DIARY FOR JULY.

1. Sat .... Long Vacation com. Last day for Co. C. to equal-
2. SUN ... *3rd Sunday after Trinity.* [Roll of Loc. Mun.
3. Mon ... County Ct. and Surrog. Ct. Term beg. Heir and [Devisee Sittings commence.
8. Sat .... County Court and Surrog. Ct Term ends.
9. SUN ... *4th Sunday after Trinity.*
14. Frid.... Last day for Judges of Co. Cts. to make return of
15. SUN ... *5th Sunday after Trinity.* [Appeals from Ass't
18. Tues... Heir and Devisee sittings end.
23. SUN ... *6th Sunday after Trinity.*
25. Tues ... *St. James.*
30. SUN... *7th Sunday after Trinity.*
31. Mon ... Last day for Co. Clk. to certify County Rate to [Municipalities in Coun

NOTICE.

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

The Local Courts'

AND

MUNICIPAL GAZETTE.

JULY, 1865.

POWER OF SCHOOL TRUSTEES TO LEVY RATES.

A question of some importance on this subject came up for discussion a short time ago in the Court of Common Pleas, in a case of *The Chief Superintendent of Schools in re Hogg* v. *Rogers*. The decision upon it was given on the 12th June last, and we now hasten to lay it before our readers. We shall in our next issue give a full report of the case.

The action was brought in a Division Court for trespass against a collector of school rates for unlawfully seizing and detaining a horse, the property of the defendant. The warrant under which the seizure took place, was dated February 22nd, 1864, and annexed to it was a rate bill taken from the assessment roll of 1863. The judge of the Division Court decided that the trustees ought to have waited for the completion of the roll of 1864 before issuing the warrant; that a township collector is only authorized to act upon the roll which is made up, finally revised and certified, and delivered to him on or before the 1st October in the year in and for which the taxes mentioned in the roll are to be collected, and the collector's power under his roll ceases on the 14th December following, unless prolonged by express by-law or resolution of the county council; and that a school collector has no greater power than a township collector, and must proceed under the same restrictions as to time and authority in the exercise of his duties.

This decision was appealed from and the appeal was sustained. The learned judge who delivered the judgment of the court stated that the sole question was whether school trustees have authority in any year, before a copy of the revised assessment roll of that year has been transmitted to the clerk of the municipality, to impose and levy a rate for school purposes upon the assessment roll of the proceeding year. He came to the conclusion that they have, and that they are not restricted to making one levy, but may levy at any time as need requires it, and may use, and can only use, the last existing revised assessment roll for imposing the required rate. He thought that the error of the decision was in making the analogy between municipalities and trustees and township collectors, and collectors under warrants of trustees identical, thus restricting the common school acts by acts not necessarily affecting them.

He drew attention also to the evils that would arise from compelling trustees thus to wait till the new roll was completed, as there were many instances in which such a delay would operate most prejudicially to the interests of the school section, and be a hardship upon teachers and others.

FALSE PRETENCES.

(*Continued from page* 67.)

A prisoner was indicted and held to be properly convicted upon the following facts: The prisoner had applied to one F. for a loan upon the security of a piece of land, and falsely and fraudulently represented that he had built a house and workshop upon it. F. advanced the money upon the prisoner signing an agreement for a mortgage, depositing his lease and executing a bond as collateral security.

Upon an indictment for obtaining money by false pretences, it appeared that the prisoner had told the prosecutrix that she kept a shop at a particular place, and that she might go home with her until she got a situation. She then borrowed ten shillings of her and promises to repay it when she got home; but having got it she left the prosecutrix altogether. It was untrue that she kept a shop at the

place named, and the prosecutrix stated that it was on the faith of that representation that she parted with the money. The jury found the prisoner guilty of obtaining the money, the prosecutrix parting with it under the belief that the prisoner kept a shop at the place mentioned, and that she should have the money when she went home with the prisoner—and it was held that the conviction was right.

A., the servant of B., rendered an account to B. of £14, as due from A. to his workmen, and B. gave A. a check for the amount. All that sum was due except seven shillings, which A. kept when he got the check cashed, and paid the workmen the residue. A. was charged with obtaining B.'s check with intent to defraud him of the same, and a conviction was held to be good and supported by the evidence.

Upon an indictment for obtaining goods by false pretences it was proved that the prisoner falsely represented himself to the prosecutors as being connected in business with one J. S., of N., whom he stated to be a person of wealth, and by that representation obtained the goods for himself, and not for the supposed J. S. It was held that although the credit was given to the prisoner himself he was properly convicted.

HORSE RACING AND OTHER GAMING.

In these days of horse-racing extraordinary, when a French horse has had the unparalleled audacity to walk into England and quietly win the Derby, and so "achieve a victory greater than Waterloo," it may not be amiss to give a brief sketch of the laws affecting horse racing, as they at present exist.

Under the Common Law wagers are said to be valid, but they are illegal if contrary to public policy or public morality, and so many kinds of games and wagers are illegal at the Common Law: (*Wood* v. *Elliott*, 3 T. R. 693; *Cousins* v. *Nantes*, 3 Taunt. 522; *Hussey* v. *Cuckett*, 3 Camp. 168; *Dalby* v. *Indian Moses*, 15 C. B. 365.) Several old statutes were passed in England for the purpose of preventing excessive and deceitful gaming, the principal of which are 16 Car. 2, cap. 7, and 9 Anne, cap. 14. The latter of these (sec. 2) makes illegal any bet on any game, including horse racing, amounting in the whole at any one time or sitting, to the sum or value of ten pounds, and the loser of such a bet, if he has paid over money under it, may recover the same back by action.

The preamble to 13 Geo. II., cap. 19, is worthy of notice; it recites that "Whereas the great number of horse races for small plates, prizes, or sums of money, have contributed very much to the encouragement of idleness, to the impoverishment of many of the meaner sorts of the subjects of this kingdom, and the breed of strong and useful horses hath been much prejudiced thereby," and "for remedy thereof" it enacts that no person shall enter, start or run any horse, &c., unless it be the *bonâ fide* property of the person so entering it, and that no person shall enter, &c., more than one horse, &c., for the same plate or prize. Section 2 of the same statute provides that no plate or sum of money shall be run for which is under the value of fifty pounds. And by section 5 horse races within the protection of the statute were limited to races taking place on Newmarket Heath and Black Hambleton.

The remedy supplied by this statute appears to have been effectual, and that more speedily than could have been anticipated, for we find section 11 of 18 Geo. II., cap. 34, reciting that "the thirteen royal plates of one hundred guineas each, annually run for, and the high prices given for horses of strength and size, are sufficient to encourage breeders to raise their cattle to the utmost size and strength possible," it therefore takes away entirely the restriction as to locality of the race—permitting it to be run in "any place," which words have been interpreted not to refer exclusively to regular courses or established places for racing: (*Evans* v. *Pratt*, 3 M. & G. 759.)

It will therefore be seen from these statutes, as explained by various decisions, that where the wager or bet exceeds ten pounds it is immaterial to consider whether the race is legal or not, for such excess renders the bet illegal; and so, if the race be for fifty pounds or upwards, but the bet exceeds ten pounds, it is illegal.

There are several cases in our own courts in which races were declared to be illegal, and where the money deposited with stakeholders was recovered back.

Sheldon v. *Law*, 3 O. S. 85, is the leading case, and is thus summed up by *Macaulay, J.:*

"1. If it was a wager on a horse race, and not a match, it was void, because there was

no match for £50, and the race being consequently illegal, all bets thereon were void.

"2. If the bet in question constituted the match, then it was void, because the parties did not own the horses, and it was in direct contravention of the 13th Geo. II.

"3. If not the match, but a wager upon a match, it would seem void, as exceeding £10, under 9 Anne, ch. 14, although at Common Law all wagers were legal."

It may be interesting to the owners of trotting horses to know that trotting matches, even though taking place on ice instead of the orthodox "turf," and in harness, are legal "horse races" within the statute, a horse race having been defined to be matching the speed of one horse against another. *Macaulay, C. J.*, "could not find," however startling such a sight would have appeared to an English jockey of the old school, "that a race between two horses driven in sleighs on the ice is not a horse race just as much as it would be if the two riders had ridden upon the horses, either in saddles or bareback over the same course:" (*Fulton* v. *James*, 5 U. C. C. P. 182.)

Law reports, generally so dry, at all events to the uninitiated, occasionally afford amusement as well as instruction; and the case of *Wilson* v. *Cutten*, 7 U. C. C. P. 476, was a "smart thing," even in horse-racing, although the ingenuity of the perpetrator was very properly unsuccessful. A match was made by the owners of two horses, on the following terms, namely, that "Butcher" was to distance "Warrior" three times out of five, in mile heats. Two heats were run, in the first of which Butcher did distance Warrior, but in the second Warrior distanced Butcher. Upon this, his owner contended that he had won the race, as, according to the rules of racing, a distanced horse could not run again. It was held, however, that this rule did not apply in such a case, and that the race was not won; and that, as there had been in fact no race, the plaintiff was only entitled to recover the amount he had deposited with the stakeholder.

