THE

Local Courts' and Municipal Gazette.

VOLUME III.

FROM JANUARY TO DECEMBER, 1867.

EDITED BY

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TABLE

OF THE

CASES REPORTED IN TH S VOLUME.

DIARY FOR JANUARY.

1. Tues. .. *Circumcision.* Taxes to be comp- from this day.
5. Satur. Last day for Tp. Vill. and Town Clerk to make
6. SUN... *Epiphany.* [returns to Co. Clerk.
7. Mon. .. Co. Ct. and Surrog. Ct. Term ends. Mun. Elec.
8. Tues... Elec. School Trustees. Heir and Dev. sitt. com.
9. Wed. .. Assizes County York.
12. Satur. County Ct. and Surrogate Ct. Term ends.
13. SUN... 1*st Sunday after Epiphany*
14. Mon. .. Election of Police Trustees in Police Villages.
15. Tues... Treas. & Cham. of Mun. to make return to Board of Audit. School reports to be made,
19. Satur. Articles, &c., to be left with Sec. of Law Society.
20. SUN... 2*nd Sunday after Epiphany.*
21. Mon. .. Members of Municipal Councils (except Co 's) and Trust of Police Vil. to hold 1st meeting.
22. Tues... Heir and Devisee sitt. ends. Mems. Co Council
23. Wed. .. Dec. of office by Sch. Tr. [to hold 1st meeting.
25. Friday *Conversion of St. Paul.*
27. SUN... 3*rd Sunday after Epiphany.*
30. Wed. .. Appeal from Chancery Cham. School Financial Report to Board of Audit.
31. Thur... Last day for Counties and Cities to make return to Provincial Secretary.

NOTICE.

Subscribers in arrears are requested to make immediate payment of the sums due by them. All payments for the current year made before the 1st March next will be received as cash payments, and will secure the advantages of the lower rates.

The Local Courts'

AND

MUNICIPAL GAZETTE.

JANUARY, 1867.

COUNTY JUDGES.

One of the most important requirements in the orderly government of a country is upright and efficient judges—men who will administer the law without fear, favour or affection: with painstaking industry and the severity of logical analysis: having a thorough grounding in the fundamental principles of the common law and of equity jurisprudence, combined with a thorough and practical knowledge of the legislative changes that are being daily made both in the common and statute law. To this must be added, what are perhaps rarer qualities, an intuitive insight into character and the workings of human nature, and a keen observance and appreciation of the customs, wants and necessities of the people with whom they are either mediately or immediately brought in contact.

This last requisite applies with peculiar force to County judges in this country. Often obliged to decide upon the spur of the moment, with no assistance from books, or from the arguments of experienced counsel—with a mass of evidence, perhaps "pitchforked" into court without order, rhyme or reason—in a crowded court room, with but comparatively little time to devote to each case, it is little to be wondered at, if judges sometimes give decisions which are not all that could be desired. The greater care should therefore be exercised in the selection of men to fill these offices,—men who are not only sound lawyers but also who can quickly and correctly discover the point at issue, analyse and apply the evidence, scrutinise motives, and attach to the evidence of each witness the credibility or importance which it deserves.

The following remarks, taken from a leading legal publication in England, with reference to the appointment and position of the county judges there, are so much to the purpose that we copy them:

"There is no subject at present more deserving of the attention of the legislature and of the bar than the administration of law in the county courts. In the great majority of cases over which the jurisdiction of these courts extends, there is no appeal from the decision of the judge who decides upon them in the first instance. It may be true that they are occasionally of trifling importance to the parties concerned. On the other hand, to the majority of the suitors, who are of the poorer class, they are of great moment, and the decisions thus pronounced affect the existence of homes and the future of many lives. But the administration of law has a wider bearing than that which concerns the interest of the litigants in any particular case. It is necessary for the promotion of good citizenship and loyalty to the Crown and the institutions of the country that the law of the land should be fairly administered by every authorised tribunal. In many cases the vagaries of our county court judges are not a credit to the profession or the government. Some of these gentlemen carry out a law and practice of their own, decide upon principles of absolute morality, and not in accordance with legal authority, and hold courts which are only distinguished for loud talk between the litigants and the judge, and other great irregularities. * * * * Above all, care should be taken that good men should be appointed to the important position of a county court judge."

There is good and bad of every thing in this world; and though we are not now complaining of the appointments that have been hitherto made in this country, or say that persons appointed to offices of high public trust for political reasons are unfitted, *ipso*

facto, from occupying their positions with advantage to the public, we do say that political motives or party influences, or the desire to shelve a friend, or silence an opponent, should have nothing to do with the appointment of the justiciary of the country.

Whilst making the general remarks contained in the last few sentences, we do not wish to be understood as referring to appointments of this kind that have lately been made. On the contrary, we have reason to believe that the appointments to the county judgeships of Huron, of Bruce, and of Peel, have been made with a due regard for the interests of the public, irrespective of any of the objectionable influences alluded to. Mr. Brough is a Queen's counsel of high standing at the equity bar, who, though not very conversant with common law practice, (which, however, he will soon pick up,) takes with him to his new sphere of action in the Division Courts, a thorough knowledge of the principles of equity jurisprudence, as distinguished from those uncertain, crude notions of natural justice, which some few judges, we are afraid, practically put in its place, thereby doing much "substantial *in*justice" to all parties, unsettling the ideas of the people, as to what is or is not law, under a particular state of facts, and so causing unnecessary litigation, injuring trade, and bringing their courts into contempt. Mr. Kingsmill, the county judge of the new county of Bruce, is also well fitted, by his knowledge of the country people, their ways and customs, obtained by an extensive and varied practice in the country, and by his good common sense and tact and general knowledge of law, for the post which has been assigned him. The judge of the newly separated county of Peel is a gentleman of less experience than either of the other two, but that will mend by time. It might be objected to him that it is unadvisable on principle to select a person to occupy a judicial position in the place in which he has been living, and whilst there is some force in this, we do not think it of much importance in this particular case, and certainly if the feeling which is already entertained of Mr. Scott in the locality where he resides is any index of the future, there is every reason to think that his career will be a useful one.

We wish these gentlemen every success in the laborious and responsible duties which they have undertaken to perform.

FEES TO OFFICERS.

We hear from all quarters of the country of the great falling off in the business of the Division Courts. No doubt this tells well for the increased prosperity of the country, and is a most gratifying fact; but it enforces consideration of the present system of remunerating officers.

We have never been favourable to the payment of clerks by fees. The system of funding the fees and paying these officers by salary, is obviously the best, and is now all but universal in England. No one will now deny that Division Courts are a necessity; and further, that it is all important for the public interests, that a Division Court clerk should be a man of probity and means, and possess the education and business capabilities necessary to enable him to dischargethe duties of his office with safety and advantage to the public. He must, moreover, to keep suitors safe, furnish security to a large amount; in fact he is required by law to do so. With the small emoluments incident to a reduction in business, the public cannot expect to retain or obtain competent persons to serve in the office of clerk. Hence the necessity for putting them on a salary graduated according to the time required for the performance of the duty and the responsibility of the officer. The officers connected with the administration of justice in the Superior Courts are paid by salary, and we cannot but think it an invidious and unwise distinction to leave the officers of courts, which are "for the many," to remuneration by fees.

We are aware that our views on this subject as formerly expressed, did not meet with the approval of many of our readers, but such being our convictions, we felt bound to express them; now however we think that the justice of our remarks will be more appreciated, and that the course we advocate will be found not only more correct in principle, but on the whole, better for the interests of the officers themselves.

It is only the Legislature that can apply the proper remedy, and we strongly advise those interested to prepare for an appeal to Parliament to correct the existing evil.

We send herewith our Sheet Almanac for 1867. Those interested in school matters will find in it further information for them, whilst our municipal friends will see that we have endeavoured to mention all the dates which

the late acts give with any degree of certainty. The index for the last volume will be issued with the February number. A variety of circumstances occurring at the close of an old and the beginning of a new year have combined to render the issue of the present number later than usual.

SELECTION.

DOMESTIC SERVICE.

The state of the laws regulating the conditions of employers and employed, is a matter of great interest and importance at the present time. The demands for the extension or rather the lowering of the franchise, have brought with them, as a fringe of seaweed on rough waves, new theories and assertions respecting the compacts between those who command and those who obey. Perhaps no subject is of more social importance than the just regulation of hired services, and all the more so, when a sort of protest against injustice is made by the hired. Much is to be said on both sides, for, as regards the master equally with the servant, the law permits hardships.

It is not here proposed to deal with any other topic than that of domestic service. But the writer must record his entire agreement with an admirable suggestion in the *Law Times*, of September 8th, 1866, in regard to the alteration of the statute 4 Geo. IV., chap. 34, which authorises an imprisonment with hard labour to be inflicted on servants leaving employ, &c. The suggestion is, in order to obviate the supposed inequality between master and servant, that summary jurisdiction be given to the county court judge, to award damages, and, in default, imprisonment, against either party, for breach of contract.

