bad.

The Municipal Council of Frontenac, &c., *v.* Chestnut et al. 9 U.C.B.R. Rep. 365,

THE LAW JOURNAL.

JUNE, 1855.

"It so happens, under the system of economy which has come into use, that County Judges generally have the heaviest duties, and the shabbiest pay of any class of public servants. The professional study required to fit one for the office of County Judge, extends over ten years. Five of these, the candidate must been employed as a practising Barrister. This lengthy routine is a pre-requisite of candidateship. But it is supposed that a County Judge shall have certificates to the appointment, of a higher kind. It is expected that his standing in the profession shall be respectable—that he shall be a sound, experienced lawyer—that his opinions shall command respect—that he shall be impervious to rudeness and loud talking—that he shall be able to travel thirty miles on foot, if need be, when his local courts cannot be reached by a conveyance. He is required, in short, to be a gentleman of high mental attainments, and to possess a physical constitution which no amount of labour can overcome. The occupants of the office have a more practical idea of what it is to labour for the country's good, than any other class of public servants. In point of remuneration, they are only placed on a level with Postmasters and Collectors at the principal ports. And all this, while they are arbiters in the course of a single year, of disputes, involving, perhaps, hundreds of thousands of pounds. It is certainly not unreasonable to suppose that the time has come when the Province can afford to remunerate public officers on a scale commensurate with the importance of their duties. Almost each successive session of Parliament, has added to the weight of the duties of the County Judges, by extending the jurisdiction of the Division Courts, And on the ground of enhanced labour, they are entitled to an increase of remuneration, were there nothing else in the circumstances of the country to justify such an increase.

The Act revising the former Civil List Act, which passed during the late session, no doubt, in part compassed the necessities of the case to which we invite attention. But the increase authorized by that Act in salaries exceeding £500, was altogether inadequate, so far as relates to County Judges. A special provision was made in behalf of the Circuit Judges of Lower Canada, and a similar provision for the County Judges in this section of the Province was certainly justified by strong considerations. The Government perhaps act prudently, in not taking precedence of public opinion in matters affecting the expenditure of the public money. But cases there are, where the public cannot be the proper judges of what is just, from non-acquaintance with the peculiar facts. In these cases, it becomes the duty of the government to take precedence of popular demands, on the presumption, that what is a simple matter of justice the public will in the end approve."

The above extract, which appeared in the *Leader* of the 19th inst., is conceived in that high-toned appreciation of what is just and right, and calculated to be of real benefit to the public, and uttered in that straightforward and independent spirit which should ever characterize an honest and useful press aiming at the accomplishment of what is sound and beneficial in principle and administration.

To the *Leader* belongs the credit of bringing prominently forward the duty of *acting* on a principle, of which every one is willing to make a barren recognition—Justice—but which until now has laid dormant in respect to that most useful and important class of public servants the County Judges of U.C.—While express provision is made for the better remuneration of the subordinate and superior officers of Government, the men who have equal and more work to do—need as high attainments—and whose services are really more sensibly and directly felt by the masses generally than those of any other class, and who are notwithstanding less adequately remunerated, should not be overlooked. It is unworthy of any Government to fail in doing what is right, and in the highest sense of the word politic, whether assailed by importunity or not, if justice and wisdom claim it at their hands.

The establishment of the County and Division Courts have given to Canada the inestimable benefits of cheap and speedy justice—thereby preventing litigation in fact—for where the remedy is immediate, it is useless to incur or withstand it. The importance of these Courts it were useless to illustrate. It comes home to and is felt by every man. Is it not, then, for the best interests of the people to secure their highest efficiency? Unless the duties of the office are ably discharged, is it not worse than useless? Can this, then, be expected, unless the emolument attached to the situation be sufficiently considerable to attract to and secure for it the services of leading men in the Profession? The standing in the Profession, of a man selected for a County Judge, should be more than respectable—it should be high. He should rank with the first of his brethren of the Bar. If this be not so, no suitor in these Courts can ever be certain of obtaining justice. A man's claim may be the most legal and equitable possible, and yet be defeated through the sheer incapacity of the Judge. It is but a truism to say so, but the fact cannot be too steadily kept in view, or too constantly urged on the consideration of all interested in the well-being of the country, whether rulers or ruled. It is a most grievous error to fancy that because the jurisdiction of these Courts is limited, less ability is required in the discharge of the duties belonging to them; and no man who has ever gone a circuit, or had any opportunity of seeing anything of Practice in the country, but can testify that from the very fact of much of the business being transacted by the less able members of the Profession, the difficulties which arise to be solved by the Judges are often times increased ten-fold. Young, inexperienced,—even unlearned members of the Profession, may meet the wants of the country in many cases tolerably well—not so the Judge; if he be wanting in sound learning and ability, the law is a dead letter.

