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VOL. VIII. TORONTO, MARCH, 1861. No. 3.

THE UPPER CANADA LAW JOURNAL

AND MUNICIPAL AND LOCAL COURTS' GAZETTE.

CONDUCTED BY

W. D. ARDAGH, Barrister-at-Law; ROBT. A. HARRISON, B.C.L., Barrister-at-Law.

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REMITTANCES.

L. W., London, $15, E. C. C., Niagara, $4, P. D., G. Sound, $9, C. C. K., Chatham, $4, H. R., Woodstock, $4, R. Y., Esquesing, J. M., do., F. McC., Milton, W. L. P. E., do., G. C McK., do., J. W., Jr., do., G. T. B., $21, W. S., Brockville, $11, W. J., Rainham Center, $4, Z. B., Whitby, $14, H. H. T. Penetanguishene, $5, C. A., Ottawa, $5, R. & E. M., Hamilton, $6, J. S., Toronto, $4, A. T. H. B., Galt, $4, R. R. L., Bowmanville, $4, J. W., Meaux, $5, Judge W., Chatham, $3, J. T., Derry West, $4, G. O. C., Hamilton, $4, M. McP., Vroomanton, $4, J. C., Port Albert, $4, W. M. P., Cornwall, $4, R. G., Simcoe, $12, J. McR., Williamstown, $4, E. R. K., Selkirk, $4, R. B., Avondale, Stratford, $4, W. F., Walkertown, $4, A. McG., Stratford, $4, H. McC., Frankville, $4, W. F., Toronto, $4, J. A., Dunnville, $4, R. G. M., Morristown, $4, H. H., Clinton, $4, D. McC., Woodbridge, $4, T. A. A., Berwick, $3, J. C., Craighurst, $4, M. of S., Scarboro, $4, R. D., Peterboro', $4, R. M. Zimmerman, $3, A. P., Orillia, $4, G. S. M., Kingston, $4, H. R. E., St. Thomas C.W., $4, J. C., Hamilton, $4, W. H. M., Claremont, $4.

STANDING RULES.

ON the subject of Private and Local Bills, adopted by the Legislative Council and Legislative Assembly 3rd Session, 5th Parliament, 20th Victoria, 1857.

1. That all applications for Private and Local Bills for granting to any individual or individuals any exclusive or peculiar rights or privileges whatsoever, or for doing any matter or thing which in its operation would affect the rights or property of other parties, or for making any amendment of a like nature to any former Act,—shall require the following notice to be published, viz:—

In Upper Canada—A notice inserted in the Official Gazette, and in one newspaper published in the County, or Union of Counties, affected, or if there be no paper published therein, then in a newspayer in the next nearest County in which a newspaper is published.

In Lower Canada—A notice inserted in the Official Gazette, in the English and French languages, and in one newspaper in the English and one newspaper in the French language, in the District affected, or in both languages if there be but one paper; or if there be no paper published therein, then (in both languages) in the Official Gazette, and in a paper published in an adjoining District.

Such notices shall be continued in each case for a period of at least two months during the interv. of time between the close of the next preceding Session and the presentation of the Petition.

2. That before any Petition praying for leave to bring in a Private Bill for the erection of a Toll Bridge, is presented to this House, the person or persons purposing to petition for such Bill, shall, upon giving the notice prescribed by the preceding Rule, also, at the same time, and in the same manner, give a notice in writing, stating the rates which they intend to ask, the extent of the privilege, the height of the arches, the interval between the abutments or piers for the passage of rafts and vessels, and mentioning also whether they intend to erect a draw-bridge or not, and the dimensions of such draw-bridge.

3. That the Fee payable on the second reading of and Private or Local Bill, shall be paid only in the House in which such Bill originates, but the disbursements for printing such Bill shall be paid in each House.

4. That it shall be the duty of parties seeking the interference of the Legislature in any private or local matter, to file with the Clerk of each House the evidence of their having complied with the Rules and Standing Orders thereof; and that in default of such proof being so furnished as aforesaid, it shall be competent to the Clerk to report in regard to such matter, "that the Rules and Standing Orders have not been complied with."

That the foregoing Rules be published in both languages in the Official Gazette, over the signature of the Clerk of each House, weekly, during each recess of Parliament.

J. F. TAYLOR, Clk. Leg. Council.
10-tf. WM. B. LINDSAY, Clk. Assembly.

OPINIONS OF THE PRESS.

THE UPPER CANADA LAW JOURNAL.—This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the profession in Canada, and will prove interesting in the United States.—*American Railway Review*, September 20th, 1860

THE UPPER CANADA LAW JOURNAL.—This useful publication for September is before us. We heartily recommend it as a very useful Journal, not only to members of the legal profession, but also to Magistrates, Bailiffs, &c., and in fact every person who wishes to keep himself posted in law matters. It has been recommended not only by the highest legal authorities in this Province, but also in the United States and England. The present number is replete with useful information.—*Welland Reporter*, September 20th, 1860.

UPPER CANADA LAW JOURNAL.—We have received the April number of this excellent publication, which is a credit to the publishers and the Province. Among a great variety of articles of interest, we especially note two, one on a series on the Constitutional History of Canada, the other upon a decision declaring the right of persons not parties to suits to search the books of the Clerks of Courts for judgments. The question arose out of a request of the Secretary of the Mercantile Protection Association.—*Montreal Gazette, April, 25th.*

THE UPPER CANADA LAW JOURNAL, for May. Messrs. Maclear & Co., King Street, Toronto.—In addition to interesting reports of cases recently tried in the several Law Courts, and a variety of other important matter, this number contains well-written original articles on Municipal Law Reform; responsibilities and duties of School Trustees and Teachers; and a continuation of a Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada.—*Thorold Gazette, May 19th*, 1859.

UPPER CANADA LAW JOURNAL.—The March number of this very useful and interesting Journal has been received. We think that the articles found in its pages are equal in ability to any found in kindred periodicals either in England or America. Messrs. Ardagh & Harrison deserve the greatest credit for the manner in which the editorial work is performed. We hope their enterprise may be as profitable as it is creditable.—*Hastings Chronicle, May, 16th* 1859.

The Upper Canada Law Journal. Maclear & Co., Toronto. This well conducted publication, we are glad to learn, has proved eminently successful. Its contents must prove of great value to the Profession in Canada, and will prove interesting in the United States.—*Legal Intelligencer*, Philadelphia, August 6, 1858.

Upper Canada Law Journal.—We have received the first number of the fifth volume of this highly useful Journal, published by Maclear & Co., of Toronto, and edited by the talented Robert A. Harrison, Esq., B.C.L., author of the Common Law Procedure Act, which has obtained classification along with the celebrated compilers of England and is preferred by the professionals at home to all others.

There is no magistrate, municipal officer, or private gentlemen, whose profession or education wishes the law to be well administered, should be without it. There are knotty points defined with a simplicity that the most ordinary minds can understand, and the literary gentleman will find in its pages, a history of the constitution and laws of Canada, from the assumption of British authority. Subscription, $4.00 a year, and for the amount of labour and erudition bestowed upon it, it is worth double the amount.—*Victoria Herald, January* 19, 1859.

The Law Journal of Upper Canada for January. By Messrs. ARDAGH and HARRISON. Maclear & Co., Toronto, $4 00 a year cash.

This is one of the best and most successful publications of the day in Canada, and its success prompts the editors to greater exertion. For instance they promise during the present volume to devote a larger portion of their attention to Municipal Law, at the same time not neglecting the interests of their general subscribers.—*British Whig, January* 18, 1859.

The Upper Canada Law Journal, for January. Maclear & Co., King Street East, Toronto.

This is the first number of the Fifth Volume: and the publishers announce that the terms on which the paper has been furnished to subscribers, will remain unchanged,—viz., $4 00 per annum, if paid before the issue of the March number, and $5 00 if afterwards. Of the utility of the *Law Journal*, and the ability with which it is conducted, ample testimony has been afforded by the Bar and the Press of this Province; so it is unnecessary for us to say much in the way of urging its claims upon the liberal patronage of the Canadain public.—*Thorold Gazette, January* 27, 1859.

THE UPPER CANADA LAW JOURNAL AND LOCAL COURTS' GAZETTE, is the name of an excellent monthly publication, from the establishment of Maclear & Co., Toronto.—It is conducted by W. D. Ardagh, and R. A. Harrison, B. C. L., Barrister at Law.—Price $4 per annum.—*Oshawa Vindicator*, October 13th., 1858.

LAW JOURNAL, for November has arrived, and we have with pleasure its invaluable contents. In our humble opinion, the publication of this Journal is an inestimable boon to the legal profession. We are not aware of the extent of its circulation in Brantford; it *should be taken*, however by every member of the Bar, in town, as well every Magistrate and Municipal Officer. Nor would politicians find it unprofitable, to pursue its highly instructive pages. This journal is admitted by Trans-Atlantic writers to be the most ably conducted Journal of the profession in America. The Publishers have our sincere thanks for the present number.—*Brant Herald*, Nov. 16th., 1858.

The *Law Journal* is beautifully printed on excellent paper, and, indeed, equals in its typographical appearance, the legal record published in the metropolis of the United Kingdom. $4 a year is a very inconsiderable sum for so much valuable information as the *Law Journal* contains.—*Port Hope Atlas.*

UPPER CANADA LAW JOURNAL, Maclear & Co., Toronto, January.—We have so frequently spoken in the highest terms of the merits of the above periodical, that it is scarcely necessary for us to do anything more than acknowledge the receipt of the last number. It is almost as essential to Municipal officers and Magistrates as it is to Lawyers.—*Stratford Examiner, 4th May*, 1859.

THE UPPER CANADA LAW JOURNAL for March. By W. D Ardagh and Robt. A. Harrison, Barristers at Law. Maclear & Co., Toronto. $4 a year cash.—Above we have joined together for a single notice, the most useful periodical that any country can produce, and happy are we to add, that it appears to be well and deservedly patronised. We have so repeatedly alluded to its merits, that the reader will readily excuse any longer make-mention.—*Whig, May, 18th* 1859.

THE UPPER CANADA LAW JOURNAL, *and Local Courts Gazette.*

The August number of this sterling publication has been at hand several days. It opens with a well written original paper on "Law, Equity and Justice," which considers the questions so frequently asked by those who have been, as they think, victimized in a legal controversy:—"Is Law not Equity? Is Equity not Law?" Liability of Corporations, and Liability of Steamboat Proprietors, are next in order, and will be found worth a careful perusal. A "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," is continued from the July number; it is compiled with care, and should be read by every young Canadian.

The correspondence department is very full this month. There are letters from several Division Court Clerks, asking the opinions of the Editors on points of law with which it is important every clerk should be familiar. There are communications too from Justices of the Peace, asking information upon a great variety of subjects. All questions are answered by the Editors; and a glance at this department must be sufficient to satisfy every Clerk, Justice of the Peace, Bailiff or Constable that in no way can they invest $4 with so much advantage to themselves, as in paying that amount as a year's subscription to the *Law Journal*. The report of the case, "Regina v. Cummings," by Robert A. Harrison, Esq., decided in the Court of Error and Appeal, is very full, and of course will receive the careful attention of the profession. The Reports of Law Courts add greatly to the value of the publication.

THE UPPER CANADA LAW JOURNAL, &c.

We are indebted to the publishers of this interesting law periodical for the numbers till this sale of the present volume, (Vol. 4.) commencing with January last. Its pages have been looked over by us with much interest, It is the only legal periodical published in Upper Canada, and is conducted with great ability. Each number contains elaborate original articles on professional subjects, mainly of importanec to the bar of Canada, but also entertaining to that of the United States— communications on mooted points and replies thereto, serial instructions to magistrates and other officers—and numerous decisions of the Division and other Courts of Canada. We welcome it as an excellent exchange.—*The Pittsburgh Legal Journal, Sept. 4th*, 1858.

THE LAW JOURNAL, for February, has been lying on our table for some time. As usual, it is full of valuable information. We are glad to find that the circulation of this very ably conducted publication is on the increase—that it is now found in every Barrister.s office of note, in the hands of Division Court Clerks, Sheriffs and Bailiffs.—*Hope Guide, March 9th* 1859.

THE UPPER CANADA LAW JOURNAL for July. Maclear & Co., Toronto. $4 a year.—To this useful publication the public are indebted for the only reliable law intelligence. For instance, after all the Toronto newspapers have given a garbled account of the legal proceedings in the case of Moses R. Cummings, out comes the *Law Journal* and speaks the truth, viz: that the Court of Appeal has ordered a new Trial, the prisoner remaining in custody.—*British Whig, July* 6, 1858.

THE UPPER CANADA LAW JOURNAL. Toronto: Maclear & Co.—The July number of this valuable journal has reached us. As it is the only publication of the kind in the Province, it ought to have an extensive circulation, and should be in the hands of all business as well as professional men. The price of subscription is four dollars a year in advance.—*Spectator, July* 7, 1858.

Upper Canada Law Journal.—This highly interesting and useful journal for June has been received. It contains a vast amount of information. The articles on "The work of Legislation," "Law Reforms of the Session," "Historical Sketch of the Constitution, Laws and Legal Tribunals of Canada," are well worthy of a careful perusal. This work should be found in the office of every merchant and trader in the Province, being, in our opinion, of quite as much use to the merchant as the lawyer.—*Hamilton Spectator.*—*June* 8, 1858,

U. C. Law Journal, August, 1858: Toronto Maclear & Co.

This valuable law serial still maintains its high position. We hope its circulation is increasing. Every Magistrate should patronize it. We are happy to learn from the number before us that Mr. Harrison's "Common Law Procedure Acts" is highly spoken of by the English *Jurist*, a legal authority of considerable weight. He says it is "almost as useful to the English as to the Canadian Lawyer, and is not only the most recent, but by far the most complete edition which we (*Jurist*) have seen of these important acts of parliament."—*Cobourg Star, August 11th*, 1858.

UPPER CANADA LAW JOURNAL.—The August number of the *Upper Canada Law Journal and Local Courts Gazette*, has just come to hand. Like its predecessors, it maintains its high standing as a periodical which should be studied by every Upper Canadian Law Student; and carefully read, and referred to, by every intelligent Canadian who would become acquainted with the laws of his adopted country, and see how these laws are administered in her courts of Justice.—*Stratford Examiner, August 12th*, 1858.

DIARY FOR MARCH.

1	Friday	Last day for ret of C.L. Rolls where time ext by Mun Council
..	SUNDAY	*3rd Sunday in Lent*
4	Monday	Last day for notice of Trial County Court
5	Tuesday	Chancery Examination Term, London & Belleville, commences Last day for notice Brantford and Kingston
10	SUNDAY	*4th Sunday in Lent*
11	Monday	Last day for service of Writ for Toronto.
12	Tuesday	Quarter Sessions and County Court Sittings in each County Last day for not Chancery Exam Hamilton & Brockville.
17	SUNDAY	*5th Sunday in Lent*
19	Tuesday	Chanc Examination Term, Brantford & Kingston, commences. Last day for notice for Barrie and Ottawa.
21	Thursday	Last day to declare for Toronto
24	SUNDAY	*Palm Sunday*
26	Tuesday	Chancery Exam Term, Hamilton and Brockville, commences. Last day for notice for Goderich and Cornwall
29	Friday	*Good Friday.*
30	Saturday	Last day for notice of Trial for Toronto.
31	SUNDAY	*Easter Sunday*

TO CORRESPONDENTS—*See last page*

The Upper Canada Law Journal.

MARCH, 1861.

THE ENGLISH WRIT OF HABEAS CORPUS.

John Anderson, the negro, arrested under the provisions of the Ashburton Treaty and the Provincial Statute passed to give effect to that treaty, and recently discharged by our Court of Common Pleas, upon the ground of defects in the warrant of commitment under which he was arrested, is reported to have said, when discharged, "that he never thought there was so much law in Canada as he had experienced."

The remark, though bluntly put, is indicative of the many vexed questions to which the arrest, detention, and subsequent discharge of this man gave rise. From the day of his arrest till the day of his remand by the Court of Queen's Bench, in Upper Canada, much doubt was entertained as to the proper construction of the provisions of the treaty and statute under which he was arrested, and by virtue of which he was detained in custody. From the day of his remand by our Court of Queen's Bench till the day of his discharge by our Court of Common Pleas there was a continued ferment throughout the Province. That ferment was not lessened by a knowledge of the fact that the Court of Queen's Bench *in England* had presumed to exercise a jurisdiction *in Canada* opposed to every principle of legislative independence, judicial independence, and of self-government. Though divided, as our people were, in the construction of the Ashburton Treaty, all united in the opinion that the English Court, in sending a writ of *habeas corpus ad subjiciendum* to Canada, had done wrong. Men, legal and lay, joined in the condemnation of the proceeding, as being one calculated only to sting us in the most sensitive part of our body corporate—our national pride. Men of all politics, conservative and reform, ministerial and opposition, pronounced the act of the English Court both high-handed and unfounded. Birth was given to a feeling of resistance which will not in all probability slumber till the assumed jurisdiction of the English Court is tested and defeated on national grounds.

When, however, we speak of a feeling of resistance, we do not desire to depict overt acts of treason; we do not intend to indorse the absurd stories circulated in the neighbouring States, about "the ring of 1775." Such stories were a libel on our loyalty. While determined to resist encroachments on our rights as an independent colony, by all constitutional means, there never was nor is there the slightest intention to kindle the flame of rebellion.

Men argue that if an English Court can command *our* Sheriffs to obey writs of *habeas corpus*, why not writs of execution and other process of a similar kind? They ask themselves, where is to be the limit? Who is to define it?

There was a time when Colonial Sheriffs and other public officers were appointed in England, under the great seal of England, and imposed upon us whether we liked them or not. That time is passed. Then our Sheriffs were English officers appointed by English authority. Then English Courts might have attempted to issue writs to Canada without much murmur, but now, when in the enjoyment of powers of self-government, we appoint our own officers by our own provincial seal and dismiss them when we please, the exercise of such a jurisdiction grates upon our ears.

But the fact that the exercise of the jurisdiction is distasteful is no argument against the existence of the jurisdiction itself, but rather against the exercise of it. Does the jurisdiction in fact exist? If it does, was it rightly and discreetly exercised in the case of Anderson? These are questions, to the solution of which we are about to apply our mind.

The writ issued was a *habeas corpus*, the right to which is one of the great bulwarks of the liberty of a British subject. So long as the *right* to that writ exists, so long must liberty in Britain be more than a name. The right is only suspended under circumstances of great national peril. The writ is described by Blackstone as a high prerogative writ, running into all parts of the King's dominions. The reason he assigns is, that the King is at all times entitled to have an account why the liberty of any of his subjects

is restrained, wherever that restraint may be inflicted.—(3 Black. Com. p. 131.) But is not the Queen as much present in the Superior Courts in Toronto as she is in the Superior Courts in London? And if she, a body corporate, receives the information as to the cause of the detention in custody of her subject in Toronto, is it necessary for her once more to hear the same story in London? The presence of the Queen in her Courts at Westminster is a legal fiction. She is as much present in her Courts at Toronto as in Westminster. When we speak of the Queen we do not mean Victoria, we mean the Crown—the body corporate of that name. In England, the Crown has its great seal. In Canada, the same Crown has a different seal. We therefore see that though the Crown acts in Canada as well as in England, the machinery of its action is not in Canada *the same* as in England.

When we presume to question the jurisdiction of an English court of justice to issue a writ of *habeas corpus* to a Sheriff in Canada, we do not attempt to dispute the *right* of a British subject to the writ. Sir William Blackstone does not say that a writ of *habeas corpus* issued by the Court of Queen's Bench *in England* runs into all parts of Her Majesty's dominions; but simply that the writ, which may be issued in any part of Her Majesty's dominions where there is proper machinery for the purpose, runs into all parts of the jurisdiction that issues it. If he intended more, his remarks made a century since, at a time when colonial independence was unknown, must be read with much qualification as applied to modern times. There is a great distinction between "the plantation" of his time, when a British subject in London could, by an affidavit made in London, have execution against his debtor in a Colony, and our time, when the Colony makes its own laws, has its own courts, and is substantially an independent power. The idea of such a Colony never occurred to the great commentator, and, had it, he would have entertained the idea only to smile at its supposed absurdity or impracticability.

The writ of *habeas corpus ad subjiciendum* may derive its existence when issued from one of three sources—the Common Law, the statute 31 Car. II. c. 2 (passed in 1677), or the statute 56 Geo. III. c. 100 (passed in 1816); and its effect when issued will in some degree depend upon the source of its existence.

The writ is very seldom, if ever, issued at common law. When issued under the statute law it is much more effective, and therefore it is generally issued under the 31 Car. II. c. 2. Of the extent of its operation at common law little is known, and that little is not at all satisfactory. Most of the expressions attributed to learned Judges in regard to its effect at common law will be found, when closely examined, to have reference to the writ under the statute of 31 Car. II. c. 2. One thing is clear. The object of the statute was not to diminish the effect of the common law writ, or the powers of the Courts in regard to it, but rather to make the writ more effective and to give increased powers to the Courts, so as to place the writ as nearly as possible within the reach of any person deprived of his liberty in any part of Her Majesty's dominions. We may therefore safely assume that the effect of the writ at common law, and the powers of the Courts in regard to it before the statute, were, if any thing, less than under the statute.

