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DIVISION COURTS.

OFFICERS AND SUITORS.

CLERKS—*Answers to queries by.*

Judgment Summons—Defendant resident in another County.

We have been kindly favored with the following paper on the important questions submitted in our last month's issue. The writer has handled the subject with much ability, and as we entirely agree in the conclusions arrived at, and finding our own ideas more briefly and better put than in an article we had ourselves prepared, we prefer inserting the following in lieu of our own:—

I consider the Division Court to be a tribunal of a purely local and limited jurisdiction, and that its judgments, orders or decrees, can only be enforced in the way pointed out by the Act of 1850, or the amendment Acts of 1853 or 1855; the 91st sec. of the Act of 1850, authorizing the summoning and examination of debtors against whom orders or judgments have been obtained as to their means of satisfying the same, &c., does not confine the proceeding to judgments of the Division Court in which the judgment or order has been given or made, but extends it to "*any unsatisfied judgment or order in* ANY *Division Court*," and authorizes the summons to issue from any Division Court within the limits of which the defendant, in the suit, shall then dwell or carry on his business. Then by the Act of 1853, sec. 2,—that and the former Acts are to be read and construed as one Act, &c.

The 30th sec. provides, "that the summons under the 91st sec. of the Act of 1850 may be issued from the Division Court wherein the judgment was obtained, as well as from the Division Court within the limits of which the defendant shall dwell or carry on his business; *and thereupon such further proceedings may be had thereon as if such summons had issued in the manner pointed out by such section.*"

Now, what are those "further proceedings"? and how and where are they to be taken? Was it contemplated that the Judge who should hear and determine such summons had any jurisdiction over a person out of his County? I think that previously to the passing of the Act of 1853, there existed no power in the Division Courts of summoning a party for any purpose out of another County into the County of which the Court formed a Division Court; and that a *Judgment Summons* could only be resorted to as a remedy, after the defendant had left the County in which judgment was obtained, by summoning him to the Court of the Division in which he might dwell or carry on his business; that the "further proceedings" authorized the Judge, who might hear the summons, (if he should think fit) to order that the defendant should be committed to the common gaol of the County in which the party summoned should be resident, (see sec. 92 of D.C.A. 1850);—and that under the 95th sec. of D.C.A., 1850, when an order of commitment is made, the Clerk was to issue under the seal of the Court a Warrant, directed to the Bailiff of any Division Court within the County; who, by that Instrument was empowered to take the body of the person, (within the County of course) and the gaoler of the County was bound to receive and keep him, &c., until discharged, &c. Then the 97th clause, I think, relates to and provides for a case where, *after* summons issued and served, and perhaps order for commitment made, the defendant leaves the County, (although the specific words are "*shall be out of the County*,"—it cannot surely be inferred that those words mean at the time of summons being issued and served) then that the Bailiff of the Court might either execute the warrant himself in any County or place where such party might be, or send the same to the Clerk of any other Division Court within the jurisdiction of which such party shall then be, &c.; and when such order of commitment should have been made, and the person apprehended, he was forthwith to be conveyed, in custody of the Bailiff or officer apprehending him, to the gaol of the County *in which he was apprehended, and kept therein for the time mentioned in the warrant*, &c., unless, &c. So that the conclusions I have come to respecting the Acts of 1850 and 1853, are that a Judgment Summons could not issue from one County to another after the debtor had left the County in which judgment was rendered—that he might be summoned from any part of the same County to the Court in which it was so rendered; and that if he removed to another County after being summoned, and the Bailiff authorized to commit him, that Bailiff might follow him for that purpose, or authorize the Bailiff of that County to act upon the warrant; in either of which cases the defendant should be committed to the gaol of the County in which he was apprehended.