But it may be said—all this is undeniable—but the salaries of the Judges *are* adequate. The best test of this is,—do the leading men of the Profession fill these offices? When we see Judges resigning their situations on the County Bench, and again returning to their practice at the Bar, though we may indeed feel, and be thankful that we can feel, that the County Court Judgeships are generally ably and efficiently filled, we cannot shut our eyes to the fact that this is no proof that the stipends are what they should be; while on the other hand the fact we have mentioned, if it be but occasionally true, speaks volumes to shew the very contrary to be the case. Numberless are the reasons, into which it would be fruitless for us to enquire, which may lead a man to accept a Judgeship, and having accepted retain it, other than that the office is really such as his position and attainments entitle him to expect. And we cannot but fear, that in a few years we shall more clearly see these offices less ably filled, unless they be made more worthy of acceptance.

Little know the public of the severe mental labour the County Judge undergoes day by day, year after year, within the walls of his library—how incessant and arduous are the duties he there performs. They see him only in Court, and little dream that that is his Vacation! a mere pastime compared to his unseen labour. They may know something, but very little of, and cannot rightly estimate their bodily labours incurred in the unvarying monotony of travelling their circuits six times a year, at all seasons, and in all weather; nor can they form an adequate idea of the effect of exposure, and the discomforts incident thereto. But the public are sometimes Egyptian Tax-Masters in demanding service and wisdom from its servants, and refusing leisure—exacting perfection and compelling haste, and requiring it of men whose life, by its own exaction, it has made one perpetual hurry and continuous exhausting effort. "The duties of a Judge," says Lord Bacon, "compel him to forego many advantages, and to relinquish many of the enjoyments of social life."

Since the present salaries of County Judges were fixed, the expenses of living have doubled, yet no move has yet been made to do the "simple justice," while every session important additional duties, by increased jurisdiction and otherwise, have been heaped upon them.

Again, it was some years since deemed advisable to restrain County Court Judges from practising as lawyers—thus changing the original compact between the Judge and Government. As to the propriety of the change there can be no question;—to say the least, the increased confidence it would secure in the Courts over which they preside would be a sufficient recommendation, but those who accepted office on the understanding that they could devote their leisure time to professional pursuits were thus deprived of an important source of additional income, and the compensation which was made for the change was undoubtedly most inadequate. There are, moreover, expenses incident to, and absolutely unavoidable, in connection with the office of a County Court Judge, too important to go unmentioned. In most counties the Judge must necessarily keep a pair of horses, at an expense of certainly not less than £60 per annum. He must undoubtedly add regularly to his library, or he cannot keep pace with the progress in the Science of the Law, and he would soon be in the unfortunate position of finding himself inferior to the Bar of his County, and his usefulness as a Judge impaired. The salaries of the County Judges we also think should be uniform.

While the Fees collected in the Superior Courts are insufficient to meet much beyond their contingent expenses, (the remaining charge being paid out of the general revenue,) the Local Courts are almost wholly self-supporting, the "fee fund" supplying means to defray nearly all expenses, *including the salaries of every County Judge in U.C.*, and the deficiency, which is made good out of the general revenue, only amounts to about £3,000.

Such being the case, why should there be a moment's hesitation in making an adequate salary for County Judges? and that, too, when the sum required would be so comparatively small.

We cannot close our remarks without reverting to the change in the tenure of the office,—which placed it on a humiliating footing, and retrograded to a principle that enlightened legislation ignored—a tenure at pleasure or caprice—instead of one of certainty and fixedness during good behaviour and competency of the incumbent. The objections to it are so obvious that it would be superfluous to urge them in detail, but we do trust that ere long so glaring an injustice and error will be rectified; and as we have reason to believe that no objection to the *principle* of our Judges holding their offices as formerly, led to the change, so we hope that due regard to their position, and the dignity of the office, will restore it to its former basis.