The question whether or not cock-fights are illegal, appears to be still undecided (*Martin* v. *Hewson*, 10 Ex. 737; 1 Jur. N. S. 214; 24 L. J. Ex. 147). A foot-race has been held to be "a lawful game, sport or pastime," under the proviso to sec. 18 of 8 & 9 Vic. cap. 109 (*Batty* v. *Marriatt*, 5 C. B. 818). But where a number of persons assembled together on a public highway, to enjoy a diversion called a "stag hunt," which consisted in one of the number representing a stag, and the others chasing him, this was held to be gaming under the meaning of section 72 of the English statute 5 & 6 Wm. IV. cap. 50, against gaming (*Pappin* v. *Maynard*, 9 L. T. N. S. 327). Half-pence used for pitch-and-toss are held not to be instruments of gaming within the 5 Geo. IV. cap. 83, sec. 4 (*Watson* v. *Martin*, 11 L. T. N. S. 372). The game of dominos is not in itself illegal, and playing at dominos does not necessarily amount to gaming, within the meaning of the statute (*Reg.* v *Ashton*, 1 El. & B. 286).

EXEMPTION ACT—BEES.

We notice that an act was passed last session entitled "An act to define the right of property in swarms of bees, and to exempt them from seizure in certain cases" (cap. 8). Our object is to draw the attention of bailiffs and others to the fact that by section 2 bees reared and kept in hives are to be considered private property, and as such shall, to the extent of fifteen hives, be exempt from seizure for debt, or for the discharge of any liability whatsoever, save and except the amount of their purchase money. This enactment should be noted in connection with section 151 of the Division Courts Act, and section 4 of 23 Vic., cap. 25.

MUNICIPAL CORPORATIONS.

There was an important decision last term as to the amount of interest on money which Municipal Corporations may receive and take. The case was *Moore* v. *Corporation of the Township of North Gwillimbury*, which came up on an appeal from the County Court of York and Peel. The effect of the decision was that municipal corporations not being corporations created for the purpose of lending money, are not restricted as to the rate of interest which they may receive and take. In fact they can like individuals loan money at any rate of interest agreed upon. The case referred to, will be read with interest upon this point, and we shall probably be able to give a report of it in our next number.

SELECTIONS.

SOME ACCOUNT OF A VETERAN COUNTY JUDGE—HIS LABOURS AND REMUNERATION.

He joined the British regular army as a volunteer in 1812. When fifteen years of age he was present at the battle of Queenston. He was also in the battle of York, Stony Creek, Beaver Dam, Black Rock, Chippewa, and Lundy's Lane, where he commanded a company, the storming of Fort Erie, the siege of Fort Erie and the sortie made at Fort Erie. He left as Lieutenant in 1817 and commenced the study of the law. He was sworn in as an Attorney in November, 1820, with the late Sir J. B. Macauley; called to the bar in Hilary Term, 1823; he then stood No. 68 on the Barrister's Roll; he is now No. 14 on that Roll and No. 8 on the Bencher's. He was appointed Judge of the Ottawa District Court, 21st December 1825; Judge of the Johnstown District Court 30th June, 1837, and Judge of the County Court of the United Counties of Stormont, Dundas and Glengarry, on 6th January, 1842. He has now been a Judge for 38 years.

In the Ottawa District he travelled to perform the duty in 11½ years, 11,040 miles, principally on horse back. The Judges were then remunerated by fees, and his amounted to about $40 yearly; making in 11½ years $460. A constable's fees for 11,040 years would be $1104. The expenses at $4 per day attending the Court amounted to $2168. He then worked for the *honor* and *paid for it*. He will have no objection we fancy *now*, if the Government will pay over the balance of $1708. The 5½ years services in the District of Johnstown, was rather better; he travelled 5280 miles and was two hundred and sixty-four days absent from home, and his expenses at $4—$1057; but his fees of office amounted in all to $1480, his gain is therefore was $424, or $1.70 per day, not making any deduction for professional loss during his absence. One case he is aware of; a person waited three days for him, got impatient and placed upwards of sixty cases in the hands of another lawyer.

As a sort of interlude, in '37 and '38 he raised and drilled four troops of lancers and it *paid* better than Judge's fees and was more agreeable. In 1824 the Judges were compelled to reside within jurisdiction, and this gentleman was transferred to the Eastern District, now the Counties of Stormont, Dundas and Glengarry, and shortly afterwards was informed that his salary would be $1300!!! This was no *boon* however, as he could not practice in his own Court, as both *Attorney* and *Judge*, as did formerly the *Commissioners* of the defunct *Court* of *Requests*; and his professional emoluments fell the first year from $3200 to $800, here was a dead loss of $1100 besides his travelling expenses. In 1845 the judges were prohibited practising, and the *magnificent* sum of $300 (!!) yearly was given in lieu, and the Judge had now to mourn a yearly loss of $1600 and travelling expenses. Hoping for better times, he pursued the "even tenor of his way," but it was "a hard road to travel," and a *long* one too. From January '42 to January '64 he has accomplished 20,244 miles, to the discomfiture of divers horses, the wreck of many carriages, and the rupture of divers traces, straps and appurtenances, the injury of his health and the destruction of divers coats, pants and clothing. But the Judge became an expert backwoodsman and became familiar with dirty beds, poor fare, worse liqour, heat, cold, crowded court rooms, impure air, roads without bottoms, travelling some times on foot, on horseback, in canoes, in rain, in snow storms, in fact he learned to put up with *every* discomfort, except sleeping double; with fleas and bed-bugs, he is well acquainted but desires to discontinue the familiarity.

To sum up—the number of miles he has travelled in 38 years is 26,564; hereafter it will be 1242 yearly. The number of cases tried is 29,210, the number of special cases, demurrers, &c., in term exceeds 500, and he retains a vivid recollection of sitting up till two of the clock in the morning on many occasions, to master them. The criminal cases probably exceed 500 to 550. The number of days spent *in* Court is 2960, a little over eight years. Four cases have been appealed and two reversed.

The amount of salary received from the Province since the year '42 is	$45.400
Fees received in the Ottawa District ...	460
" " Johnstown " ...	1,480
Total	$47,440
Deduct expenses in Ottawa Dist't $2,168	
" Johnstown " 1,506	
" Stormont, Dundas, and Glengarry..... 4,768	
	$8,442
Leaves a balance for the Judge of	$38,998

This gives for 38 years $1,026 yearly; but if the Judge had continued his practice and given up the *honor* in 1842, his remuneration from it since then at $3,200 yearly, would have amounted to $67,200 and he would have saved $4,768 travelling expenses, equal to $71,968; from this deduct the sum received from the Province $45,550, and it will shew that he would have been a gainer of $26,468. —*Cobourg Sentinel.*

MAGISTRATES, MUNICIPAL & COMMON SCHOOL LAW.

NOTES OF NEW DECISIONS AND LEADING CASES.

CORPORATION—DELEGATION OF AUTHORITY—NUISANCE.—Public officers cannot delegate their powers; and therefore a third person though acting with their license and permission and under the superintendence of their surveyor, cannot justify himself for acts creating a public nuisance although the acts so done are within their statutory powers and would be legalized if done by themselves. *Head* v. *Bush*, 13 W.R. 651.

SUNDAY TRADING—29 CAR. 2, c. 7, s. 1.—A farmer working on his own land on a Sunday is not liable to conviction under this section. The words, "or other person whatsoever" are to be construed *ejusdem generis*, and a farmer is not *ejusdem generis* with a tradesman, who is the only *employer* named; nor with a labourer, who is a person employed. *The Queen* v. *Silvester*, 33 L. J., N. S., Mag. Cas. 79.

HABEAS CORPUS—EXTRADITION TREATY WITH AMERICA—6 & 7 VICT. c. 76—FORGERY BY THE LAW OF THE STATE OF NEW YORK.—The 6 & 7 Vict. c. 76, s. 1, which was passed to give effect to an extradition treaty between England and the United States, provides that, in pursuance of that treaty, any person charged with the crimes of "murder, &c., forgery committed within the jurisdiction of the United States," who shall be found within the territories of her Majesty, shall, upon requisition being made by the United States' authorities, be delivered up to their custody.

Held, that an offence, which had no common element with forgery by the law of England, but with respect to which the local Legislature of New York had enacted, previously to the conclusion of the extradition treaty, that any person charged therewith should, after conviction thereof, be deemed guilty of forgery, was not within the purview of 6 & 7 Vict. c. 76, s. 1. *Reg* v. *Windsor*, 13 W. R. 655.

MANSLAUGHTER — TURNING OUT A VICIOUS HORSE ON A COMMON—CULPABLE NEGLIGENCE—NUISANCE.—It is culpable negligence for one who has a right to turn out horses on a common, intersected by public paths, which he knows are unenclosed, to turn out a vicious horse, knowing the propensities of the animal to kick, so that it may kick persons passing along or close to the paths on the common; and where a child, standing upon a common close to a public path, was kicked by a vicious horse so turned out, and death ensued, the prisoner, who turned him out, was held guilty of manslaughter.