The words "domestic service," says a writer in the *Alexandra Magazine:*—

"Instead of conveying the idea of a condition —which properly belongs to them—of happiness and peace, are suggestive of a complication of ills, which form a social grievance of no small magnitude; the causes are various, but the evil exists in some shape or other, and there is no doubt about it; but as regards the remedy, it is not so easy to speak; some persons are for 'waiting,' in the expectation that 'the evil will cure itself;' as to that suggestion, it is only neccessary to say, that we seem to have waited long enough without any sign of amendment in the matter: others, who think that something should be done, are much divided concerning tho means that ought to be employed in order to palliate or correct some of the more glaring abuses."

With the social remedies for this state of things we of the law have nothing to do, further than to remark, that the last words spoken in the shadow of death by the great and good poet-judge, are pregnant with meaning. Talfourd has told us solemnly, how great a power is the sympathy between classes; and it may be that his words will yet bear fruit little dreamed of. But our province is to point out the present state of the law upon this matter, the defects which are complained of, and the remedies which are feasible.

1. *The contract between employer and employed.*—In domestic service it seems that a general hiring is, in point of law, a hiring for a year, on the terms that either party may terminate the hiring by a month's notice, or its equivalent in wages. (*Fawcett* v. *Cash*, 5 B. & Ad., 904). This rule is held to apply merely to domestic servants; a principle, we believe, illustrated in the case of *Smith* v. *Hayward* (7 Adolphus & Ellis, 544), and of course the power of paying a month's wages in lieu of notice, to secure instantaneous departure of an objectionable servant, is counterbalanced by the power of the servant to leave immediately, an sacrificing a month's wages.

In a paper laid before us on the subject of domestic service, written we believe, by Mrs. Baines, who has devoted much time and labour to the subject, this latter facility of leaving service is spoken of as a great grievance. We are inclined to think, that in many cases it acts hardly against the mistress or master left suddenly in the lurch. But no one-sided provision can be thought of; and the remedy must equally protect the servant from sudden dismissal (often the source of calamity), and the master from sudden abandonment by his domestics. The writer would suggest a summary power of awarding damages, and in default imprisonment, lodged in the county court judge, against either party; the rule to be laid down, that a month's notice shall entail for that month the *status quo ante.*

2. *Causes of dismissal.*—If a servant is guilty of misconduct, he or she may be discharged at once without either notice or wages. But to justify immediate dismissal, moral misconduct must be proved, or wilful disobediance of orders. The fact of a servant having caused his master's apprentice to run away, having assaulted feloniously a female servant, and having made fraudulent entries in accounts, have all been held good causes for immediate dismissal; and where a justifiable cause of dismissal exists, it is not needful to state such cause in dismissal. All these facts evince the possesion of power by the master, though some writers dwell only on the varied tyranny by servants over mistresses, which "servantgalism" has bloomed into luxuriant profusion.

3. *Medical attendance.*—Chitty tells us that the law does not bind the master to have medical attendance for his sick servant, though we should imagine any person with common humanity would consider himself under a moral contract so to do; but if the master send for the medical man he must pay the latter's bill. (*Sellen* v. *Norman*, 4 C. & P.)

4. *Responsibility of Masters.*—For every trespass or tortious act committed by the servant in the course of his ordinary employment,

the master alone is liable in law. "The fitness of the agent is always at the risk of the employer," says Keating, J., in *Williams* v. *Jones* L. T. R., Vol. 13, N. S. And therefore the law makes the employer liable for all injuries committed by the employed in the regular course of his work; not, however, outside that. So far the law is hard, perhaps, on the master, but logically so; yet on the other hand, to equalize rights, the law gives no remedy against the master, where a fellow-servant has been thus injured by another. This is on the principle that such risks are accepted by the servant as considered in his wages, (*Morgan* v. *Vale of Neath Railway Company*, L. T. R.. Vol. 13, N. S.) So if the former rule of law be considered stringent on the master, the latter is equally on the servant. This should be remembered by those who are always prone to imagine and argue, that the ancient order of things is changed, and the masters have become the dependant and weaker class. A very painful case is reported from the Nisi Prius Court at Liverpool, at the last summer assizes, where a hole having been made in the floor of a factory, for the repair of a shaft by one of the servants of the defendant, a fellow-servant (the plaintiff) fell through and was injured. The judge nonsuited the plaintiff on the rule given above.

Such are the principal provisions of law which affect master and servant. But if a good servant is obtained, in the proper sense of the word, there will be neither necessity nor inclination for any appeal to legal rules. And although a laywer is out of place if he quits the clearly defined boundaries of law for the flexible limits of morality, or rather social morality, in discussion, it may not be out of place if these pages devote some of their space to the consideratisn of questions which affect, more or less thousands of families.

There is not the *entente cordiale* that there should be between employers and employed, generally speaking, in domestic service. The mistresses complain loudly against the servant, the servants against the mistresses. The latter complain of long hours of labour, undue and trying interference in the trivial details of dress, and the like; and generally, of a want of recognition that servants are "flesh and blood like the mistresses." And, on the other side mistresses complain of the insolence and "dressiness" of their servants; of their liability to desert them suddenly on slight cause; and of their frequent habit of slandering, indirectly, the character of master and mistress, in such a manner, as while not actionable, yet works mischief, and keeps servants away.

I do not know that this latter propensity is confined to servants. But undoubtedly (as we had the honour of pointing out in the last number of this Magazine) the law of slander has loopholes wide enough to let many offenders escape. It is possible, and sometimes the fact, that ill-disposed servants can and do slander among themselves the master and mistress whom they disapprove of. Enough may be done, say those who allege and complain of this practice, to keep an obnoxious master servantless; while at the same time nothing is said that comes within the limits of the law and slander. In a letter written by a lady whose experience and interest in the matter are well known, emphatic complaint is made of the habit of slander by servants; "mostly a vice indulged in simply from a love of mischief, a malignant feeling difficult to define or account for;" and instances are given of new servants induced to desert their masters suddenly from the unpunishable representations of the old ones. The writer laments the deficiency of the law in not touching cases in which the speeches just keep on the weather-side of defamation, and and asks for legislative remedy. This is hardly feasible. And, as in the former instance, any remedy must be open to superior and inferior alike. The mistress who insinuates doubts of her servants—who, without doing it illegally, clouds their characters, must be equally liable to summary remedy. There is no doubt room for both complaints; and we have no wish to underrate the discomfort and annoyance that can be caused by bad servants, although, on the other hand, the amount of suffering that can be inflicted by bad mistresses is not to be forgotten.

In the case of such slander as may work either party injury, without being actually actionable—if a new remedy is insisted on, it would certainly, we think, be best found in an additional power conferred on a county court judge in awarding damages, and in lieu a month's imprisonment against the convicted defendant. After all, we cannot find any substitute for the principle of paying in person where it is impossible so to do in purse, and the only way to avoid the appearance of partiality and the inevitableness primarily of imprisonment, is to give a chance to either party of paying a pecuniary mulct.

The object of this paper is to give, very briefly expression to the complaints of both sides. There is no doubt that reason for dissatisfaction exists far more than it should, with superior and inferior alike. The desire of all who study the realities of life must be, in the words of an article which appeared in the *Alexandra Magazine*:—"that the employer and employed may join hands in this effort, and by taking their stand on the broad and high ground of goodwill and Christian fellowship, that they may each be enabled to see more clearly defined the path of duty that lies before them."

No legal reform can have any permanent, or, indeed, any temporary good fruit unless its principles are backed by the teachings of social morality. This is peculiarly so in the question before our readers. The remedy for many patent evils in the relationship of employer and employed lies in mutual consideration and respect. Talfourd in his dying words, showed the key to many puzzles of civilization. Those noble and simple utterances, made

solemn and pathetic in the extreme by the immediate presence of death, were the true exposition of all real and good reform—the basis on which all lasting good work must be built. "Sympathy," and especially "between classes,"—the subtle interchanges of sentiment and experience—is worth all the theoretical morality in the world in legislative and social labours. More especially and vividly does this apply to the subject of the rights of employer and employed. Whatever defects there are must be remedied in a sympathetic spirit of justice to both. The thousands who fill the posts of domestic servants must be taught that they are held as "our own flesh and blood," though in a lower social sphere. And the thousands whom they serve must have security for honest service and protection against idle tongues and ready opposition. To heal differences and to promote good feeling is not the work of the legal reformer, save in so much as his efforts give tangible aid to the social preacher. By these combined efforts good may be done: but to expect a solution of a vexed and important question from an Act of Parliament, is tantamount to expecting a rare plant to bloom into vigour and beauty in a day. Individual exertion is needed, individual labour and individual influence. These, in combination with judicious and well-weighed legislative action, are the only remedies for grievances which, well or ill-founded, certainly exist in the minds and memories of many masters and servants.

W. Reade, Junior.

Law Magazine.

MAGISTRATES, MUNICIPAL, INSOLVENCY, & SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

Insolvency Act—Appeal.—Notice of the application for an allowance of appeal must be served within eight days from the day on which the judgment appealed from is pronounced, but the application itself may be after the eight days.

Where the notice was served in time, but named a day for the application, which did not give the time the insolvent was entitled to, and was irregular in some other respects, the notice was held amendable in the discretion of the judge.—*Re Owens*, 3 U. C. L. J., N. S., 22.