Now, the question arises, how is all this affected by the statute of 1855? I think not in anywise. I think that that statute merely extends the jurisdiction of the Division Courts so as to enable them to try causes and pronounce judgments therein within their former jurisdiction "*in amount*," when the defendant does not reside in the Division or County where the cause of action *arose* and that the service of summons refers exclusively, in so far as that Act is concerned, to the original commencement of such suits, and not to any subsequent proceedings thereupon; and that under the 3rd sec. of the last named statute the plaintiff, having an unsatisfied judgment, should apply for a transcript of the judgment, and take or send it to the Clerk of any other Division Court, whose duty it is upon its receipt to enter it in a Book, &c.; whereupon "*all other proceedings shall and may be had and taken for the enforcing and collecting such Judgment in such Division Court by the officers thereof, that can be had or taken under the U. C. D. C. Acts, upon Judgment recovered in any Division Court for the like purpose.*"

D. J. H.

N.B.—The misprint of 18 Vic. cap. 130 instead of *cap.* 125, in our last number, the reader will please correct.

BAILIFFS—*Answers to queries by.*

The Judge has adjourned a case, and ordered an amended account to be served on defendant: am I, as Bailiff, entitled to charge for the service and mileage?—J. C.

Certainly, if served by you; it is a *proceeding* in the cause within the meaning of the Act for which a Bailiff is entitled to the Fees.

May I request to be informed before whom the affidavit of Justification mentioned in the Schedule of Bailiffs' Fees is to sworn, or can the Bailiff himself take the oath? He is authorized to swear appraisers.

Before any County Judge, Divison Court Clerk, or Commissioner for taking affidavits, as provided for in sec. 33 of the D. C. Extension Act. The Bailiff has no authority to administer any Oath but that to appraisers.

SUITORS.

When the Judge has ascertained what are really the points in dispute, he will call on the parties for their proofs. The plaintiff commonly begins and when required by the Judge to prove his demand, he should state the name of his witness, who will be called by the Bailiff of the Court. When the witness appears and is sworn, the plaintiff should question him, so as to draw out the facts within the witness' knowledge; or, if he feels himself incompent to do so, should state to the Judge what he expects to prove by the witness, who will then be examined by the Judge. After the plaintiff has concluded his examination, the defendant has the right to cross-question the witness, and when he has done, the plaintiff may put any further question that may be necessary to explain properly any thing stated in cross-examination: and thus the plaintiff goes through with the examination of all the witnesses.

After the plaintiff has concluded his case, the defendant in like manner calls his witnesses, and the plaintiff has the right to cross-question them. The parties should not interrupt each other in the examination of witnesses, as it will never serve any good purpose to do so, but on the contrary produces much confusion, as well as needles irritation.

When the evidence on both sides is closed, the Judge gives judgment, stating, if it seem necessary, his reasons; to which, it seems almost unnecessary to add, the parties should listen with respectful attention.

It would be out of place here to discuss the question of evidence generally. But two general rules may be stated which guide all Courts in the investigation of disputed facts.

1st. No evidence will be admitted but such as is relevant to the questions in dispute.

2nd. The best evidence which the case admits ought to be advanced, if it can be had—and if it cannot, then the next best; but the foundation for *next best* (secondary) evidence must be first laid by showing that the *best* evidence cannot be procured. In our next some points of evidence in cases of ordinary occurrence will be explained, in connection with the above guiding rules.

ON THE DUTIES OF MAGISTRATES.

SKETCHES BY A J. P.

(*Continued from page* 104.)

THE HEARING.

We now come to consider the proceedings when both parties appear before the Magistrates, and before entering upon *hearing on the merits*, it seems in place to notice the subjects: first,—of private adjustment; second,—of preliminary objections.

Of Compromises by the Parties

In cases of personal injuries, trespasses, disputes between master and servant, and in all such like cases, where the mischief is confined to the complainant, and does not involve the interests of the public or compromise the public peace, it is competent for the parties in any stage (before judgment) of a proceeding for summary conviction, to compromise with the sanction of the Magistrates before whom the matter of complaint is to be heard; but where the offence is of a public nature, or felonious in character, it is not legally the subject of a compromise.[1] If, therefore, when a case is called on, the parties express a desire to settle the case amongst themselves, and the Justices have the facts before them, showing the nature of the charge, it will, as a general rule, be proper for them to lend their sanction to an adjustment—should the case be one in which a compromise may be lawfully made. But where the facts are imperfectly known to the Magistrates, it will be proper to enter on the hearing so far as may be necessary to obtain evidence on which to form a judgment—whether the case is one that may be *legally* compromised, and compromise should be permitted, or whether the public interests require that the case should be proceeded with. If the case be one that *may* be legally compromised, the discretionary power to compel the case to be proceeded with would not appear to extend beyond injuries to the person, or offences accompanied with force of an indictable character. In matters of trespass, disputes between master and servant, and like cases, which partake more of civil injuries than criminal offences, it would seem that the parties could enter into a compromise of their own accord, and so supersede the necessity for a judicial investigation. In this last class of