Semble, that if the child, at the time she was kicked, had been upon a part of the common more remote from the path, the prisoner's offence would have been the same; but *quære* as to this. *Reg.* v. *Dant*, 13 W. R. 663.

CORONER'S INQUISITION — IMPUTATIONS — REFUSED TO QUASH—ENTITLING AFFIDAVITS. — A coroner's jury found the cause of a death into which they were inquiring to have been disease, adding that it was accelerated by an overdose of certain drugs taken in excess, and improperly compounded, prescribed and administered by one F. as a cholera preventative, and that F. was deserving of severe censure for the gross carelessness displayed by him in such compounding and prescribing.

This inquisition having been brought up by certiorari, granted on the application of F., the court refused to quash it, holding that the imputation which it contained, not amounting to any indicatable offence, gave him no right to have it quashed, and that, under the circumstances, public justice did not require their interference.

Quære, whether the affiadivits were properly entitled *The Queen, plaintiff*, v. *Robert Farley*, defendant: *The Queen* v. *Farley*, 24 U. C. Q. B.

MAGISTRATES—JURISDICTION.—In a prosecution before justices, their jurisdiction is ousted by the accused setting up a claim of right, yet that claim must be *bona fide*, and the mere belief of the accused unsupported by any ground for the claim will not be sufficient. *Reg.* v *Cridland*, 7 E. D. B. 353; *Reg.* v. *Stimpson*, 10 Jur. N. S. 41. (See page 55, *ante*.)

MUNICIPAL COUNCILLOR—DISQUALIFICATION.—A surety by bond to a municipal corporation for their treasurer, and to the treasurer for the collection of taxes, is disqualified for a seat in such corporation; as is also a party who is acting as their solicitor in the defence of suits.

A shareholder in a company in which the Council holds stock, and which has borrowed money from the Council, and secured the repayment by mortgage, is also disqualified: *Reg. ex rel. Coleman* v. *O'Hare*, 2 U. C. Prac. R. 18.

A person holding the office of local superintendent of schools, entitled to a salary to be paid by the County Treasurer, is not disqualified by 12 Vic. cap. 81, sec. 132: *Reg. ex rel. Arnold et al.* v. *Marchant*, 2 U. C. Cham. R.

A lessee of a Municipal Council is disqualified from sitting in such Council; so a person who has contracted for a lease though the contract be executed only by himself, and not by the corporation: *Reg. ex rel. Stock* v. *Davis*, 8 U. C. L. J. 128.

SIMPLE CONTRACTS & AFFAIRS OF EVERY DAY LIFE.

NOTES OF NEW DECISIONS AND LEADING CASES.

SALE OF GOODS—ACCEPTANCE—DELIVERY.—The defendant, a corn merchant at C., sold by sample to J. W., on the 3rd of November, 1864, goods above

the value of £10 under a verbal contract. He delivered them on the 7th of November, in accordance with trade usage, at the S. railway station to J. W.'s order. On the ninth of November J. W. became bankrupt, and, previous to his bankruptcy, he had taken no active step whatever with respect to the acceptance or declining of the goods, which were then unpaid for, and had not been compared with the sample. The defendant gave the railway authorities at S. notice, on the 11th November, not to part with the goods to the bankrupt's assignees without his consent. The assignees claimed them on the 1st of December, but the railway company, on the 5th of December, re-delivered them to the defendant at his request.

In an action by the assignees against the defendant for the recovery of the goods,

Held, that the defendant was entitled to have the goods re-delivered to him, inasmuch as, first, there had been no acceptance and receipt of them by J. W. or his assignees sufficient to satisfy section 17 of the Statute of Frauds: and, secondly, the goods were not, at the time of the bankruptcy, in the "order and disposition" of the bankrupt within the meaning of 12 & 13 Vict. c. 106, s. 125. *Smith et al.* v. *Hudson*, 13 W. R. 683.

SALE OF GOODS—PROPERTY—DELIVERY.—On the sale of an entire heap of fire-clay at so much per ton, where no duty remained to be performed by the seller, and the buyer was at liberty to cart it away, the clay to be weighed at a machine on the road to the buyer's, it was *held* that the property in the clay passed by the contract to the buyer. *Furley* v. *Bates*, 33 L. J., N. S., 43.

LANDLORD AND TENANT.—Where a tenancy is implied from the receipt of rent, its terms are a question of fact for the jury.

A. was tenant for life of land, with power to lease for twenty-one years, with remainder to B. for life. A. leased to a tenant on the terms that at the expiration of the tenancy he should pay the tenant, according to valuation, for all fruit trees on the land planted by the tenant. At the end of the term, A. re-let to the tenant, not in pursuance of the power, to hold from year to year on the same terms as before. A. then died, and the tenant continued in occupation, and paid rent to B. B. did not know of the term binding the lessor to pay for fruit trees. B. determined the lease by notice to quit.

Held, as a matter of fact, that B. was not bound to pay the tenant for fruit trees left on the land and planted by him.

And (per Bramwell, B.) there was no evidence to go to a jury of any such liability. *Oakley* v. *Monck*, 13 W. R. 721.

RAILWAY COMPANY—FENCES—DAMAGES.—The Grand Trunk Railway and the Weston Plank road crossed the plaintiff's land not far apart on parallel lines. The railway company, it was alleged, found it necessary to change the course of a stream over which the road company had built a bridge, to which the latter consented, on the railway company agreeing to make and maintain a bridge for them over the new channel. *Held*, that such agreement could not impose upon defendants any obligation to fence at this latter bridge, or make them liable to the plaintiffs for omitting to do so.

The plaintiffs also sued defendants for neglecting to fence in their own railway. *Held*, that though only lessees of the land, they were "proprietors" within the reasonable construction of "The Railway Act," and might recover for damage done to them.

Held, also, that the fact of cattle from time to time getting upon the plaintiffs' land and destroying the crops did not constitute a "continuation of damage," so as to entitle the plaintiffs to recover for more than six months' injury; for the continuation of the omission is not what is meant, but of the damage resulting from it, and several unconnected acts of damage, each complete in itself, is not a continuation within the act. *Brown et al.* v. *Grand Trunk Railway Co.*, 24 U. C. Q. B. 350.

VENDOR AND PURCHASER — PRINCIPAL AND AGENT.—Where an agent is employed to find a purchaser for any property, it is meant that he should find a third person and not the agent himself. The taking on himself the position of a principal annihilates all his rights as an agent—therefore, if, when so employed, he becomes, either alone or jointly with others, the purchaser of the property, he is not entitled to charge agent's commission on the sale. *Salomons* v. *Pender*, 5 C. C. C. 118.

RIGHT OF WAY.—A right of way, held to pass under the word "appurtenances," where there was sufficient to show that the word was used in a flexible sense. *Kavanagh* v. *The Coal Mining Company*, 14 Ir. Com. Law Rep. 82.

SHAREHOLDER—LIABILITY.—A. verbally authorises B. as his attorney, to execute a joint-stock deed of partnership for him, and B. executes the deed. That deed is not the deed of A.; yet if there be evidence that A.'s name had been put

on the list of shareholders with his consent, so as to entitle him to participate in the profits, he will be held liable as a contributory in case of insolvency. *Leishman* v. *Cochrane*, 12 W. R. 181.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

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

IN RE BOON AND THE CORPORATION OF THE COUNTY OF HALTON.

Temperance Act of 1864—*By-Law under*—*Motion to quash.*

A by-law passed under 27 & 28 Vic, ch. 18, after having been submitted to the electors, enacted, "1. That the sale of intoxicating liquors and the issue of licenses therefor is by this by-law prohibited within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864' 2. That by-law No. 41 is hereby repealed." By law 41 recited a petition from the rate-payers for it, and enacted that from its passing and approval by the electors, "the sale of intoxicating liquors, and the issue of licenses therefor is hereby prohibited."

The court refused to quash this by-law on account of the second clause, for though its insertion was contrary to the letter of section 2 of the statute, it could have no effect, the prohibition in both by-laws being identical, and the approval of the electors having been obtained; and the defect therefore was "a defect of procedure or form," within section 37.

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

Sadleir applied for a rule calling on the Corporation of the County of Halton to shew cause why by-law No. 42, passed on the 24th of January, 1865, should not be quashed with costs, on the ground that it was in excess of or contrary to the second section of 27 & 28 Vic., ch. 18, which enacts that such by-law shall not have embodied therein any other provision than the simple declaration, that the sale of intoxicating liquors and the issue of licenses therefore is by such by-law prohibited.

The by-law moved against was as follows:—"To prohibit the sale of intoxicating liquors and the issue of licenses therefor within the County of Halton, under authority and for enforcement of 'Temperance Act of 1864,' Be it enacted by the Corporation of the County of Halton, 1. That the sale of intoxicating liquors, and the issue of licenses therefor, is by this by-law prohibited within the County of Halton, under authority and for enforcement of 'The Temperance Act of 1864.' 2. That by-law No. 41 is hereby repealed.