Corporation—Contract ultra vires—Executed Consideration.—Defendants being a Joint Stock Road Company under Consol. Stat. U. C., ch. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorised by the act (sec. 32), but the plaintiff built the road, the defendants accepted it and levied tolls upon it, and after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done.

Held, that they were liable upon the common counts.—*Thornton* v. *The Sandwich Street Plank Road Company*.—25 U. C. Q. B. 591.

General Liability and Jurisdiction of Municipal Corporations and Officers — Power to make Notes, &c.—Agents, officers, or even a city council of a municipal corporation, cannot bind the corporation by any act which transcends their lawful or legitimate powers. And this rule applies to the issue of negotiable as well as non-negotiable evidences of debt.

The duties and powers of the officers of a municipal corporation are prescribed by the statute, and every person dealing with them as such may know, and is charged with knowledge of the nature of these duties and the extent of these powers.

A corporation may set up a plea of *ultra vires*, or its own want of power under its charter or constituent statute to enter into a given contract, or to do a given act, in excess of its corporate power and authority.

Negotiability will not validate obligations which are not binding because of want of power to make them.

Warrants drawn by the proper officers of a municipal corporation on the treasurer thereof, are not bills of exchange, but are, in legal effect, the promissory notes of the corporation.

Municipal corporations have and can exercise only such powers as are expressly granted, and such incidental ones as are necessary to make these powers available, and are essential to effectuate the purposes of the corporation; and these powers are strictly construed.

When the officers of a city have no express power, to issue for current, ordinary debts, negotiable paper which shall be free from equities in the hands of purchasers, and it is not necessary as an incident to those granted, or to carry out the purposes and objects of the corporation, it cannot be held to exist by implication.

The assignee of warrants drawn by the officers of a municipal corporation on the treasury thereof, is bound, at his peril, to ascertain the nature and extent of the powers of such officers and of such corporation.

The want of corporate power or the want of authority in the municipal officers, cannot be supplied by their unauthorized action or representations.

Warrants issued by a municipal corporation in payment of a judgment at the rate of one dollar

in warrants for every seventy-five cents due on the judgment, are tainted with usury.

It may be doubted whether a municipal corporation is bound by the action of its council in agreeing to pay a sum clearly, distinctly, and ascertainably greater than is legally due.

No municipal corporation can erect a toll-bridge and levy and collect tolls, unless authorized by the law of the state.

A municipal corporation has no power to lend its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises.

The building of side-walks is, ordinarily, a legitimate municipal object.

When a municipal corporation, acting under the Constitution of 1846, issued in payment of a *bonâ fide* indebtedness, scrip to circulate as money, after which the scrip was taken up by the issuance of ordinary warrants on the treasury thereof for the amount of the same, it was held that the transaction could not be impeached by the corporation on the ground that the scrip was illegal and void.—*Clark* v. *The City of Des Moines*, 6 Am. Law Reg. 146.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

NAVIGABLE WATER—RIGHT OF CROWN TO LAY OUT HIGHWAY—ITS RIGHT TO GRANT PORTION OF LAKE NOT NAVIGABLE.—A grant of land will carry land covered with water.

The evidence shewed that the portion of the grant in dispute at extraordinary periods when the water of the lake was pressed up at this particular part of it by strong winds, admitted of scows passing over it, but that the water was not then more than four or five feet deep, and that at ordinary times it was quite shallow and fordable: *Held*, not navigable water.

The property in question formed part of the lake, though not navigable: the Crown surveyed a part for the line of road, which was then under water, the effect of which was that the property in question, which lay to the north of this intended road, would, if the roads were made, become a mere stagnant pond:

Held, that the Crown had the right to lay out the highway where it did, and that, therefore, it could grant the portion to the north of it, which would be thus excluded from the lake; and that it could do this without the aid of 23 Vic., ch. 2, sec. 35.—*Ross* v. *The Corporation of the Village of Portsmouth* —17 U. C. C. P. 195.

INJUNCTION—CO-TENANCY —Although the general rule is that the mere fact of one tenant in common holding possession of the entire estate, will not render him liable to a co-tenant, who might himself enter and enjoy the possession with the other, and the court will not in such a case interfere with the dealing of such co-tenant in regard to the property, still where the co-tenant in possession was the mother of the other co-tenants, all of whom were infants at the time of her second marriage, the court, at the instance of one of the children who had attained majority, restrained the husband and wife from selling or disposing of the crops of the current year, or the proceeds thereof, unless they undertook to bring into court one-third of such proceeds: but refused to interfere with the possession of the mother and her husband in respect of previous years; although as to such previous years the mother might have been accountable to her infant children as trustees for them.—*Bates* v. *Martin*, 12 U. C. Chan. R. 490.

ACTION ON BOND — LIMIT OF AMOUNT TO BE RECOVERED —Action on bond payable by instalments. Judgment was entered for the amount of the penalty. Proceedings were had from time to time by *sci. fa.* *Held* that the defendants were bound to pay the expense of levying the sum due, but that the whole amount the plaintiffs were entitled to recover is limited to the penalty.

The plaintiff may not charge interest on the penalty, or amounts remaining due thereon.—*Randall et al.*, v. *Burton et al.*, 3 U. C. L. J., N. S. 8.

DISCOVERY—PRINCIPAL AND AGENT — PRIVILEGE.—Letters received by the agent of a party to a cause from other parties, although written in confidence, but relating to the subject matter of the cause,—*held*, to be in the custody or power of the principal, and not exempt from production under an order to produce. No communication privileged, except as between a solicitor and his client.

The defendants not wishing that the names of their agents should appear, cut out the signatures at the end of the letters containing certain information, but *held*, that such letters must be produced entire and not mutilated.—*Wiman* v. *Broadstreet*, 3 U. C. L. J., N. S., 23.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

Markham v. The Great Western Railway Company.

Railway Act, sec. 147—Horse not "in charge."

The plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendant's railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed—*Held*, upon a bill of exceptions tendered in the County Court and error thereon, that the horse was not "in charge of" any person within Consol. Stat. C., c. 66, sec. 147, and that the plaintiff could not recover.

[Q. B., T. T., 30 Vic., 1866.]

Error from the County Court of Essex.

Defendants were sued for killing the plaintiff's horse. The defence was rested on the provisions of Consol. Stat. C., c. 66, secs. 147, 148, 149.

It appeared from the plaintiff's evidence that, just as it was getting dark in the evening, the plaintiff's son, nineteen years old, was riding one horse, leading another, and driving a third horse in front, along a road crossing the railway.

The horse killed was from sixty to one hundred feet in front of the driver. He apparently heard the train and attempted to run across the track, but was killed when he got half way over. It was blowing so hard that the witness could not hear the train till it was close upon him, and heard no whistle till the train was right upon him; it had just commenced to rain; he said he did not take much notice about the train.

On this it was objected that the plaintiff must fail; that the horse was at large, and not "in charge of" any person, &c., under the statute.

The learned judge, however, left the question to the jury, who found for the plaintiff.

The defendants tendered a bill of exceptions, upon which error was brought to this court.

Irving, Q. C., for the defendants.

Prince, Q. C., contra.

The cases cited are referred to the judgments.

Hagarty, J.—The objection comes before us as if on a demurrer to evidence—whether, admitting the truth of the plaintiff's evidence, it was sufficient in law to entitle her to recover.

Was the horse killed "at large," or was it "in charge," within the meaning of the statute?

Cases have occurred under the act in our own courts nearly approaching to the present.

In *Thompson* v. *Grand Trunk Railway Co.* (18 U. C. Q. B. 94), a boy was driving four horses loose before him. He drove them through a gate on a road about sixty yards from the crossing. He tried to get ahead of the horses as he saw the train approaching, but they ran to the crossing and were killed. The late Sir *John Robinson* said: "There could be no stronger case against the plaintiff's recovering, even if there was no such statute in force as the 20 Vic., ch. 12, sec. 16; but with that statute in force, there can be not the slightest room for doubt, for we consider it clear that upon the facts proved these horses cannot be held to have been *in charge* of the boy within the meaning of the statute, so that he could prevent their loitering or stopping in the highway at the point of intersection with the railway. If he had had even one of the four horses secured by a bridle or halter, there would have been rather more pretence for admitting the horses to be in his charge, for the others would probably, though not certainly, have remained near the one he was leading."

In the next case in the same volume, *Cooley* v. *The Grand Trunk Railway Co.*, (p 96), the plaintiff's servant drove his three horses for them barn to the highway, and along the highway to a watering place existing close to the railway track. He used no halter nor did anything more than drive them loose before him. A train came, and the horses ran on and along the track, and one was killed. It was held that the plaintiff could not recover; the same learned judge saying it was clear that the plaintiff's horse when it got upon the railway was not in charge of any person within the meaning of the statute.

We cannot distinguish the case before us from those cited, unless the fact that the plaintiff's servant was riding one horse and leading the others, will enable us to say that the third horse allowed to go loose in front was in his charge.