Then what is the effect of the writ under the first statute 31 Car. II. cap. 2, passed in 1677, and the jurisdiction of the English Courts under that statute? By sec. 11 of this act, it is expressly declared that "an *habeas corpus* may be directed and run into any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey, any law or usage to the contrary notwithstanding."

If before this act a writ of *habeas corpus* issued in England would run into the privileged places named, the enactment is unnecessary. If therefore entitled to assume any thing, we must assume that before the enactment the English Courts had not the jurisdiction, and that the enactment was made to confer the jurisdiction. It is, by sec. 16 of the same act, provided, "that if any person or persons, at any time *resident in this realm*, shall have committed any capital offence in Scotland or Ireland, or any of the islands or foreign plantations of the King, his heirs or successors, where he or she *ought to be tried for such offence*, such person or persons may be sent to such place, *there to receive such trial*, in such manner *as the same might have been done before the making of this act.*" Thus the Legislature, so far from intending by this act to interfere with local courts or local jurisdictions in colonies or plantations, for the sake of precaution, expressly provided against any such interference; and went further, by declaring that even residents in England charged with capital offences committed in the plantations, instead of being tried by English Courts, should be sent to the Plantations, there to be tried. The distinction between English Courts and Colonial Courts is here expressly observed.

This tends to support the dictum of Lord Denman in the case of *Carus Wilson*, 7 Q. B. 984, to the effect that "a court within the Queen's dominions, exercising public authority, must be taken to be competent to judge of its own law"—a dictum mentioned with approbation in the more recent case of Dodd, 2 DeG. & J. 510.

It does seem to us that, for the purposes of our inquiry, the Courts in England are as to England as much *local* as

the Courts in Canada are as to Canada *local*, and that, where in each country there are Courts of superior jurisdiction, the assumption by the former of a territorial jurisdiction over the latter, for any purpose whatever, is as if the Courts of Canada were, in spite of the Courts in England, to assume a territorial jurisdiction over England; and we think that this view will be strengthened rather than weakened by a reference to authorities.

Before leaving the statute of Charles, we may as well mention that the "counties" mentioned in it are English counties, and therefore the jurisdiction intended to be exercised, except where otherwise provided, is *a local one*. By sec. 18, it is provided that, "to the intent that no person may avoid his trial at the assizes or general gaol delivery, by procuring his removal before the assizes, at such time as he cannot be brought back to receive his trial there, that after the assizes proclaimed for *that county* where the prisoner is detained no person shall be removed from the common gaol upon any *habeas corpus* granted in pursuance of this act, but upon any such *habeas corpus* shall be brought before the Judge in open court, who is thereupon to do what to justice shall appertain." Until lately there were no such divisions as "counties" in Canada, these divisions being almost peculiar to England, and this of itself would be one argument to show that the jurisdiction was restricted to England, where counties at the time of the passing of the act did and do still exist. But look at the absurdity of attempting practically to apply the jurisdiction territorially to a colony like Canada? The Court of Queen's Bench in England, without knowing any thing of the time when assizes are held in Canada, or whether assizes are in reality held here at all or not, grants a *habeas* to bring up the body of a man in gaol, accused of an indictable crime in Canada? The answer might be that the assizes had been proclaimed for the county in which he is imprisoned, and therefore that he must be brought before *our* Judge of Assize. Our Sheriff might in fact be commanded at that very time to have the body before our Court of Assize. If he obeyed the English writ he would be punished by our Court for disobeying their writ, and, if he obeyed our writ, ought for the same reason to be punished by the English Court for disobeying theirs. Between two fires the Sheriff would be distracted, and his usefulness as an executive officer of our courts, to whom *alone* he is responsible for his conduct, be seriously impaired. His duty is to obey the mandates of our courts, no matter what the consequence in relation to foreign courts. And yet by sec. 5 of the statute of Car. II. the act of obedience to the mandates of our courts. which might be in effect a disobedience of the mandates of the English courts, would, under certain circumstances, if the English writ were to have any operation in Canada, render the Sheriff "incapable to hold or to exercise his office!" In other words, the performance by a Canadian Sheriff of his duty towards the Canadian Courts, might have the effect in England of rendering him incapable of further holding or exercising his office—an office conferred upon him by colonial authority, and the duties of which he had properly discharged according to the laws of Canada!

The only way of preventing such a conflict is to read the statute as giving to English Courts local jurisdiction in England and to Canadian Courts local jurisdiction in Canada; and this seems to us to be its true construction.

Next, as to the third source of a *habeas corpus*, 56 Geo. III. c. 100, passed on 1st July, 1816. In this act the Colonies are not named. It cannot therefore, according to well understood legal principles, have any force whatever in the Colonies. We may however look at it, in order to see how far the English Legislature designed English Courts to have more than local jurisdiction. By the first section, it is enacted "That where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit), within that part of Great Britain called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or *Man* (for the first time mentioned), it shall and may be lawful for any one of the Barons of the Exchequer, of the degree of the coif, as well as for any one of the Justices of one Bench or the other; *and where any person shall be so confined in Ireland*, it shall and may be lawful for any one of the Barons of the Exchequor, or of the Justices of the one Bench or the other, *in Ireland*, and they are hereby required, upon complaint, &c."

By the previous act (31 Car. II. c. 2) it was declared that the writ issued in England might run into "any county palatine, the cinque ports, or other privileged places within the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey," but no mention was made either of the isle of Man or of Ireland. The Isle of Man having, in the mean time, been by Act of the Legislature 5 Geo. III. cap. 26, expressly annexed to England, extended operation was given to the writ; but as to Ireland, though in the words of Sir William Blackstone, a part "of the Queen's dominions," still, having Superior Courts *of its own*, the power to issue the writ for Ireland was left to be exercised as before, by *its own courts*.

What, for the purposes of our inquiry, is the difference between Ireland and Canada? Each, is governed by a Viceroy. In each, the Crown acts by deputy. Each, has its Superior Courts of Law and Equity. One is as much

subject to Imperial control as the other. In fact, Ireland is at the present time more under the direct dominion of the Crown than Canada. Canada has its own legislature *Ireland has not*. Certainly there is more resemblance between Ireland and Canada than between Jersey and Canada —the Isle of Man and Canada—Calais and Canada—St. Helena and Canada? And yet English Courts hesitate not to exercise a jurisdiction *in Canada* which dare not be attempted *in Ireland!*

It is said that the laws of England and of Canada are identical. This is a mistake. The laws of Canada are no more identical with those of England than are the laws of Ireland identical with those of England. Ireland, before it came under British sway, was a distinct kingdom—a foreign dominion. Canada, before 1759, was a French colony—a foreign dominion—a dominion of the crown of France. When Ireland was, in 1801, brought under the direct dominion of England, the laws of Ireland were preserved. So when Canada was, in 1759, surrendered to the British, it was expressly stipulated that she should retain her former laws It is true that the criminal laws of Canada resemble those of England; but the same thing may be said of the criminal laws of Ireland. When Canada, in 1792, was divided into two Provinces, Upper and Lower Canada, with independent legislative powers, it is true that the Legislature declared that in all matters of controversy relative to property and civil rights, resort should be had to the laws of England as the rule for the decision of the same; but it must be borne in mind that, since 1792, the legislature of Upper Canada and (now that the Provinces are re-united) of Canada have altered the laws of England as it existed in 1792, in an endless variety of ways. It must also be borne in mind that since that year England has also been altering her laws. Though in 1792 the laws of both countries, in relation to civil rights, were as nearly as possible identical, since that year England and Canada have been travelling in different directions—each making laws for the government of its own people, without any regard to the laws of the other. This remark applies with as much force to the criminal as to the civil laws of both countries. How then can it be said that, in 1861, the laws of the two countries are identical? They are in truth no more identical than are the laws of the State of New York and of England. And so far as the oneness of the laws is relied upon to give jurisdiction for the issue of a writ of *habeas corpus*, the writ might as well go to the State of New York, or any other State of the Union, as come to Canada.

It is said, however, that the jurisdiction did once exist, and that it has not been taken away by the Legislature. Did it ever exist as regards Canada, or a colony in the situation of Canada? We deny that it ever did, and challenge the proof.

We are told that it lies to Jersey —(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 357; 2 Burr. 856; *Belson in re*, 7 Moo. P. C. 114; *In re Carus Wilson*, 7 Q.B. 984; *In re Brennan*, 10 Q. B. 492; *In re Dodd*, 4 Jur. N. S. 291.) What is the analogy between Jersey and Canada? It is true that Jersey is governed by laws and customs somewhat different from those of England. It is true that this island is not bound by an act of the English Parliament, unless particularly named in it. It is true that all causes are originally determined by their own officers, the bailiffs and jurats of the island. It i true that an appeal lies from them to the Queen and Council, as the last resort. But it is not equally true that as far back as 1677, and before any of the decisions above quoted, it was by Act of Parliament expressly enacted that the writ of *habeas corpus* issued by Courts in England should run to Jersey. Is there any such Act of Parliament in relation to Canada? Is there, moreover, any comparison to be made between the circumstances of the Province of Canada, with its independent legislative government, and the Island of Jersey, governed by the ducal customs of Normandy?

We are told that the writ runs to the Isle of Man —(*Ex parte Crawford*, 13 Q.B. 613.) Is there any analogy between Canada and the Isle of Man, which, in 1765, was purchased by England for £70,000? Is it not true that, by the statute 5 Geo. III. cap. 26, the whole island and all its dependencies was unalienably vested in the British crown, as an integral part of the British Empire? Is it not true that since (and not before) the Vesting Act, the English Legislature has provided for the issue of the writ of *habeas corpus* to the Isle of Man? Is it not true that the decision as to the Isle of Man was since the Vesting Act, and has express reference to it? Are there any such acts in relation to Canada? There are none. The comparison is not only void of analogy but ridiculous in its nature, viewed either from a legal or a national point of view.

We are told that the writ ran to Calais when in the possession of the British?—(Bac. Abr. Habeas Corpus, B. 2; Viner's Abr. Habeas Corpus, E. 2; Anon, 1 Ventris, 239; 2 Burr. 856.) Of this there is no satisfactory proof, nothing except dicta without foundation, and apparent precedents, about which little or nothing can be ascertained. But was Calais such a colony as Canada—a colony possessing independent legislative and judicial powers? The reference to the Calais precedents is of no weight, not only because we have no reliable report of them, but because there is no parallel between Calais in the fifteenth century and Canada in the nineteenth century. The comparison is

absurd, and could never have been made by any person possessing the slightest knowledge of Canada, its constitution, its institutions, or its resources.

We are told that the writ runs to the Island of St. Helena. There is no authority for this assertion. The case cited (*Ex parte Lees*, 9 El. B. & El. 828) is no authority for the position. The writ of *habeas corpus* as well as *certiorari*, asked for in that case, was refused. Lord Campbell, in giving judgment, said "This was an application for a writ of error or *certiorari*, to be directed to the Supreme Court of the Island of St Helena, to bring before the Court of Queen's Bench in England the record of a conviction alleged to be erroneous. Some old precedents of writs issued out of this Court to the French dominions of our early Sovereigns were cited to show that the writs might lawfully issue. No precedent, however, of any such proceeding with respect to a dependency like St. Helena, for several centuries, was brought before us; and it was not at all explained in what manner our writs of error, *certiorari*, or *habeas corpus*, could be enforced in such dependencies. Without, however, deciding how far we might be empowered to issue such a writ, we are clearly of opinion that we ought not to direct such a writ to issue in the present case."

England's colonies of the present day are not what her colonies were in the fifteenth and sixteenth centuries. Even as to the latter, however, we assert there is no satisfactory proof of the exercise of a jurisdiction such as was recently exercised with regard to Canada. The jurisdiction is one which in our belief never did exist, and for which in modern times at least there is no necessity. No case can be found of a writ of *habeas corpus* ever having issued from the English Courts to Canada, or to any other colony of independent legislature and independent judiciary. The jurisdiction appears to us to have been usurped in the Anderson case. The cases of the Isle of Man and Jersey, chiefly relied upon by the Court when ordering the issue of the writ, are, for reasons already mentioned, wholly inapplicable; and the case of St Helena, so far as applicable, is an authority against the jurisdiction.

The exercise of the jurisdiction appears to us to have been the more extraordinary, if the right to exercise it had been undoubted, when it is considered that the Court was not under any obligation to issue the writ upon the materials before them.

Anderson, who, when escaping from slavery in the State of Missouri, was arrested under the laws of that State by one Digges, slew Digges and fled to Canada. His surrender as a fugitive from the criminal justice of Missouri was demanded of Canada. He contended that he was not guilty of "murder," within the meaning of that term as used in the Ashburton Treaty, which provides for the surrender of fugitives from justice, as between Great Britain and the United States. He appealed to the Court of Queen's Bench for Upper Canada, a court of superior jurisdiction in this colony, and his appeal failed. He was remanded under warrant of the Court to his former custody. His case was about to be appealed to the Court of Error and Appeal, or Supreme Court of Upper Canada. A cry of sympathy for an escaped slave is raised and is wafted across the Atlantic. The Secretary of an Anti-Slavery Society in London hears the cry, and, fired with zeal, hastens to make an affidavit in order to invoke the aid of an English Court by writ of *habeas corpus*. He knows nothing of the facts, but still he must make an affidavit. He swears that Anderson is a British subject domiciled in Toronto. He swears that Anderson is illegally detained in the gaol of that city. He swears that Anderson has never been legally accused or charged with or legally tried or sentenced for the commission of any crime or of any offence against the laws in force in Canada. He swears that Anderson was not otherwise liable to be imprisoned or detained under or in virtue of any such laws. He also swears that, unless a peremptory writ is issued, the life of Anderson will be exposed to the greatest and to immediate danger. This was what might be called a pretty stiff affidavit. It was made by a man more than 3,000 miles distant from the place where all the occurrences about which he swore took place, but of which he had no personal knowledge. He, however, took good care to suppress facts in regard to the cause of Anderson's detention, about which, if he knew anything of the case, he must have had some knowledge. With him, however, the end probably justified the means.

We say there was no obligation on the English Court of Queen's Bench to grant the writ on such materials. In the first place, the jurisdiction was, to say the least of it, doubtful. In the second place, the affidavit was not made by the prisoner himself, nor was it shown that he was so coerced as to be unable to make an affidavit.—(See *In re Parker et al*, 5 M. & W. 32; *In re Carus Wilson*, 7 Q B. 984.) In the third place, the affidavit, on its face, bore evidence of the fact that it was made by a man who appeared to be as reckless in taking an oath as he was unwarranted by the facts in making it. In the fourth place, the writ though of right is not of course.—(*Hobhouse's case*, 3 B. & Ald. 420; *Ex parte Knight*, 2 M. & W. 106.)

The course that the Court should have adopted would have been to have issued a rule to show cause why the writ should not issue.—(*In re Crawford*, 13 Q. B. 613.) Had this course been adopted, the rule would certainly have been discharged, because of the deception practised by the applicant in fraudulently suppressing facts material to be

known on the application for the rule.—(*Carus Wilson's case*, 7 Q. B. 1000.) Besides the right to the writ by a person in a colony is grounded on the fact that the person in custody is a British subject, and the affidavit which stated that Anderson was a British subject domiciled in Toronto was positively untrue. He was a foreigner domiciled in Upper Canada, but not a British subject. True it is that a foreigner, *while in England*, is entitled to the protection of English laws and to the English writ of *habeas corpus* (*case of Hottentot Venus*, 13 East. 195; *Canadian Prisoners*, 1 P & D. 516; 9 A. & E. 731; S. C. *Ex parte Besset*, 6 Q. B. 481); but the reason urged by those who support the jurisdiction of an English Court to issue writs of *habeas corpus* beyond its local jurisdiction, is that the Queen "is entitled to have an account why the liberty of any of *her subjects* is restrained, wherever that restraint may be inflicted." So that in the affidavit produced to the English Court there was not only *suppressio veri* but *suggestio falsi?*

The remarks which we have made on this troublesome question do not arise from any want of respect for the English Court of Queen's Bench. We hold that and the other English Courts of superior jurisdiction in much veneration. But we do regret the occasion which rendered necessary such remarks as we have made. It might have been easily avoided, and by not avoiding it the Court of Queen's Bench in England has established a precedent of which the Anti-Slavery Society in London will not be slow to avail itself whenever a fugitive to Canada from crime committed in the United States happens to be a colored man. We do not advance an opinion on the vexed question whether Anderson did or did not commit the crime of murder within the intent and meaning of the Ashburton Treaty. But we do say that color should be no immunity against punishment for crime. We know by experience that when a fugitive from the United States, accused of crime, happens to be a colored man, nothing is more simple than to get up a cry of slave hunters, slave hounds, &c., and that no cry is more greedily seized in England than that same cry. It is just possible for men, in their zeal for the rights of the slave, to overlook the responsibility of the criminal and so beget results the reverse of beneficial to society, either in Canada or Great Britain.

We yield to none in sympathy for the slave. We abhor the system. We deplore its consequences. But while we sympathise with the slave, while we abhor slavery, while we deplore its consequences, we cannot close our eyes to the fact that the recent action of the Court of Queen's Bench in England was alike disrespectful to the rights of our colonial judiciary and dangerous to our colonial independence. Much as we admire the English Bench, we cannot allow that admiration to blind us to the excellence of our Colonial Bench. We have men on the Bench in Canada second to none in England. They have our utmost, our unbounded confidence. It will never do to allow that confidence to be shaken, that Bench to be humiliated, by the nod of an English Chief Justice.

Standing in the relation that England and Canada bear to each other, the jurisdiction recently arrogated by the English Court of Queen's Bench can only be supported on the hypothesis of the existence of an appellate jurisdiction —a superior right—superior power. But provision is made for appeals from the decisions of our Courts to Her Majesty in Privy Council, in the same manner that appeals lie from the decisions of English Courts to Her Majesty in the House of Lords. That and that alone is the only recognized, the only constitutional, channel of appeal from the colonies. With it Canada is at present satisfied. But whenever an English Court, in its zeal for the supposed cause of the slave, or from any other cause, without having appellate jurisdiction, choses at the instance of the Secretary of an Anti-Slavery Association, or of any other zealot, to exercise such a jurisdiction, it is a duty which we owe to ourselves—to our laws—to our institutions—and to the laws and institutions of the mother country, to protest against the exercise of the jurisdiction.

We sincerely believe that if the English Court of Queen's Bench had not been as ignorant of our laws and institutions as it appears to have been of our geographical position, the writ would never have been issued. This, however, is any thing but a justification for an act so fraught with consequences so mischievous.

We object not so much to the exercise of the jurisdiction in the particular case which has occasioned these remarks, as to its exercise on any occasion whatever. The exercise of such a jurisdiction is alike distasteful to our people, dangerous to our institutions, and hostile to our ideas of self-reliance and self-government. If we pride ourselves in one thing more than another it is in our ability for self government; and if we are grateful to the mother country for any one thing more than another, it is that she has confided to us the reins of government. Our course is onward and forward. While pushing forward to take our place on the pedestal of nations, we have well nigh forgotten the acts of colonial misrule under which we at one time suffered. A recurrence to former checks will not only revive the recollection of what is past, but make us restive in the future.

It is to be hoped that the Provincial Parliament, which is about to assemble in Quebec, will take up the subject of the English *habeas corpus*, and have an understanding with the Imperial authorities about it. Few will be found to maintain the existence of such a jurisdiction, notwithstand-

ing the ex parte determination of the English Queen's Bench to the contrary None will be found to justify the exercise of the jurisdiction on any occasion whatever.

SPRING CIRCUITS, 1861.

EASTERN CIRCUIT.

The Hon. Mr. JUSTICE BURNS.

Perth	Tuesday,	16th April
Brockville	Monday,	22nd April.
Ottawa	Monday,	29th April.
L'Orignal	Monday,	6th May.
Cornwall	Friday,	10th May.

MIDLAND CIRCUIT

The Hon. Mr. JUSTICE McLEAN.

Cobourg	Tuesday,	19th March.
Peterboro'	Thursday,	28th March.
Whitby	Tuesday,	2nd April.
Belleville	Tuesday,	9th April.
Kingston	Tuesday,	23rd April.
Picton	Tuesday,	7th May.

HOME CIRCUIT

The Hon. Mr. JUSTICE RICHARDS.

Milton	Wednesday,	13th March.
Hamilton	Monday,	18th March.
Niagara	Tuesday,	2nd April.
Welland	Tuesday,	9th April
Barrie	Tuesday,	16th April.
Owen's Sound	Wednesday,	8th May.

OXFORD CIRCUIT.

The Hon. CHIEF JUSTICE DRAPER.

Stratford	Wednesday,	13th March.
Berlin	Monday,	18th March.
Guelph	Monday,	25th March.
Woodstock	Tuesday,	2nd April.
Cayuga	Wednesday,	1st May.
Brantford	Monday,	6th May.
Simcoe	Wednesday,	13th May.

WESTERN CIRCUIT.

The Hon. Mr. JUSTICE HAGARTY.

Sarnia	Thursday,	14th March.
Sandwich	Monday,	18th March.
Chatham	Monday,	25th March.
London	Monday,	8th April
St. Thomas	Thursday,	18th April.
Goderich	Tuesday,	30th April.

TORONTO

The Hon. SIR JOHN BEVERLY ROBINSON, CHIEF JUSTICE.
Monday, 8th April.

HILARY TERM, 14 VIC.