In the present Administration we have all confidence—and it will afford us no little pleasure to see that its existence has not been too short to entitle itself to the honour of bringing these measures to maturity, and to the gratitude of the country for effecting an important change tending to improve the administration of the Law in Canada.

ACTIONS BY MINORS IN THE DIVISION COURTS.

The 27th section of the D. C. Act makes it lawful for any one under the age of twenty-one years to

sue in a D. C. for any sum of money not exceeding £25, due to him for wages, in the same manner as if he were of full age.

This section is not the foundation of a minor's right to sue—he could sue without it, it is merely a regulation of practice enabling the minor to sue in the *same manner* as if he were of full age, that is, either in person or by authority, without the intervention of a "next friend;" and the effect of this, as we understand it, is in giving the privilege to make an infant liable, as other parties would be, for costs should he fail in the action. The privilege spoken of extends to the specified causes of action only, viz., for "monies due for wages," and neither in the Statutes nor in the general Rules is there any express provision to shew how an infant is to sue in the D. C. for other causes of action.

The 64th section of the English Co. Courts Act is similar to sec. 27 (above referred to), and in reference to suits by infants the following Rule has been adopted:

"RULE VI. Where an infant applies to enter a "plaint for any cause of action (other than for "wages or piece work, or for work as a servant) "he must procure the attendance of a next friend, "at the office of the Clerk, at the time of entering "the plaint, and no plaint shall be entered until "the next friend has undertaken in the form in the "Schedule to be responsible for costs; and on "entering into such undertaking he shall be liable "in the same manner and to the same extent as if "he were a party in an ordinary suit; and the "cause shall proceed in the name of the infant by "such next friend, and such undertaking shall be "filed by the Clerk, and no order of the Court shall "be necessary for the appointment of such next "friend. If the plaintiff fail in or discontinue his "suit and shall not pay the amount of costs "awarded by the Court to be paid by him to the "defendant, such proceedings may be taken for "the recovery of such amount from the next friend "as for the recovery of any debt or damages ordered "to be paid by the same Court."

We give the above rule as shewing the practice in England, not that we venture to say the "next friend" can be summarily dealt with in the D. C. as if a rule similar to the above was in force, but we give it as indicating the course of procedure. As the rule of the common law in respect to the disability of infants remains in all cases, except those mentioned in the 27th section, how is an infant plaintiff to sue?

By the D. C. E. Act, sec. 18, in any case not expressly provided for by the Statutes or Rules, the general *principles* of practice in the Superior Courts at common law at Toronto may be applied, in the discretion of the Judge, to actions and proceedings in the Division Courts. The primary object of the practice in the Superior Courts is to secure a responsible party for the costs in case the plt. fails in his action, and, as an incident that the dft. should have time for enquiry as to the responsibility of the *prochien ami*. The formal proceeding, therefore,—a petition, consent, and affidavit of signing petition and consent, the preliminary attendance before a Judge, and the admission by final order—may, in our judgment, be dispensed with in the D. C., and the following simple procedure adopted.

The "infant" plt. appears before the Clerk with his "next friend," who signs an undertaking; it may be as in the following form, which is similar to that used in the English Co. Courts:—

In the —— Division Court for the County of ——.

I, the undersigned, being the next friend of A.B., who is desirous of entering a suit in this Court against C.D., hereby undertake and agree to be responsible for the costs of the said C. D. in such cause, and that if the said A.B. fails to pay to the said C. D. when and in such manner as the Court shall order all such costs of such cause as the Court shall direct him to pay to the said C. D., I will forthwith pay the same to the clerk of this Court.

Dated this —— day of ——.

Signed in the presence of } T. T.
E. F. Clerk. }

The undertaking may also be brought, when in a complete state, to the Clerk; for it is not *necessary*, though it is advisable, that he should see it signed by the "next friend."

The summons should be in the name of the minor as plt., suing by his "next friend," thus:—

"A. B., an infant, suing by his next friend T. T., plt.
vs.
C. D., dft.