In the first case cited the Chief Justice notices, without deciding, the aspect of such a state of facts. He says there would have there been rather more pretence for admitting the horse to have been in charge. We are unable to see how the horse driven from sixty to one hundred feet in front of the others, which doubtless were duly "in charge," can be said to have been properly under the man's control. The event shewed his utter inability to prevent the animal running on or across the track. Common sense would suggest that in the dusk of the evening a train rushing rapidly past the point that the witness was approaching, would startle a horse so driven, and render him quite unmanageable.

If animals usually driven—viz.: oxen, pigs or sheep—have to approach or cross a railway, we should naturally consider them as "in charge" when the person or persons driving them could readily head them off or turn them if necessary from the track; but a mounted man leading a second horse would be, as happened here, quite unable to stop a horse driven before him and allowed to be from fifteen to twenty-five yards in front. He would be at least equally helpless while he had to manage his own horse and that which he was leading, and at the same time prevent the animal some distance before him from rushing forward to the track, as if he were on foot with all three horses loose before him.

We had occasion in a former case of *McGee* v. *The G. W. R. Co.* 23 U. C. Q. B. 293, to notice the large object of public safety contemplated by the legislature in making this most salutary provision respecting cattle. See also *Studer* v. *Buffalo and Lake Huron Railroad Co.*, *ante*, p. 163. It should not be frittered away by such distinctions as are sought to be established between this and the decided cases.

We think the horse was not under that control and care which a due regard to the lives of the travelling public (if not to railway corporations) required its owner to have provided for it at the time it was killed by defendants' train; and that the appeal to this court must be allowed, and the judgment below be reversed.

Draper, C. J.—I agree in the views expressed by my brother Hagarty, and based upon the

judgments of this court given when Sir John Robinson presided over it.

The result of those decisions I take to be, that horses which are driven near or across the railway loose, without halter, bridle, or other similar fastening, and therefore under no actual present check or holdfast, and are not so close to their driver as to be under his immediate manual control and restraint, are not "in charge" within the spirit and meaning of sec. 147 of "*The Railway Act*" of this Province.

Hence where the evidence for the plaintiff clearly and decisively shews that a horse for the killing of which by their locomotive, &c., an action is brought against a railway company, was not so in charge, the judge presiding at the trial ought, as a matter of law, to rule that the company have incurred no liability whatever.

Courts and juries should never lose sight of what has been so properly averted to by my learned brother as the object of the provisions in this respect of the Railway Act. It was not merely to protect these companies, but to prevent the recurrence of those frightful catastrophes, so dangerous and destructive to passengers on railway trains, which have been caused by horses and cattle getting upon the railway track. By throwing the responsibility upon the owners of permitting their horses, sheep, swine or other cattle, to be at large upon any highway within half a mile of the intersection of such highway with any railway or grade, unless such cattle are in charge of some person, and depriving them of any remedy against the railway company in case of their cattle, &c., being killed, the legislature make it their interest to diminish one of the risks to which the public are exposed in making use of the railway.

Appeal allowed.

THE CORPORATION OF THE CITY OF TORONTO v. THE GREAT WESTERN RAILWAY COMPANY.

Railway—Assessment.

The Court of Revision confirmed the assessment of a lot of land occupied by a Railway Company at $1200 annual value, and assessed the station built upon it at $1500, and the County Court judge being appealed to, confirmed the value of the station, "subject to the question" whether it could be assessed in addition to the land, "and left for the determination of a higher court," whether after the valuation of the land had been fixed in accordance with Sec. 30 of the Assessment Act the building could be added. *Held*, that this was in effect a confirmation of the assessment, the reservation being inoperative, and that the court had no power to review the decision.

[Q. B, T T., 30 Vic., 1866.]

Special Case. The assessors for the City of Toronto assessed certain land and premises belonging to the Great Western Railway Company, who appealed to the Court of Revision, who assessed the land itself at an annual value of $1200, and also assessed the large frame Railway Station erected upon the same lot of land at an annual value of $1500.

It was stated in the case that the land in question, bounded by Scott street on the east, Esplanade street on the south, Yonge street on the west, and a lane on the north, was a lot on the whole of which the company had erected a building, which, together with the land, was used entirely for railway purposes: that through the building were laid several railway tracks, and on each side thereof, all being upon the premises in question, were placed buildings used for freight-shed, clerk's office, waiting room for passengers, baggage room, &c., &c, the building on each side of the track being connected by a roof, and all forming a railway station, being the terminus of the Great Western Railway in Toronto, and no part being used except for railway purposes.

From this assessment the Great Western Railway Company appealed to the judge of the County Court, who confirmed the assessment of the land at an annual value of $1200, and decided that "subject to the question whether such property could be assessed in addition to the value of the land as previously assessed, by a building thereon used for railway purposes, he confirmed the value of the large railway station at the sum," &c., (as the Court of Revision had done) "and left for the determination of a higher court whether, after the valuation of the land had been fixed in accordance with the 30th section of the Assessment Act, there was or was not power to add thereto the value of the buildings of the nature in this case described."

The city brought an action for the two amounts which had been imposed as rates upon these separate annual values, and this, by consent of the parties, and by a judge's order, was made a special case for adjudication by this court without pleadings, the question submitted being "whether the company can be assessed for the value of the buildings used and occupied for railway purposes under the provisions of the Assessment Act, when the land occupied by the railway upon which such buildings rest has been already assessed at the average value of land in the locality as land used for railway purposes.

C. Robinson, Q. C., for the plaintiffs, cited *Great Western R. W. Co.* v. *Rouse*, 15 U. C. Q. B. 168; *Municipality of London* v. *G. W. R W. Co.*, 17 U. C. Q. B. 264; Consol. Stat. U. C. c. 56, sec. 30.

Irving, Q. C., for the defendants cited *In re Great Western R. W. Co.*, 2 U. C. L J. 193; *Regina* v. *Glamorganshire Canal Co.*, 3 E. & E. 186; *Cother* v. *Midland R. W. Co.*, 2 Phillips 469.

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

This action seems very like an attempt to make this court a tribunal to review the determination of the judge of the County Court under the Assessment Act, the 64th and 68th sections of which appear to us to intend that his decision shall be final.

Supposing that the learned judge of the County Court had simply confirmed the decision of the Court of Revision, we do not imagine it would be questioned that neither in this nor in any other form could his judgment be reviewed. But in place of a simple confirmation the case states that the learned judge has confirmed it, subject to the question left for the determination of a higher court whether he is right in confirming it or no. We think this is in law a confirmation, and the reservation is inoperative, for the first was his duty, if that was the conclusion he arrived at, and the latter was not contemplated or authorized by the statute. We assume he intended to confirm because he has said he has confirmed, though he has desired to subject his opinion to review or even reversal. But either he has confirmed or he has not discharged the duty cast upon him by the legislature, for he

certainly has neither varied nor reversed the decision of the Court of Review.

As to the question itself, as at present advised, we do not think it would be found to present any great difficulty, and if the city assessors or the Court of Revision had put the two annual values into one, as forming the whole valuation of the "land," though there might have been an appeal to the County Judge on the question of excessive valuation, and he must have confirmed or reduced it, we do not see how, under the statute, his decision could have been brought in question.

But for the purpose of determining this case as presented, we have no objection to state our opinion that the judge of the County Court has confirmed the assessment as revised by the Court of Revision, and we think this court cannot review or annul his adjudication.

Judgment for the plaintiffs.

COMMON PLEAS.

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

MCCURDY V. SWIFT, ADMINISTRATRIX.

Temperance Act of 1864, 27 & 28 *Vic. c.* 18, *ss.* 40, 41—*By-Law—Liability of innkeeper—Right to sue before prosecution for felony—Death of party assaulted—C. S. U. C. c.* 78 *—Pleading.*

Declaration, that defendant by his servant *wrongfully and in violation of the Temperance Act of* 1864. *in the township of A., then and there being fully in force*, furnished and gave one W. while in defendant's inn intoxicating liquors, whereby he became and was intoxicated, and while so intoxicated did assault the intestate, whereby he was immediately killed;

Held, on demurrer, that it was not necessary to allege a by-law of any municipal body as in operation in A. under the Temperance Act, but that the declaration could be sufficiently maintained under the 41st section of that Act, under which the action was brought, as being one of the express provisions in force everywhere, irrespective of local prohibition, without holding that *fully* in force meant that the *full* Temperance Act was in force in A., which would have required a by-law to have been first passed for the purpose. But,

Held, that the declaration was defective, in not shewing that W. drank *to excess in the inn*, which was necessary to fix the innkeeper with liability under the 40th sec. of the Act.

Held, also, (1.) That the Temperance Act may be construed as giving the civil remedy, at any rate against the innkeeper, notwithstanding a felony may have been committed which has not been prosecuted for, although it does not, like the Imperial Act, contain any express provision to that effect. (2.) That, as the legal representative is by sec. 41 expressly authorized to sue for an assault upon the deceased, the action may, under the construction of the act be brought, though such assault has resulted in death. (3.) That this case was within the terms of C. S. C. ch. 78, the death of a person having been caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the injured party (by virtue of the Temperance Act) to maintain an action and recover damages in respect thereof; and that, therefore, defendant, who would have been liable by that act if death had not ensued, was still liable, notwithstanding the death of the person injured, and though caused under such circumstances as amounted to felony; and, therefore, the case was within that act.