The following gentlemen were called to the Bar:

Messrs. P. O'Brien, T. B. Pardee, Sarnia; W. H. Scott, B.A., Toronto; C. F. Goodhue, London; A. Bruce, B.A., Hamilton, J. A. McKenzie, B.A., Sarnia; G. W. Des Vœux, B.A., Toronto; G. S. Papps, LL.B., Hamilton; C. D. Paul, M.A., St. Thomas; C. I. Benson, B.A., Toronto; James Windeat, Toronto.

The following, were admitted as attorneys-at-law:

Richard T. Huggard, London; Morgan Jellett, jun., Belleville; John Wright, Port Hope; Edward C. Campbell, Niagara; Thomas Boys, Barrie; Thomas Deacon, Perth; D. C. Macdonald, London; M. McCarthy, Barrie; J. A. Ardagh, Toronto; H. Wethey, Toronto; J. Carpenter, Toronto; John Paterson, Toronto; C. D. Paul, St. Thomas; G. S. Papps, Hamilton; W. H. Scott, Toronto; C. H. Benson, Toronto; C. F. Goodhue, London.

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INAUGURAL LECTURE.

Delivered at the University of Queen's College, Kingston, C. W., on February 4, 1861, at the Inauguration of the Faculty of Law

BY W. G. DRAPER, ESQ., M.A.

The custom of having Law Readers in the English Inns of Court, is one of great antiquity, for we find that so long ago as 1580, the celebrated Sir Edward Coke, one of England's most erudite Jurists, was appointed by the Benchers of the Inner Temple, Reader of Lyon's Inn,—an Inn of Chancery under their rule,—where he lectured to Students at Law and Attorneys. I have neither time nor opportunity to enquire whether Lectures or Readers were ever appointed prior to this time; but it proves the practice to be an ancient one, which is to a certain extent an argument in its favour.

The practice has, I believe, not been regularly continued in the English Inns of Court, but on the contrary, has been prosecuted at intervals; and it is only within the last half century,—I might say, within the last few years,—that it has become a positive institution.

An authority of no mean standing at the English Bar, has asserted that the system of teaching Law by means of Lectures, always has been, and must prove a failure. I mean Dr. Samuel Warren, who in his Treatise on the Study of the Law, p. 13 *et seq*, gives his reasons therefor as follows: "The Lectures present the Student with, no doubt, a well tempered weapon, but make no attempt to teach him how it must be used."

Dr. Warren further alludes to the various failures to establish Law Lectures in England, instancing among others, the attempt in the Inner Temple Hall, made by Messrs. Starkie and Austen, two most able professional men, as a proof of the futility of making such trials, and asserting that the almost universal opinion of the profession then was, that the attempt would not be repeated.

There was certainly a great deal of force in these objections of Dr. Warren at the time of his writing them, some sixteen or eighteen years ago.

The plan then adopted was, to give Lectures and nothing but Lectures,—learned and erudite disquisitions on the most difficult and abstruse principles of Law which were written out at great length, and read over to the Student in a period of time not exceeding an hour's duration. The idea appearing to be not to convey instruction, but to write a brilliant essay.

I cannot better illustrate my meaning than by giving a portion of a summary of a Lecture given by Professor Amos, who delivered a course at the London University in 1834-'5. it runs thus: "Corporeal, Incorporeal, and Derelict property; Blackstone's Classification; Property, why called Incorporeal; Corporeal profits and Incorporeal property; Modes of transferring property; Livery of Seisin; Statute of Frauds; Uses; Effect of Statute Henry VIII. Springing and shifting Uses; Transfer by Deeds, Effect of delivery; Statutes requiring signature contrasted with Common Law; Authorities respecting Execution of Deeds collected; Escrows' Antiquities of Deeds; Maddox's Formulare; Spelman's Posthuma," and so on for ever so much more. Now judging from the summary, the Lectures must have been most abtruse. Let any one get these Lectures and read them for his own benefit, and it will take a long time thoroughly to comprehend the different subjects treated of,—even if the reader have been many years at the Bar. If that be so, how much more difficult for a Student to comprehend this jargon, and carry away the finest subtleties of the English Law in their heads, in the short period of one hour. The impossibility is apparent, and hence, the failure of the system.—the only wonder being, that the acute penetration of English Lawyers passed over, without notice, so glaring an absurdity.

In England, now-a-days, a different plan is being adopted, as well at the Universities, as at the Inns of Court, at the

King's College, and the Incorporated Law Society, viz: To publish a list of works on which the Lecturer discourses during the hours of Lecture. And secondly, to hold public examinations, at the end of each Session upon the works treated of.

In the first system, the Student would scarcely be able to take down half-a-dozen notes on the subjects treated of. In the second, he has the advantage of being able to prepare himself, by reading the text-book beforehand, so that any difficulties encountered in the course of his study, can be easily solved and removed by the Lecturer.

With ordinary care and ability, no Student could, under this system, fail to pass the requisite examination, and at the end of his three year's course, obtain his Degree of Bachelor of Laws, and the benefit which such Degree confers. And while on this point, I may as well mention what such benefits are.

Any Student articled to a practising Attorney before 1st March, 1860, will only be required to serve three years, provided he takes a Degree either in Arts or Laws. If articled after 1st March, 1860, the Student must serve for three years after taking his degree.

And any person having taken a Degree, may be admitted to practice at the Bar in Upper Canada, after having been on the Law Society's Books for three instead of five years,—which is required if no Degree has been conferred—and in case of Degrees conferred in Upper Canada, the Student may be admitted to the Bar at the end of three years, notwithstanding his having been entered on the Law Society's Books before taking the Degree,—provided he was entered prior to 1st March, 1860—otherwise the Degree must be prior to the date of his admission.

Having referred thus casually to the system about to be adopted here, and to the advantages which will accrue therefrom, I will now proceed to give a sketch of the difference which exists between the Profession in England, in America, or the United States, and in this country; offer a few remarks upon the different systems; shall next endeavour to give a slight history of the rise and progress of Law and Lawyers in Canada, and conclude with a few suggestions on the Study of the Law, and the various advantages which belongs to our profession.

In England, the different branches of the profession are kept distinct and separate. There is no amalgamation between Barristers and Attorneys, as there is here. To a certain extent, the Barrister looks down upon the Attorney,—although in a vast measure he is dependent on him for his success. Indeed, in former days, I believe it was considered highly derogatary for a Barrister—especially if he were young at his profession—to be seen conversing with an Attorney, as it was considered to be symptomatic of "touting for briefs." No better illustration of this feeling can be given than by relating an anecdote of the late Lord Norbury, who, being once applied to for a shilling subscription to bury a pauper Attorney, waggishly pulled out a guinea, and tendering it to the applicant, said: "What! only a shilling to bury an Attorney? Here's a guinea! Go and bury one-and-twenty of 'em."

The profession,—as in this country—is divided into two classes, viz: Barristers and Attorneys, and Solicitors. The difference between these two last being that one practices at Common Law and the other in Equity. There are others who follow special branches of the profession, such as Proctors, Conveyancers, Special Pleaders, &c.

In the United States there is no such distinction. The term *Lawyer* indicates one who practices all the branches of the Law. Their practical minds and levelling spirit have wiped out all nominal distinctions in the profession. Their only qualification is five year's study in an office, and the passing of an examination. That accomplished, every avenue of distinction which the profession affords is open to the young candidate, without any questions been asked as to whether he studied as a Barrister or an Attorney, at Chancery, or at Common Law.

In Canada, the distinctions between the Barrister and the Attorney or Solicitor, are recognised as in England, with this difference, that it is here permitted to practice all three and combine them together, so that the same person may be at once Barrister and Attorney and Solicitor.

The advantage of this system has been recognised by high legal authority in England, and strong opinions expressed in favor of our Canadian plan.

In a number of the *Law Magazine*, and *Law Review* of last year, the following passage occurs.* After referring to the practice of advertising as adopted by Lawyers in Canada, who in a plain straightforward way insert their names as Barristers, Attorneys, Solicitors, Conveyancers, &c., in the different local newspapers, the editor compares it to the English dodge of publishing a book, or an Act of Parliament, somewhat after this style "The Metropolitan House-maid's Window Cleaning Protection Act, 1860, with notes by Job Briefless, Esq., Barrister-at-Law, Lincoln's Inn."

The editor then goes on to say: "In Upper Canada it will be seen the same men practise both as Solicitors and Barristers, and form themselves into firms. The practice is recommended by good sense and reason. The state of Society no doubt favors the combination, and much might be said for the system in England were it openly adopted with us. A paper issued by the Law Amendment Society, published in 1852, on the relation between the Bar, the Attorney and the Client, affords ample evidence of what is the opinion among liberal minded men in the profession on this subject."

Indeed, the Canadian system has been to a certain extent recognised in the High Court of Admiralty in England. This Court is divided into two Inferior Courts, the Instance Court and the Prize Court, in which Barristers and Attorneys practise with equal privileges. It is therefore a matter of great congratulation, as well to those practising the profession, as to those about to commence the study of it, that we have a system which in this respect combines the advantages of both the English and American plans—the dignity and learning of the first, with the practical utility and strong common sense of the Second.

However, on reflecting on the peculiar circumstances under which the practice of the Law was commenced in this country, it will be seen that it could hardly have been otherwise. Now-a-days there is scarcely a village of any note in Canada that does not contain one or two Lawyers, in whose offices some instruction can be obtained as to the practice and principles of the profession, and where suitors can obtain redress. But how different was the case some fifty or sixty years ago, at the commencement of this century? I doubt if there were half-a-dozen Law Books in the country, and there were certainly not a dozen Lawyers.

Litigation must have been slight; but slight as it was, the number of Lawyers was insufficient to meet the demand for their services—so much so that in 1803 Parliament passed an Act authorizing the Govenor to license six individuals to practise Law, and these six together with the other practitioners, were only too glad to transact any description of business, whether as Barristers, Attorneys or Conveyancers. There was scarcely work enough to earn a livelihood by practising all the branches at once; money was scarce, and necessity therefore compelled the adoption of the plan now universal in this country of combining them all together, leaving it optional to the practitioner to choose one or more as it pleased him. No doubt the same reasons, combined with the republican element, produced the same result in the neighbouring States.

* See 6 U. C. Law Journal, p. 157.

When Canada was finally conquered—that is to say after the Treaty of Paris, which was concluded on 10th May, 1763, the English Government granted to the Canadians, being then an entirely French population amounting to about 60,000 souls, the privilege of having their own Laws and Religion, and an Act was passed to that effect by the Imperial Parliament in 1774. At that time Upper Canada was little better than a wilderness, and the necessity for bringing English Laws into this part of the Province did not occur until long after.

The Declaration of Independence in 1774, and the consequent war between Great Britain and the United States, drove a great number of loyal British subjects to take up their abode in that portion of Canada now known as Upper Canada. The population being entirely British, and having increased to a great and unexpected extent for the reasons above given, the application of the French Law was found irksome to a great degree, and it soon became necessary to effect a change.

This was effected through the instrumentality of Lord Dorchester, in 1791, by dividing the province of Canada into Upper and Lower Canada, and giving to the Upper province a separate Constitution and Laws.

The first Upper Canadian Parliament met in Niagara, then called Newark, on 17th September, 1792, and at once passed an Act adopting the Laws of England as the rule for the decision of all controversies relative to property and civil rights. This was the first Act passed, and the second was equally important. It established Trial by Jury for the decision of all issues of fact.

It was not however until the year 1794 that a Court called the Court of King's Bench was established; on this Court was conferred "all such powers and authorities as by the Law of England are incident to a superior Court of Civil and Criminal Jurisdiction," and was to be presided over by a Chief Justice and two puisne Judges,

(To be continued.)

DIVISION COURTS.

TO CORRESPONDENTS

All communications on the subject of Division Courts, or having any relation to Division Courts, are in future to be addressed "To the Editors of the Law Journal, Barrie P. O."

All other communications are as hitherto to be "To the Editors of the Law Journal Toronto."

THE LAW AND PRACTICE OF THE UPPER CANADA DIVISION COURTS.

(Continued from page 37.)

In 1838 the number of courts was 173, the number of commissioners presiding therein 1068—on an average six commissioners (judges) to each court! In some of the larger towns two only of the commissioners for the court presided, the others following in their turn, unless a difference of opinion arose, when it became necessary to have a third commissioner present. In other places three commissioners held the court, and in many places from four to six of these gentlemen occupied the seat of justice at the same time. Each commissioner doubtless had his own opinion on the cases coming before him, and each court its own notions of what was right, changing, it may be supposed, with every change in the presiding commissioners. In fact they had no settled rule of decision; and justice, or more frequently injustice, was administered by a thorough contempt of law. With one thousand and sixty-eight commissioners what could be expected? few of them had that training in the rules and course of law, and forms of business which concerned their office, without which they could not be expected to determine rightly, and keep within the bounds of their jurisdiction.

It is easy to suppose that this would lead to a mischievous and embarrassing contrariety of decision in the same court, and amongst the different courts; so that each tribunal would have almost a law to itself—nay, changing at every sitting of the court.

The intrinsic objections to this system were too marked to admit of question; and they would every day have become more apparent as the growing business of the country presented cases involving new and more complex questions for determination. The rapid advance in the population, wealth, and business operations of Canada would, doubtless, in a few years necessarily have suggested some decided change. But other grounds were superadded of a tangible character, and established a general conviction in the public mind that some improved system should be devised for dispensing justice in the inferior tribunals.

The commissioners of the courts of requests were openly charged not only with ignorance and incapacity, but with corruption and partiality, as well as making merchandize of their office. A number of complaints against them were from time to time preferred to the Executive Government; but in the great majority of cases the parties who felt themselves aggrieved went no further than to express their dissatisfaction in general conversation, or in the public prints of the day.* In fact these courts appear to have fallen into thorough contempt. They failed to give satisfaction in any way to the public, and did not even command that small share of respect which would enable them to preserve common order and decorum at their sittings. Such a state of things could not last long. In May, 1839, the House of Assembly passed an address, praying the Lieutenant Governor to appoint fit and disinterested persons to "make such an investigation and scrutiny into the public departments of the Province, as would enable them to report thereon and recommend such changes in the system as they might deem beneficial."

In compliance with this address commissions were issued in the October following; and to Mr. Draper and Mr. Hagarman (the law officers of the day) was committed the investigation respecting "the courts of requests, and commissioners of these courts."

* Many of the complaints, doubtless, arose from the disappointment of losing suitors: for some of the courts were most respectably constituted, and gave satisfaction in their mode of conducting business. The writer recollects the present Judge of Mid Hesex presiding in the Court of Requests for the town of York, and other gentlemen of education and intelligence; but the great majority of commissioners were in a high degree ignorant, and as presumptuous as they were ignorant.

The points proposed for the consideration of this committee were few. The main one was, "Whether it might not be practicable to provide for the recovery of small debts in a manner more consistent with the fixed principles of law and equity, by dispensing with the services of numerous commissioners then acting in the courts of requests, and substituting a system of occasional circuit courts in each district, by the judge of the district court, with liberty of a jury in certain cases;" and the committee were not restricted to the specified queries, but were invited in the spirit of their instructions to investigate generally the subject proposed.

After a *thorough* investigation of the subject referred to them, the commissioners in the month of December in the same year reported. They arrived at the conclusion that courts of requests ought to be abolished; and in order to render the system of local tribunals for the recovery of small debts useful and efficient, that new courts should be established

They recommended for adoption the organization of courts with similar jurisdiction as to amount to that of the courts of requests, in every district in Upper Canada, presided over by the judges of the several district courts (thereafter to be barristers of three years' standing), and that salary should be substituted for payment by fees. In support of the proposed change was, amongst other grounds, urged the strong probability of uniform principles of decision, not only in each district but throughout the Province: that the jurisdiction of the courts would be confined within the limits intended by the Legislature, and would not be overstepped by district judges, as was often the case by the commissioners of the courts, "from a want of clearly understanding technical distinctions, and the observance of well-established rules of evidence and law, as regards the responsibility of parties; a competent knowledge of which, it was assumed, existed in the different judges of the district courts:" and that the administration of justice would be on a more independent footing by substituting salaries for fees—the existing system making remuneration depend on the amount of business done.

"Without pausing," said the report, "to consider what may have been the effect, the tendency of such a system to encourage litigation is sufficiently obvious; and indeed one ground of accusation against the commissioners which has been urged is, that they are inclined to favor those parties who bring the greater number of suits before them for adjudication."

This report was laid before the House of Assembly the following year but too late in the session for proper consideration, and no further action was taken upon it by the Parliament of Upper Canada.

(*To be continued*)

EXPENSES IN THE COURTS.

The difficulty which Mr. Cossey suggests in his letter published below is worthy of consideration It is one the practical remedy for which is not easy to determine. At the utmost it could only be in cases where a sum certain was claimed for debt or the like that a judgment by default could be entered It would never do to apply the rule to actions for damages. The entry of appearance would be a notice of defence and failing such notice judgment could be entered of course. Look on the other side and suppose a defendant having a good defence fails to enter it with the clerk, a thing that would often occur, or be brought about by contrivance of a dishonest plaintiff—even if a certain time were given to apply to have that judgment set aside there would be no end to the difficulty and inconvenience.

In the case put we have no compassion for B. he could have saved all the expense he was put to by giving a confession of judgment to the bailiff who served the summons, which confession that officer would have been bound to take—or he might after service and a proper time before the Court day, have attended at the clerk's office and acknowledged judgment to him. We happen to know that many of the leading County Judges are not in favour of allowing a judgment by default to be entered in any case by the clerk, believing that it would open the door to fraud and complicate the simple procedure of the Courts.

Mr. Justice Burns we believe, when holding the office of County Judge, was against even the modified rule allowing judgment to be entered on confessions except as now upon order of the judge made at the sittings of the Court The interest of defendants are studiously cared for under the Division Court Law. They can give a confession to either bailiff or clerk, or if the suit is one to which the ordinary confession would not be applicable, the defendant can under rule 30 serve a notice of admission on the plaintiff or on the clerk—and a plaintiff may do the same thing as to defendant's set off The rule will best explain itself.

"With a view to save unnecessary expense in proof, the "defendant (or plaintiff) shall be at liberty to give the opposite party a notice in writing that he will admit on the "trial of the cause any part of the claim (or set off), or any "facts which would otherwise require proof, and after such "notice given the plaintiff (or defendant) shall not be "allowed any expense incurred for the purposes of such "proof—the notice to be according to the form," &c.

We are not prepared to deny that in some cases the present practice may operate to the loss or injury of *plaintiffs* without their ability to prevent it, but deny in toto that defendants can justly find fault with the law as it is in this particular. Perhaps a provision of this kind might be an improvement, allow judgment by default in cases of *debt* for sums certain where the claim entered is accompanied by an affidavit from the plaintiff that the same is due and unpaid. And to guard against an improper judgment standing allow the defendant to apply for a new trial on terms at any time before actual sale of his property.

We should like to hear from clerks on the subject generally. Will some of our old friends state their views?

To the Editors of the Law Journal.

GENTLEMEN,—*The Division Court Act was intended to afford* a cheap and speedy remedy for the recovery of small debts.

I submit that experience in its working shows in many instances a very expensive remedy to litigants under the present procedure, this is inevitable, as plaintiffs rarely know until their cause is called in court whether there is any defence or not, and are often mulcted in heavy expenses for not being prepared or in being expensively prepared when there is no defence, I think the procedure in the County Court should be adopted which would give all parties timely notice of what they are to meet at court and to be prepared for every contingency. I will give you an illustration of what I assert, and it is not an exceptional one; they are numberless. A. of Hamilton, sues B. of the County of Perth, where debt was contracted, and brings with him two witnesses to prove his claim. On the cause being called, B. makes default and consequently no evidence is required. Distance A. and witness travelled, seventy miles, the two witnesses are allowed say, $6 each, amount $12 which may or may not be collected. Then there is A.'s expenses, say $6 more, which in any event is lost. Now, if B. had been required to put in an appearance a certain time before court, and did not do so, $6 would have been saved to A. and $12 to B. The costs had there been judgment by default under the procedure, I recommend would have been only $1 50, a clear saving of $16 50. My plan would be to have the process so framed that defendant should appear in eight or ten days after service with a notice of the day court, would be held for the trial of issues and in default of appearance the clerk might enter judgment, and after a time to be named issue execution thereon. I would allow on every judgment so entered for fee fund the same as an undefended hearing. This method would save thousands of dollars now paid under the present procedure. How very simple for plaintiffs who reside at a distance to write to the clerk if any appearance entered, and if not, how very satisfactory to remain at home and not be compelled to waste valuable time and money in attending court? The plan I propose would at once silences the very frequent and emphatic words of defendant!! I NEVER INTENDED TO DEFEND, AND IT IS HARD TO PAY SO MUCH EXPENSES. I have had long experience in the working of the Division Courts, having been clerk for seven years, and what I say I am confident is the unanimous opinion of all the clerks in the Province. Our judge takes every pains in his power to make the working of the courts as inexpensive as possible. I have often heard him when parties who made no defence complain of the expenses of witnesses who attended to give evidence, say parties must come prepared as they do not know what they have to meet until defendant is called: and the expense must be allowed, at the same time remarking he could not agree but that a different procedure should be adopted by the legislature.

Yours, &c.,

WM. COSSEY.

Clerk 4th D. C. Co. of Perth.

Shakespere, Jan., 8th, 1861.

A FEW VEXED QUESTIONS.

To the Editors of the Law Journal.