It may be well to serve a copy of the undertaking with the copy of summons—it will inform the dft. who the "next friend" is, and give ample time for enquiring as to his solvency; and thus do away with any ground for an adjournment for that alleged object. This, though not the only mode, appears the most simple and easily managed practice, when it becomes necessary to sue by "next friend" in a D. C.

DIVISION COURTS.

(Reports in relation to)

ENGLISH CASES.

EX: MORETON *v.* HOLT. *Jan* 26.

A Co. C. judgment cannot be removed into any of the Superior Courts of Westminster for the purpose of issuing execution upon it from there; under the 17 *Geo.* 3, *c.* 70, *s.* 4; *or* 1 *& 2 Vic. c.* 110, *s.* 22; *as those Acts do not apply to the Co. Courts as at present established.*

The plaintiff in this case had recovered a judgment in the Co. C. at Windsor, against the defendant, for a sum above £20. A new trial was applied for and refused. A few days afterwards, an *ex parte* application was made to Crompton, J.

at chambers, to remove the judgment into the superior court, for the purpose of issuing execution thereon, under the 19 Geo. 3, c. 70, s. 4; and 1 & 2 Vic. c. 110, s. 22; this the learned judge refused. An application was afterwards made to Martin, B., upon an affidavit, showing that execution had been issued in the Co. C., that no effects of defendant could be seized, and that he was keeping out of the way. *Copeman* v. *Gladden*, 15 Jur. 90, was also referred to, where a *certiorari* issued under similar circumstances. In that case, the motion was granted, and the rule made absolute, as of course there being no opposition to it, and no cause shown against it. An order was made, and the defendant was subsequently arrested, and a summons having been obtained to discharge defendant out of custody and heard before Alderson, B., he referred the matter to the Court. A rule *nisi* was accordingly obtained, and

Griffits showed cause.—The judgment in the Co. C. was properly removed under the powers given by the 19 Geo. 3, c. 70, s. 4, or the 1 & 2 Vic., c. 110, s. 22. The former says, that forasmuch as persons served with process issuing out of inferior courts where the debt is under £10, may, in order to avoid execution, remove their persons or effects beyond the limits of the jurisdiction of such court, it then enacts, that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record, it shall be lawful for any of his Majesty's courts of record at Westminster, upon affidavit made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person of the defendant, or his, her, or their effects, and of execution having issued against the person or persons or effects, as the case may be, of the defendant or defendants, and that the person or persons or effects of the defendant are not to be found within the jurisdiction of such inferior court, to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon, against the person or effects of the defendant in the same manner as upon judgments obtained in the said courts at Westminster, &c. [PARKE, B.—But there is no power to arrest a party under the new Co. Courts Acts; a person may be taken into custody and imprisoned for a number of days as for a contempt; not in execution, or as a discharge of the debt. The Act cited, therefore, does not apply; it is not the kind of judgment that can be removed. This Co. C. is not such a court of record as was contemplated.] The 1 & 2 Vic., c. 110, s. 22, enacts, "that in all cases where final judgment shall be obtained in any action or suit in any inferior court of record in which, at the time of passing of this Act, a barrister of not less than seven years' standing shall act as judge, &c. * * * * * it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, &c., or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who, at the time of the commencement of this Act, shall have recovered, or shall at any time thereafter recover such judgment, &c., upon the production of the record of such judgment, such record, &c., being under the seal of the inferior court, and signature of the proper officer thereof, to order and direct the judgment to be removed into the said superior court, &c.; and immediately thereupon such judgment shall be of the same force as a judgment recovered in such superior court, &c. All the requisites have been complied with by affidavits. [ALDERSON, B.—You ought to show that the judge was a barrister of at least seven years' standing; but I know that by the Act of Parliament establishing these Co. Courts, an attorney may be appointed. In the case referred to, of *Copeman* v. *Gladden*, no one appeared to show cause against the rule, and probably the matter was scarcely mentioned; it certainly was not discussed, nor the point raised.]

Lush, who appeared for the plaintiff in support of the rule, referred to sec. 16 as to the judgments not being removed.

Griffits.—Judgments of the Lord Mayor's Court are frequently removed in the same way as this has been; and there is no distinction in principle between the cases.

PARKE, B.—To allow these judgments to be removed would, in fact, take away all the effect of the Co. Courts Acts, the object of which is quite clear, as stated in the first section of the Act. The Acts of Parliament referred to and relied upon do not apply to these new Co. Courts.