Semble, that the allegations in the declaration, that the intestate was killed within twelve months next before action brought, and that plaintiff sued as well for the benefit of herself, as the wife of deceased, as for that of their infant children, were necessary allegations.

[C. P., T. T., 1866.

The *declaration* stated that in the lifetime of Angus McCurdy, the deceased and intestate, the defendant was in the possession and occupation of a certain inn, tavern, or house of public entertainment, in the township of Ashfield, and while so using and occupying the same, which was under the charge of a servant of the defendant, the defendant, by his servant, wrongfully and in violation of the Temperance Act of 1864, in the township of Ashfield, then and there being fully in force, furnished and gave one William Wooley, while in the said inn, &c., intoxicating liquors, whereby Wooley became and was intoxicated, and while so intoxicated did assault, beat and ill-treat the said Angus McCurdy, whereby he was immediately killed, within twelve months next before the commencement of this suit; and the plaintiff, as administratrix, pursuant to the statute in that behalf, as well for the benefit of herself, as the wife of the said Angus McCurdy, as for the benefit of the three infant children [naming them] of the said Angus McCurdy, born of the body of the plaintiff, brought this action, and claimed $5,000.

The defendant demurred to the declaration on the following grounds: —

1. No by-law was shewn to have been passed, prohibiting the sale of intoxicating liquors in the township of Ashfield.

2. No facts were shewn from which it could be ascertained that the furnishing of intoxicating liquors to William Wooley was in violation of the Temperance Act of 1864.

3. The plaintiff could not, by the rules of pleading, allege generaly that the furnishing of intoxicating liquors was in violation of the act, for it involved an allegation of law,

4. No proper issue in fact could be taken on such allegation.

5. There were various provisions of the act against furnishing liquor, and the particular facts relied upon should have been shewn, so that it might have been known whether the facts were within any of the provisions of the act.

6. No facts were shown from which Wooley became or ever was liable to an action by the said Angus McCurdy for or in respect of the alleged assaulting, &c., and therefore defendant was not liable in this action.

7. McCurdy having been immediately killed, Wooley never was liable to McCurdy for the assault, &c.

8. It appeared a felony had been committed, and there could be no right of action by McCurdy against Wooley.

9. It was not shewn that Wooley had been acquitted or convicted of the felony, or of the assaulting, &c.

10. The statute did not apply when the party assaulted was killed by the assault.

11. It was not shewn the defendant's servant had any power, permission or authority from the defendant to furnish the liquor to the deceased.

In Easter term last, *S. Richards*, Q. C., for the demurrer:—

It was not stated, nor can it be inferred, that there was a sale of spirituous liquors by the defendant in violation of law. The exceptions in sec. 12 of the 28 Vic. ch. 18, the Temperance Act of 1864, should have been negatived.

(The Chief Justice referred to *Van Buren's* case, 9 Q. B. 669.)

The case appears to have been a felony on the part of Wooley, and therefore no action can be brought against him until after he has been prosecuted for the felony, which has not been done: *Crosby* v. *Long*, 12 East. 409; Hales' P. C. 546; but even then this plaintiff could not sue Wooley: the action against him could only be brought by

the deceased, if he had lived; and no action will lie against the defendant, unless Wooley could have been sued.

The remedy in this case, if there be any, should have been against the servant of the defendant: secs. 12-13-40-41-42 of the act.

J. Gwynne, Q. C., contra:

A by-law did not require to be stated in this case: such a law is only required to give effect to merely local provisions. The declaration, therefore, is sufficient in charging the sale of liquor to have been contrary to the Temperance Act. See sec. 16 of this act and the form in schedule C.

The plaintiff had a right of action against Wooley under the Act of Canada, Consol. Stats ch. 78. The defendant is by the Temperance Act liable with Wooley, which makes him in effect liable in the same way and to the same extent as Wooley; and as Wooley is liable under ch. 78, so also is the defendant.

A. WILSON, J., delivered the judgment of the court.

The Temperance Act (in sec. 1) authorizes any municipal council "to pass a by-law prohibiting the sale of intoxicating liquors and the issue of licenses therefor." Sec. 12 provides that while the by-law "continues in force, no person, unless it be for exclusively medicinal or sacramental purposes, or for *bonâ fide* use in some art, trade or manufacture, or as hereinafter authorized by the third or fourth sub-sections of this section, shall within such county, &c., by himself, his clerk, servant or agent, expose or keep for sale, or directly or indirectly on any pretence, or by any device, sell or barter, or in consideration of the purchase of any other property, give to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous, or otherwise intoxicating." The third sub-section provides that licensed distillers or brewers may expose at their distilleries or breweries, and keep for sale, such liquor as shall have been manufactured thereat and no other, and may sell thereat quantities not less than five gallons at a time, to be wholly removed and taken away in quantities not less than five gallons at a time; and licensed brewers may sell bottled ale or porter of such manufacture in quantities not less than one dozen bottles of at least three half pints each at a time, to be wholly removed and taken away in quantities not less than one dozen such bottles at a time. Sub-sec. 4 makes a somewhat similar provision in favor of merchants and traders.

From the 39th to the 46th clauses inclusively they are headed "General provisions, irrespective of local prohibition."

The 40th section is: "Whenever in any inn, * * * * wherein intoxicating liquor of any kind is sold, whether legally or illegally, any person has drunk to excess of intoxicating liquor of any kind therein furnished to him, and, while in a state of intoxication from such drinking, has come to his death by suicide or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn, * * * * and also any other person or persons who, for him or in his employ, delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to an action as for personal wrong, if brought within three months thereafter, but not otherwise, by the legal representatives of the deceased person, and such representatives * * * * may recover such sum, not less than $100 nor more than $1000, in the aggregate of any such actions, as may therein be assessed by the court or jury as damages."

The 41st section is: "If a person in a state of intoxication assaults any person or injures any property, whoever furnished him with the liquor which occasioned his intoxication, if such furnishing was in violation of this act, or otherwise in violation of law, shall be jointly and severally liable to the same action by the party injured as the person intoxicated may be liable to; and such party injured, or his legal representatives, may bring either a joint and several action against the person intoxicated and the person or persons who furnished such liquor, or a separate action against any or either of them."

By the Consolidated Statutes of Canada, ch. 78, it is provided: "Whenever the death of a person has been caused by such wrongful act, neglect or default, as would [if death had not ensued] have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although his death has been caused under such circumstances as amount in law to a felony"

The action under this act must be brought by the personal representatives of the person injured in case of his death.

In the case of death by duelling, the person inflicting the wound or injury, and all others aiding or abetting the parties, as seconds or assistants, may be proceeded against, although no action for damages could have been brought by the person whose death may be so caused, had death not ensued.

The actions under the statute must be brought within twelve months after the death of the deceased person.

This declaration does not set out, or profess to set out, a by-law of any municipal body as in operation under the Temperance Act in the township of Ashfield: it alleges that the furnishing of the liquor was done "wrongfully and in violation of the Temperance Act in the township of Ashfield, then and there being fully in force," which may be sufficiently maintained by the fact that the 41st sec., under which this action is brought, is one of a number of clauses which are by the express provisions of the act in force everywhere in the province, irrespective of local prohibition, without holding that *fully* in force means that the *full* Temperance Act was in force in the township; which would have required a by-law to have been first passed for the purpose.

The 41st section gives a right of action, if the furnishing of the liquor was in violation of that act, or otherwise in violation of law; and under this the plaintiff may rely on the violation of the local prohibition or by-law, or on the violation of the enactments which have effect irrespective of local prohibition, or on the violation of the provisions of general law, if there be any such. We do not say there are, but we think this action

is well brought under the second general class of cases

The violation of the Temperance Act, shewn or professed to be shewn in this case, is a violation of the provisions of the 40th section. That section, as before stated, makes the offender liable "whenever *in any inn* * * * any person has *drunk to excess of intoxicating liquor*, of any kind, *therein furnished to him*, and *while in a state of intoxication from such drinking* has come to his death by suicide," &c.; and, it is said, it is a violation of the act to furnish a person in an inn, &c., with intoxicating liquor, who drinks to excess therein, and from such drinking becomes intoxicated, although such person does not come to his death thereby; and I think this is so: the innkeeper has done everything on his part to complete his part of the transaction: it then only depends on circumstances whether liability shall attach upon him for his past misconduct.

It is a wrongful act to make an excavation on one's own ground near to a common and public highway, and to leave it not properly protected to keep the public in passing along the highway from injury: *Barnes* v. *Ward* (9 C. B. 392); *Manley* v. *The St. Helen's Co.* (2 H. & N. 840). Perhaps for this alone an indictment would lie; but the same rule applies to a private way or path leading to one's house: *Chapman* v. *Rothwell* (El. Bl. & El. 168). So it is a wrongful act to drive horses, or to conduct a railway engine, unskilfully: *Vose* v. *The Lancashire Railway Co.* (2 H & N. 728); but no action lies in any such case unless damage result from the act complained of.