It was shewn by affidavit that this by-law was submitted to the electors of the county on the 20th of February, 1864, as a whole, the clauses numbers one and two being together proposed, and no separate vote was taken upon each clause.

By-law No. 41 recited that a large number of the rate-payers of the county had petitioned the council for the passing of a by-law to prohibit the sale of intoxicating liquors and the issuing of licenses therefor within that county, and that the by-law might be submitted for approval to the municipal electors; and enacted, "that from and after passing of this by-law, and the approval thereof by the municipal electors of the county, the sale of intoxicating liquors, and the issue of licenses therefor, is hereby prohibited."

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

The objection is that this by-law No. 42. has embodied more than the simple declaration mentioned in the statute, for it contains also a repeal of a prior by-law.

The first section of the act gives power to the municipal council to pass a prohibitory by-law; the second relates to the form and contents of such by-law; the third provides that the municipal council, when passing such by-law, may order that the same be submitted for approval to the electors, in which case such approval becomes indispensable.

In this case it is sworn that the by-law moved against was so submitted. I infer there was an order for that purpose, and it is not asserted that the electors disapproved.

It cannot be denied that this by-law is on the face of it contrary to the letter to the act, but unless on examination it is found to be equally in violation of its spirit and true meaning, we should not, we think, quash it on a summary application.

The statute contains no form of the by-law to be followed. The object of the second section appears to be to ensure that the single question, whether the sale of intoxicating liquors and the issuing of licenses for that purpose should be prohibited, shall be submitted to the electors, and (by sub-sec. 4 of section 5,) it is further provided, that they shall vote only "yea" or "nay" upon that question. If therefore the second section of this by-law does really present another and different question, the proceeding is contrary to the intent of the legislature plainly expressed. But before deciding this, by-law No. 41 must be looked at, and there we find that it contains in identical words the same prohibition which is enacted in the first section of by-law No. 42. The recital contained in No. 41 is obviously unimportant.

The objection appears then to be merely formal; for, first, the prohibition in the two by-laws is identical; and, second, the provision for obtaining the approval of the electors has been complied with. The repeal of No. 41 is inoperative to effect any change either by removing or imposing an obligation on the municipality, nor does the validity of the last by-law depend in the slightest degree upon the repeal of the first. If the second clause were omitted, the first would have precisely the same effect, and its presence neither qualifies, or limits, or strengthens the first clause. Hence, in our opinion, it comes within the 37th section of the statute, that "no by-law passed under authority and for enforcement of this act, shall be set aside by any court, for any defect of procedure or form whatever." The first section contains the simple declaration required by the statute; the second in reality contains nothing.

Rule refused.

ELECTION CASES.

(*Reported by* ROBERT A. HARRISON, Esq., *Barrister-at-Law.*)

REG. EX REL. BLAKELEY V. CANAVAN.

Con Stat. U. C., cap. 54, *s.* 70—*Sufficiency of real property in respect whereof to qualify*—*Incumbrances*—*Effect thereof.*

Held, 1. That the real property in respect of which a candidate for the office of alderman in a city qualifies, may be of an estate either legal or equitable.

Held, 2. That the estate need not be free from incumbrances.
Held, 3. That if incumbered, and after deducting the gross amount of the incumbrances from the assessed value of the premises, there be still left a sufficient annual value in respect of which to qualify, that the qualification is sufficient.

[Common Law Chambers, February 27, 1865.]

On the 11th day of February last, an order was obtained for a writ of summons in the nature of a *quo warranto* directed to the defendant to show by what authority he exercised the office of alderman for St. Patrick's Ward, in the city of Toronto, and why he should not be removed from the said office.

The relator objected to the election of the defendant on the grounds—That the defendant was not at the time of the election possessed of the necessary property qualification for alderman; that at the time of the taking the last assessment for the city he was not then the owner of the property on which he claimed to qualify as freehold, and that he procured the said property to be rated in his name for the purpose of giving an appearance of qualification, being, in fact, not the owner or entitled to qualify therein, and never beneficially interested therein, and that if at any time he was beneficially interested therein, he was not at the time of his election beneficially interested to an amount sufficient to qualify him; that any estate which remained in him at the time of the election was not freehold, and insufficient as leasehold, both in value and estate; that the equity of redemption, if defendant was beneficially entitled thereto, was insufficient in value, and was not rated in respect thereof, and that the value of the leasehold in defendant's name was insufficient to complete his qualification.

In support of the statement and writ two affidavits were filed, that of the relator and of the assessor of St. Patrick's Ward.

It appeared from the affidavit of the relator that on the last revised assessment rolls for the city of Toronto the defendant was rated for premises on Strachan street, as owner of the annual value of $240, and as occupant of certain leasehold premises rated at $160 (regarding the latter no objection was taken); that the premises on Strachan street, on which ten dwelling-houses are erected, consists of lots 1, 2 and 3 on block B, west side of that street. That from memorials in the registry office it appears that at the taking of the assessment for 1864 the legal estate in these lots was vested in Captain Strachan. That he conveyed the same by deed, dated 18th August, 1864, to Mrs. Mary Ann Nixon, sister of the defendant, who mortgaged the same by deed dated 27th August, to the Western Canada Building Society, for $500, and that she also by deed dated the 23rd August, but not registered until 10th December following, conveyed the premises to defendant, subject to the mortgage; and that the defendant, by deed dated 1st December, 1864, mortgaged the premises to one Hime for £275, payable in three years; both of which mortgages appear not to be discharged, and the relator stated his belief that the premises were not equal in value to the amount of the mortgages, and that he was informed that Capt. Strachan had contracted to sell the lots to one Baines, from whom Mrs. Nixon acquired her interest therein, but that the purchase money was not paid to Captain Strachan until after the taking of the assessment, and about the date of the deed to Mrs. Nixon. He also swore that he was informed the defendant is in insolvent circumstances, and that defendant never was beneficially interested in the premises in question.

The affidavit of John Clarke, one of the assessors for St. Patrick's Ward for the years 1863 and 1864, verified extracts from the assessment rolls for these years, showing the manner and in whose names the property in question was assessed. In 1863 it appeared to have been assessed in the name of Ann Canavan and Thomas Barry and John Canavan, trustees. In 1864 it was assessed in the sole name of the defendant. Clarke swore that in 1863 it was assessed at the request of defendant in his defendant's name, for a Mr. Canavan; that in the month of March, 1864, the assessors assessed the premises in the same way, but that subsequently defendant told them that he wished his name inserted as owner, which was done in April, 1864. and before they had completed their assessment of the ward, and the same was so returned to the City Clerk on the 1st of May following, as required by law.

Robert A. Harrison shewed cause and read and filed several affidavits on the part of defendant. The defendant swore that in March, 1863, he purchased the premises on Strachan street, from Captain Strachan, getting a bond for a deed; that in August, 1864, Captain Strachan informed him that if he paid the balance then due he would allow him a discount; that in the same month he made an application in (his sister's) Mrs. Nixon's name to the Building Society for a loan of $500, with a view of paying Captain Strachan; that upon the request of the defendant and with his sister's consent, Captain Strachan conveyed to her the lots in fee; that Mrs. Nixon executed the mortgage to the Society; that the sole reason of the deed being so made to Mrs. Nixon was in consequence of an arrangement between defendant and the Secretary of the Society, in which the mortgage was to be given in a third party's name, he (the defendant) executing a bond to the Society as additional security for the same. That on the 23rd August Mrs. Nixon, by deed, conveyed the premises to defendant in fee; that on the 1st December last, he (defendant) executed a mortgage on the premises to one Hime for £275. The defendant swore that this was solely executed as a security to Hime to take effect only on his (defendant) receiving from Hime two mortgages which Hime held as collateral security for advances made by Hime to the defendant and some of his clients; that he had not then, nor has he since withdrawn the two mortgages, and that they still remain in Hime's possession; and he further swore that at the time of his election Hime had not the slightest claims on the mortgage for £275, or on the premises contained therein; and he also swore that he did not cause himself to be assessed for the property for the purpose of giving himself a qualification, but solely on account and for the sole reason that at the time he was sole owner of the property, and that he is still owner.

James McGill Strachan swore that he being the owner in fee of the property in question in March, 1863, gave a bond for a deed for the same to defendant conditional on payment of £140, within three years, to execute a convey-

ance thereof to defendant; that in the month of August, 1864, he suggested to the defendant that he would allow him a discount if he would take out his deed for the lots; that in same month defendant applied for the loan referred to; that he (Strachan) executed a deed to Mrs. Nixon for the purpose as understood between defendant and himself of Mrs. Nixon executing the mortgage to the Society for the loan; and that he (Strachan) received the proceeds of the loan, and he further swore that he is satisfied that at the time of the last assessment and at the time of defendant's election defendant was possessed of the property in question to his own use and benefit.

Mrs. Nixon swore that she accepted the deed and executed the mortgage at the instance of the defendant, and afterwards conveyed the property to defendant, as stated above, all of which was done for the sole purpose of facilitating the loan, and that she had no interest whatever in the property.