Lush, contra, not called upon.

Per curiam: Rule absolute, with costs; the defendant to be discharged out of custody; no action to be brought.

[*Note.*—See *Copeman* v. *Gladden*, 16 L. T. Rep. 393, and the note and query to that case.]

EX. HERNAMAN *v.* SMITH. *Jan.* 27.

Co. C. jurisdiction—Cause of action where arising—Apprehensions—Conviction.

A. offered a reward for the apprehension of any person stealing sheep. B. apprehended a sheep-stealer in the district of the Co. of Newnham, but he was convicted at the Hereford assizes. B. then commenced a plaint against A. for the amount of the reward in the Co. C. of Newnham:

Held, on an application to rescind an order for a prohibition that the cause of action did not arise within the jurisdiction of the Co. C. of Newnham, under the 60th section of 9 & 10 Vic., c. 95.

In this case an action had been brought in the Co. C. of Gloucestershire, holden at Newnham, to recover the sum of £20, the amount of reward offered for the apprehension of sheep-stealers by a bill in the following terms:—

"Much Marcle Association for the Prosecution of Felons.

"We, whose names are hereunto subscribed, having entered into an association for the detection, apprehension, and prosecution of felons, hereby offer the following rewards (over and above what is allowed by Act of Parliament) for the apprehension of any person or persons who shall commit any or either of the undermentioned offences on any or either of our respective persons or properties."

Then followed a list of offences and rewards, and amongst them,

"For stealing sheep a reward of £20.

"The above rewards will be paid on conviction of the offenders, by applying to Mr. Burgum, the treasurer."

This paper had the name of the defendant, amongst others, attached to it. The summons was issued out of the C. C. at Newnham by leave of the judge, on the ground that the cause of action arose within the district of the said C. C. and upon the hearing thereof the plaintiff John Hernaman appeared by his attorney, and the defendant Thomas Smith appeared by counsel and pleaded to the said action, "Not indebted."

The plaintiff's attorney then proceeded to call evidence in support of the said claim, and put in evidence the handbill, and proved that the defendant Thomas Smith was a member of the association therein mentioned, and the then treasurer thereof, in the place of Mr. Henry Burgum, who had resigned; and he also proved that Samuel Rock was apprehended by the said John Hernaman at Newnham, within the jurisdiction of the district court of Newnham, and that he was subsequently convicted of stealing a sheep, the property of the said Thomas Smith, at the summer assizes holden at Hereford, in and for the county of Hereford, in the year 1853; whereupon it was objected, on the part of the defendant, that formal proof of such conviction should be adduced to entitle the said Hernaman to maintain the action, and in consequence of such objection the trial of the cause was adjourned by the judge of the said C. C. to the then following court day.

The cause came on again for trial at Newnham on Wed-

nesday the 27th day of November last, and on that occasion the plaintiff's attorney again appeared for him, and the defendant Thomas Smith also appeared by his counsel, when the plaintiff's attorney put in evidence a certificate under the hand of the deputy clerk of assize of the Oxford circuit, in accordance with the Act of Parliament, of the conviction of the said Samuel Rock at Hereford, and on proof of such certificate it was objected on the part of the defendant that the judge of the Co. C. at Newnham had no jurisdiction, inasmuch as the conviction had taken place out of the jurisdiction of the said Co. C.; to which it was answered on the part of the plaintiff, that the cause of action was the apprehension of the offender, and that as the apprehension had been proved to have taken place within the district of the Newnham Co. C., the judge had jurisdiction; whereupon the judge, after hearing the argument on both sides, decided as follows:—"I am of opinion that the apprehension is the cause of action, and that the mention of the conviction in the handbill regulates only the time and mode of payment of reward, and that the apprehension being in this district, I think the court has jurisdiction." Whereupon plaintiff's attorney proceeded with the case, and at the close of the said plaintiff's case, the counsel of the defendant went into evidence, with a view to prove that the said John Hernaman did not apprehend the said Samuel Rock, but that he was in fact apprehended in Newnham by some other party; but failed in support of such defence, and the judge ultimately found a verdict for the plaintiff, for the £20 and the costs of action.