[1] Kier v. Leeman, 6 Q.B., 308; 9 Q.B., 867.

cases, at all events, it would not be proper for the Magistrates to place the slightest impediment in the way of a compromise, and in all *proper* cases it is obviously desirable for Magistrates, not only to sanction, but to recommend litigating parties to arrrange their differences amicably.

Amongst the various ways, says a moral writer, in which a Magistrate's office "enables him to promote the happiness of mankind, he is employed in a manner not only the most satisfactory to himself, but perhaps the most useful to others;—when he acts as a peace-maker—when he removes secret animosities—puts an end to open quarrels, and prevents embryo lawsuits," &c.

In England, says Mr. Stone in his work on the Petty Sessions, page 88, Magistrates frequently recommend parties to settle out of Court; "and accompany such recommendation with an appropriate persuasive to reconciliation, by urging the propriety of acting upon the charitable motto—'forgive and forget.'" Such a course is more particularly to be recommended, when from the youthful age of the defendant, from their personal knowledge of the parties, or from other circumcumstances, the Magistrates are convinced that the ends of justice would be better satisfied, and the peace and harmony of the neighbourhood more effectually preserved, by an amicable adjustment of the complaint, than by a judicial decision and probable consignment of one or other of the parties to the moral contamination of a gaol. It is the use of this peculiar office of *peace-making* by Justices of the Peace, in regard to petty quarrels and minor offences, recognized and upheld as it is by the Legislature and sanctioned by the voice of the country, which so honourably distinguishes the high-minded and impartial country Magistrate."

What is here said is not by any means meant as giving the slightest encouragement to the compounding of prosecution, *when either the law of the land or the public good requires that the offence should be openly punished.*

In giving effect to a compromise, Magistrates may allow the case to be withdrawn, or on being satisfied that such compensation as they may have suggested or the parties have settled among themselves, has been made by the aggressor to the party injured, the Magistrates will inflict a nominal penalty.

Steps previous to taking Evidence and preliminary Objections.

The 16 Vic., cap. 17, sec. 12, states that if both parties appear, either personally or by their respective counsel or attornies, before the Justices who are to hear and determine such complaint or information, then the said Justices shall proceed to hear and determine the same. This does not appear to conflict with the general power of Magistrates to compel the attendance of a defendant before them: and, should they think that the ends of justice require his presence, they may issue their warrant to enforce it. There are few cases, however, in which an appearance for the party by counsel or attorney will not answer the ends of the enquiry. When the parties then are present, and ready to proceed with the hearing, the presiding Magistrate should open the proceedings by causing to be read, or reading himself, the complaint or information against the defendant. The 13th section of the last mentioned Act only renders it necessary to state the *substance* of the information or complaint to the defendant; but it recommended that the same should be read at length in all cases, and where the defendant is not assisted by counsel or attorney, that after reading the information or complaint, the substance and nature of the charge should be stated and explained to the defendant—but where a defendant has legal assistance, this particularity would of course be needless.

When read, it is competent to the defendant to object to the form the information or complaint—that is, if *not* made or laid under the provisions of the Act 16 Vic., cap. 176,—or to the process issued thereon, and if found to be defective or inaccurate the complaint may be dismissed, but the complainant may commence the proceedings anew. It is unnecessary to say more on this point, as now nearly every case will be within the provisions of the Act just referred to, which expressly provides, as before mentioned, that no objection shall be taken or allowed to any information, complaint, summons or warrant, for any alleged defect therein, in substance or in form, or for any variance; and that where the defendant has been misled by the same, an adjournment may be made. It is only, therefore, in cases where the error or defect objected to has in the opinion of the Justices deceived or misled the defendant, that objections would be of any avail, and then only for the purpose of an adjournment, which may be made on such terms as the Justices may think fit.