H. L. Hime swore that in December last defendant requested him to hand over to him (defendant) two mortgages amounting to about £300, which defendant had deposited with him as collateral security for notes discounted, for the purpose, as he stated, of filing bills to compel payment of the amounts secured by them, and that the defendant proposed substituting in lieu thereof a mortgage on property of his own; that he (Hime) consented, and that defendant on the 10th Dec. last delivered to him a mortgage made by himself for £275 on the property in question; he swore that defendant did not take away the two mortgages, but merely took an indenture of assignment of the same, from which defendant said he could obtain the particulars of the two mortgages; and he further swore that at the time of defendant's election, and when he subscribed his declaration of office in January last, although the mortgage was in his office and registered, that he did not hold it other than as he (Hime) terms it, as an escrow, and that he had no claim whatsoever against the same, or the properties therein mentioned, and he stated that the defendant had not since taken away the mortgages.

Mrs. Ann Canavan swore that she never had any estate in the premises in question, and that she always understood it to be defendant's property.

Thomas Barry swore that he is a co-trustee with defendant by virtue of a power in a deed of trust made in 1856, between A. Burnham, of Cobourg, and the defendant; that he does not hold or ever held as trustee or otherwise for Ann Canavan, named in such trust deed any property on Strachan street, and verily believes that she has not or ever had any property there; that he was appointed a trustee in 1862, and is still acting as such.

William B. Canavan swore to Barry and defendant being the trustees aforesaid; that he had consulted from time to time with his mother, Ann Canavan, the *cestui que trust*, regarding securities held by the trustees for her benefit. That some time in 1863 defendant represented to Mrs. Canavan that he had purchased the property on Strachan street from Capt. Strachan, and requested her to allow it to be held as part of her trust property, and to allow him (defendant) an amount of money for the same; that Mrs. Canavan declined to accede to such proposal, or accept the same, and that she did not accept it, and that she has no interest in it, and stated that she had just reason to believe that the property is defendant's. He also conducted the making of the assignment to Mrs. Nixon for the person already mentioned, and that she executed the deed in his presence to defendant, and swore that the property from the time defendant purchased from Captain Strachan was his to the present time.

C. S. Patterson and *Lauder* for the relator.

MORRISON, J.—Under the 70th clause of the Municipal Act the persons qualified to be elected aldermen in cities are residents who have at the time of the election in their own right, &c., as proprietors or tenants freehold or leasehold property, rated in their own names on the last assessment roll to at least in freehold to the annual value of $160, or leasehold to $320, and so in the same proportion in case the property is partly freehold and partly leasehold, and the clause defines the term leasehold to include a tenancy for a year or from year to year, and that the qualifying estate may be either legal or equitable.

As it is admitted here that the property in question was assessed in the name of the defendant, and was rated on the last assessment roll at a sufficient amount to qualify him for the office, the only question to be determined is whether at the time of his being so assessed, and at the time of his election, the defendant was possessed of an equitable estate on the premises. Upon the argument Mr. Patterson pressed upon me that taking the mortgage of $500 and the mortgage for £275 into account, and assuming the latter to be a subsisting mortgage and a charge on the property, the defendant had not such an interest in the property as was sufficient to qualify him within the meaning of the act. With regard to the £275 mortgage—when I consider the circumstances sworn to by the defendant and the mortgagee, under which the mortgage was made and the sworn disavowal of all claim and interest therein mentioned, and that that disavowal is based upon the fact that the purpose for which the mortgage was made was never carried into effect: if it were necessary for me to determine the point, I would hold that it was no encumbrance on the property.

The 70th enacting clause is silent as to encumbrances. If the Legislature intended that the qualifying property should be encumbered, or if encumbered, to be reduced for qualification purposes proportionably, it is not unreasonable to suppose that it would have so enacted in express words. We find the Legislature so speaking in other statutes with reference to property qualification for members of the Legislature, justices of the peace and others, where the amount is stated to be over and above all incumbrances thereon. The concluding words of the clause, declaring the estate may be either legal or equitable, in my judgment points among other estates, to that which is subject to incumbrances.

But even if I held that the amounts of the two mortgages were both to be deducted from the assessed value of the premises with a view of

ascertaining whether the defendant had a sufficient qualification, it still appears he is sufficiently qualified. The assessors having rated the property at $240 annual value, I must assume that it was assessed as being of the value of $4.000, and deducting $1,600, the amount of the two mortgages, would leave $2,400 as the rateable interest of the defendant, giving an annual value of $144, which, being added to $80, half of the annual value of the rated leasehold property, would make $224—more than sufficient to qualify the defendant for the office to which he was elected.

On the whole case, and from all the facts disclosed upon the affidavits filed by the relator and on the part of the defendant, I am of opinion that at the time of the defendant's election as alderman he was possessed as proprietor of equitable estate in the premises sufficient to qualify him for the office; and that the office of alderman for St. Patrick's Ward, in the City of Toronto, be allowed and adjudged to the defendant, and that he be dismissed and discharged from the premises charged against him, and do recover his costs of defence.

Order accordingly.

Regina ex rel. Hartrey v. Dickey.

Con. Stat. U. C. cap. 54, *sec.* 70—*Qualification of aldermen in cities—Declaration of office.*

Where a person elected alderman of a city made a declaration of office, inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the *quo warranto* summons against him, qualified in respect of other property, his election was upheld.

[Common Law Chambers, Feb. 27, 1865.]

On the 14th February last, an order was obtained for a writ of summons in the nature of a *quo warranto*, directed to the defendant, to show by what authority he exercised the office of alderman for the ward of St. Patrick, in the city of Toronto, and why he should not be removed from the said office.

The relator's objections were the following:—1st, that the defendant had not the necessary qualifications at the time of the taking the last assessment for the city—that is, he was assessed, with two others, his partners, for $195, annual value of an iron foundry, and for a vacant lot on Beverley-street at $67; 2nd, that the defendant was not the owner in fee simple of the land and premises set out in his declaration of office; 3rd, that the vacant lot mentioned in defendant's declaration of office is not his property, and that the other lands mentioned in the declaration are heavily incumbered with mortgages to the amount of £700 and upwards.

In support of the relator's statement, only one affidavit (his own) was filed, which, after setting out that he was qualified as an elector and voted at the election, stated that defendant was a candidate for the office of alderman, and being elected, took his seat in the City Council; that the defendant, in his declaration, made by him after his election, stated as his property qualification for the said office, "An estate of freehold, to wit, a foundry and premises and vacant land on Beverley-street, in St. John's ward;" that he had examined the last revised assessment rolls for the city for 1864, and found that the name of defendant, jointly with John Neil and James J. Dickey, appeared thereon as rated for the said iron foundry and premises on Beverley-street as freehold for $195, and that defendant is rated for a vacant lot on the same street as freehold for $67; and that these properties are the same as mentioned in defendant's declaration: he further stated that he was informed by S. Brough, Esq., that the defendant induced him (Brough) to make a proposition to defendant in writing, proposing terms on which he (Brough) would sell the vacant lot above mentioned—it being his (Brough's) property—to defendant, which Brough did, and that defendant never accepted the proposition, nor did he (Brough) ever convey the lot to defendant; that it appears by the last assessment roll for the city for 1864, this vacant lot had been originally rated to Brough, but his name was erased and the name of defendant inserted therein instead; that Brough told the relator, defendant had not paid him anything for the lot, and that he (relator) believes that defendant procured his name to be put on the assessment roll for the purpose of appearing as qualified for the office of alderman; that having searched the records of the registry office for the city, he verily believed that defendant has no legal estate in the land and premises described by defendant as a foundry, &c., in his said declaration; and that by the records in the registry office the property claimed by defendant is encumbered by mortgages to the amount of £700.

Blake, Q. C., showed cause, and filed several affidavits on the part of the defendants.

John Carr, clerk of the City Council, testified that on the 15th April last, he was the owner of a house on Denison avenue, in St. Patrick's ward; that on that day he leased the same for one year thereafter, quarterly, to defendant, and that defendant entered into occupation of the same as his tenant, and was assessed in the last revised assessment roll as tenant thereof at $100 rent, the lowest actual annual value of the premises; that the lease has ever since continued, and is still in full force and virtue. He further stated that as clerk of the Council he had the custody of the last revised assessment rolls of the city, and he testified to correct and exact transcripts of those portions of the rolls in which defendant appears as assessed in the ward of St. Patrick. By this transcript the defendant appears to be assessed as follows:

BEVERLEY STREET.

No.	*Assessment.*	
No. 538	Nathaniel Dickey John Neil, J. J. Dickey,	Annual value. As owners, foundry, &c.....$195
536	Nat. Dickey, as owner, house.....	84
537	" " "	72
349	(Originally S. Brough) owner vacant lot.....	67

Revised, and name of N. Dickey inserted.

DENISON AVENUE.