Toronto, February 11th, 1861.

GENTLEMEN,—I have been a reader of your Journal for some years past, and can bear testimony to the very great service you have done the public—lay as well as professional—especially in reference to questions affecting the under-current business of the people in the Division Courts and matters concerning the Municipal laws.

Having frequently occasion to do business for myself and others in the Division Courts, I have found a great difference of opinion on some points among persons administering the Division Court laws, so much so as at times to occasion great public inconvenience.

The vexed questions to which I more particularly allude are those, on which I do not know that you have given any opinion in your Journal Suppose a case:—

1st. Where "A" obtains a judgment in Toronto against "B," who lives at Barrie. In due course a transcript is sent from the clerk in Toronto to Barrie for collection, and an execution issued, upon which the bailiff returns "*Nulla Bona.*" "B" then removes to Owen Sound. "A" learns that he has property there, and goes to the clerk in Toronto for a transcript to Owen Sound. The clerk in Toronto turns to his books and finds that the Barrie clerk has sent in a return under the seal of the court, stating that "B" has no goods in his Division. The return is official, and so entered by the Toronto clerk. "A" is told by the Toronto clerk, "I cannot give you a transcript to Grey, you must apply to the clerk at Barrie, all proceedings are removed from this court to Barrie." "A" replies, that the original judgment is not removed but only a transcript, and that as soon as the Toronto clerk officially becomes aware that the Barrie clerk has not made the amount on the transcript from Toronto, he may give a transcript to any other county; or, if he is made aware that "B" has come to reside in the Toronto Division, under such circumstances he can issue an execution in Toronto and levy the amount on the original judgment. The Toronto clerk refuses to issue any transcript in either case, and refers the applicant "A" to the Barrie clerk. Is the clerk right in so acting, in your opinion, and may he not legally issue a transcript to another county on getting a return of "*Nulla Bona*" from Barrie? You will observe in the Consolidated Statutes, (Sec. 139), that the words are used in reference to transcript judgments, that "all proceedings *may be taken* for enforcing and collecting the judgment in such last mentioned Division Court *by the officers thereof* that could be had or taken for the like purpose upon judgments recovered in any Division Court." In the original act the word "may" was "shall." It is contended that the word "may" is merely directory, not concluding proceedings in any other Division. You will see that the words of the clause do not say that the transcript sent "shall become a judgment" of the Division Court to which it is sent, but the judgment of the original Division is referred to as existing and merely for the time suspended.

2nd. "*Payment of money into court on a tender previously made.*" Sections 87, 88, and 89, refer to the law governing payments into court on a tender of money. In the 88th section you will find these words: "In case the plaintiff do not further prosecute his suit, all further proceedings shall be stayed unless the plaintiff within three days give notice of his intention to proceed, &c." Now, a case like this occurred—"A" sues "B" for rent, say £10, "B" pays into Court £5, having previously tendered it under these sections. "A" does not give any notice as the law requires, within three days after learning that the money is so paid—of his intention to proceed for the balance of the £10 The case comes up for trial, or stands on the trial list before the Judge—"A" says I wish to proceed for the balance of the £10—"B" says you cannot do this—you are barred—"*all proceedings are stayed.*" "A" then says to the Judge, I am not willing to take £5 for £10, my not giving the three days notice was an oversight, I will give it for next Court, and adjourn the suit, or withdraw my case entirely and bring a new suit.

Now, under these circumstances, is "A" barred from recovering anything more—can the Judge not legally grant him an adjournment for the purpose of giving notice to proceed, or can "A" not withdraw his suit—in other words be non-suited? Do the words "all proceedings shall be stayed unless, &c." amount to an absolute *bar*, like a judgment on the merits?

2nd. "*Dividing Causes of Action.*" Section 59 of the Division Court Act, says, "A cause of actions shall not be divided into two or more suits for the purpose of bringing them within the jurisdiction of the Court." In some Division Courts it is held that "A" having a note, say for £10, and an account for £20, all due, may at the same Court sue on the note as one cause of action, and for the account as another, both being against "B"—or, that "A" having an account for £10, and an action for damages for a breach of contract, or for a tort for £10, can divide them—both together being under £25, and in the first case both together being over £25. Now, can "A" so divide his causes of action in your opinion. Must he not in the first case (as he certainly could, and legally secure County Court costs,) sue in the latter Court?

Must he not in the latter case join the two causes of action, both being within the jurisdiction (within £25,) and sue in one action?—or does the fact in the latter—that one is for damages or tort, and the other on contract, warrant a different course? In other words, can a person in the Division Court sue for tort and contract in one action?

4th. "*Division Court Clerks Examining Garnishee Debts.*" The last case occurring under the Division Court Laws to which I will direct you attention, is the following:—The Consolidated Statutes of Upper Canada, at pages 248–9, sections 295, 296, say, "In cases in the County Courts, when the amount claimed, &c., is within the jurisdiction of the Division Court, the order to be made, &c., shall be for the garnishee to appear before the Clerk of the Division Court, &c., and if the garnishee do not pay, &c., and do not dispute, &c.," then the Judge is to make a certain order.

By this attaching order the garnishee must either go and admit the debt or deny it before the Clerk, who must of course keep some kind of a record of it—in default to do so, on certain proofs the Judge makes an order to enter judgment. Now, you will see that by this section, a burden is thrown upon Division Court Clerks, that may be onerous, yet no provision is made as to what they are to charge, nor how they are to proceed in the examination of the person garnisheed. Would not the proper compensation be found by looking at the tariff of Clerks fees, thus—

1st. "Taking confession of judgment," 15 cents—putting the taking of the confession or denial of the garnished debtor on the same footing as a confession.

2nd. "Every affidavit taken, &c.," 20 cents—supposing the Clerk to swear the debtor.

3rd. "Transmitting papers, &c.," (that is the examinations) to the County Clerk, &c., in addition to postage, &c., 20 cents. Thus in each case the Clerk's fees would be, say 55 cents. Your opinion on these four points is respectfully requested. I would remark that there are several other apparently unsettled points of law in the Division Court practice, in my mind, to which, owing to the length of this communication, I cannot now refer.

I am, yours truly, &c.,

CHARLES DURAND,
Barrister.

We thank Mr. Durand for his very acceptable communication, and regret that it did not reach us sufficiently early to enable us to enter into an examination in the present number, of the vexed questions to which he refers. We insert the letter at present.

It is by communications such as Mr. Durand's, that uniformity in the Courts will be most effectually promoted.—EDS. L. J.]

U. C. REPORTS.

QUEEN'S BENCH

(*Reported by* CHRISTOPHER ROBINSON, Esq., *Barrister at Law.*)

McMILLAN v. HUGH RANKIN, REUBEN SPOONER, PATRICK DALY, AND JAMES SWIFT

Schools—Rate levied by trustees—Voluntary Subscriptions

The freeholders and house holders of a school section cannot substitute a voluntary subscription among themselves, for the expenses of the school instead of the provisions made by law and a resolution to have such subscription, and that the trustees neglected to collect it, is therefore no answer to the avowry for a rate levied by them in the usual way.

(H. T., 23 Vic., 1860.)

The question to be determined in this case arose upon demurrer, and the pleadings, which it is unnecessary to give at length, were in substance as follows:—

The plaintiff brought replevin for a cow and calf

The defendant, James Swift, as collector of school section number 14 in the township of Kingston, made cognizance under a warrant dated the 31st of May, 1858, from the other defendants, Hugh Rankin, Reuben Spooner, and Patrick Daly, as school trustees of said section, for a rate assessed and directed to be levied by them for the salary of the teacher and repairing the school house. And the other defendants, the trustees, avowed separately for the same cause.

The plaintiff pleaded to each cognizance, in separate pleas, that before the taking, namely, on the 13th of January, 1858, at the annual school meeting of the freeholders and householders of said section, it was resolved and decided upon by the majority present that the salary of the teacher, and all expenses connected with said school, should be raised and provided for by voluntary subscriptions of the freeholders and householders of said section: that £70 was then subscribed, and the defendants were informed thereof, and the list delivered to them to collect: and thereupon it became the duty of the trustees, before the making of said ratee and warrant, to cause the defendant Swift to collect the said subscriptions: yet that the said trustees, neglecting their duty, and the decision and desire of the said majority, which it was their duty to carry out, did not collect the said subscriptions, but wrongfully made the said assessment and warrant.

The defendant Swift, and the other defendants, the trustees, replied, respectively, to these pleas, that the said resolution and decision was in the following words:—

"Resolved, that the expenses of this school section be paid by voluntary subscription, and the balance to be raised from a tax to be levied upon the parents and guardians of those sending children to the school:"

That there was no other decision whatever as to the manner in which the teacher's salary and the other expenses connected with the school should be provided for: that the whole amount subscribed voluntarily, under the said resolution or otherwise, was £2 2s 6d., which could not be collected, and would have been wholly insufficient, wherefore the rate in the said cognizance mentioned was duly imposed by the said trustees.

The plaintiff rejoined, to each replication, that he was not the parent or guardian of any child sent to the school, and that a tax could not be lawfully levied upon him in respect of the balance of the expenses of such section after said voluntary subscriptions, according to the terms of said resolution: and that for this, as well for the reason mentioned in the plea, the said rate was unlawfully imposed.

Defendants demurred, on the ground that the plaintiff being a freeholder and householder of the section was liable to the rate, and was not exempt by reason of his not being such parent or guardian: that the mode of raising the balance of the expenses of said section provided by the resolution was insensible and illegal; that the trustees could not legally carry out said resolution: and that what was provided by it being insufficient, they were justified in levying the amount by rate on all the freeholders and householders of the section.

Richards, Q C, for the demurrer. *Eccles*, Q C, contra. 13 & 14 Vic, ch. 48, sec 6, sub-sec 4, sec. 12, sub-secs. 4, 7, 9; 16 Vic, ch. 185, sec 13, were referred to

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

We were not referred to any provision in the school acts, and we can find none, which authorises the freeholders and householders inhabiting a school section at the general school meeting in January to pass a resolution to substitute a voluntary subscription among themselves, for all school purposes, which must be accepted and relied upon in lieu of all the provisions made by law for defraying such expenses: nor do we find any enactment which makes it the duty of the trustees, or gives them authority, to enforce payment of any such sums voluntarily subscribed; and without this being shewn, it is impossible to contend that the authority of the trustees and municipality to provide and collect funds is superseded by the mere fact of any such voluntary subscription having been made, which did not end in the necessary funds being produced.

Then, also, the resolution on which the plaintiff relies, as authorising the voluntary subscription, is set out by the defendants, and it is not denied that it is set out truly, and nothing could be more absurd than that that resolution, for it expresses that the expenses of the school section (that is, all the expenses) shall be paid by a voluntary subscription, and yet that *the balance* shall be levied upon the parents and guardians *of those sending children to the school*. They meant no doubt to say, upon the parents and guardians of the children sent.

The only question, therefore, is whether the defendants have in their avowry shewn a legal authority for the rate we mean, whether the trustees have, so far as they are concerned; for although they may have proceeded illegally, it may not therefore follow that the collector would be a trespasser in consequence of any thing illegal being done, which did not appear on the face of the warrant.

The school trustees rely upon a rate made by themselves, and for all that appears of their own authority given to them by law, for paying teachers' salaries, and for the repairs of the school house. We see no room for doubt that they had authority to levy such a rate under the 7th sub-section of the 12th section of the 13 & 14 Vic, ch. 48.

Judgment, in our opinion, must be given for defendants upon the demurrer

Judgment for defendants on demurrer.

SCOTT ET AL. v. THE CORPORATION OF THE TOWN OF PETERBOROUGH

Municipal corporations—Work and labour—Plea, that the debt was incurred in previous year without authority, and not provided for

Declaration against the Corporation of the Town of Peterborough for 1860, for work and materials, and for goods and money supplied etc to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro, in said County of Peterborough with the boundary line between the township of Smith and the town of Peterborough.

Pleas 1.—That the cause of action arose for and concerning a debt incurred and falling due during 1859, which was not within the ordinary expenditure of the corporation for that year, and for which no estimate was made and no rate imposed.

2. That the debt was incurred in 1859, for assisting to build a bridge not within the municipality, which debt was not authorised by any by law, nor any rate provided therefor

3. That the bridge was not on the bounds of the said town of Peterborough

Held, on demurrer, that the first and second plea shewed a good defence; and that the third plea was also good, for the declaration sufficiently shewed that the bridge was not *within* the town, though that was not negatived by the plea.

Declaration for money payable by the defendants to the plaintiffs for goods bargained and sold, for work and materials, money paid, and for goods and money supplied, furnished and given by the plaintiffs to divers persons at the request of the defendants, to aid and assist in the construction of a certain bridge across the river Otonabee, connecting the boundary line between the townships of Otonabee and Douro in the said county of Peterborough, with the boundary line between the township of Smith and the town of Peterborough; and for interest, for money had and received, and on account stated.

Second plea, that the plaintiffs' cause of action, if any, arose after the passing of the act 22 Vic, ch 99, for and concerning a debt alleged to be incurred and falling due during the municipal year, 1859, by the defendants, being a municipal corporation under the said act, and for which said alleged debt, which was not within the ordinary expenditure of the said corporation during the said year, no estimate was made by the said defendants, nor any by-law passed by them for the creation of such debt, nor for imposing any rate over and above, and in addition to all other rates whatsoever for the payment of the said debt.

Third plea, that the said alleged debt in the declaration mentioned, was incurred after the passing of the act 22 Vic., ch. 99, to wit, in the municipal year 1859, by the defendants, being a municipal corporation under the said act, in assisting to build and erect a bridge not within the said municipality of the said defendants, which said assistance, and said debt was not authorised by any by-law passed by the said defendants, being a municipal corporation as aforesaid, nor any rate nor means whatever for the payment thereof provided

Fourth plea, to the fourth count, that the bridge in the said fourth count mentioned is not situated or erected on the bounds of the said town of Peterborough.

Demurrer to all these pleas—that the defendants admitting by their pleas that they employed the plaintiffs to do the work, perform the services, and expend the money in the declaration mentioned, and that they have received and are enjoying the benefits and advantages thereof, the matters set forth in the said pleas respectively constitute no good or legal bar to this action.

Eccles, Q C., for the demurrer

Read, Q.C., contra, cited *Mellish* v. *The Town Council of Brantford*, 2 U. C., C. P. 35.

The statutes referred to are cited in the judgment.

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

The first two pleas appear to come within the decision made in the Court of Common Pleas in the case cited, of *Mellish* v *The Town Council of Brantford* (2 U.C., C P. 35), and though that judgment was given upon the effect of the original Municipal Act, 12 Vic., ch. 81, as amended by the statute passed in the following year, yet it equally applies to the state of the law which existed in 1858, and exists at present.

The plaintiff in this case has endeavoured to maintain that, without reference to questions upon what municipal corporations ought to do, and what they may or may not legally do in regard to incurring debts and providing for their payment, it is sufficient to warrant a recovery against any such corporation that the debt upon which they were sued was incurred for a good consideration in money, or materials or labour which they have accepted and used: and that it is no defence which they can be allowed to urge that they have not themselves taken certain proceedings which the law required them to take, either in contracting such debts or providing for their payment But we cannot, we think, rest upon any such principle. The legislature, in order to protect the interests of the rate-payers of the several municipalities against abuse of the powers intrusted to the municipal councils which represent them, and which have authority for many purposes to bind them, have provided certain restrictions upon their powers, which restrictions would be of little or no value for the purpose intended intended if persons dealing with corporations were not obliged for their own safety to enquire into and take notice of the extent of their powers, and what does or does not come within the proper scope of their authority. No doubt, when a person who has advanced his money or applied his labour at the request of a corporation, and is seeking to enforce payment, is met by defences of the kind which are set up in this action, if such defence succeeds, a case of apparent hardship is created, and sometimes of great real hardship; but it is necessary to consider what is due to the community, on the other hand, and what ruinous waste and injustice might take place if certain checks were not imposed on the actions of municipal bodies. Some checks have of necessity been imposed, and when in any such case the governing body of a corporation has clearly exceeded its legal powers, courts of justice have no discretion to make their acts nevertheless binding upon those whom they represent in one case more than in another, nor in any such case

The defendants in their second plea object to the attempt to make them liable in this action for a debt incurred not by themselves—that is, not by the Council of 1860—but by the Council of the previous year, 1859, because they say it was not a debt contracted for anything within the ordinary expenditure of the corporation for that year, (1859,) when the debt was incurred, nor yet was there any estimate made in 1859 of the sum that would be required to meet it, nor any by-law passed to provide for its payment by imposing a special rate for that purpose in addition to all other rates; and it is alleged that the debt not only was incurred in 1859, but that it fell due within that year.

Upon the facts stated in their second plea the corporation have no power in 1860 to impose a rate for paying this debt. They have no authority and cannot be legally obliged to pay it out of the moneys raised for meeting the ordinary expenditure of their year; and the question then is, can a recovery be nevertheless had against them, to compel payment of a debt which they have no power to raise funds for?

The facts may have been such in truth as would shew the plaintiffs' claim to be one for which the corporation could in this year make provision by a rate, but, if they were, the plaintiffs should have shewn that in a replication to the plea. We have now to deal with facts admitted to be such as the plea states.

Mr. Harrison, in his very useful work, the Municipal Manual (page 108) has placed the question fairly in view, in his note to the 221st clause of the statute 22 Vic., ch. 99, and the same question is still open upon the law as it stands in the Consolidated Statutes, ch. 54, secs. 222-224. We see no means given to the Council of 1860, by which they can raise money in the present year to pay a debt incurred and falling due in 1859, and not incurred for anything falling within ordinary expenditure; and if the defendants have not means given to them by law of raising by rate the money necessary for satisfying this claim, and this not merely because the rate would exceed their authority as regards amount, but because it is for a purpose for which the defendants have no authority to raise a rate, if this we say be the position of the defendants, then it appears they cannot be liable to have a judgment recovered against them.

If in a case like this, as stated in the second plea, or in any other case whatever, a judgment and execution should be obtained against a corporation, then it appears that the 220th section will enable the sheriff to collect the amount by striking a rate and causing it to be collected, if the amount be not paid to the sheriff by the corporation within a month after the amount of the execution has been notified to them. But we take it that that clause contemplates only the satisfaction of judgments for claims which the corporation can legally discharge, for otherwise the courts of law would have the power indirectly given to them of taxing the rate-payers without their consent to pay debts which the corporation itself could not pay by a rate.

We think the second plea is a sufficient bar to the action, and that the third plea is also good, upon the authority of the case of *Mellish* v. *The Town Council of Brantford*, which applies more directly to this plea.

The 186th and 321st sections of 22 Vic., ch. 99, are to be considered in disposing of the fourth plea. By the first of these clauses the corporation are confined in their jurisdiction, as at any rate they would be, to the limits of the municipality which they represent. But by the latter clause the corporation of a town may grant aid towards making a bridge *on the bounds of such town*. The fourth plea asserts that the bridge mentioned in the fourth count of the declaration is not *on* the bounds of the town of Peterborough. Of course, not looking out of the plea, we could not say that that was any reason against the plaintiffs recovery if the bridge was within the bounds of the town. But the question is, whether the declaration does not negative that supposition. It appears to us to do so, and if so, then the plea is a good bar.

Judgment for defendants on demurrer.

ELECTION CASES.

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

THE QUEEN EX REL JAMES FLEMING v. JAMES E. SMITH.

(Before the Honorable WILLIAM HENRY DRAPER, C. B., Chief Justice of Common Pleas.)

Municipal laws—Cities—Qualification of Candidate—Residence—Consol. Stat. U. C. cap 54, sec 70

Held, that for the discharge of every duty and for the exercise of every power, right or function of a municipal character, the City of Toronto does not form part of the County of York, though territorially within its limits and an integral part of it as to the administration of justice, and therefore that a resident in the County of York, without the limits of the City of Toronto is not, under sec 70 of the Municipal Act, a person qualified to be elected a member of the Municipal Council of the City.

(Chambers, January 25, 1861.)

This was a summons in the nature of a *quo warranto*, under the Municipal Institutions Act (Con. Stat. U. C. cap 54), dated 18th January, 1861, calling upon the defendant to show by what authority he claimed to use, exercise or enjoy the office of Alderman for the Ward of St. John, in the City of Toronto.

The objection raised to his election was that at and during and for 12 months previous to the election he was not a resident either within the ward or the city, as required by law.

It was not denied on the part of the defendant that in point of fact the objection was well founded; that is, that though carrying on business in the City of Toronto he was not a resident in the city, his place of residence being outside the city limits, within the County of York.

The defence was, that in point of law residence within the city is not necessary, provided there be residence in the county.

J. McBride for relator; *A. Wilson, Esq., Q. C.*, for defendant.

DRAPER, C. J.—The question turns upon the construction to be given to the 70th section of the Statute, which enacts that "the persons qualified to be elected mayors, members of a council, or police trustees, are such *residents of the County* within which the municipality or police village is situate, as are not disqualified under this Act, and have at the time of the election, in their own right or right of their wives, as proprietors or tenants, freehold or leasehold property rated in their own names on the last assessment roll of such municipality or police village, to at least the value following: in cities, for alderman, freehold to $160 per annum, or leasehold to $320 per annum."