It is the act or omission of the party that is wrongful, and is always so described, without regard to the results or consequences which flow or may flow from it. These results or consequences may or may not end in a liability to suit: that depends upon whether damage or injury has ensued; but although there can be no recovery and there is no damage in fact, there may nevertheless be the wrongful act; for instance, in *Wylie* v. *Birch* (4 Q. B. 566) the plaintiff was held not to be entitled to recover for a false return to a *fi fa.*, when it was shewn he had sustained no damage by it: *Williams* v. *Mostyn* (4 M. & W. 145); and in *Godefroy* v. *Jay* (7 Bing. 403) it is laid down that an attorney would not be liable for allowing a judgment by default to go against his client, if he could shew the client had sustained no damage thereby; and in *Boulton* v. *Webster* (11 L. T. N. S. 598), where it was held that in a suit under Lord Campbell's act no action lies, if the damages be only nominal.

There are many cases in law where there is *damnum* without the *injuria*.

In the 4 Jac. 1, ch. 5, the vice is described as "the odious and loathsome sin of drunkenness," and the offender was punishable; so the alehouse keeper was punishable for permitting tippling in his place: 1 Salk. 45.

In *Brandon* v. *Old* (3 C. & P. 440) *Best*, C. J., said: "Drunkenness is forbidden by the common law; but it has also been forbidden by statute from the reign of King Charles the Second down to the present time"

Our own municipal law confers powers upon the councils to pass by-laws for preventing drunkenness, suppressing tippling houses, punishing persons found drunk in public places, and sending to the Houses of Industry and Refuge all such as spend their time and property in public houses, to the neglect of every lawful calling; and they authorize very rigid terms being imposed upon all vendors of spirituous liquors.

(To be continued.)

COMMON LAW CHAMBERS.

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

IN RE LAMB, AN INSOLVENT.

Insolvent Act of 1864—*Application by insolvent for discharge—Fraudulent preference—Neglect to keep proper books of accounts—Measure of punishment.*

It appeared, on an application by an insolvent for his discharge under the Insolvent Act of 1864, that he had within three months before his assignment paid one of his creditors in full under such circumstances as was considered to amount to a fraudulent preference, and had neglected to keep proper cash books or books of account suitable to his trade. The County Judge granted a discharge suspensively, to take effect four months after the order made.

Upon an appeal from this order by a creditor the judge in Chambers thought that the judge below had acted with extreme leniency, and though he would not interfere with the order that he made, dismissed the appeal, but without costs.

Remarks upon the breach of duty in not keeping proper books of account which should be severely punished.

The requirements of the act on debtors asking for discharge should be peremptorily insisted on.

[Chambers, Nov. 27, 1866.]

The judge of the County Court of the United Counties of Lennox and Addington, granted to the above insolvent a discharge, suspensively to take effect on 1st February, 1867, after delivering the following judgment:

"The petitioner made his assignment on 1st June, 1865, and having been unable to obtain a composition and discharge from his creditors, now seeks for an order from the court granting his discharge.

"The prayer of his petition is opposed by several creditors on the grounds of fraudulent retention or concealment of part of his estate, prevarication and false statements in examination, fraudulent preference of particular creditors, and lastly, of deficient books of account.

"On hearing the parties and attentively considering the facts disclosed on the insolvents examination before me, I see no reason to believe that he has fraudulently concealed or retained any part of his effects, nor do I think that he was guilty of any prevarication or false statements, on the contrary the insolvents conduct since his assignment seems to me to be fair and honest, and not liable to the censures attempted to be cast upon it.

"There are, however, two charges made against the insolvent respecting his conduct before the assignment to which no answer appears to be given. It is shewn that in the month of April, 1865, within less than three months before the assignment, the insolvent being indebted to his shopman, McCan, in $300 for wages and borrowed money, gave him promissory notes of his customers to the amount of $400, in full satisfaction of the debt. There can be no doubt that this transaction was wholly illegal and amounted to a fraudulent preference; however natural it may be for a man pressed by his servant, who was also his creditor, for wages and loans to satisfy such a claim in the way the insolvent did,

yet the provisions of the Insolvent Act of 1864 clearly point out that such a payment is a fraud upon the other creditors.

"The second charge made against the insolvent is, that he did not keep a cash book nor other sufficient books of account suitable to his trade, which is not denied by the insolvent.

"Under these circumstances, although I do not consider with the creditors, that the insolvent should never be discharged at all, yet it seems right that some penalty should be inflicted in consequence of the faults committed by him in the above mentioned instances. I therefore order that his discharge shall be suspended until 1st February, 1867, and will sign an order granting his discharge suspensively to take effect on that day."

The petitioners being dissatisfied with the said order and decision, made an application to a judge of one of the Superior Courts of Common Law, presiding in Chambers in Toronto, to be allowed to appeal from the said order and decision, and on the seventh day of November, A.D, 1866, an order was granted by the Chief Justice of Upper Canada, allowing the petitioners to appeal to one of the judges of the Superior Courts of Common Law in Chambers from the said order.

The petitioners therefore prayed that the said order and decision of the judge of the County Court of the County of Lennox and Addington might be revised, and the same reversed and the discharge of the said insolvent, Thomas Lamb, under the said act might be absolutely refused, or that such order be made in the matter as should seem meet.

Osler for the appellants.

Holmested for the insolvents.

No cases were cited by either party.

HAGARTY, J.—The learned judge below considered the insolvent's conduct to be reprehensible in not keeping proper books of account, and suspended his discharge for six months. I do not think it wise to interfere with the exercise of such a discretion on the part of a judge who has heard the examination of the insolvent and been cognizant of the various proceedings in the case, except in a very clear case in which the appellate jurisdiction is necessarily invoked to prevent an undoubted injustice.

I think that the learned judge acted with extreme leniency, and possibly took a milder view of the bandrupt's misconduct than I should have done, judging wholly from the papers before me. Had he, with his superior opportunities of forming a correct opinion, passed a much more severe sentence I should certainly not interfere with it on the insolvent's application I think the insolvent's neglect to keep proper books a most serious breach of duty, causing great possible injury to his creditors, and tending to raise strong distrust of his integrity. The evidence of his being a very illiterate man suggests the only possible excuse, and weighed, I presume, with the learned judge. It might perhaps be said that it was not very prudent for his creditors to trust a man so unfit for the conduct of business or the keeping of accounts with such large quantities of goods on credit. I do not differ from the learned judge's view as to the alleged preference. As to the neglect to keep proper books I think it would be well always to punish such a breach of duty in a severe and exemplary manner.

We have in this country in our legislation done everything to favour debtors and render the escape from liability as easy as possible to them. It will be well at all events that the very easy requirements of the Insolvent Act on debtors asking for their discharge should be peremptorily insisted on, and proper punishment awarded to any breach of the trader's duties in conducting his business.

I gladly avail myself of the power given me by sub-sec. 6 of sec. 7 of the act, and, while feeling bound to dismiss the appeal, do so without costs.

I think Mr Lamb's creditors had just ground for feeling indignant at his conduct and in opposing his discharge, and endeavouring to have some punishment inflicted upon him.

ENGLISH REPORTS.

QUEEN'S BENCH.

(*Law Times.*)

REG. v. BLIZARD.

Municipal corporation—Disqualification of candidate—Resignation—Quo warranto—Disclaimer.

Where a party who is elected to an office is disqualified and another claims the office as having the only legal votes, the party so elected cannot, by merely resigning his office, deprive the other party of his right to the advantage which a judgment of ouster upon a *quo warranto* will give.

A., who was a town councillor of the borough of T., which was a municipal borough within the 5 & 6 Will. 4, c. 76, having one ward only, was also mayor and returning officer of such borough, and on the 1st Nov. his term of office as councillor expired and he was re-elected. B. also was a candidate, but was unsuccessful in consequence of A. polling a greater number of votes. A. made the declaration as councillor required by the Act, but finding that he was disqualified by reason of being the returning officer, he resigned his office on the 9th of Nov. On the 12th Nov. a rule *nisi* was obtained for a *quo warranto* information against him for exercising the office of town councillor at the instance of B., who was relator and claimed to be duly elected.

Held, that he was entitled to file the information, for that without a disclaimer on the part of A., he would not be entitled to a *mandamus* to be admitted to the office.

[Saturday, Nov. 24, 1866.]

This was a rule calling upon Mr. Blizard to show cause why a *quo warranto* information should not be filed against him for exercising the office of town councillor of the borough of Tewkesbury. It appeared that Tewkesbury is a municipal borough within the operation of the Municipal Corporation Act (5 & 6 Will. 4, c. 76), and has only one ward. Upon the 1st Nov. last, the annual election for councillors took place, and the then mayor, Mr. Blizard, the present defendant, whose term of office as a town councillor then expired, was a candidate for re-election. There were four councillors to be elected, but there were five candidates, the present relator, Mr. Moore, being one. At the election the mayor and three others had the majority of votes, Mr. Moore being the unsuccessful candidate. It appeared from the affidavits that on the Saturday, the 29th October, Mr. Moore served Mr. Blizard with a notice to the effect that as he was mayor he was ineligible to be a candidate, and that votes given for him would be thrown away. The mayor being indisposed did not at-

tend as returning officer at the polling booth, but the deputy mayor attended for him, except that during an hour and a half in the middle of the day the mayor himself attended, when finding he was too unwell to continue he withdrew, and left the deputy mayor as his deputy. The return of himself and the three others was made as being duly elected, and he subsequently, and before the 9th November, made the declaration required by sect. 50. Mr. Moore had attended to qualify, but was refused. Upon the 9th Nov. Mr. Blizard, finding that as returning officer he was disqualified from being elected, resigned his office of town councillor, paying £10, the amount provided in such cases by the by-laws, which resignation was unanimously accepted by the council. This rule was moved for on the 12th November.