A summons was subsequently taken out on the part of the said Thomas Smith in the Court of Q. B., calling upon the said John Hernaman to show cause why a writ of prohibition should not issue in the said cause of Hernaman against Smith, and was subsequently heard before Wightman, J., who, after hearing counsel on both sides, dismissed the said application with costs; and thereupon the plaintiff caused a writ of execution to be issued out of the said Newnham Co. C., for the damages and costs in the said action, and it was forwarded to the district court in which the defendant resides, for the levy of the said damages and costs, and was in due course levied. Subsequently the defendant obtained an order before Platt, B., for a prohibition. A rule to show cause why such order of Platt, B., should not be rescinded having been obtained.

Honyman now showed cause.—The question is, whether the cause of action in this case arose within the jurisdiction of the Co.C. Here the apprehension took place at Newnham; but the conviction, which was necessary to complete the cause of action, was at Hereford; and, to bring the case within this statute, the whole cause of action must arise within the jurisdiction: (9 & 10 Vic., c. 95, s. 60.) It is not only the promise which is the cause of action; it is the promise *plus* the breach. [PARKE, B—Everything is done by the plaintiff to entitle him to the reward; but the reward is payable upon a contingency, and that contingency takes place out of the jurisdiction; does that oust the Co. C. of its jurisdiction? That is the question. Everything is done within the jurisdiction that the plaintiff is bound to do.] The cause of action arises on the conviction; and there is no complete cause of action till then. It was the intention of the Legislature either that you should serve the defendant where he lived, or where the contract was made, and where therefore, presumably, the witnesses resided. The Statute of Limitations would not commence to run until the conviction, which shows that until then there was no complete cause of action. A case of appeal, *Borthwick and others* v. *Walton and others*, was heard in in the Court of C. P. on the 22nd instant, (not yet reported) that was an appeal from the Co. C. of Lancashire, held at Manchester. The plaintiffs resided at Manchester and the defendants at Oxford. I have the paper book of Maule, J., and a note by Mr. Scott, the reporter. Maule, J., there said, "Everything that is requisite to show a ground of action is part of the cause of action." Suppose this was an action on a life policy, or on a *post obit* bond, would not the death be a part of the cause of action? He cited *Harrington* v. *Ramsay*, 22 L. J. 326, Ex.; *Buckley* v. *Hann*, 5 Exch. Rep. 43; *Reg.* v. *Birch*, 1 Bail. C. C. 56; *Re Fuller*, 2 E. & B. 578; *Murray* v. *East India Company*, 5 B. & Ald. 204; Com. Dig. Tit. Comt, p. 9; *Peacock* v. *Bell*, 1 Wms. Saund. 74 n; *Ireland* v. *Lockwood*, 1 Roll. Abr. 546.

Macnamara in support.—The cause of action within the meaning of the section arose within the jurisdiction of the Newnham Co. C., although that cause of action could not be enforced until the conviction. The contract was made, and all the requisite conditions to be performed by the plaintiff were complied with within the district of that court; it was only that in which the plaintiff had no voice that was done out of the district. The cause of action differs materially from the right of suing. The foundation or gist of the action under this section has reference to the locality, and not to the time of suing. It is the substance that must be regarded, and not all that must be alleged in a declaration, or all that must be proved: (*Williams* v. *Land*, 4 Taunt. 729; *Sutton* v. *Clark*, 6 Taunt. 29.) [ALDERSON, B.—I must say, if that case of *Williams* v. *Land* were to occur again, I should be disposed to take time to consider it. POLLOCK, C. B.—The Court of C. P. has decided that the whole and every part of the cause of action must arise within the jurisdiction of the Co. C., and that if any part arise beyond, you must go to a court having general jurisdiction.] That case is distinguishable from this: an inchoate cause of action arose in the apprehension, to be made complete on the conviction. The case *Re Fuller* proceeded on the case of *Murray* v. *The East India Company*, where it was held, in an action by an administrator on a bill of exchange payable to testator, but accepted after his death, that the Statute of Limitations began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there is a party capable of suing. *Buckley* v. *Hann* was an action against an indorsee on a bill of exchange, the indorsement of which had been actually made in the city of London, but the delivery took place in the county of Middlesex, and it was held that the cause of action did not arise within the city; because there was no complete endorsement until delivery: (*Marston* v. *Allen*, 8 M. & W. 494). He also referred to Com. Dig. Tit. Action, n. 5, Pl. 7, 11; *Bulwer's* case, 7 Co. 2 a, 1 Wms. on Ex. 701, 3 edit.; *Barnes* v. *Marshall*, 21 L. J. 388, Q. B.; *Reg.* v *Birch*, 1 Bail. C. C. 56; *Wild* v. *Sheridan*, 21 L. J. 260, Q.B.; *Martin* v. *Dawes*, 11 M. & W. 736; *Buller* v. *Fox*, 18 L. J. 304, C. P.