1069 Nathaniel Dickey, occupant..... 100

He further stated that defendant appealed against the assessmens of $100 on the vacant lot; and having stated to the Court of Revision that he was the owner, his name was inserted, and he procured the assessment to be reduced to $67. He further swore that as city clerk, having the city books before him, and being familiar therewith, he prepared for defendant his declaration

of qualification, and informed defendant that it was, as he believed it in fact to be, taken correctly and sufficiently from the assessment books; and he stated that he did not include the leasehold property, because he believed, as he still believes, that defendant's qualification in Beverley street was sufficient.

James J. Dickey, a brother and partner in business of the defendant, swore: that defendant and one John Neil and himself, for some years past, and at the present time, have been and are co-owners in fee of the land on which the foundry is erected, and assessed in the roll at $195; that the lands are subject to a mortgage to the Scottish Amicable Society for £500 sterling, principal money, and no arrears of interest. He stated that last June he and his partners were prepared to pay it off, and applied to do so, but that the company's agents refused, unless upon a six months' notice, and subsequently an agreement to extend the time for four years was made, giving additional security for the payment of the mortgage money upon certain shares in another society, worth in cost at present at least $2,150, and payable in 1868, with a high rate of interest, compounded half-yearly, and which in 1868 will amount to a sum much larger than the mortgage on the premises; which shares were to be transferred to the solicitor and agent of the mortgagee, and to Edward Blake, Esq., their solicitor, as trustees for both parties: and he further swore, that independent of that security, the mortgaged premises are worth $6,000, and that they would not accept any less sum therefor; that on the 1st May, 1864, Mr. Brough agreed with defendant for the sale to him of the second lot on Beverley-street, and that Brough signed and delivered to defendant an agreement for the sale, which agreement was verified and produced, and by it Mr. Brough agrees to sell the premises, letting them out to the defendant for £400, payable in ten years, with interest half-yearly, to be secured by mortgage on the lot; conveyance to defendant and mortgage back to be prepared and executed as soon as conveniently may be; defendant to pay the taxes for the then current year, 1864. Mr. J. Dickey further stated, that he was present at a conversation between defendant and Mr. Brough on the subject of the purchase; that there being some incumbrance on the lot, which Mr. Brough was to pay off or have the time for payment extended, the defendant assuming the same, it was agreed that Mr. Brough should make arrangements in respect of the incumbrance, and the contract should then be completed by conveyance. In the meantime defendant should enter into possession, which he did, and has since continued in possession; and he stated that defendant is the owner in equity of the fee of the premises.

The defendant himself, in his own affidavit, stated, that J. J. Dickey was the person who managed the transactions with the Scottish Amicable Insurance Society, and he incorporated the several matters stated in J. J. Dickey's affidavit, and stated that they were true. And as to his declaration of qualification, he stated that he supposed and believed that it included the other properties mentioned in the affidavits; that as it was prepared by the clerk of the Council, he did not closely examine it, as the clerk knew the properties he was assessed for, and who informed him at the time that it included property more than sufficient for his qualification.

A. McNab for the relator.

Morrison, J.—As to the first objection, after a careful examination of the affidavits filed on the part of the defendant, in connection with the fact that the last revised assessment roll shows that the defendant, besides being rated with his partners for the foundry premises, and as sole owner for the vacant lot, that he was also rated as sole owner for two other properties rated at the annual value of $156, and also a leasehold property to the value of $100, and holding the views I have expressed in the previous case of *Regina ex rel. Blakely* v. *Canavan*, respecting equitable estates and incumbrances, I am of opinon that defendant, at the time of his election, was duly qualified for the office of alderman.

The relator having suppressed the fact of the defendant being rated for the property valued at $156, and not negativing the defendant being possessed of them at the time of his election, I do not think it necessary to call on the defendant for further affidavits relating to those properties.

As to the second and third objections, they are directed specifically against the validity of the defendant's declaration of office, not against the validity of the election, or the defendant's qualification at the time of his election.

The authority for the issuing of the summons herein is founded upon the 128th section of the Municipal Act, which enacts, that if the relator shows, by affidavit to a judge, reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matter contested. The clause and the subsequent sections are all directed to the trial of the validity of the election and the due election of the relator or some other person. The declaration of office referred to in the relator's statement is required to be made by the 175th section, but I see nothing in the act declaring that if the person elected omits making such declaration, or makes a defective one, or that he is not seised or possessed of the estate therein mentioned, that his election shall be void, or that it should be held that he was not duly elected. The statute, on the other hand, provides, by the 183rd clause, that if the person duly elected does not make the declaration of office within twenty days after his election, he is subject to a penalty, and by the 15th clause of the Interpretation Act, the wilful and corrupt making of any false statement in any declaration required or authorized by any of the consolidated statutes of Upper Canada, shall be a misdemeanor, punishable as wilful and corrupt perjury.

But even if the objections were open to the relator, it is quite clear from the affidavit of the clerk of the City Council, that having the custody of the assessment rolls, he drew up the declaration for the defendant, and inserted in it, as he thought, sufficient property for the purpose, and that it was a mere omission on his part to insert the other property for which the defendant was rated as proprietor.

As to the merits of the whole case, the defendant has fully met the objections attempted to be set up by the relator.

I am of opinion, therefore, that the office of alderman for St. Patrick's ward, in the city of Toronto, should be allowed and adjudged to the defendant, and that he be dismissed and discharged from premises charged on him, and do receive his costs of defence.

Order accordingly.*

UNITED STATES REPORTS.

COMMONWEATH OF PENN. for use of BENJAMIN KELLOGG, &c., v. ALFRED C. HARMER, et al.

1. The liability of a Recorder of Deeds on a false certificate of search, only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him.
2. The sureties of the Recorder of Deeds are not liable for false searches.

Opinion of AGNEW, J., on demurrer.

The first three causes of demurrer are unimportant as they are all amendable, but the amendments should be made. The remaining four bring into view substantial defects. The first to be noticed is the manner of stating the plaintiffs. Kellogg was the person who obtained the recorder's certificate and made the first purchase under it. He sold to Wm. Mullison who afterwards sold to Anna Shott. Under the act regulating suits on official bonds the suit is in the name of the Commonwealth, and as many persons may be suggested plaintiffs who choose to join, but each must declare and assign breaches for his separate injury. Here, however, the pleader has suggested Kellogg as plaintiff for use of Mullison for use of Shott. Kellogg, in this suit, is the only plaintiff, while the others are merely persons to whom his right of action has passed. This being the suggestion of the plaintiff, it is plain that no injury sustained by either Mullison or Shott can be declared upon, for in this form the last assignee merely takes what Kelogg may recover.

In one point of view this cause is also unimportant because is is clearly amendable by striking out the use and permitting the two last named to come in as plaintiffs in their own behalf, the act referred to giving the right of suggestion at any time before judgment. But this change in the relation of the parties from uses to plaintiffs, discloses the real vice of this declaration. The only damages averred are those arising upon the sale from Mullison to Anna Shott, who it is alleged paid $18,000 for the property upon the faith of the false certificate of the recorder of deeds. The declaration being amended, that is, Anna Shott being suggested plaintiff in her own right the question is at once presented, can she found an action against the recorder for damages upon a certificate of search given to Killogg, an antecedent purchaser?

The question is important, as in this city the custom is to pass the certificates of search of deeds, mortgages and judgments with the title papers, each subsequent purchaser taking the title upon the faith of the former searches down to the date of the certificate, and procuring new searches only for subsequent conveyances and liens. While it is important, still I think it is not difficult of determination. So far as the certificate is the evidence of the state of the public record this custom is well enough. A search once made by the officer under his official responsibility is in all probabilities correct and therefore may be relied upon without a new one. It is not often these searches are incorrect, otherwise actions upon false certificates would be more frequent, their rarity is the evidence of official correctness and fidelity; and therefore the certificate has all the force of evidence in the hands of subsequent purchasers, that it had in those of the first. But when you touch the official responsibility of the officer, you reach a different question. It is then not simply the evidence which the certificate affords, but the duty it involves.

What is this duty? It is, as the keeper of the record, to make searches for deeds and mortgages, and other recordable instruments at the instance of those who may apply therefore and pay him the fee, which the law allows him for the performance of the duty. The duty is specific to make it for him who asks for it and pays for it, and therefore has a right to the responsibility of the officer and to rely upon it. It is he who is deceived by the officer's false search because he alone stands in privity with him, by demanding performance of the duty and making compensation for it. The emoluments of the office constitute the consideration of undertaking the responsibility. Who would accept the office and perform such duties involving such heavy liabilities, if he were to be allowed no equivalent. The officer who makes a search stands, in reference to its correctness, in the attitude of an insurer, and his fee represents the premium. To make him responsible to every new purchaser without a fee would be as inequitable as to hold an insurer liable upon a new risk without a new premium.