Powell, Q. C., now showed cause, and argued that, as Mr. Blizard had resigned his office before this rule was moved for, the rule was useless, as he no longer held the office from which it was the object of these proceedings to remove him. He was stopped by the court.

Cook, Q. C. (*Dowdeswell* with him), in support of the rule, argued that, as the relator himself claimed the seat, inasmuch as the votes given for Mr. Blizard, who was returning officer, were thrown away (*Reg.* v. *Owen*. 28 L. J. 316, Q B.), it was necessary that Mr Blizard should disclaim the office, which he could only do upon a *quo warranto* information; that it is necessary for the relator's purpose, as he claims the seat, that it should appear upon record that Mr. Blizard had intruded into it, and that a mere resignation was no admission that he was not lawfully elected; that a writ of *mandamus* would not do, as a return might be made to it that Mr. Blizard was elected, *Reg.* v. *Wardlow*, 2 M. & S. 75; *Reg.* v. *Morton*, 4 Q. B. 146; *Reg.* v. *Hartley*, 2 Ell. & Bla. 143; *Reg.* v. *Earnshaw*, 3 Ell. & Bla 143, n. *c.*; *Reg.* v. *Sidney*, 2 Low, Max. & Pol. 149.

Powell, Q C., was heard in reply.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. At first I certainly entertained a strong opinion that the rule was unnecessary and should therefore be discharged; but I am bound to admit that Mr. Dowdeswell's argument has convinced me that it should be made absolute. In an ordinary case, if a man is elected and discovers that he is not qualified, I am far from saying that a proceeding by *quo warranto* is necessary in order to divest him of his office. The cases cited have mostly been where the party elected has resigned his office after proceedings have been commenced against him. I do not decide with reference to those cases. In this case the facts are very different. If the purpose of this application were merely to procure a vacancy in the office, I should be of opinion that a resignation would accomplish that object as effectually as a *quo warranto* information. But here the proceedings are instituted by a relator, who not merely questions the qualification of the party, but claims the office himself. He gives notice of his design, and says that the votes given for his opponent are thrown away, and that the effect is to place him in his position. Now, to enable Mr. Moore to obtain that position and be admitted, it must necessarily be assumed that there never was an election of Mr. Blizard at all. A resignation implies that he has been elected, for a man cannot be said to resign an office to which he has not been elected, and to receive a resignation is also to assume that the party has been elected. To refuse this rule, therefore, would be to deprive Mr. Moore of the advantage to which he is entitled, and be merely to drive him to a new election. I admit, therefore, that Mr. Dowdeswell is right in saying that it is an act of justice to Mr. Moore to make this rule absolute. He has a right to a judgment which shows that Mr. Blizard was an intruder into the office, whereupon he can come to this court for a *mandamus* to be himself admitted. The rule will be made absolute accordingly, unless Mr. Blizard undertakes at once to disclaim. As regards the costs, it seems that Mr. Blizard, as soon as he became aware that he really was disqualified, did all in his power to divest himself of his office; it is hardly fair, therefore, that he should be saddled with the costs of this rule. I think the only costs he should be called upon to pay, are those incident to the disclaimer.

LUSH, J.—I entirely agree with my Lord. I certainly at first thought that this rule was useless, but I am convinced that it is otherwise. A Mr. Moore himself claims the office, a mere resignation is not sufficient, and he is entitled to a disclaimer from Mr. Blizard.

Rule absolute.

CORRESPONDENCE.

Thorold Division Court—Dismissal of the Clerk.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

Gentlemen,—Your insertion of the following will confer a favor upon the subscriber.

At the sittings of the court, held here on 25 Nov., 1865 the Judge imposed a fine of $10 upon a suitor for an assault commited in the Court, which he says he ordered to be paid in 24 hours. Suffice for the present to say, that three months passed away and the fine was not paid. On the 10th of April last, the Judge enquired whether the fine had been paid. I replied that it had not; and, amongst other things, told him I had been advised that I had no authority to issue process, as the matter then stood. The Judge said I needed no further authority, and the fine must be collected. I went to work to see how I could meet the Judge's views, and on the 13th April, sent him a note as follows:—"The imposition of the fine upon —— is the first instance within my fifteen years experience as a Clerk of this Division court, and being anxious to acquaint myself with the method of proceeding, I find in 22nd Vic., Cap. Consolidated Statutes, Sec., 182, what, to me, seems to mean that the warrant should be issued by the Judge—I would be glad therefore to receive further instructions from you in this matter."

My note was returned by the Judge endorsed as follows:—

"Mr. Keefer will, in form 62, Division Court Rules, find the warrant, as soon as it is prepared it will be signed by Mr. Price."

I next proceeded to make out the warrant, and made another discovery. I went to the Judge on the 16th of April, and told him that Rule 55, stood in the way of further proceedings. He read it, and seemed much annoyed, said there had been negligence—he would not have his proceedings laughed at—that the money must be paid by *somebody*; and that he would look into it. I clearly understood that *somebody* to mean the clerk; but I didn't take the hint. On the 5th ult. the Judge wrote me that he had not received any return of the fine, and that he would on that day apply to a proper officer for a return, and in the event of his not receiving one that was satisfactory, I might consider that as my dismissal from the Clerkship of the 5th Division Court of Welland. Of course no return had been made, and I learn the Judge did not make the enquiry of the proper officer, as he said he would. On the 20th ult., the Judge handed me a note dated 21st Nov., as follows:

"I have not heard anything from you since my letter referring to the——matter; I therefore conclude that you do not intend to take any steps in the case, and that you accept your dismissal. You will give up all the books and papers belonging to the 5th Division Court to the County Attorney, when he demands them."

The following day, 21st of November, I waited on the Judge. He did not listen well to what I had to say—and got very warm when I told him I had been advised by more than one legal gentleman, in whom I placed confidence, that I was not delinquent in regard to the fine,—that I could not, even in that extremity, consent to pay it wrongfully, and I thought he could not transfer the penalty intended for another to me. But the payment of that fine *by me*, was held by him a *sine qua non* to preserve the dignity of his court, and on the 28th ult., Mr. Raymond, the County Attorney, called, and received from me the property of Court, in obedience to the order of the judge, dated 21st ult., mailed in the Post Office here on the morning of the 28th, and received by him during the forenoon.

I do not voluntarily surrender any part of my work by which I am endeavouring to support my family. At the same time there is some comfort in the consideration that I do not suffer in my self respect in parting company with his honor Judge Price

JACOB KEEFER.

[It is quite clear that a warrant of commitment must be under the hand and seal of the judge and even if it be thought that it was the duty of the clerk to prepare the warrant, the omission to do so was too severely punished by the infliction of the highest penalty the judge could impose upon the clerk, namely, dismissal from office.

Though clerks strictly speaking hold office "at the pleasure" of the judge of the county wherein they perform their duties; the judge, ought nevertheless to act as though the appointment were "during good conduct." The tenure is not properly at the *arbitrary* pleasure of the judge, but in the exercise of his powers of removal he ought to be guided by a sound discretion.

As the facts are presented by Mr. Keefer, the punishment appears to exceed the offence—if offence it was. If authority is not found in the standard works on law or the regular law reports for a summary dismissal on such grounds, the following from an old source may possibly suit the case; and standing alone there would be no "conflict of decision to embarrass" its application:—

"I told him I was judge in my own little court,
And he would not do for me.
And he would not do for me."

—EDS. L. C. G.]

Execution—To what Bailiff to be directed.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

DEAR SIRS,—In your *Local Courts and Municipal Gazette* of December last, page 191, you say that a clerk of a Division Court has no power to issue a writ of execution to the bailiff of another court, and refer to the 135th sec. of the Act. I think you have overlooked the 2nd sec. of 18 Vic., cap. 125; 79th sec. of cap. 19, C. S. U. C., which gives the clerk authority to do so. If I am right, it might be well to notice it in your *Gazette*, so that parties may not be misled. Yours,

Jan. 3, 1867. A SUBSCRIBER.

[We are always glad to be set right when in error, Editors being after all but fallible mortals; our correspondent, however, upon further examination will find that section 79 of the Division Courts Act has no reference to writs of execution, merely speaking of writs, &c., "*for service.*" The law is defective, and should be amended].—EDS. L. C. G.

Division Court Books.

TO THE EDITORS OF THE LOCAL COURTS' GAZETTE.