By the Territorial Divisions Act (Con. Stat. U. C. ch. 3), the counties of Upper Canada consist of the several townships therein mentioned as forming the same, including in such townships and counties the cities, towns and incorporated villages situate within the limits of such townships and counties respectively; and in mentioning of what the County of York consists, ten townships are enumerated, and then "the City of Toronto." Territorially speaking, therefore, the City of Toronto is within the County of York. But the very same section of this Act contains this further provision: "for municipal purposes, the Cities of Toronto, Hamilton, Kingston, London and Ottawa shall not form part of the Counties of York, Wentworth, Frontenac, Middlesex and Carleton, within the limits of which they are respectively situate, but shall, for municipal purposes, be counties for themselves." Municipally speaking, therefore, the City of Toronto is a county of itself, and does not form part of the County of York within the limits of which it is territorially situated.

Independently, however, of municipal purposes, a city may be within as forming part of a county, in respect to the registration of deeds, and for the holding of courts, such as Courts of Oyer and Terminer and General Gaol Delivery, Quarter Sessions, County Courts and Division Courts, but under the provisions of existing laws the City of Toronto has its separate Registry Office; its Recorder's Court, which is the substitute for the Court of Quarter Sessions; and its Division Court, which ousts the Judge of the County Court of so much of his prior jurisdiction. In fact, except for the Assizes and the County Courts, the City of Toronto would be a county entirely separate from the County of York.

It is, however, certainly a county of itself for municipal purposes. The County Council is unconnected with it and has no jurisdiction or authority over it. But all towns (at least until

separated under the 26th section), townships and incorporated villages, are directly connected with the county, and the reeves and deputy reeves of such municipalities constitute the County Council

What is meant by municipal purposes? This expression cannot mean that it is to be a county for the same municipal purposes that a county consisting of several townships is created, or with the same municipal institutions and powers; because in these respects the institutions and powers of a city, though a county for municipal purposes, differ very widely from those of counties It may, I think, be properly construed thus. that for the discharge of every duty and for the exercise of every power, right or function of a municipal character, the City of Toronto does not form part of the County of York, though territorially within its limits and an integral part of it as to the administration of justice, as already noted.

If this be so, then the County of the City of Toronto cannot be within the County of York for any municipal purpose. And besides the provision in the Territorial Divisions Act, the 361st sec. of the Municipal Institutions Act expressly declares that every city shall be a county of itself for municipal purposes, and for such judicial purposes as are therein specially provided for in the case of all cities, but for no other.

Unless by making the city a county of itself for municipal purposes be a segregation of the city from all other local divisions, as to the exercise of all municipal functions general or individual, I do not see what the legislature have intended.

Then is the election by the inhabitants of the city, who are erected into a corporation, of the council, one of the municipal purposes? I think there can be no doubt, so far; and the question is narrowed to this, whether this corporation or municipality may not be truly and properly described as being within the city, whose inhabitants are incorporated, which city for municipal purposes is declared to be a county?

It is urged against the affirmative of this question, that, as the city constitutes the county, it cannot with propriety be said to be within that county which it constitutes; and that the expression in the 70th section must reasonably be understood as referring to territorial and not to municipal divisions, and therefore the county of York and not the county of the city is intended as that in which the candidate must be resident

The repetition of this provision as to certain cities being counties for municipal purposes, in the Municipal Institutions Act, tends, I think, to a contrary construction; for it is plain that no resident out of a county (not being a city) could under this act be elected a member of a council of any municipality within that county; and when for municipal purposes each city is declared to be a county, it may be inferred that the members of the council of the municipality of that city-county were intended to be resident within that city-county. Speaking of counties proper, it is easy to understand why it was thought expedient to allow the electors of each separate municipality within the county to elect any otherwise qualified resident of the county—because the County Council itself is composed of one, or in certain cases, two members of the council of every such municipality There is a common interest and bond of union throughout the whole county; nothing of that sort, or analagous to it, exists as between cities and counties

Again, it was argued that in regard to officers, ministerial and judicial, spoken of in the Municipal Institutions Act, no provision in that statute requires their residence to be within any municipality, and that electors even for cities need not be residents if they are freeholders and rated as such upon the assessment roll of the municipality within which they claim to vote But the case of officers has no bearing on the question Residence may be and usually is imposed as a condition, and it was a matter which the legislature saw fit to leave to those who had the appointment. Here the Act certainly requires residence—the question being as to the limits And with regard to electors: as real property within the municipality was subject to taxation, it may well be that the legislature thought it reasonable that non-resident owners of such property should, under certain conditions, be entitled to vote.

It was further urged, to show that the legislature in regard to residence gave a wide latitude, under which it might happen that when a union of two counties was being severed, every member of the provisional council of the junior county might be a resident of the senior county under the section now under consideration. But on examining this section in connection with the Territorial Divisions Act, I do not adopt this conclusion, for senior county and junior county are by this last named Act distinct counties, composed of distinct territory, divided into townships and villages, &c., each of which is a separate municipality It cannot be truly affirmed that the resident of a municipality of any township which constitutes a part of the county of Peel is a resident of the county of York, though these counties form a union of counties; and if not, such resident would not be qualified to be elected for a municipality within the county of York, according to the plain meaning of the 70th section.

Many other provisions of the acts were also referred to as showing that, notwithstanding the provision making cities counties for municipal purposes, there were matters in common between them, as the making aldermen of cities justices of the peace for the county, when the territorial and not the municipal divisions are plainly referred to: or that the cities, counties, or the general counties, were not in all cases limited to their own boundaries, as with respect to the power of holding industrial farms by cities, the right of county councils to hold its sittings in the city, and of city and other councils to hold their sittings out of the limits of their municipality. As to all which it is enough to say that, being plainly expressed, there is no question as to them, but that they do not help the construction of the clause under consideration.

It was also said that it was a species of disfranchisement to deprive a resident of a county, otherwise qualified, from being elected a member of any municipality within its limits This however is begging the question, for the franchise is conferred on a defined class; and it is no disfranchisement to say that a man who possesses all the defined qualities, except one, does not come within that class. He is not enfranchised unless he has the entire qualification.

On the whole, I think the relator is entitled to judgment.

A case precisely similar in all respects (*The Queen on the relation of Blasdell* v *Rochester*) was decided by my brother, Burns, not quite a year ago.* He took the same view of the statute which I do; and though I have not seen the reasons on which he arrived at that conclusion, I am confirmed in my opinion by knowing that he placed a similar construction on the act.

(Before the Honorable WILLIAM HENRY DRAPER, C. B., Chief Justice of the Common Pleas)

THE QUEEN ON THE RELATION OF DONALD MCGREGOR v. H. KER.

Municipal Act—Qualification of Councillors—Joint assessment—Sufficiency of rating—Evidence—Interest—Competency

Where, on the assessment roll, under the general heading, "Names of taxable parties," were entered the names of "Ker, William and Henry," for two separate parcels of land, in the proper columns were the letters "K" and "H," and in the column headed "Owners and address" was entered opposite to the parcels of land and the names in the first column, "Wm Ker & Bros" *Held*,

1. That "William Ker and Henry Ker" and not "William Ker & Bros." were the persons in whose names the properties were rated
2. That sec. 80 of the Municipal Institutions Act, which provides that when real property is owned or occupied jointly by two or more persons and is rated at an amount sufficient, if equally divided between them to give a qualification to each then each shall be deemed rated though placed in the act under the head "Electors" extends as well to candidates as to electors
3. That the defendant named in a *quo warranto* summons is an interested party trying an issue, and therefore not competent to give evidence on his own behalf

This was a summons in the nature of a *quo warranto*, calling upon the defendant to show by what authority he claimed to use, exercise or enjoy the office of councillor in the village of Streetsville.

The objection raised was, that the defendant had not at the time of his election in January last, in his own right, or in right of his wife, as proprietor or tenant, freehold or leasehold property rated in his own name on the last revised assessment roll of the village, as required by the 70th section of the Municipal Institutions Act.

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* No report of this case can be found Should it be hereafter found it will be inserted in the columns of the *Law Journal*

The affidavits on which the summons issued showed that the defendant was not, at the time of the election, rated in respect of property, freehold or leasehold, on the last revised assessment roll of the village of Streetsville, otherwise than as in the extract from the roll produced, of which the following is a copy

NAMES OF TAXABLE PARTIES.									VALUE AND DESCRIPTION OF REAL PROPERTY.								PERSONAL PROPERTY.			
Nos	Occupants	Profession, Occupation, &c	Freehold	Household	Age	Owners and Address	Non-Resident	School Section	Street, Square, or other Designation	No of Lot, or House, &c	No of Acres, Feet, or other measurement	Yearly Value of each Lot	Yearly Value of each House or Building	Total Yearly Value of Real Property	Taxable Income	Total Value of Personal Property	Total Yearly Value of Personal Property or Income	Total Yearly Value of Real and Personal Property
29	Ker, William and Henry	Cabinet Makers	F.	H.	40 & 35	W. Ker & Bro's		V.	Queen				$60			$400	$34	$120
	Do.	Do.				Do.			Credit				36	$96				

It appeared by this that under the general heading, "Names of taxable parties," were entered the names "Ker, William and Henry," for two separate lots—one on Queen street, the other on Credit street—in the village of Streetsville.

In the proper columns were the letters "F." and "H," as required by the 163rd section of the Municipal Institutions Act, in order to show whether the persons named were freeholders or householders, or both.

The yearly value of the house or building on Queen street was entered as $60, and of that on Credit street as $36.

In the column headed "Owners and address," was entered, opposite these lots and the names in the first column, "Wm. Ker and Bros."

The affidavits stated that the firm of William Ker and Brothers was composed of William Ker, Henry Ker and John Ker; that William Ker was assessor for the village of Streetsville for 1860; and that the property on Credit street, set forth as above, was freehold. This was stated in an affidavit correcting a former statement of its being leasehold, which was sworn to, to the best of the deponent's knowledge and belief. But on search made in the Registry office, the registrar, on the 26th January, 1861, stated that there was no deed registered of the property above mentioned, on Queen street or Credit street, or of any part thereof, to William Ker and Brothers, or to any one of them

An affidavit, sworn 31st January, 1861, was put in from Dr. Crombie, who swore that he conveyed to Henry Ker (the defendant) the lot situate on Queen street in the village of Streetsville; that before making this deed, deponent asked whether it would be safe for the others, William and John, to make the title in Henry's name; and that William Ker replied, it would not make much difference in which of their names it was drawn, and that it might as well be made in Henry's name.

R. A. Harrison for relator; *D. McMichael* for defendant

DRAPER, C. J.—I am of opinion that I must consider William Ker and Henry Ker as the persons in whose names these properties are rated. Under the 19th sec. of the Assessment law, it is the duty of the assessor so to frame his roll. If land be occupied by owner, it is to be assessed in his name; but if the owner, being the included in one of the classes mentioned in section 22, be not the occupant, but some other person is, then the names of both owner and occupant must be entered, and the land is to be assessed against both. The 24th section shows how one is to be distinguished on the roll from the other; and I infer from the 22nd and 24th sections, read together, that the name of each should appear as rated for the land. The 79th section of the Municipal Institutions Act provides that in case both the owner and occupant of any real property are rated therefor, "both shall be deemed to be rated within this act." This I think confirms the view, that each of them is to be considered as the taxable party, and should be so stated on the roll, under the 19th, 22nd and 24th sections of the Assessment law.

The qualification required by the 70th section, may be thus divided: first, residence in the county; second, having at the time of the election freehold or leasehold property, of a specified value, in their own right or the right of their wives; third, that such property should be rated in their own names on the last revised assessment roll.

For the relator it has been contended that the first column, headed "Occupants," is to be treated as having no relation to the Municipal Act at all; and that for the purposes of this act, William Ker and Brothers are to be considered as the parties in whose names this property is rated; and that this entry in effect is an entry of William Ker alone, because his brothers are not named, in accordance with a decision of Sir J. B. Robinson, in the case of *Reg ex rel. McVean* v. *Graham* (not reported). I do not in the least dissent from that decision; but it does not appear to me to apply; for, as I have already said, I think this property is rated in the names of William Ker and Henry Ker; and as the 79th section, above quoted, recognizes the rating, for the purposes of the Municipal Act, of both owner and occupant, we need not enquire into the effect of the rating under the head "Owner," if the defendant is sufficiently rated as occupant.

But it is further objected, that the 70th section requires a separate and individual rating of real property to the candidate, and

that a rating to him jointly with another person is insufficient; and that the 80th section of the statute, which enacts that where real property is owned and occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided between them, to give a qualification to each—"then each shall be deemed rated within this act," otherwise neither shall be deemed so rated—is confined to the case of electors, because that word is put as a heading indicating a group of clauses relating to electors. In my opinion, this is not a sufficient reason for restraining the words "deemed rated within this act," which are used in the 79th and are repeated in the 80th sections, to the case of electors only I think they extend to all cases of rating mentioned in the act, and include the qualification as well to be elected as to elect

Concluding, therefore, that these two landed properties on Queen street and Credit street, in the village of Streetsville, are rated to William Ker and the defendant, and that under the 80th section referred to the qualification is divisible, and as the amount of the values is ninety-six dollars, the question is, whether the half of that amount (forty-eight dollars) constitutes a legal qualification? The qualification required by law is, freehold to forty dollars per annum, or leasehold to eighty dollars per annum, or in those proportions in case the property is partly freehold and partly leasehold.

I think, upon the affidavits put in by the relator, I may treat the defendant as rated, as for freehold property, for the lot on Credit street. This is rated at the yearly value of $36, and one half of it amounts to nearly four-ninths or rather less than half of a qualification by freehold. Looking at the entries as affecting the other lot, I do not see how the defendant can claim to have more than a leasehold interest in that. Assuming, for the sake of the argument, that to be so, then the whole yearly value is sixty dollars, one half of which is just three-tenths of a leasehold qualification. so that the defendant falls short of half a leasehold as well as of half a freehold qualification.

It is only upon the assumption that both the qualifications are freehold, that the defendant can possibly sustain his election; and as William Ker and brothers are stated as owners on the assessment roll, the presumption is against the defendant being rated as for a freehold interest in either property

It would not be right to hold a party too rigidly to the entries on the assessment roll. If in fact he had a legal qualification, I should be inclined to go as far as possible for the purpose of reconciling the mode of rating as thereon expressed with the actual facts, so as to support the election; and therefore I will give the defendant an opportunity to file affidavits to show what the true state of the title to both lots was at the time of the assessment, and at the time of the election. Such affidavits should be those of competent witnesses, not his own merely, as he is on the points suggested an interested party trying an issue

Let the case therefore stand over till the 9th instant, at 10 a m., with leave to both parties to file affidavits on the points suggested

If on enquiry the facts appear so clear that there can be no doubt of the result, the parties may, if they please, consent to a judgment without further hearing *

THE QUEEN, UPON THE RELATION OF WILLIAM CLINT v. EDWARD UPHAM

(Before His Honor Judge McKENZIE, County Judge for the United Counties of Frontenac, Lennox and Addington.)

Municipal Election—Qualification of Voters

Held, That into a municipality divided into Wards, a voter cannot vote in a ward in which he is not assessed for real property lying in the ward

Held, that a Municipal Council has no authority to place names on the assessment roll after it is finally passed by the revising tribunal.

Held, that it is wrong in a municipal clerk to add a name after the commencement of an election to the copy of the roll furnished by him to the Returning officer

Held, that when a voter having an interest in an election is the relator, claiming the seat for an opposing candidate, and after a scrutiny it is found that the opposing candidate has a clear majority of the legal votes polled, the seat will be awarded to such candidate, notwithstanding that the votes for the defendant whose right to the seat is disputed.

(28th January, 1861.)

A writ of summons, in the nature of a *quo warranto*, was issued in this cause on the fiat of the County Judge of Frontenac, Lennox and Addington, calling upon the defendant to shew by what authority he used, exercised and enjoyed the office of Municipal Councillor for Ward No 1 of the Township of Loughborough. The relator claiming an interest in the election to the said office as an elector, and that William Boice was duly elected, and should have been declared, duly elected and admitted to the said office.

The relator contested the election of the said defendant, and claimed the seat for William Boice, on the ground that William Boice had the majority of the legal votes entered on the poll-book.

He objected to the votes of William Pensyle, Peter Foxton, John Cromer, George Ockley, and Harvey Simpkins, on the ground that they were not rated on the last revised assessment roll relating to the said Ward No. 1, in respect of real property, as freeholders, or householders, their names having been put on the roll by order of the Council in November last He objected to the vote of one Charles McCullough, on the ground that he was improperly placed on the voter's roll, the second morning of the election, not being qualified according to law—being assessed in Ward No 2 of the Township of Loughborough, and not in Ward No 1

The relator complained that the Returning officer improperly rejected the votes of Hugh McCaul, Thomas Philips and Martin Grooms, which were tendered to William Boice at the election.

The defendant on his part denied generally the allegations of the relator, and objected to several votes recorded for Wm Boice at the election. He objected to the votes of James Boice and Peter Ruttan, on the ground of bribery. He objected to the votes of William McDougall, Bryan Kelly, David Hyet or Hyat, and Nelson Holister, who voted for William Boice at the election, on the ground that their names do not appear on the last revised assessment roll for the Township of Loughborough He objected to the vote of John Hatton, which was recorded for William Boice, on the ground that he was not a freeholder or a householder at the time of the election, nor at any time during last year.

The election was held at the village of Sydenham, on the 7th and 8th January, 1861. The defendant, Edward Upham, voted for William Boice, and Wm. Boice for the defendant

Sir Henry Smith, Q C, for relator; *O'Reilly*, for defendant.

MACKENZIE, Co. JUDGE.—According to the poll-book returned to me, 45 votes were recorded for the defendant, Upham, and 44 votes recorded for the opposing candidate, Boice; so that the defendant was returned as duly elected by a majority of one vote.

The names of William Pensyle, Peter Foxton, John Cromer and George Ockley were placed on the assessment roll only on or about the 24th of November last, under an order made by the Municipal Corporation of Loughborough, on the seventeenth November last, directing the Clerk of the Municipality to insert those names on the Roll

This was a very wrong proceeding on the part of the Council. It was a very perilous violation of the law, involving in all probability criminal consequences to the actors. If pernicious practices of this kind could be tolerated, the members of any Municipal Corporation might make themselves permanent, by placing a few weeks before each election, the names of a sufficient number of persons favourable to them on the Assessment Roll, as householders or freeholders, rated in respect of real property. It is a very serious proceeding to interfere in any shape or form with the Assessment Roll, after it has been finally passed by the revising tribunals.

I will strike the names of William Pensyle, Peter Foxton, John Cromer, and George Ockley, out of the poll-book, as they should have never been there, or on the Assessment Roll, of last year.

Charles McCullough was rated on last year's Revised Assessment Roll of Loughborough for real property, as occupant in Ward No 2 thereof. He removed out of Ward No 2 to Sydenham, in Ward No 1, on the 12th of November last He was not rated on the Assessment Roll for any real property in Ward No. 1 The Clerk of the Municipality, on the morning of the second day of the election, inserted the name of Charles McCullough, on the copy of the Assessment Roll, furnished by him to the Returning Officer

* There being a dispute as to the facts the learned Chief Justice, at the suggestion of counsel for the relator, ordered the production of oral testimony Witnesses both for relator and defendant were, on 25th February ultimo, examined by the Chief Justice, and the case now stands for judgment on the testimony then adduced.

for that ward as a person entitled to vote in Ward No. 1, though rated for real property in Ward No. 2 only. The Returning Officer received the vote of Charles McCullough, after his name was so improperly inserted, and recorded it for the defendant.

This was also a wrong proceeding on the part of all parties concerned Wrong on the part of the Clerk for improperly inserting a name after the commencement of the election, on the copy of the Roll delivered by him to the Returning Officer, verified by his own solemn declaration. Wrong in the Returning Officer, for recording the vote of a person whose name was not entered on the copy of the Roll when it was delivered to him by the Clerk of the Municipality, and who was not rated on the last revised Assessment Roll of Loughborough, for any real property in Ward No. 1 Wrong in McCullough for voting in a ward in which he was not rated on the Assessment Roll for any real property.

On consulting the 20th section of the "Consolidated Assessment Act of Upper Canada," which directs, "that land shall be assessed in the Municipality or Ward in which the same lies," and the 78th section of "The Upper Canada Municipal Institutions Act," which provides, "That when a Municipality is divided into Wards, no elector shall vote in more than one Ward, and if entitled to vote in the Ward in which he resides, he shall not be entitled to vote in any other Ward," and the 2nd sub-section of the 97th section of the latter Act which provides, "That the Clerk of each Municipality shall deliver to the Returning Officer a correct copy of so much of the last revised Assessment Roll for the Municipality or Ward as contains the names of all Male Freeholders and Householders rated upon the Roll in respect of real property lying in the Municipality or Ward" It will be seen that when a Municipality is divided into Wards, that the right of voting is restricted to the Ward in which the elector resides, if entitled to vote therein—which means, if he is rated on the Assessment Roll, in respect of sufficient real property within the Ward

The 74th section of the Act points out very clearly who shall be the electors, "The Elector of every Municipality, for which there is an Assessment Roll, shall be the male freeholders thereof, and such of the householders thereof as have been residents therein for one month next before the election, who were severally rated on the last Revised Assessment Rolls for real property in the Municipality, held in their own right, or that of their wives as proprietors or tenants.' Being rated on the last Assessment Roll seems to constitute the basis of voting. When a Municipality is divided into Wards, an elector has no right to vote in a Ward in which he is not rated on the Roll as proprietor or tenant for real property lying in the Ward in which he proposes to vote. The law is not as was contended for on behalf of the defendant, on the argument, namely, that a residence in a given Ward in the Municipality at the time of the election, gives the elector the right of voting in the resident Ward in respect of real property lying in another Ward and rated upon the Roll as such property lying in another Ward. I hold the law to be that an elector, whether a Freeholder or a tenant in a Municipality divided into wards, cannot lawfully vote in a Ward in which he is not rated on the last Assessment Roll for real property lying in the Ward. On the other hand every such elector must vote, if vote at all, in a Ward in which he is rated on such Roll for real property lying in the Ward

Charles McCullough certainly had a lawful right to vote in Ward No. 2, but no right whatever to vote in Ward No. 1. His vote consequently must be struck out of the Poll Book.