But when we come to analyse the transaction, we will find it impossible to carry on the notion of continuing liability. The injury arising from a false certificate of search, undoubtedly falls upon the person who obtains and acts upon it; because the fact which causes his injury, to wit, the undisclosed deed or mortgage precedes his purchase. It is the title *he* purchases which it affected. As it is he who suffers by the unrevealed conveyance of incumbrance, the right of action is personal to himself. It does not run with the land, but passes to his personal representative. If he sell with covenants for title, or for quiet enjoyment, his own liability to his vendee requires him to retain it, to make good his own loss. If not answerable to his vendee because he has given no covenant for title, the rule *caveat emptor* which protects him, also protect the officer who is responsible to him. The action being his own he may also end it by accord and satisfaction or by release.

Carry this further. He can recover for the injury which leads him to accept a worthless title or an incumbered estate. This is clear. His damage is the cost of the worthless title, (the case laid in the declaration) which is the price paid. To-morrow he sells for twice as much; and the next day his vendee sells for three times the first sum, which price will be the real damage. If the first one being paid by the recorder, release him, will that satisfy the injury, or will it be only *pro tanto*, leaving the second to run, and

* See *Regina ex rel. Grayson*, v. *Bell*, 1 U.C. L. J. N.S. 130.

on his payment and release, leaving the third what shall remain? This is a sad jumble of interfering rights, growing out of continuing liability. But it is said the recorder may take up his certificate on payment. But this will not always protect the subsequent purchase, which may have taken place before the discovery of the secret deed or mortgage so that the right of action has vested, if vest it can. A continuing liability beginning like a snowball, increases like an avalanche overwhelming and destroying the unfortunate incumbent of office. Now while he must bring fidelity and diligence to the execution of his duties, the law owes him protection against needless severity and hardship. It is much less hardship to require a new search for every purchaser than to entail upon officers, the accumulated burthens of independent transactions, and adventitious advance of the prices of real estate.

If instead of continuing liability, we proceed upon the ground of successive liability to each new purchaser, the case runs counter to the objections before stated. The officer owes but one duty which is to him who employs and pays him. If a new liability arise, it is because of a new duty which cannot take place without renewed privity and renewed compensation. It encounters a further objection. The new duty at each successive purchase, gives rise to a new cause of action, which runs only from its breach, and cannot occur till the new purchase is made. This may be twenty years after the date of the certificate. But this is repugnant to the statute of limitations which bars actions against sureties in official bonds after seven years from the injury, and that must arise during the official term.

It cannot be the case that a right of action follows the floating certificate down the stream of title, because there is no adequate compensation for this tremendous risk, there is no privity of duty between the officer and those coming after the person procuring the search, there is a compounding of several injuries, where but one can naturally exist, and because it is clearly harsh, unjust and impolitic.

If any one will have, in addition to the satisfactory evidence which the certificate affords, the personal responsibility of the officer, let him ask for it and pay for it by obtaining a new search. There is good reason for this, a new search may reveal the before undiscovered incubus upon the title, freeing the officer from further liability, and applicant from injury and litigation. Give the officer a locus, and the citizen the means of escape from undesired difficulty.

There is an objection not contained in the grounds of demurrer fatal to this action, if the condition of the bond he correctly set out in the declaration. The only condition recited is to "deliver up the records and other writings belonging to the said office, whole, safe and undefaced to his successor therein, according to law." This covers only the public interest but provides for no protection against private injury. The liability of the sureties is strictly legal, and cannot be extended beyond the terms of the condition.

Judgment for the defendant on the demurrer.

Derry v. Lowry.

A conductor of a passenger car has no right to eject a passenger on account of color or race. No regulation of the company will justify such a proceeding, or protect him from liability in damages.

Mrs. Derry, a very respectable woman, almost white, alleged that she got into a passenger car, on the Lombard and South street line, about 11 o'clock at night, being then on her way home from a church, where, with others of her race, the had been engaged in providing comforts for the wounded soldiers. After she had been seated for a few minutes, the conductor came in and told her she must get out; that no niggers were allowed to ride on that line. Mrs. Derry pleaded the lateness of the hour; that there were only two or three passengers in the car, none of whom had objected, and finally asserted her right to remain. The conductor, thereupon, called in the aid of two friends standing upon a street corner, took off his coat, seized hold of her, struck, kicked, and finally ejected her from the car with great violence, tearing her clothes and inflicting some personal injuries. On the part of defendant it was alleged that there was a rule established by the superintendant of the road, known to and approved of by the directors, that all colored people were to be excluded from the cars; that in obedience to this rule the defendant had ordered Mrs. Derry to leave, and only used force when rendered necessary by her resistance. It appeared, however, from the testimony of officer Somers that the defendant admitted that he did kick "the Nigger."

Earle and *White*, counsel for plaintiff, contended that the company were common carriers and had no right to exclude from their cars may person, otherwise unobjectionable, because of their race or complexion.

Allison, J., then charged the jury as follows:

The important question involved in this action is the right claimed by conductors of city passenger railways to refuse passage to persons of color, and to eject such persons from the cars of which they have charge, when entrance to the same is obtained without their knowledge or consent.

In most instances the conductor in charge of the car shields himself under an alleged regulation of the company of which he is an employee or agent. This is the case here, although in fact there was no such regulation of the Lombard and South street Passenger Railroad; the attempt to set up the existence of such a rule, enacted by the directors of the company, utterly failed; but for the purposes of the case now under trial, I instruct you, as a principle of law, that the existence of such a by-law or resolution of the company, would not avail the defendant as a justification for the wrong complained of in the plaintiff's declaration. It would be proper to allow proof of the existence of such a regulation, to be given to the jury in mitigation of damages, to show that defendant did not, of his own motion, with wicked and malicious intention, inflict personal violence upon the plaintiff; but that he was acting under the instruction of the company, whose ervant he was, in ejecting her from the car.

The principles of law which govern city passenger railway companies, in no respect that I am aware of, differ from those applicable to

common carriers in general. They are companies chartered to carry passengers along a certain defined route, and between established termini. They are chartered for the accomodation of the community generally, and to this end the uses of the public highway of the city along and over which every person, without distinction of age or sex, or nationality or color, has a right to a free and unobstructed passage, is to the extent defined in the several acts of incorporation given to these companies for the construction of their roads. But these grants by the Legislature were not intended to divert the highways of the city from the purpose for which they were established; to some extent they changed the *mode* of transit over said highway; but the object of the grant was in aid of this common right of passage upon and over the streets of the city; it was to render travel more easy and convenient to those to whom the right belonged, and this right is a common right; it belongs equally to the rich and to the poor, to the black man as much as to the white man. A company claiming to exercise the power which the defendant, acting for his principals, the Lombard and South street road, sought to enforce as against the plaintiff in this action must show the most clear legislative authority as a justification. The charter of this company has been put in evidence, and it is not pretended that such an express power is therein contained. Nor can it be reasonably argued that such a power is taken by implication; for its exercise is not in aid of that which is by the letter of the charter granted to the company, but in its practical application is a restriction of its general corporate authority in violation of its public duty, and at war with the purpose for which the body was created. The rule that lies at the foundation of all corporate right is that the power shall be strictly construed, that corporations shall be permitted to do only that which they take by express grant, or that which by implication is conceded to them when necessary to the existence of the body corporate or requisite to carry into effect the letter of the charter itself. Neither branch of this proposition, which is one of the plainest axioms of the law has been established by the defence; on the contrary, the act of defendant was a clear violation of the rights of the plaintiff when he put her out of the car, because her skin was a few shades darker than his own. The letter of the charter of this company did not authorize it; and the act, so far from being justified under the reserved or implied grant of authority, was in itself a violation of the obligations and duties of the company, who as a common carrier, are bound to carry every individual who, paying the amount of fare charged to others, desires to travel on the road, and as against whom no reasonable or well-founded objection can be made on personal grounds.

The true principle is that a corporation created for the carriage of passengers has no right to exclude any class of persons, as a class, from the benefits of its mode of its transportation; it may *for cause* either by or without a regulation exclude individuals. A corporation of this description might as well undertake to make nationality or religion a ground of exclusion, as color; it would not be difficult to determine in advance the legal force of a by-law excluding all Germans or Frenchmen or Irishmen, or Protestants or Catholics, Jews or Greeks, as such, from the passenger cars of the city; such an exclusion would not be tolerated by any intelligent tribunal; and yet in this, the day of our comparative enlightenment and freedom from a prejudice, to which we were so long in bondage, a question can be seriously made before a court and jury and practically enforced at the bar of public opinion, as to the right of an individual conductor, or a company, to turn persons out of the passenger cars of the city with force and violence because of their complexion. Than this, nothing can be more unreasonable; nothing, in my opinion, is a clearer or grosser violation of the plainest principles of the law and of the rights of individuals.

But, it is asked, are these corporations powerless to protect themselves or the passengers whom they carry? By no means; they have a perfect right to exclude any one not a fit person to ride in their cars. Intoxication, profane or indecent language, the presence of one affiicted with an offensive or contagious disease, smoking in the cars, are but illustrations of the principle, because these are a reasonable offence to the travelling public; these of themselves constitute a ground for exclusion or removal; but the mere prejudice of one class against another cannot be allowed to subvert or overthrow the cardinal doctrine of the equality of all before the law, in the maintenance of the sacred rights of person and of citizenship.