POLLOCK, C. B.—We are all of opinion that this rule ought to be discharged; it is unnecessary to discuss the cases cited in the course of the argument on both sides. I found my judgment on this, that it appears to me clear that in this case the conviction was part of the cause of action. without it there was no cause of action. That being so, the Court of C.P. has decided that "all and every part of the cause of action" must arise within the Co. C. district. I think we are bound by that decision, and for myself do not feel disposed to depart from it.

PARKE, B.—I am of the same opinion. I thought at first there might be some distinction between what was to be done by the parties themselves and collateral matters; but on looking to the cases cited, I am satisfied there is no such distinction. I am satisfied that the cause of action is *all* that there is to be done, whether that it be by the plaintiff or by a third person. I am therefore of opinion that this rule ought to be discharged.

ALDERSON, B.—I am of the same opinion. The very expression used in the statute, "whole cause of action," shows that it is composed of parts. Well then, in this case we have some part of the cause of action arising within the jurisdiction of this Co. C., and another part beyond the jurisdiction. I therefore think that it cannot be contended that this case comes within the meaning of the Act.

Rule discharged with the costs of the rule only.

LAW SOCIETY OF UPPER CANADA,

(OSGOODE HALL.)

Easter Term, 18th Victoria, 1855.

During this present Term the following Gentlemen were called to the degree of Barrister-at-Law:

On Monday the 4th of June—DONALD FRASER and JAMES FOSTER BOULTON, Esquires.

On Tuesday the 12th of June—JOHN MACDONALD, WILLIAM FLANAGAN, and ANTHONY LACOURSE, Esquires.

On Saturday the 16th of June—JOHN VANDAL HAM, Esquire.

On Tuesday the 12th of June, in this Term, the following Gentlemen were admitted into this Society as Members thereof, and entered in the following order as Students of the Law, their examinations having been classed as follows, *viz*:

Junior Class.

Messieurs DAVID ASHE SAMPSON, HENRY O'BRIEN, JEHIEL MANN, Junior, and SAMUEL WELD.

Ordered—That the examination for admission shall, until further order, be in the following books respectively, that is to say—

For the Optime Class:

In the Phœnissæ of Euripides, the first twelve books of Homer's Iliad, Horace, Sallust, Euclid or Legendre's Geometrie, Hind's Algebra, Snowball's Trigonometry, Earnshaw's Statics and Dynamics, Herschell's Astronomy, Paley's Moral Philosophy, Locke's Essay on the Human Understanding, Whateley's Logic and Rhetoric, and such works in Ancient and Modern History and Geography as the candidates may have read.

For the University Class:

In Homer, first book of Iliad, Lucian (Charon, Life or Dream of Lucian and Timon), Odes of Horace, in Mathematics or Metaphysics at the option of the candidate, according to the following courses respectively: Mathematics, (Euclid, 1st, 2nd, 3rd, 4th, and 6th books, or Legendre's Geometrie, 1st, 2nd, 3rd, and 4th books, Hind's Algebra to the end of Simultaneous Equations); Metaphysics—(Walker's and Whateley's Logic, and Locke's Essay on the Human Understanding); Herschell's Astronomy, chapters 1, 3, 4, and 5; and such works in Ancient and Modern Geography and History as the candidates may have read.

For the Senior Class:

In the same subjects and books as for the University Class.

For the Junior Class:

In the 1st and 3rd books of the Odes of Horace; Euclid, 1st, 2nd, and 3rd books, or Legendre, 1st and 2nd books; and such works in Modern History and Geography as the candidates may have read: and that this Order be published every Term, with the admissions of such Term.