The vote of Charles McCullough together with the votes of William Pensyle, Peter Foxton, John Cromer and George Ockley, will make 5 votes which must be deducted from the 45 votes recorded in the Poll Book for the defendant. This will reduce the aggregate number of votes received by the defendant to 40 lawful votes.

It was admitted by the defendant's counsel with commendable candour, on the argument, that the opposing candidate William Boice had 41 lawful votes recorded for him at the election in the Poll Book. The state of the Poll then would give William Boice a clear majority of one over the defendant. And as a majority of one is, in the eye of the law, as effectual as a majority of one hundred, there will be no occasion to enquire into the validity of the exceptions taken on behalf of the defendant to the votes of James Boice, Peter Ruttan, William McDougall, Bryan Kelly, David Hyatt, Nelson Holister and John Hatton, which were given to William Boice, or into the alleged improper rejection of the votes of Hugh McCaul, Thomas Phillips and Martin Grooms, which were tendered for William Boice.

The real question for me to decide is, whether a new election for Ward No. 1 should be ordered under the circumstances, or whether the opposing candidate William Boice should be ordered to be admitted into the seat at once Before deciding this point I would make an observation on the trivial objection urged against the vote of "William McDougal." The omission to add the letter D to the L in the surname in entering the name in the copy of the Roll sent to the Returning Officer, and in the Poll Book, is gravely urged as a ground for depriving Boice of McDougal's vote. The name of McDougal is one of great antiquity, and often found in law-books and historical writings, especially in the history of Highland warfare The letter D is sometimes added to L, and sometimes not, but I believe never pronounced The objection could scarcely be urged in earnest, Boice is entitled to his vote.

As to the question of a new election, or admitting Boice to the seat at once, I can find no case in point. In the present case the opposing candidate is not the relator, and the opposing candidate Boice, voted for the defendant. This clearly disqualified Boice for a relator. Then, can a person who cannot claim the seat in his name, obtain it in the name of a third party, a municipal elector? The cases have gone so far as to establish that a third party, who acquiesces in an election, or takes part in promoting the election of the party complained against, cannot afterwards become a relator, to dispute that which he himself has concurred in, and helped to bring about. But it is urged that Clint, the present relator, has not acquiesced in the election of the defendant, and has done nothing so far as I can see to promote it

There are persons who would rather pay a penalty, than fill a municipal office. And, no doubt, the 183rd section of the Municipal Institutions Act was passed to meet such a contingency. It is there enacted 'that every qualified person, duly elected to be Mayor, Alderman, Councillor, &c., who refuses such office, shall be liable to a penalty of not less than eight and not more than twenty dollars. It sometimes happens that a party is put in nomination as a candidate against his own will—elected against his will, and compelled to serve against his will, or pay a penalty; there would be nothing out of the way in such a person voting for another candidate to get rid of what he deemed a troublesome office —This remark cannot apply here, as the present opposing candidate, Boice, seems anxious enough to get the seat, now usurped by the defendant.

By the 127th section of the Act, 'any candidate at an election, or any municipal elector, who gave or tendered his vote at an election, may be a relator to contest the validity of the election of a councillor, &c.' The law has given the relator Clint, then, a clear right to contest the election of the present defendant, and to demand the seat to be awarded to Boice. The present relator has done nothing so far as I can see, to compromise himself in the matter, or to prevent his demanding that William Boice should be admitted to the office of councillor, to which he the relator and the majority of the legal electors of Ward No 1 of the township of Loughborough, elected him. The law has given to the relator Clint, as well as to every other elector in the Ward, the right to contest the election of the defendant as relator, and when the right is exercised by an elector, the legal consequences must follow in the same manner as if an opposing candidate was contesting the election. The relator Clint, is asserting a right common to himself and his co-electors, irrespective of the individual claim of William Boice. In deciding the validity of contested election of this kind, the law seems to regard the rights and interest of the tax-payers and the legal electors as the criterion of judgment. The relator, Clint, has made out a clear case against the defendant by legal evidence, and established that William Boice was elected to the office by a majority of the legal voters of the Ward, and claims the office for Boice.

I cannot depart in this case from the rules laid down by myself in the case Reg. ex. rel *Pomeroy* v. *Watson*, decided in 1855, in the case Reg ex. rel. *Atcheson* v. *Donoghue*, decided in 1857, and in the case Reg ex. rel. *Forward* v. *Bartells*, decided in 1858. In each of which cases I ordered the defendants, after a scrutiny,

to be unseated and the relators to be admitted into the office The same principles must govern the present case. Boice and through him the majority of the electors of Ward No. 1 have been deprived of a legal right by the illegal election of the defendant, and I am bound by law to see that the candidate who had the majority of legal votes shall be restored with as little delay as possible, to the now usurped seat

As I do not feel myself at liberty to order a new election in the face of the cases which I have justified, and others in the books, the defendant must be removed, and Boice admitted into the office at once

I therefore adjudge and order, that the defendant Edward Upham, be removed from the office of councillor for Ward No 1 in the township of Loughborough; and that William Boice be admitted in his place, and that a proper writ of mandamus issue, commanding the Municipal Corporation of Loughborough to admit him accordingly, and that the defendant pay the relator his proper costs.

Judgment for the relator with costs.

THE QUEEN ON THE RELATION OF JOHN FORSYTH AND JOHN L. DOLSEN.

(Before W. B WELLS, Esq., Judge of the County Court of the County of Kent)

Towns—Qualification of Mayor—Contract—Declaration of Office

Held as follows:—1 That the mayor of a town, though not now elected by the town councillors from among themselves, is equally subject with them to the statutory disqualifications of the Municipal Act, but that under the circumstances of this case defendant could not be said to be interested by himself or partner in any contract with the municipal corporation, so as to be disqualified to be elected mayor of the town. 2 That the neglect of a person elected mayor, within twenty days after knowing of his election or appointment, to make the declarations of office and qualification under s 183 of the Municipal Act, does not work a forfeiture of office in addition to the pecuniary penalty by that section imposed

The statement and relation of the relator against the Defendant declared that he usurped the office of Mayor in the Town of Chatham, and that the election of defendant to the office should be declared invalid and void, for the causes following, viz:—

First—That the said John L Dolsen was not duly or legally elected or returned as such Mayor, in this, that at the time of the said election he was, and still is a lessee of the Municipality of the Town; and that he has not since his said election taken the oaths or made the declarations required by the Statute in such case made and provided, before entering on the duties of said office.

Second—That the said John L. Dolsen is a member of the firm McKeller & Dolson of Chatham, aforesaid, lumber merchants and mill owners.

Third—That during the month of August 1853, the said McKellar & Dolsen applied by petition to the Town Council of Chatham, asking for a lease for five years of the extremity of Second street, in the said Town, between King street and the River Thames, and offered the use of an equal width of their lot adjoining one John Sherriff's property, for public purposes, for an equal period therefor.

Fourth—That by Resolution of the said Town Council in the month of August, 1853, the said piece of ground so by the said McKellar and Dolsen applied for, was in consideration of their offer to give a like width of land aforesaid, granted to them for the term of five years from the date of said Resolution.

Fifth—That the said McKellar and Dolsen have ever since continued to occupy the said piece of land, and are now in possession of the same, as tenants of the said Municipality.

Sixth—That the said John L. Dolsen did not before entering on his duties as such Mayor, on the 21st day of January, make the necessary oath or declaration as required by the Statute, and is thereby disqualified from holding the said office of Mayor.

A summons against the defendant was issued on the above complaint, on the 25th January, returnable in eight days from service, and the parties were heard on the 4th of February.

In reply to the complaint, the Defendant stated that he was properly qualified for the office of Mayor, that the only transactions that he or his partner, McKellar, ever had with the Corporation of Chatham in reference to the pretended lease of the extremity of Second street, mentioned in the relation, were fully detailed in the certified extracts from the minutes of the Corporation of the town, filed in the court—That he was elected to the office of Mayor of the town on the 7th and 8th January 1861—That he did on the 21st of the said month, make and subscribe the declaration of qualification and office, under the statute, a true copy of which was filed—That he did afterwards, on the 28th of January 1861, take, make and subscribe the declaration of qualification and of office under the Statute—a true copy of which was also filed—That he did on the day of the date of the said several and respective declarations cause the same to be filled in the office of the Clerk of the Corporation of the town of Chatham.

Copies of the following resolutions were filed:—

Resolution passed by the Council of the Town of Chatham, 19th August, 1853

"McKellar and Dolsen's petition relative to their occupation of a portion of Second street as a Lumber Yard, was brought up, upon which is was moved by Mr Woods, seconded by Mr. Burns, that in consideration of the offer of Messrs. McKellar & Dolsen, that they will grant to the Municipality the use of a like amount of land, as an approach to the water from King street, as that now occupied by them on that portion of Second street and between King street and the Water, they be allowed to continue to occupy the said piece of land for the term of five years from this date."

Resolution passed by the Council of the Town of Chatham, 29th June, 1855

"The Committee apointed at last meeting to take into consideration the Petition of John Walton and others, praying that the obstructions on Second street, between King street and the River, ought to be removed, presented their report, recommending that the said Street be opened up within a definite period:

Upon which it was moved by Mr. Winter, seconded by Mr. Ireland—That that part of Second street occupied by Messrs. McKellar & Dolsen, be opened up by them, and the obstructions removed within one year from this date"

Woods for relator. *McCrea* for defendant.

WELLS, Co. J—By the 73rd sec c. 54, Con. Statutes, it is enacted that "no person having by himself or his partner, an interest in any contract with or on behalf of the Corporation, shall be qualified to be a member of the Council of the Corporation."

By the 102 Sec of the Act, "The qualification of a Mayor shall be the same as that of an Alderman in Cities, and of a Councillor in Towns."

By the 120 Sec. "The Mayor shall be deemed the Head of the Council, and the head and Chief Executive officer of the Corporation."

The Mayor of a Town, therefore, although not now elected by Councillors from among themselves, is equally subject with the them to the above disqualifying clause.

The first Resolution of the Council of the Town relative to the portion of Second street, in the said Town, occupied by the Defendant and his partner, was passed on the 19th August, 1853 The "Corporations amendment Act," 13th and 14th Vic. c 64 Sec 192. will govern the case. By it, it is declared "not to be lawful for any of such Municipal Corporations to make any By-Law for the opening, stopping up, altering, widening or diverting any public highway, road, street, or lane until they shall have caused at least one calendar month's notice to have been given, by written or printed notices, put up in the six most public places in the immediate neighbourhood of such highway, road, street, or lane, nor until they shall have heard in person, or by Counsel, or Attorney, any person through whose land such highway, road, street or lane, or proposed highway, road, street or lane, shall run, and who may claim to be so heard before them."

The proposed stopping up of one street of the town and the opening up of another on the land of McKeller & Dolsen, unquestionably came within the purview and restrictions of this clause of the statute, and probably no previous consent of the parties on whose land the new street was to be opened, could have enabled the Council to dispense with the necessary notices. The Council were precluded from passing a By-Law save under certain conditions of a month's notice, &c Much less could they attain the object of di-

verting even for a season, a public highway or street, by mere resolution. The then Municipal Law, extended no power to Councils to perform any act of such importance, save under the formality of a By-Law even could the notice required by the section controlling this case, be dispensed with.

In reference to the question whether there may not be a tenancy of some kind of the road, by the Defendant and his partner, it will be borne in mind that a tenancy for a term of years is always created by express contract between the parties. If such a tenancy were created by the resolution of the Council, it may not have been in their power to determine it before the expiration of the five years, by the second resolution—but the five years expired in 1858, and the tenancy was put an end to by the efflux of time. A tenancy at will can only exist during the joint will of both parties, and it has not been made to appear that the Corporation has ever properly expressed its will on the subject, even if it have the power of doing so The possession of the road cannot be considered a tenancy from year to year on the part of defendant and his partner, as no rent or equivalent for rent, has been paid or tendered by the possessors, or any act done by either the Corporation or themselves, which would create a presumption that such a tenancy was intended. A tenancy by sufferance is the very lowest known to the law,—and is described as a mere invention of the law, to prevent the continuance of the possession of one who comes in by right, and holds over without right, from operating as a trespass. This sort of tenancy never can arise by contract either express or implied—and therefore if the defendant and his partner were tenants at sufferance of the corporation they would not have any contract with the same within the meaning of the Statute. The word *contract* must be construed in its ordinary legal signification, and under no view of the case can I hold that the defendant has anything even tantamount to it, with the corporation. It is not necessary for me to go into the question as to the power of the corporation to enter into a contract for the lease of land, without the same being in writing and under the corporate seal.

The other objection against the defendant holding his seat, is, that he did not take the proper oath of office before entering on his duties. He was elected on the 8th of January ult On the 21st of the same month he made the Declaration of Office, and transacted business as Mayor. On the 25th of the same month these proceedings were instituted. It appears in evidence that on the 28th of the same month he made other declarations of office, which it is contended were made within the twenty days allowed by the Statute and that the relator is premature, if he objected in this way at all, in making his objections to any irregularity or omission in the first declaration, and should have waited until twenty days from the election had expired I am of this opinion. In the case of *The Corporation of Asphodel and Sergeant et al*, 17 U. C Q B, 593, the Councillors proceeded to business, elected the Reeve, &c, without having made any declaration whatever, yet they did not thereby forfeit their offices; though their acts were null. I must hold, therefore, that the clause 183. chap. 54, Con Stat, requiring the declaration, is merely *mandatory*, and does not impose the penalty of a forfeiture of office for non-compliance with its provisions.

Judgment in favour of the defendant with costs.

CHAMBERS.

Reported by ROBERT A. HARRISON, ESQ, *Barrister-at-Law*

WALLIS v HARPER AND GIBSON.

Examination of judgment debtor—Consol Stat U C cap 24, sec 41—Committal—Mode of committal

Held, that the proper way to apply sec 41 of Consol Stat U C cap. 24, where the debtor without excuse fails to attend, or, being examined, refuses to answer upon any point as to which he is properly interrogated, or answers equivocally or evasively, so that he is evidently endeavoring to conceal the truth, is to punish him as for a contempt of the order, or to compel him to obey it by directing him to be imprisoned for a period, within the discretion of the judge, not exceeding twelve months, but that, when attending, his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property, or made away with it, in order to defeat or defraud his creditors, the proper course for the judge is to allow a *ca sa* to issue.

(Jan 24, 1861)

J. B Read, under the Consol. Stat. U. C. cap. 24, sec. 41, moved for an order to commit, or for the issue of a *ca sa* for the arrest of the defendant Gibson, under the following circumstances.

Gibson was examined under the authority given in that clause

It appeared from the examination that he had been in business as a builder in Toronto till five or six years ago, when he retired, having been engaged in speculations in real property, and his circumstances or prospects being such, he stated in his examination, as to lead him to believe that he could maintain himself comfortably without continuing in the business of a builder

He was examined before Mr. Heyden, the Clerk of the Crown and Pleas for the Court of Common Pleas, in regard to the state of his affairs at the time he retired from business—the debts he owed then, and his assets or means of payment; also in regard to his transactions since—what moneys he had paid out and on what accounts, what moneys he had received and how they had been applied, and what had become of the property he had when he retired from business; with a view to show that he actually had the means in his possession or under his control of satisfying the plaintiff's claim, or a considerable part of it.

His transactions had been numerous in mortgages or notes, made and endorsed for the accommodation of himself and others, to which he was a party.

The examination lasted ten days, and was extremely voluminous.

It also appeared that this plaintiff's judgment was obtained in October last, and that many other judgments had been obtained against defendant in the Courts of Queen's Bench and Common Pleas —not less, as he admitted, than ten or twelve, of which he gave a detailed account—all of which were unsatisfied at the time of the examination; and among the judgments was one obtained against him by the co-defendant in this suit, Harper, upon process sued out in March last; to which he made no defence, but allowed judgment to be recovered on as many as eighteen promissory notes—most of them for large sums—and admitted that it was understood between him and Harper that he was to make no defence, but allow judgment to go by default, which he did.

He gave a mortgage also to Harper upon his real property, as a security for any sums for which Harper might be made liable upon paper signed and endorsed by him for defendant Gibson's accommodation.

This account on oath, of this judgment and mortgage, and of his affairs with Harper, was in the highest degree unsatisfactory and suspicious, for he admitted that in regard to a large portion of the notes for which he allowed judgment to go against him by default in Harper's suit, he was neither in law nor justice liable to Harper at all, for they were notes which he had either made or endorsed for Harper's accommodation. He admitted also that Harper having lately made a general assignment for the benefit of his creditors, he Gibson had ranked as one of his creditors, and in that character had executed the deed of assignment.

This plaintiff's judgment was on a promissory note for $800, made by Harper and endorsed by defendant Gibson, and which the plaintiff bought from an agent or broker of Gibson. The defendant Gibson appeared from the examination to have little or no visible personal property remaining which the sheriff could seize in execution;—he swore that his real estate, which had been large and various, would not sell for enough to pay the money for which it is mortgaged.

The plaintiff's attorney arranged and classified the answers given by Gibson upon his examination, as they applied to the different descriptions of property, and to his transactions and affairs generally since he retired from business in 1855 or 1856, and endeavored to show from it that the defendant ought, according to his own account, to have upwards of £900 at his disposal, after setting against what he admitted he had received, all sums which he stated himself to have disbursed.

ROBINSON, C. J.—Having read all the notes taken by Mr Heyden of the examination, and compared with them the result at which the plaintiff's attorney claims to have arrived, I can only say that I look at the defendant's account of his business and affairs as altogether untrustworthy, and such as to show that he is unable or unwilling to give such an account of them as it would be reasonable to expect from any careful man of business of ordinary

intelligence; but as to deriving satisfactorily from it any particular conclusion in regard to the defendant's ability to pay off this debt, I cannot say that I have succeeded in doing so.

It would not surprise me to learn that the defendant Gibson has means under control to a much greater extent than nine hundred pounds, which he might, if he pleased, apply towards the payment of this debt. On the other hand, considering the enormous rates of interest at which he has been raising money, the irregular manner in which his affairs have been conducted and his accounts kept, and his want of knowledge of accounts, or his apparent recklessness, it would not surprise me to learn that he has no such sum as nine hundred pounds, nor any considerable sum, in his possession or within his control, out of which he could satisfy the plaintiff's judgment.

It is certain, however, that the account he has himself given of the judgment which he allowed Harper to obtain against him, and the want of foundation for that judgment to anything like the amount recovered, throws great suspicion on the defendant's conduct, not only in this matter but in others, so as to prevent much reliance being placed upon his statements.

The questions put to the defendant, with very few exceptions, are not reported, only the answers are given, and in many instances, where they appear evasive and unsatisfactory, that may be owing to the defendant not having been so interrogated as to call for a more precise statement.

Taking these answers altogether, as to the account the defendant has given of his means of payment, I must say that they are very far from satisfactory.

Then the question is, what is the proper mode of dealing with such a case, under the existing law? The Consol. Stat. U. C. cap. 24 sec. 41, provides for obtaining an order on any judgment debtor to submit to an examination as to his estate and effects, the property and means he had when the debt for which judgment has been signed was incurred, or to the means which he still has of discharging the judgment, and as to the disposal he may have made of any property since contracting the debt; and then it enacts, that in case such debtor shall not attend, as required by the order, and does not allege a sufficient excuse for not attending, or, if attending, he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property, in order to defeat or defraud his creditors or any of them, the court or judge may order the debtor to be incarcerated in the common gaol of the county in which he resides, for any time not exceeding twelve months, or may direct that a *ca. sa.* may issue against him; and such writ may thereupon be issued upon such judgment.

In case such debtor enjoys the benefit of the gaol limits, such court or judge may make a rule or order for his being committed to close custody, under the 35th section of the same act.

I have always hitherto thought that the proper way to apply this provision, when the defendant without excuse fails to attend, or, being examined, refuses to answer upon any point as to which he is properly interrogated, or answers equivocally or evasively, so that he is evidently endeavoring to conceal the truth, he should be punished as for a contempt of the order, or, to compel him to obey it, by directing him to be imprisoned for a period, within the discretion of the judge, not exceeding twelve months; but that when his answers are such as to lay a reasonable ground for the suspicion that he has concealed his property or made away with it in order to defeat or defraud his creditors, the proper course then for the judge is to allow a *ca. sa.* to issue; for in that case I think the intention of the Legislature was, that although it should no longer be allowed to the plaintiff, by his own affidavit of belief or suspicion, merely to entitle himself to execution against the person, yet, when the court or a judge sees that upon the statements made by the defendant himself, after fair opportunity of explanation, that the plaintiff may reasonably entertain such belief or suspicion, then the execution against the person may be allowed to go, and the debtor will thereupon be subject to be dealt with as debtors in execution had been before the act, under the provisions which are now embodied in the 26th chapter of the Consolidated Statutes. The object, then, is, not to punish as for a contempt of the order, but to place in the power of the creditor such means of coercion as an execution against the person may afford, under the restrictions and modifications to which that remedy is now made subject.