The argument which is used as a justification for the exclusion of people of color from the cars, would shut them out from and bar against them our courts of justice, forbid to them the use of public ferries, bridges and highways, and rests not upon any principle of legal or moral right, but upon bald, naked prejudice alone. It is our duty, gentlemen, in the discharge of our duties, you in your sphere and I in mine, to cast aside all prejudice, that the law may vindicate its just claim to strict and impartial justice. And if, by the action of courts and juries, wrong has been done to that class of citizens to which the plaintiff belongs, it is time that such errors should be contradicted.

The logic of events of the past four years has in many respects cleared our vision and corrected our judgment; and no proposition has been more clearly wrought out by them than that the men who have been deemed worthy to become the defenders of the country, to wear the uniforms of the soldier of the United States, should not be denied the rights common to humanity, and this not only without law, but against law and the plainest principles of right and justice. The judge further charged the jury that the instructions of a principal to a subordinate to do an illegal act, such as to commit an assault and battery upon the person of a citizen, was no justification of the subordinate for so doing; that such a plan could not shield a conductor of a car from his accountability before the law, to the person injured.

He also instructed the jury upon the question of the violence inflicted by the plaintiff upon the defendant; that if such violence was used in defence of her person when assaulted by the defendant, and was no greater in degree than

was necessary to defend herself against the attack made upon her person and rights, the law would justify her in the employment of such force. Nor would the use of excessive force by her in resisting a personal assault be a defence to her claim for damages; it may be taken into consideration by the jury upon the question of the amount of compensation to be given to her, but not as a defence to the action.

That the jury, for a wrong like that complained of by the plaintiff may go beyond mere compensatory damages, and may give vindictive damages, by way of punishment. Verdict for plaintiff. Fifty dollars damages*.—*Philadelphia Legal Intelligencer.*

CORRESPONDENCE.

Hearing fees on confessions.

To the Editors of the Local Courts' Gazette.

Gentlemen,—I cannot agree with you in saying that a hearing fee is chargeable on a confession of judgment.

The 84th and 85th sections of the Act respecting Division Courts, gives the judge authority to hear, try, and give an order or judgment in the cause. The charges in schedule B for the hearing and order have reference to these sections.

The confession of judgment is taken by the clerk or bailiff, under the authority of the 117th section, and I find nothing in this section to constitute a hearing. On its production to the judge, and its execution proved, *judgment may be* entered thereon. There is no necessity for his giving an order to that effect; the statute gives the power. He does not inquire, as in the case of an undefended cause, how much is due, and he awards no amount; he merely administers the oath to the officer intrusted with the taking of the confession. Hearing is synonymous with trial, an inquiry to ascertain a disputed fact, or to ascertain an uncertain amount. This confession having been given to an accredited officer of the court, the judge's authority to hear or inquire is taken away; he cannot increase or diminish the amount confessed; he exercises no judgment, gives no opinion or decision. The framers of the statute evidently contemplated no charge for a hearing, for they prohibit the charge even for an *order*. Neither plaintiff nor defendent need be present, and there *can be no hearing* of the parties. If, indeed, the judge orders the time for payment, that is an *order*, for which nothing can be charged. He merely looks at the affidavit, to see that the requirements of the 117th and 118th sections have been complied with. Administering an oath is not a hearing.

It would be no boon to a defendant to permit him to give a confession, if he is to be charged with a hearing: better for him to allow judgment to go by default, and save the expense of the affidavit of the execution and the hearing. The intention of the framers of the act certainly was to save costs, and this would only increase it. The reference to the judge is only to prevent fraudulent practices.

Yours,

Judex.

[We gladly insert the letter of "Judex," as of course our only object is to facilitate the discussion of every question upon its merits. But at the same time, we must frankly confess that our opinion on this subject, as already expressed, remains unchanged.—Eds. L. C. G.]

Division Court execution — When it binds defendants goods.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you oblige a subscriber by answering the following question in your next issue?

Does a Division Court execution bind the goods of the defendant from the time that it is placed in the bailiff's hands, so as to prevent such defendant from disposing of the goods to a *bona fide* purchaser for valuable consideration, or does it bind the goods of the defendant only from the time of seizure? If you know of any cases in point, please cite them.

A Bailiff.

Kingston, June 9, 1865.

[We know of no case which decides this question. It was doubted in *Culloden* v. *McDowell*, 17 U. C. Q. B. 359, whether a Division Court execution could bind defendant's property "before an actual seizure;" but the point was not decided. So far, however, as we can express an opinion in the absence of authority, we should say that it does not bind till an actual seizure.—Eds. L. C. G.]

* It will scarcely be credited by "benighted" Canadians that such an occurrence as was the foundation of this action could have taken place in a professedly "free and enlightened" country. *Profession*, however, is one thing, and *practice* another.—Eds. L. C. G.

Division Court Act—Cause of action—Meaning thereof.

To the Editors of the Local Courts' Gazette.

Gentlemen,—You would confer a favor by answering the following question in your next issue.

A., living in Lindsay, gives a note in the following form:

Lindsay, June 1st, 1864.

Six months after date, for value received, I promise to pay B. or bearer the sum of sixty dollars. (Signed) A.

Before the note matures, B., its holder, transfers it by delivery to C., living in Peterborough, who keeps the note until it becomes due. Upon default made in payment of the note by A., cannot the suit be entered in Peterborough?—in other words, does not the *cause of action* arise there?

Yours, &c., Inquirer.

Millbrook, June 12, 1865.

[A suit may be entered and tried in the court holden for the division in which the cause of action arose, or in which the defendant or any one of the defendants resides or carries on business at the time the action is brought (Con. Stat. U. C. cap. 19, sec. 71). The words "cause of action," here used, mean the whole cause of action, and that embraces the contract as well as the breach. In the case put by our correspondent, we think it clear, on the authority of decided cases, that the action is not maintainable in Peterboro', unless the defendants or some of them reside in that county (*In re Watt and VanEvery et al.* 23 U. C. Q.B. 196; *In re Kemp & Owen*, 14 U. C. C. P. 432.)—Eds. L. C. G.

Inspector of weights and measures—Duty in regard to yard-sticks—Fees.

To the Editors of the Local Courts' Gazette.

Gentlemen,—An inspector of weights and measures has a yard-stick presented to him to be stamped. The stick is subdivided into half, quarter, eighth and sixteenth parts, also into inches and lines. The inspector examines the measure, and finds it correct. Is he entitled to stamp each subdivision of the yard, and charge for it, or is he only entitled to charge ten cents for stamping the stick, as the act requires, at the top and bottom?

Your opinion, appearing in some future issue of your valuable "Gazette," will oblige.

Yours truly, Measure.

[What the inspector is to examine and mark is the measure. That he is to stamp and brand as near the two ends, top and bottom, as may be (Con. Stat. U. C. cap. 58, sec. 10). The yard-stick is the "measure," and not the subdivisions thereof. The inspector, therefore, is not, in our opinion, entitled to charge for each subdivision as if a separate measure.—Eds. L. C. G.]

INSOLVENTS.

Wm. Dunn	Toronto.
Timotheus E. Pomeroy	Belleville.
Seth Wheadon	Belleville.
Timothy H Buckley	London.
W. A. McPherson	Richmond.
D. L Beausijour	Montreal.
D. Guimont	Cape St. Ignace.
W. A. Clark	Clarksburgh.
W. & A. McGillivray	S. Plantagenet.
J. S. Fowlds & Bros	Hastings.
Samuel Ross	Brockville.
Geo. Craig	Southampton.
Wm. H. Carney	Owen Sound.
Wm. Smith	Brockville.
Adolphe Belanger	Montreal.
John Warren	Oshawa.
Peter Lenfesty	Owen Sound.
R. J. O'Loane	Stratford.
Andrew McNab	Beaverton.
Simon Kleiser	Toronto.
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Thomas Story	Ottawa.
C. & T. Glasco	Brantford.
John E. Nelles	Sparta.
P M. Lawrason	New Durham.
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J. W. Inman	Hamilton.
Jas. O. L. Gibson	Whitby.
Joseph Hatch	Woodstock.
Edward Ferguson	Southampton.
D. N. Shoemaker	Tp. Walsingham.
Alexander Waters	Owen Sound.
Arthur Crawford	Toronto.
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James Caldwell	Orangeville.
Louis Champeau	Montreal.
Richard Chamberlin	Hull.
Robert Edgar	Owen Sound.
Archibald Taylor	Tp. Eldon.
Abraham C. Singleton	Brighton.
Wm. Atkins	Brantford.
George Brown	Ottawa.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

WILLIAM HENRY RICHEY ALLISON, of Picton, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

JOHN McINTYRE, of Kingston, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

GEORGE DEAN DICKSON, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

REGISTRARS.

JOHN HIGGINSON, Esquire, to be Registrar of the County of Prescott. (Gazetted June 17, 1865.)

TO CORRESPONDENTS.

"Judex"—"A Bailiff"—"Inquirer"—"Measure"—Under Correspondence.