Ordered—That the class or order of the examination passed by each candidate for admission be stated in his certificate of admission.

NOTICE.—By a Rule of Hilary Term, 18th Victoria, students keeping Term are henceforth required to attend a course of Lectures to be delivered, each Term, at Osgoode Hall, and exhibit to the Secretary on the last day of Term, the Lecturer's Certificate of such attendance.

Lecturer next Term—ADAM WILSON, Esquire, Q.C.
Subject—The Law of Landlord and Tenant.
Hour of Lecture—From 9 o'clock to 10 o'clock, A.M.

ROBERT BALDWIN,
Treasurer.

Easter Term, 18th Victoria, 1855.

CORRESPONDENCE.

To the Editor of the "Law Journal."

SIR,

Can you inform me how, in the following case, the 8th section of the Division Court Act, 16 Vic. ch. 177 would apply.

A., the master of a schooner, engages B. as a hand, from C. to D. No fixed wages agreed on. B. performs his duties, and on their arrival at D. requests payment. This A. refuses. A. is not a foreigner, and formerly lived at some place in Canada, but has at this time no place of residence on land, living entirely on board his vessel. Under these circumstances, the amount due for wages being under £10, can B. sue him in the Division Court at all? If so, should he sue him in the Division Court for C. or for D.? That is to say—does the cause of action *arise* in C. or in D.?

Yours very truly,
"RUSTICUS."

26th June, 1855.

[The above question has come to hand at so late a period that we have not time, in this number, to give it consideration—and it is one deserving some attention—but we insert it as likely to be of practical utility, and shall be happy if any of our readers can furnish us with any direct authority on the point. We would for the present refer "Rusticus" to the case in England, printed in this very number—Hernaman *v.* Smith—which touches on this point very closely. The difference between the "cause" of action and the "right" of action does not seem very clearly defined—see the remark of MAULE, J., as quoted from Borthwick et al. *v.* Walton et al. In our next number we will refer to a few authorities on this point which came under our own notice some time since, but which at present we cannot readily lay our hands on.—*Ed. L. J.*

APPOINTMENTS TO OFFICE, &c.

REGISTRAR OF SURROGATE COURT.

THOMAS KEATING, of Guelph, Esquire, to be Registrar of the Surrogate Court of the County of Wellington, in the room of John Kirkland, Esquire, deceased.—[Gazetted 16th June, 1855.]

CLERK OF COUNTY COURT.

JAMES HOUGH, of Guelph, Esquire, to be Clerk of the County Court of the County of Wellington, in place of Alfred A. Baker, Esquire, resigned.—[Gazetted 19th May, 1855.]

NOTARIES PUBLIC IN U.C.

WILLIAM HAMILTON BURNS, of the City of Toronto, Esquire, Barrister and Attorney-at-Law, and JAMES COCKBURN, of the town of Cobourg, Esquire, Barrister-at-Law, to be Notaries Public in Upper Canada.—[Gazetted 19th May, 1855.]

GEORGE STEVENSON, Esquire, of Port Sarnia, Gentleman, to be a Notary Public in Upper Canada.—[Gazetted 2nd June, 1855.]

MANUEL OVERFIELD CRYSLER, of Dundas, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada.—[Gazetted 9th June, 1855.]

CORONERS.

JOHN P. WHEELAN, of Scarborough, Esq., to be Associate Coroner for the United Counties of York and Peel.

JOHN WELLINGTON ROSEBURGH of Dundas, Esquire, to be an Associate Coroner for the County of Wentworth.

CHARLES YOUNG, of the Township of Stafford, Esquire, to be an Associate Coroner for the United Counties of Lanark and Renfrew.—[Gazetted 19th May, 1855.]

DR. EGERTON GRIFFIN, to be an Associate Coroner for the County of Brant.—[Gazetted 26th May, 1855.]

EDWARD DANCY, M.D., and ELIJAH ELI DUNCOMBE, M.D., Esquires, to be Associate Coroners for the County of Elgin.

JOHN BARNHART, the younger, Esquire, M.D., to be an Associate Coroner for the United Counties of York and Peel.

JOHN WANLESS, M.D., ANDREW McKENZIE, M.D., and JOHN WELLIS, M.D., Esquires, to be Coroners for the City of London.—[Gazetted 16th June, 1855.]