CHANCERY.

Reported by A. GRANT, Esq., *Barrister-at-Law.*

BURNHAM v. PETERBORO'.

Principal and surety—Municipal Corporation.

Where a corporation, having a debt to pay, which it is their advantage to discharge immediately, raised money upon an accommodation note of an individual and applied the money to the payment of the debt, promising to protect the note, or to repay, relief was given in this court against the corporation upon a breach of the promise. And if the corporation could have been compelled to pay the debt, the person so giving his note will be entitled to stand in the place of the corporation creditor.

Mr. *Adam Crooks* for plaintiff.

Mr. *Hector*, for defendants.

ESTEN, V. C.—The facts of this case are clear beyond dispute. A sum of £700 was raised upon the note of the plaintiff, at the request of the mayor, and applied to the use of the town in discharging a balance due upon its subscription to the railway, whereby its debt was paid, and it was enabled to recover interest on its stock, which it is doing by means of an action at law. The proceeding was sanctioned by resolution of the council. It is true that it was expected at the time that about £1800 would be recovered from Messrs. Whitmarsh and Conger, a balance on the debentures, which, however, is still unpaid. This circumstance is, I think, immaterial. The charges of embezzlement or misappropriation are clearly rebutted. I cannot imagine what Mr. Sawers means by saying that the debt was an unjust one, and one which ought not to be paid. The corporation owed a debt which it was unable to pay; a third person intervenes at its request, and pays this debt upon its promise to indemnify him. Can any demand be more just in the abstract than this demand of the plaintiff? It would be much to be regretted, if any technical difficulty stood in the way of the satisfaction of so just and equitable a claim. But I think none such exists. I cannot doubt that it would be competent for the corporation to apply any surplus moneys it might have, not applicable to any particular purpose, to the satisfaction of this debt without resorting to a new loan. But even supposing none such to exist, and that a new loan would be necessary, it would require time to accomplish it, and the demand was urgent. The same remark is applicable to the alleged misappropriation of the £1500 sterling, with which, however, the plaintiff is in no way connected. Under any of these circumstances it would be highly advantageous to the corporation that the debt should be paid at once, for it would not subject them to any liability, to which they would not be otherwise subject, and it would instantly entitle them to a large sum, by way of interest, on their stock. I have no doubt that if a third person under such circumstances were to pay this debt at the request of the corporation, or to raise money on his credit to enable them to pay it, on a promise of repayment with interest, or on a promise to protect the note, and the contract were performed, and the corporation had the benefit of it, they would be legally liable. This is precisely that case. The plaintiff is, however, substantially, although perhaps not technically, a surety, and entitled to indemnity, and has a right, therefore, to the aid of this court. His right may be rested on another ground. It is an old and well known head of equity that although a loan to a married woman is invalid, yet if the money be actually applied in payment for necessaries, unprovided by her husband, the party furnishing the money may apply to this court to stand in the place of the persons who have supplied the necessaries, and to proceed against the husband in their names. It cannot be doubted that the corporation could have been compelled to pay the balance of their subscription, and this money having been applied to that purpose, the plaintiff may stand in the place of the railway company. I think the plaintiff should have a decree with costs.

COUNTY COURT CASES.

WILSON J. SWITZER v THE TRUSTEES OF SCHOOL SECTION NO. 8, IN THE TOWNSHIP OF ERNESTTOWN

(Before His Honor Judge McKENZIE, County Judge for the United Counties of Frontenac, Lennox and Addington.)

Common Schools—Teacher's Salary

Held that an action at law will not lie on an award made under the 84 section of the U. C. Common School Act between a school teacher and trustees.

Held, that under section 12 of the amended School Act of last session, all agreements between teachers and school trustees must be in *writing* signed by the parties and under the corporate seal.

(28 January, 1861.)

This was an action on award. The declaration alleged that the plaintiff was a duly qualified Common School teacher, and that he was employed by the defendants to teach a Common School in School Section No. 8, in the township of Ernesttown, for a period of 12 months, at a salary of £60 a year, payable quarterly. That the plaintiff in pursuance of said engagement, entered upon his duties of teacher of said Common School, and during the period of his engagement did teach in said School, according to the terms of his engagement; and that the sum of £30 being the last two quarters of salary, is due to him from the defendants. That differences having arisen between the plaintiff's salary, board, and the manner in which he conducted the school, as well as the right of the plaintiff to receive the balance of his salary, for an alleged want of qualification; and that in order that the matters in difference between them might be satisfactorily settled, the matter was left to arbitration, according to law, and that the arbitrators made their award, in writing, in favor of the plaintiff, for £30 to be paid within a certain time now past. Yet that the defendants, although often requested so to do, have not paid the said sum of £30 nor any part thereof, although the time for the payment thereof hath elapsed.

The defendants demurred to the declaration, assigning as causes of demurrer:

1st. That the declaration showed no cause of action in this, that it is not alleged that the defendants contracted under their corporate seal.

2nd. That no action at law can be sustained for the claim of the plaintiff as set forth in the declaration.

G. L. Mowat for the demurrer; *O'Reilly* contra.

MACKENZIE JUDGE, C. J.—I have not been able to meet with any case in which the point, whether an action, will lie upon an award made under the 84th section of the Common School Act, has been decided.

By section 84, cap. 64, Upper Canada Consolidated Statutes it is enacted, 'in case of any difference, between trustees and a teacher, in regard to his salary, the sum due to him, on any other matter in dispute between them, the same shall be submitted to arbitration,' and by 85th section, the arbitrators, or any two of them may issue their warrant to any person th rein named, to enforce the collection of any moneys by them awarded to be paid, and the person named in such 'warrant shall have the same power to enforce the collection of the moneys mentioned in the warrant, by seizure and sale of the property of the party or corporation, against whom the same has issued, as any bailiff of a Division Court has in enforcing a judgment and execution issued out of such Division Court,' and by section 87, it is enacted that 'no action shall be brought in any Court of law or equity to enforce any claim or demand between trustees and teachers which can be referred to arbitration as aforesaid."

I have persued the elaborate judgment delivered by the Chief Justice of Upper Canada in the case of *Kennedy* v. *Burness*, 15 U. C. Q. B. 473, also the judgment of Mr. Justice Hagarty, in the case of *Kennedy* v *Hall*, 7 U. C. C. P., 218, and the judgment of Mr. Justice Richards, in the case, *Kennedy and Murray* v. *Burness et al*, 7 U. C. C. P., 227, and find the object, force and effect, of awards like the one set out in the declaration examined at great length. Although the point now under consideration has not been decided, still, from the language of the judge, it seems to me that they thought an award between trustees and a school teacher was final, and conclusive, not liable to be made the subject of an action in any court. The words 'no action shall be brought to enforce any claim or demand' between trustees and teachers, in the 87th section, seem to point out at attempts to build up actions in our Courts upon awards. The present action is brought to force a claim which has been already decided.

In looking at the 9th section of the amended School Act of the last session of Parliament, 23 Vic., cap. 49—I feel convinced that no action at law will lie against the School Corporation upon an award made between teachers and trustees who wilfully refuse or neglect *for one month after publication of an award*, to comply with or to give effect to award under the Statute. It is enacted by the 9th section of the amended act that if trustees under section 84 of the U. C. School Act, the trustees so refusing or neglecting shall *be held to be personally responsible for the amount of such award*, which may be enforced against them individually by warrant of the arbitrators within one month after the publication of their award. It appears to me that the Legislature has substituted arbitrators for Courts in a matters of dispute and claims between trustees and teachers, vesting the arbitrators not only with powers of adjudication, but also with very high and extensive powers of enforcing the collection of any moneys by them awarded to be paid.

I am of opinion that the present action against the School Corporation cannot be sustained. As to the exception taken by the demurrer to the declaration, for want of an allegation in the declaration, that the defendants contracted under seal, from the judgment of the Court of Queen's Bench in *Kennedy* v *Burness*, I think such an allegation unnecessary. If the cause had gone to trial, the plaintiff would require to produce an agreement in writing. But, for the future, under the 12th section of the amended School Act of last session, agreements between teachers and trustees must be in writing, signed by the parties thereto, and sealed with the corporate seal.

In the present case, judgment must be for the defendants on the demurrer.

Judgment for the defendants on the demurrer.

DIVISION COURT CASES.

In the First Division Court of the County of Elgin.

GEORGE LIGHT v ROBERT LYONS AND JOHN LYONS.

Division Courts—Splitting causes of action.

Where plaintiff sued for the breach of a contract in the hiring by the defendants of a yoke of oxen belonging to the plaintiff, on an alleged promise to return them in as good order and condition as when hired, alleging as a breach that they were not returned in as good order, &c., but were injured, &c., and it was made to appear on the trial of the plaintiff that the defendants had been on a former occasion sued by the plaintiff for the hire of the same oxen on the same contract for hiring, which suit resulted in judgment for the plaintiff. This was held to be a splitting of the plaintiff's cause of action within the meaning of the Division Court Act, and judgment in the second suit was given for defendants.

(18th March, 1857.)

This was a suit brought by the plaintiff to recover £10 for the breach of a contract in the hiring by the defendants of "a yoke of oxen belonging to, and the property of, the plaintiff," on an alleged promise "that they were to be returned in as good order and condition as when hired;" and alleging for breach that they "were not returned in good and proper order, but were injured," &c.

It was urged as a legal defence on the part of the defendants, irrespective of the facts and merits of the case as they transpired upon the examination of witnesses, that as the defendants had been sued by the plaintiff in this Court, in a previous plaint for the hire of the same oxen on the same contract for hiring, as the present suit was founded upon, which suit was tried and judgment was rendered for the plaintiff for the use and hire of the same cattle, for £4 3s. 1d., the plaintiff had split up his cause of action and brought two suits where one would have sufficed, thereby subjecting the defendants to the costs of a second suit, and contrary to the 26th section of the Division Court Act of 1850, and contrary to law, irrespective of the statute.

It was admitted by the plaintiff, that this suit was brought on the promise for the same hiring of the same oxen as the former suit.

Hughes, Co. J.—The 24th section of the Division Court Act of 1850* requires the plaintiff in any suit brought in a Division Court, to enter "a copy of his account or demand, in writing, in detail, and the particulars of his demand in any case of tort or trespass which shall be numbered," &c., and then, after providing for a summons, the clause requires that a copy of the summons, to which shall be attached a copy of the plaintiff's account or of the particulars of such demand, as the case may be, shall be served ten days, &c.

Then the 26th section† enacts "that it shall not be lawful for any plaintiff to divide any cause of action into two or more suits for the purpose of bringing the same within the jurisdiction of a Division Court," &c.

The 26th section, I apprehend, was to restrain parties from bringing several suits for a cause of action or items of account amounting in the aggregate to more than £25, which is the ultimate limit of the jurisdiction of the Court for the recovery of a debt account, or breach of contract or covenant, or money demand, or to recover damages for torts amounting in the aggregate to more than £10—which is the utmost limit of the jurisdiction for torts—by splitting up their cause of action and bringing two or more suits in order, apparently, to give the Court jurisdiction, and thereby avoid the limit of jurisdiction fixed by the 23rd section of the act,‡ which enacts that the judge shall have power, jurisdiction, and authority to hold plea of all claims and demands whatsoever, &c., of debt account, or breach of contract or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed shall not exceed the sum of £25, and in all torts to personal chattels to, and including the amount of £10; with certain exceptions and provisions thereinafter expressed.

The jurisdiction of the Court has been since extended to other personal actions, to which it is not necessary to allude in the present case.

It becomes now necessary to enquire how the 26th section affects the present case. I think it refers only to actions where the claims or demands of two or more suits for the recovery of a debt account, or breach of contract or covenant, or money demand, would, when added together, amount in the aggregate to more than £25, or where for a tort the aggregate would amount to more than £10; and where they are "split up for the purpose of bringing the same within the jurisdiction of a Division Court," and that that section does not affect the present case, because the aggregate of these two suits would not amount to more than £15, this being a suit, as it is expressed in the summons, "for damages on contract," and the former being also upon a contract for "the use and hire of cattle," as upon an ordinary action of assumpsit or debt. So that it cannot be said the cause of action has been "split" or divided, as expressed by the statute, for the purpose of bringing the same within the jurisdiction of the Division Court.

It may be useful to state what I conceive the law to be generally, upon this subject, to guide suitors as well as myself in future cases, for the sake of uniformity in so far as the Courts of this County are concerned, and also to give my judgment as I take the law to affect this particular case, irrespective of the Division Court Statutes.

Wherever I have found parties bringing two suits when one might have sufficed, and thereby subjecting a defendant to the hazard or possibility of paying the costs of two plaints instead of one, and where one would have answered every purpose, I have uniformly exercised the discretion given to the judge by the 3rd section, by apportioning the costs between the parties in such a manner that the plaintiff was obliged to pay half the costs, and indeed, in one case, where it was manifest that a third party's name had been used as a plaintiff in order to oppress a defendant with the costs of a second suit, where the real *bona fide* holder of a note had indirectly split up his cause of action and brought one in his own name and another in the name of a third party, I ordered the plaintiff to pay the costs in one of them.

It has been a matter of discussion in the Superior Courts in England, as to what is meant by statutes in England containing similar provisions to our own, by "dividing a cause of action," and what is meant by the words "cause of action."

The Court of King's Bench in England, in the case of *Bagot* v. *Williams*, 3 B. & C. 235, had this subject before them. It was an action of assumpsit for money received as steward of the plaintiff. The defendant pleaded a recovery in a former action of debt of £4,000, which he alleged to be for the identical causes of action in that suit. This was denied. It appeared by the evidence of the steward who succeeded the defendant, that he investigated defendant's accounts and found there was due plaintiff £7,000; that in the estimate he took into account all the sums claimed on the then present action, except a sum of £45 which the defendant had received previous to the first suit, but that he had only discovered it since the recovery in the first suit; after he had investigated the accounts, he directed an action to be brought in an inferior local court for £4,000, and judgment passed by default. He verified only for £3,400, because the defendant (as he then thought) had not any property exceeding that sum. Upon these facts the learned judge was of opinion, that whatever constituted a subsisting debt at the time when the proceedings in the inferior Court was instituted, and was known to be so by the agent who managed the whole transaction, was to be considered as included in and constituting one entire cause of action, and he therefore directed the jury to find a verdict for the plaintiff for £45, but reserved leave to the plaintiff to increase the verdict as the court should afterwards direct. The Court upheld this view, and Bayley, J., held that the plaintiff by his own act was as equally bound as he was by the verdict of a jury, and that having chosen to abandon his claim once, he had done it forever.

It is laid down in 2 Taylor on Evidence as a general rule, which is recognised alike by Courts of law and equity, that where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted part of their case.

The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time, *Henderson* v. *Henderson*, 3 Hare 113. It has been held, in the United States, that if a plaintiff sues for part only of an indivisible claim, as if one sues another for a year under the same hiring and then brings an action for a month's wages, it is a bar to the whole (1 Wendell's Reports 487). On page 1314 of first volume Taylor says, "The original County Court Act contains an important clause relative to this subject, for it enacts in section 63, that it shall not be lawful for any plaintiff to divide any cause of action for the purpose of bringing two or more suits in any of the County Courts, but any plaintiff having cause of action for more than £50, for which a plaint might be entered under this act, if not for more than £50, may abandon the excess, and therefore the plaintiff shall, on proving his cause, recover to an amount not exceeding £50, and the judgment of the Court upon such plaint shall be in full discharge of all demands in respect of such cause of action, and entry of the judgment shall be made accordingly. The term 'cause of action' here employed, is one of indefinite import, but the Courts have fixed its meaning to a certain extent by holding, first, that it is not limited to a cause of action on one separate entire contract, but that it extends to trademen's bills where the dealing is intended to be continuous, and where the items are so far connected with each other that if they be not paid they form one entire demand (*In re Akroyd*, 1 Ex. R. 479 is cited), and next, that it does not preclude the plaintiff from bringing distinct plaints whenever the claims are of such a nature as would justify the introduction of two or more counts in the declaration, if the action were brought in one of the Superior Courts."

In conformity with this, a landlord has been allowed to sue his

* Con. Stat. U. C. ch. 19, sec. 24, p. 147. † Con. Stat. U. C., ch. 19, sec. 59.
‡ Con. Stat. U. C., ch. 19, sec. 55.

tenants in one plaint for rent, and in another for double value, in consequence of the premises being held over after the expiration of a notice to quit (*Wickham* v. *Lee*, 12 Q. B 526). *Wood* v. *Perry*, 3 Ex. 442, is an authority shewing that the Court of Exchequer held the words cause of action in a similar British Statute, meant 'cause of one action,' and were not to be limited to an action upon one separate contract.

Broom in his legal maxims, page 249, in applying the rule "nemo debet bis vexari pro una et eadem causa" says, "The plaintiff in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost, and after he has once received the full value he is not entitled to further compensation in respect of same loss; and by a former recovery in trover and payment of the damages, the plaintiff's right of property is barred, and the property becomes vested in the defendant in that action as against the plaintiff, *Cooper* v. *Shepherd*, 3 C B 266."

After what has been said, and giving the best consideration in my power to the case, I think the plaintiff in bringing his first suit against the defendant upon the contract proved, voluntarily abandoned his right to recover damages for the alleged breach of the same contract in this suit, for it properly belonged to the subject of litigation between them, and might have been brought forward all in one plaint In other words, I consider the claim for damages upon that contract indivisible, and that plaintiff cannot be permitted to bring separate suits for that which I consider to be but different parts of the same plaint, any more than could the payee of a promissory note be permitted to bring one plaint for the recovery of the principal, another for the interest, and another for the damages, by reason of protest or the like, which would to any person of common sense appear unreasonable.

Irrespective of the law of the case, I do not consider that the plaintiff has made out a sufficient case even upon the merits.

Judgment for the defendant.*

GENERAL CORRESPONDENCE.

TO THE EDITORS OF THE LAW JOURNAL.

AYR, January 17, 1861.

GENTLEMEN,—Please to give your opinion on the following in your next number, and oblige

Your obedient servant.

1. A is owner of lot number one in the eighth concession of B. About sixteen years ago A employed and paid a licensed surveyor for running out his lot. Trees which were then blazed can still be traced. Monuments which were then planted still stand. And fences have been put up on the line which was then running between lots one and two. Is this line good? Will it be considered the *original line* according to the amended Surveyor's Act of June, 1857? No other line has ever been run between lots one and two. Again, no lines have ever been run between lots two and three, nor between lots three and four; but between lots four and five there is an attested monument standing. The owners of lots two and three intend having their lines run out in a short time. Will the surveyor that they employ have to commence at the monument planted on the line run between lots one and two, and measure to the monument standing between lots four and five, and divide equally, according to the Surveyor's Act of 1849? Or will he have to commence at the town line, where there is a monument which was planted by the Government Surveyor when he run out the township, and measure to the *monument between lots four and five, and divide accordingly*? If he does the latter, he will alter the line between lots one and two some links on to lot number one. If this is done, which of the two lines will stand good or be legal, the one which was run sixteen years ago, or the one to be run now?

2. W, becoming insolvent, made a deed of assignment (without the release clause), for the benefit of his creditors, to X and Y, who were none of his creditors. The assignees advertised it regularly in the local newspaper. They notified the creditors by letter, requesting them to come forward and execute the deed of assignment, but none of them has done it except Z. When the property, real and personal, has been sold, and the debts collected, will any of the creditors receive benefit from the funds besides Z, who is the only one that has executed the deed of assignment? If the proceeds have to be divided ratably amongst *all* the creditors, how will the assignees act? They cannot know the amount unless each creditor lodge his claim, justly authenticated, with the assignees.

3. Again, T held a mortgage against part of the estate. T sued W on the mortgage, and got judgment against him, and has sold the mortgage property, but has failed to get his pay in full out of it. Will T receive his apportionment for his balance along with the other creditors?

I am, yours, &c.,

A SUBSCRIBER.

[It is not our purpose to answer questions of general law, and when we do so it is only where the questions if answered will convey information useful to the general body of our readers.

The *first* question put by our correspondent is one in which "the owner of lot number one in the eighth concession of B" may have a very great interest; but really it would be imposing too much on the good nature of our readers to occupy our space with an opinion as to whether, under the particular circumstances stated, "the line run sixteen years ago, or the one to be run now," is to govern? Let "the owner of lot number one in the eighth concession of B" submit his case to some member of the profession in active practice—pay his fee—and be guided by *his* opinion.