GENTLEMEN,—I observe in your last issue, that "OBSERVER" thinks it a great injustice

for clerks to find books for the benefit of the public, and that he occasionally has to pay fourteen dollars for a procedure book. I can only say that I am not quite so philanthropic as "OBSERVER," being compelled to furnish court books at *my own expense.* I also exercise my own judgment as to what kind of books. I buy with a due regard to my personal exchequer, as well as furnishing a good and durable procedure book; hence I buy just the common cheaply bound blank books; the result is, those books that have been in use for ten or twelve years are in fragments, and I will venture to say, this is the case with over one-half of the Division Court books in the country; while, if the public (as they should do) furnish the clerks with proper well bound books, it would be far better for the interest of suitors. The county council of Elgin have very properly taken the matter in their own hands, and have furnished all the Division Court clerks in that county with a most superior set of books that will last for centuries, with careful use, which also secures a uniformity of books among all the clerks of that county. I think other county councils might wisely adopt the example of the county of Elgin; but there ought to be a general uniformity in this respect, and the government ought to take the matter in hand. The fees of clerks are very small, besides there is much writing they have to do in connection with their office, for which no fee is allowed; such as taking a bailiff's return to executions, making a return on transcripts, remitting money to foreign suitors, &c., &c.; and then to have to buy the books at their own expense to enter these proceedings in, is truly absurd. Then I will ask, who will not buy the cheapest books they can get that will answer the purpose? I am sure I will.

Yours, CLERK DIV. COURT.

Co. Norfolk, Jan. 7th, 1867.

Trading horses on Sunday—Quashing By-law—Conviction.

TO THE EDITORS OF THE LOCAL COURTS' GASETEE

GENTLEMEN,—I should feel obliged by your giving your opinion on the following points: First Con., Stat. U. C., c. 104, s. 1, states that it is not lawful for any merchant, mechanic, workman, labourer, or other person whatever, on the Lord's day to sell, or publicly shew forth, or expose offer for sale, or to purchase any goods, chattels or other personal property, or any real estate whatever, or to do or exercise any worldly labour, business or work of his ordinary ealling, "conveying travellers or Her Majesty's mail by land or by water, selling drugs and medicines, and other works of necessity, and works of charity" only excepted. The 7th section of the said act, places the penalties by a conviction before a justice of the peace, that the person convicted of any act declared not to be lawful by the foregoing section, shall be fined in a sum not exceeding forty dollars, nor less than one dollar, together with the costs. Now, would or should a conviction which alleged that a person who was a labourer, had sold a horse on the Lord's day, be bad, or should a conviction, made after the form laid down in the act, be quashed because it was not the ordinary calling of the defendant, *i.e.*, a horse trader; or in other words can a labourer trade horses on the Lord's day without being subject to fine. No other objection taken to the conviction.

Another case: a County Council pass a by-law that no person shall exhibit himself in a state of drunkenness, or be guilty of cursing, profane swearing, obscene, blasphemous, or grossly insulting language, or other immorality or indecency, in saloons, taverns, or other houses of public entertainment, or in the streets, highways or public places in the said county. Is a by-law made by the county council of a county good until quashed, or should a conviction made under the above clause of a by-law be quashed because the council inserted in said by-law the words "in saloons, taverns, or other houses of public entertainment." No other objection taken to the conviction.

Your opinion on the foregoing will oblige

J. P.

[1. It is not against the act for a labourer to trade horses on the Lord's day. In order to bring the person accused within the operation of the act, it must be shown that the work done was "work of his ordinary calling," and it is not, we apprehend, any part of the calling of a labourer to trade horses. We therefore think the conviction bad.

2. By-laws are not good till quashed. If in excess of the powers of the municipal corporation that passes them, against law, or illegal for any other reason, they are bad, although not quashed. And a conviction under a bad

by-law is a bad conviction. But we do not think the by-law to which our correspondent refers bad as against the objection which he mentions.—EDS. L. J.]

REVIEW.

Reprints of the BRITISH QUARTERLY REVIEWS and BLACKWOOD'S MAGAZINE, by the Leonard Scott Publishing Co., 38 Walker St., New York.

The person that is supplied with the *Edinburgh*, the *North British*, the *London Quarterly*, and the *Westminster Reviews*, and *Blackwood's Magazine*, may rest assured that he is possessed of a mine of literary wealth that can in no other way be obtained, without immense research, and without much greater expenditure of time, thought and money than, in one way or another, most men are capable of.

A sketch of the rise and position of these most valuable periodicals will be of interest to those unacquainted with the following particulars—such we copy from a cotemporary:—

"The political parties in Great Britain attach a great importance to the power of the press. The Whigs in the early days of Lord Jeffrey commenced the *Edinburgh Review*, in order that by its tremendous cannonade, it might batter down the fortress of Toryism. So also, when its force was felt, the opposing party had recourse to a similar expedient; and thus, under the auspices of the Tories, arose the *Quarterly Review*. The late Wm. Blackwood, of Edinburgh, a shrewd, clear-headed, and intelligent publisher, annoyed by the assumption of his Whig neighbors, and believing that "The Blue and Yellow"—the colors of the Edinburgh—should be assailed in its chosen home, resolved to establish a magazine. He objected to a Quarterly, as his object was, by a monthly periodical, varied, racy, and trenchant in its character, to appear three times before the public for every single appearance of the *Review*. The world now knows the energy and remarkable judgment combined with great liberality which have characterized that periodical. Abroad, the editorship was attributed to Professor Wilson, Professor Aytoun, and others, but really they were only contributors, and from the beginning, and during all its history, the members of the firm have been the responsible managers. William Blackwood, senior, and his son, John, have mainly ruled the destiny of the magazine, their principle being simply to select the best writers, pay the highest prices, and take no articles from any one, no matter how elevated, how learned, how wealthy, or how famed, without remuneration.

Thus the Edinburgh, the Quarterly, and Blackwood arose. In process of time, the English Radicals felt the need of a journal, and they likewise started a Review. At the same time, the educated classes in England, desirous to become intimately acquainted with continental literature, commenced a similar enterprise; but divided counsels and continued strife led to the publication of two journals instead of one. In process of time these Quarterlies combined, and finally a union took place with the radical political journal, and thus the reading public were provided with the present *Westminster Review*.

The immense success of these reprints is only exceeded by their usefulness and cheapness. The facilities given for the formation of clubs, etc., reduces the price to a mere nothing. We have the greatest pleasure in again calling the attention of our readers to the advertisement which in another column gives all necessary information.

APPOINTMENTS TO OFFICE.

COUNTY JUDGES.

ALEXANDER FORSYTH SCOTT, of Osgoode Hall, Esq., Barrister-at-law, to be Judge of the County Court in and for the County of Peel. (Gazetted December 8, 1866.)

JOHN BOYD, of Osgoode Hall, Esquire, Barrister-at-law, to be Junior Judge in and for the County of York. (Gazetted December 8, 1866.)

SHERIFFS.

ROBERT BRODDY, Esquire, to be Sheriff in and for the County of Peel. (Gazetted December 8, 1866.)

WILLIAM FREDERICK POWELL, Esquire, to be Sheriff in and for the County of Carleton, in the room of Simon Fraser, deceased. (Gazetted December 15, 1866.)

COUNTY ATTORNEYS.

GEORGE GREEN, of Osgoode Hall, Esquire, Barrister-at-Law, to be Clerk of the Peace and County Crown Attorney in and for the County of Peel. (Gazetted December 8, 1866.)

HENRY WILLIAM PETERSON, of Osgoode Hall, Esq., Barrister-at-Law, to be County Crown Attorney in and for the County of Wellington, in the room of John Juchereau Kingsmill, resigned. (Gazetted December 8, 1866.)

CLERK OF THE COUNTY COURT.

JAMES AUGUSTUS AUSTIN, Esquire, to be Clerk of the County Court in and for the County of Peel. (Gazetted December 8, 1866.)

POLICE MAGISTRATES.

THOMAS BURNS, Esquire, to be Police Magistrate in and for the Town of St. Catharines. (Gazetted December 29, 1856.)

THOMAS WILLCOCKS SAUNDERS, Esquire, to be Police Magistrate for the Town of Guelph. (Gazetted December 29, 1866.)

CORONERS.

JOHN BARNHART, Esquire, M.D., and BEAUMONT W. DIXIE, Esquire, M.D., to be Coroners in and for the County of Peel. (Gazetted December 8, 1866.)

HERBERT FELLOWS TUCK, of Drayton, Esquire, M.D., to be Associate Coroner for the County of Wellington. (Gazetted December 22, 1866.)

ANDREW CLOBINE LLOYD, of Stouffville, Esquire, M.D., to be Associate Coroner for the United Counties of York and Peel, and also for the County of Ontario. (Gazetted December 22, 1866.)

NOTARIES PUBLIC.

ASHTON FLETCHER, of Woodstock, Barrister-at-law, to be a Notary Public for Upper Canada. (Gazetted December 22, 1866.)

THOMAS WELLS, of Ingersoll, Esquire, Attorney-at-law, to be a Notary Public for Upper Canada. (Gazetted December 22, 1866.)

TO CORRESPONDENTS.

"JACOB KEEFER" — "A SUBSCRIBER" — "CLERK DIVISION COURT"—"J. P."—under "Correspondence."

"CIVIS" and "A REGISTRAR" will be answered in next number.