The *second* question is not open to similar objections. We presume — though not so stated — that the property assigned was personalty, and that as between the assignor and his assignees there was no actual and continued change of possession of the property assigned. If correct in this supposition, then the assignment can only be sustained if made for the purpose of paying and satisfying, ratably and proportionably, and without preference or priority, *all* the creditors of the assignor their just debts. Should there be any limitation in the assignment preventing creditors, after the lapse of a given period, from taking the benefit of it, then the assignment would be probably held void, as being made for the benefit of such creditors only as shall accept the benefit within the given time, and not for the general benefit of all the creditors of the

* Though this judgment was delivered as long since as 18th March 1857, we only received a report of it during last month, and we now publish the judgment as being one of unusual interest to Judges of Division Courts

assignor. (*See* per Burns, J., in *Burritt* v. *Robertson*, 18 U.C. Q.B. 560.) Should there not be any such limitation then it is in the power of the remaining creditors to come in at any time and accept the benefit of the assignment. The difficulty suggested by our correspondent, that an assignee cannot declare a dividend without first knowing the number of persons entitled to share and the proportions in which they rank, is one which must exist, unless all creditors voluntarily and within a reasonable time make known their claims to the assignee, and rank under the assignment according to their claims. It is a difficulty which must exist so long as the Legislature see fit to leave the law in its present very unsatisfactory state. The only mode of overcoming the difficulty that we can at present suggest, is that of filing a bill in the Court of Chancery to administer the estate, and so compel creditors to prove their claims, or be barred. This is a remedy which, owing to its expense, might, in the case of a small estate, prove worse than the disease.

To the *third* question we answer, that T is entitled to rank on the estate for the balance of his mortgage money.—Eds. L. J.]

Municipal Government.—Law and Equity.—Conflict of decisions.

To the Editors of the Law Journal.

Peterboro', 19th Feb., 1861.

Gentlemen:—I beg to call your attention to two judgments, one by the Queen's Bench (*Scott* v. *The Corporation of the Town of Peterborough*),* and the other by the Court of Chancery, (*Burnham v. The Corporation of the Town of Peterborough*)† touching matters of great interest to municipalities.

The Queen's Bench judgment sufficiently shows the subject matter in dispute; that in Chancery, requires some explanation. The town of Peterborough agreed to take £30,000 stock in a railroad, and for that purpose by-laws were sanctioned by the rate-payers and passed, authorising debentures to be issued to the amount of £37,500, to provide the necessary funds. These debentures were sold and realized to within a trifle, if not the whole of the required amount. The town council, however, spent a portion of this money for other purposes, and in the end of 1858, when they came to settle for the stock, they found they were deficient about £700. Burnham, the plaintiff, then one of the councillors, gave his note, which was discounted and the proceeds applied to pay the balance of stock deficient, and funds for which had already, as I have said, been realized to within a trifle if not fully.

The note was renewed at various times during the year 1859 (Burnham being still a councillor) until finally it was reduced to £450, and became due in the beginning of 1860. No provision whatever was made for the payment of this note by the councils of 1858 or 1859, and when it became due, the council of 1860 refused to pay it on the same grounds as they resisted the payment of the Queen's Bench suit, viz., that it was not a debt incurred by the council of 1860, but by a previous council, also that it was not a debt contracted for any thing within the ordinary expenditure of the corporation for that year when the debt was incurred; nor yet was there an estimate made of the sum required to meet it; nor any by-law *passed for its* payment, by imposing a special rate for that purpose; and that, in fact, in addition to these reasons, the amount had already been raised by debentures.

Burnham upon this, filed a bill in Chancery, and the objections were as stated above, fully set forth in the answer given thereto.

You will see from the above, that the *principle* involved in both cases is precisely the *same*. No one conversant with municipal matters will hesitate to endorse the judgment of the Chief Justice as being consonant with the municipal laws of Upper Canada, as well as with sound sense and justice, and I am much mistaken if an equally decided opinion (though of a very different nature) be not come to in regard to the chancery judgment. The effects of the chancery judgment, were it to become a precedent, really deserves a very serious consideration. All controul over a municipal council must be at an end. Any object that the majority of such council may devise, although opposed to the wishes of the great majority of the rate-payers, may be carried out in the way as is approved by this judgment, simply by taking the money designed for one object and applying it to the desired one, and then to supply the gap by discounting a note and leaving it as a legacy to their successors. If they refuse to pay, file a bill, and in accordance with the judgment the rate-payers must pay up, because, forsooth, they have reaped what the council, not themselves, look upon as a benefit. Can anything be more outrageous, or more completely prove the soundness of the argument of the Chief Justice, that "in this way the courts of law would have the power indirectly given to them of taxing the rate-payers without their consent, to pay debts which the corporation itself could not pay by a rate."

In reading the chancery judgment, one cannot but remark that the Vice-chancellor altogether ignores two considerations certainly of much weight. 1st, That the money *had already been raised* to pay for the stock, though some of it was misapplied by the council; and 2nd, That the plaintiff, Burnham, being a member of the council that both misapplied the funds and then supplied the want by discounting the note in question, could in no way, therefore, be placed on the footing of an innocent third party led astray by the council.

It would have been very satisfactory had the Vice-Chancellor referred to any clause of the municipal act authorising councils to discount notes to supply funds for which they dare not lay on a rate.

There appears a strange confusion of the facts, in representing the £700 as raised to enable the town "to recover interest on its stock," which "it is doing by means of an action at law," and as if "it would instantly entitle them to a large sum of interest on their stock." The fact is that the sum for which the town is now proceeding is one it would be entitled to *over* and *above* any dividend or interest on that stock were the railroad in a condition to pay a dividend.

* See page 65 of this Journal † See page 73 of this Journal

"The charges of embezzlement or misappropriation are clearly rebutted." No one here ever dreamed of *embezzlement*, but how misappropriation has been rebutted, is a mystery, the fact being that the money was raised for a certain purpose, and when it was required for that purpose, the money was *not*. Certainly then it must have been misappropriated

"I cannot doubt that it would be competent for the corporation to apply any surplus monies it might have, not applicable to any particular purpose, to the satisfaction of this debt, without resorting to a new loan."

This appears a most extraordinary as well as alarming *dictum*. What, if such is the case, are we to make of the numerous clauses in the municipal act, directing the means to be taken for raising money by loan, and which limit councils to a rate; or taking a vote of the rate-payers for any expenditure not of an *ordinary* kind? I for one must be excused for considering it a matter of very grave doubt how far any councillors would not render themselves personally liable by paying with the rate-payers funds in their keeping, a claim in the position of the one in question, the Vice-Chancellor's judgment notwithstanding.

As to the old and well known head of equity about a loan to a married woman, to make that applicable to the present case, I humbly submit that it must be shown that the rule would apply to a husband *who had already advanced the money for the necessaries*, and that the party suing him had applied such advance to other objects, and sought to recover it a second time, could he in that case proceed against the husband with success?

In contrasting the two judgments one cannot but observe how the Chief Justice supports his by a reference as well to the laws as to cases decided, while the other alludes to neither the one nor the other, an omission (*if it could be helped*) to be regretted, as it detracts much from confidence in its soundness.

It may be asked why the chancery judgment was not appealed, and here also lies a subject for animadversion. An appeal was attempted, but the court refused to take as security the bond of the corporation, and as no private individuals chose to undertake the responsibility of being answerable for the costs and damages in case the judgment was affirmed, the appeal fell to the ground. Now the object of security being merely to prevent the respondent ultimately suffering loss in consequence of the appeal, surely there was no risk of such in allowing the appeal on the bond of the corporation of Peterboro', and therefore the refusal can only be looked on as actually denying an appeal; *why*? can only be matter of conjecture.

Your obedient servant,

F.

[The written opinion of a judge upon a question submitted to him in ordinary course for judicial determination, is a fair subject of criticism; we therefore readily insert the communication of our correspondent.

The judgment of the court of chancery, to which he adverts, and upon which he so freely comments, certainly involves principles in direct conflict with those enunciated by the court of Queen's Bench in the other case to which our correspondent refers.

When the two courts are so much at variance on principles of municipal government, it is greatly to be hoped that ere long the court of Error and Appeal will be called upon to determine in some case or other which court is right and which is wrong. It may, however, be that both decisions are sound; one *good law*, and the other *good equity*. This conflict of decisions is one of the evils traceable to the fact that a system of jurisprudence which naturally should be solid and entire is torn into segments, and so retained contrary to reason and common sense.—EDS L. J.]

Justices of the Peace—Compromise—Jurisdiction—Penalty—Costs.

TO THE EDITORS OF THE LAW JOURNAL.

Preston, 22nd February, 1861.

GENTLEMEN:—Permit me to request your answer to a certain question in relation to the powers and duties of a Justice of the Peace in cases where he is acting in his *judicial* capacity.

Upon an information or complaint being made before a justice of the peace, against a person for having acted contrary to the provisions of an Act of Parliament or a Municipal By-Law, for the punishment of which a fine or a penalty is imposed, and the nature of which complaint a justice of the peace is authorized to *try* and *determine*: may such justice of the peace, before the time appointed for the hearing or trial of the case, receive from the defendant (who desires to settle the matter before the trial and before additional costs are incurred) an acknowledgment of the charge preferred against him, and the amount of costs incurred, together with such an amount for fine or penalty as may seem just and meet to such justice of the peace, and thereupon stay further proceedings?

I have in vain endeavored to find an authority for a justice of the peace to receive monies as fines or penalties before the actual trial, and then discharge the defendant; for the several penal clauses of the Statutes, as also the Municipal By-laws, invariably read: *upon conviction before such justice of the peace, shall forfeit and pay such fine*—or, *shall upon conviction thereof before any justice of the peace having jurisdiction, &c., pay a fine of* ——, or words to the like effect; from which clauses the inference may be drawn that no fine or penalty can be imposed *before* a conviction is made—and that, since the conviction is subsequent not anterior to the hearing or trial, no fine or penalty can be imposed and received before the time appointed for the hearing or trial, but that the hearing or trial must precede the receiving of monies for fines or penalties; and that therefore a justice of the peace is not authorized to receive the same before the trial or hearing. It, nevertheless, appears but reasonable and just that such a power should exist, for in no instance does the law desire to incur a larger amount of costs than actually necessary, which evidently would be the case if, after the defendant, having come before the justice of the peace, expressed his readiness to acknowledge the charge, to pay costs incurred, and to pay such fine or penalty as the justice of the peace might think proper to

stipulate, the justice being obliged to refuse the offer and to issue subpœnas for witnesses, have them served, and have the matter brought to a formal hearing. Moreover, if at the time appointed for the hearing or trial of the complaint the defendant at once acknowledged the charge, there would be no necessity of examining the witnesses or of entering into any further particulars of the case, in fact there would be no trial or actual hearing in that case; the Justice of the Peace would tax the costs and stipulate the amount of fine or penalty to be paid, in the same manner as he might have done before the time appointed for the hearing, when defendant offered to pay; the only difference in the two cases would be the amount of costs, which in the one case would be unnecessarily higher than in the other. Your valued answer will oblige,

Yours, respectfully,

Otto Klotz.

[When it is determined to prosecute a person for an offence either against a Statute or Municipal By-law, over which a Justice of Peace has power to exercise a summary jurisdiction, the *first* step is to lay an information against the offender, The *next* step is, procure the appearance of the defendant, in order to answer the charge. This is done according to the circumstances, either by the issue and service of a summons, or issue of a warrant and arrest of defendant thereunder. The *third* step, when the defendant appears, and no compromise is effected, is to hear the complaint, and if necessary, determine it. In most cases, however determinable, upon summary conviction, it is lawful for the litigating parties to enter into a compromise, and to supersede the necessity of a judicial adjudication. If no compromise is effected the Justice *must* proceed to hear and determine. The defendant is therefore asked to plead to the charge. He may either confess it or plead not guilty. If he confesses it, nothing more remains but to pass judgment. In coming to a conclusion, (should no compromise be effected,) the Justice must convict, acquit, or dismiss the complaint. Whether the proof of the commital of the offence arise from the confession of the party accused, or be established by the testimony of third parties, the Justice must convict before he can impose any penalty, or award any costs. The power to impose a penalty or award as to costs, both of which pre-supose a conviction, is, as mentioned by our correspondent, in general, only to be exercised upon conviction. It seems to us that our correspondent confuses a compromise with a conviction. They are quite distinct. It is not the Justice who compromises, though it is he who, if necessary, adjudicates. The compromise is the act of the parties litigant—not of the Justice. If the parties compromise, to make the compromise effective, the charge is withdrawn, and when the charge is withdrawn the Justice is completely ousted of jurisdiction. He cannot either proceed, hear the complaint or dismiss it, and therefore can neither impose a penalty or costs. If the parties compromise upon the terms of the accused paying costs, then the costs are paid, not because awarded by the Justice, but because agreed to be paid as a part of the compromise. If the parties do not compromise, the Justice proceeds to hear and determine, and upon conviction, to pass judgment, imposing such penalty as may appear to him to meet the merits of the case. The imposition of a penalty and costs is an act of judgment, and there can be no judgment till conviction. A conviction must necessarily precede the power to impose a penalty or costs.—Eds. L. J.]

REVIEWS.

The Law Magazine and Law Review for February is received. This Magazine is one that we delight to receive. We read its pages with much zest. Confessedly one of the most talented law periodicals in England, it is of its kind without competition. It does not seek to keep its readers informed on every case decided in England, but leaves to other periodicals, such as the *Law Journal*, the *Jurist*, the *Law Times*, and the *Weekly Reporter*, that task—a task which they conscientiously and efficiently perform. The aim of the *Law Magazine* is not so much to inform as to instruct. Its well filled pages abound with food for reflection. With all the qualities of the instructor it combines the fascination of the romance. It is this happy combination which makes the magazine so general a favorite among all classes of the profession. The number before us opens with a long and interesting paper on the trials of Lord Cochrane. The sufferings and the trials of this great seaman, now no more, are well portrayed. It is a relief to find that a gallant man, in early life so vilified, lived to tell the story of his wrongs and to vindicate his character in the eyes of the British public. His life was a chequered one, but his sun set free from the dark clouds of envy and malice which hovered about him in the mid-day of his existence. His end was one of peace and charity with all men. The second paper is on "Pleading of the present day." The writer shows how little is at present understood of pleading as an art, and how necessary it is that the art should be understood. He expresses the hope, in which we heartily join, that some member of the bar will attempt for the present system of pleading what Serjeant Stephen so successfully accomplished for the past system. He exposes the worthlessness of such a volume as the edition of "Stephens' Pleading," recently published under the sponsorship of "James Stephen and Francis F. Pinder, Barristers-at-Law," wherein they vainly attempt to alter the text of the great original, so as to adapt it to the present system. The "Precedents of Pleading," by Bullen and Leake, was received by the writer too late for comment. However useful the latter work may be as an index to precedents, it does not attempt to deal with principles. What is required is a dissertation on the Rules, if any, of Pleading; the principles upon which the Rules are founded; the operation of the Rules and their practical results. The third paper is one on the late Thomas Jarman, author of the Treatise on Wills, whose modesty was only equalled by his merits. Then follow thirteen other papers of varied interest and importance, including one on the case of Anderson, the Fugitive Slave, but want of space, not want of inclination, prevents a further reference to them.

Papers of the Society for Promoting the Amendment of the Law.—We regularly receive the publications of this Society, and are right glad to receive them. A Society of the kind is calculated, in a *thinking* community, to do a vast amount of good; but its power for good must in a great measure depend on the ability of its members. In every Society of the kind, while there are some men remarkable for general information and ability, there are others remarkable only for the want of these qualities. When the latter are seized with a *cacoethes scribendi* or *legendi*, and are allowed to indulge in their peculiar vein, the outpouring is a positive infliction.

Few such inflictions, we candidly confess, appear among the published papers of the Society for promoting the amendment of the Law. In our next number we hope to re-publish a very excellent paper read before the Society by Mr. Serjeant Woolrych, on "the expediency of abolishing the practice of opening biddings in the Court of Chancery."

THE WEEKLY TRANSCRIPT is the name of a law periodical recently commenced in the City of New York. It augurs well. Each number contains some original remarks of the editor on current legal topics, and the remainder of the number is filled with current decisions of permanent value. The want of such a periodical in the State of New York must have been of late much felt, and has been for a long time to us a matter of surprise. That want is now supplied by G. H Stout & Co., 102 Nassau Street, New York, the proprietors and publishers of the *Weekly Transcript*. The want, we can add, is well supplied. The publication is in form convenient, in quality good, and in general appearance prepossessing. Each number contains sixteen octavo pages; of these, twelve are devoted to law reports, and four to original articles. The price is only $3 per annum. We wish our new cotemporary *and exchange the success which the enterprise of its publishers* deserve.

LOWER CANADA REPORTS, Vol. XI., No. 1, is received. It contains the reports of ten decided cases, none of which, owing to the difference between the laws of Upper and Lower Canada, are of much interest to us. One, however (*Adams* v. *the School Commissioners for the Municipality of Barnston*), commenced but not concluded in the present number, promises to be of some interest to an Upper Canadian. When concluded, if the case bears out what it promises, we shall re-publish it for the benefit of our readers. It is full time that some effort should be made to assimilate the laws of Upper and Lower Canada, so as to make Canada one Province in laws as well as in politics. The criminal laws are the same, but the laws as to civil rights differ as widely as the poles. With a Legislature composed in great part of lawyers, and including eminent lawyers both of Upper and Lower Canada, we are surprised that no effort is made to effect the great national work of assimilation of laws. Facilities are afforded by the legislature for the practice of the law in either section of the Province, by advocates from the other. But of what practical use are these facilities, when the laws are so dissimilar that the study of many years is necessary to enable any person conversant with the laws of one section of the Province to understand the laws of the other!

THE LOWER CANADA JURIST for February is received. It contains reports of fifteen decided cases, none of which are of more than local importance. Were the editors of the *Lower Canada Jurist* to imitate the example of the *London Jurist*, and furnish to its readers original dissertations on branches of the Lower Canada laws, we apprehend the publication would be more acceptable to its readers. As it is, however, its value as a record of decisions of permanent value cannot be over-rated. It appears to be a faithful chronicle, so far as it goes, of Lower Canada *decisions*.

THE EDINBURGH QUARTERLY AND WESTMINSTER are received. The first opens with an article like many which during the last fifty years have appeared in its pages, in earnest advocacy of a Liturgical Revision, free however, in its earnestness from any exhibition of antipathy to the English Church, or the wish to weaken the power of that religious body. The events of the last few years will cause to be read two papers upon subjects similar in a few respects, that of Japan and the Kingdom of Italy. In the autobiography of Thomas Carlyle happy selections make the reader acquainted with some of the great names in a remarkable literary age. A short paper upon the Victoria Bridge shows some attention bestowed upon Canada. Other papers upon interesting topics fill up the pages of this number.

Canada and the North-west are made the subject of two long articles in the *Westminster and Quarterly*, in which reference is made to this country in a manner calculated to satisfy its most ardent admirer. In the notices thus given to this Province, is seen one of the favorable results of the visit of the Prince of Wales during the past year. The current events are treated in its own style by the *Westminster*, in several papers upon Italian and American affairs. The characteristic paper of the present number upon Theology, is in the article upon Bible infallibility. The review of contemporary literature is useful as a ready synopsis of the chief developments in Literature.

The *Quarterly* as well as the *Edinburgh*, contains a review of Motley's historical work upon the United Netherlands, which, dealing with the chief events in the important period of a great nation's history, command the attention of the reader even to considerations regarding the sinking of a people whose power was respected wherever the name of the Spaniard was heard. In an article upon Essays and Reviews, this number *undertakes a criticism from its own stand point, of a work* which has lately attracted so much attention in England and America, under the name of "Essays and Reviews.

THE UNITED STATES INSURANCE GAZETTE contains the usual amount of useful matter pertaining to its subjects.

GODEY'S LADY'S BOOK for March is received. It opens with a most beautiful plate of "Christ blessing the little Children." The engraving is from the original picture, and is said to be the first engraving from the picture that has ever been published in a magazine. The fashion plate is as usual superb. The letterpress is interesting and instructive. We do not remember ever to have seen a better number of Godey. The Magazine improves as it grows old. We learn that its success has encouraged dishonest men to attempt to deceive the public by sales of imitations. Its best protection against such dishonest efforts is its great circulation and consequently low price of subscription. Without the circulation, no publisher can furnish such a Magazine at the price—$3 per annum.

APPOINTMENTS TO OFFICE, &c.

NOTARIES PUBLIC.

DAVID McKINNON, of Hamilton, Esquire, Attorney-at Law —(Gazetted Feb. 2, 1861.)

MELVILLE PARKER, of Cocksville, Esquire —(Gazetted Feb 2 1861.)

SAMSON H GHENT, of Hamilton, Esquire, Attorney at-Law —Gazetted Feb. 23, 1861.)

ROBERT N GOUCH, of Toronto, Esquire —(Gazetted Feb 23, 1861.)

JOHN B MacLENNAN, of Cornwall, Esquire, Barrister at-Law —Gazetted Feb 23, 1861.)

CHARLES INGERSOLL BENSON, of St Catharines, Esquire, Attorney at-Law. —(Gazetted Feb 23, 1861.)

THOMAS COTTON, of Port Credit, Esquire —(Gazetted Feb 23, 1861.)

TO CORRESPONDENTS.

"A SUFFERING ONE"—Though much inclined to publish your communication with our views as to matters suggested, we cannot break through our rule which requires the real name of every writer to be furnished with his communication The name is not required for publicity, but as an assurance of good faith on the part of the writer If furnished with your name we shall make use of your communication, otherwise not.

"M N"—"J FOLEY"—Too late for present number, will receive attention in our next.

"A SUBSCRIBER"—The publication of your letter will serve no good purpose, therefore refused

"W COSSEY," "CHARLES DURAND."—under "Division Courts"

"A SUBSCRIBER," AYR—"F."—"OTTO KLOTZ"—under "General Correspondence."