MANUAL, ON THE OFFICE AND DUTIES OF BAILIFFS IN THE DIVISION COURTS.

(*For the Law Journal.*—By V.)

CONTINUED FROM PAGE 106.

SERVICES OF SUMMONS FROM FOREIGN COURTS.

The Court to which an officer belongs may be called the "Home Court," other Division Courts "Foreign" Courts. Every Bailiff is bound to serve summonses from Foreign Courts, whether of his own or of another county, if handed to him by

the Clerk of the Court for which he acts; this is provided for by the 29th section of the D. C. Extension Act of 1853 and section 1st of the D. C. of 1855. This last requires the Bailiff of any Division Court in Upper Canada, to serve summonses of *any* Division Court that shall be delivered to him for service, although issued from a Court of which he is not Bailiff; but he is not *required* to travel beyond the limits of his own county to make a service, and should he choose to do so, he can only charge mileage from the Clerk's office where he receives such summons to the county-line. We refer to what has been already said as to the mode of service: The *time for service* of Foreign summonses is prescribed by the D.C. Act of 1855, sec. 1, as follows: Where the defendant resides in a county *adjoining* the one in which the action is brought, the summons must be served fifteen days; where the county in which the defendant resides, and that in which the action is brought, do *not* adjoin, then twenty days at least before the holding of the Court at which the cause is to be tried. The Clerk who issues the summons, usually endorses thereon the days for service, as "a 15 (*or* 20) days' service" which will of course be a sufficient guide for the Bailiff. The first duty of a Bailiff is no doubt to attend to the business of his own Court, but business from Foreign Courts should, in its order, receive due attention; a neglect of duty in this last particular will be as much a breach of the Bailiff's security covenant as if the proceeding was in the Home Court.

Return of Summons.—According to the 11th rule of Practice, a return must be made by the Bailiff to the Clerk of all summonses from the Home Court, four days before the Court day at which they are returnable; that is to say, if a Court sit on the 5th of a month, the summonses must be delivered to the Clerk at his office, *at latest* on the first day of the month, but Bailiffs should not delay giving in their returns till the latest moment; as services are from time to time made, the return of them should be given in upon the first occasion after service when the Bailiff is at the Clerk's office—otherwise where the causes are numerous, the Clerk will be greatly inconvenienced in preparing the papers for the Court. The returns must state the mode of service—this is sufficiently accomplished when the blanks in the affidavits of service are properly filled in; and a special return may probably be dispensed with, but it certainly would be more convenient, as well as more regular, if a Bailiff handed in a list of all the summonses received, with the date and manner of service—and this list the Bailiff could afterwards have by him to refer to in Court if any service was questioned. If a summons has not been served, the reason for non-service must be stated in writing on back thereof, and be signed by the Bailiff: the reason may be stated in brief, as "not delivered; defendant removed from this county," (or "defendant absent from home," as the case may be.)

Return of *Foreign* Summonses should be made immediately after service is effected, to allow ample time for transmission to the Clerk of the Court from which issued. The principle of the 21st Rule of Practice is clearly applicable to all summonses of a Foreign Court sent for service; and that Rule provides, that the Bailiff shall serve the summons, and *forthwith make a return* thereof to the Clerk of his Court, in the manner required by the 11th Rule; that is, the return shall show the *mode* of *service*—or, if *not* served, the *reason*. Great particularity must be observed in the affidavit of service of such summons, for errors could not be corrected in Court, as might be done in services for the Home Court.

Forfeiture of fees for non-return.—With respect to return of summonses, and indeed all other process, punctuality is important to the officer, for the Bailiff forfeits his fees (D.C. Act, sec. 14) unless he makes return within the time required by law; and Clerks are bound to enforce such forfeiture, for the fees forfeited belong to the fee fund.

Service of Subpœnas.—The Bailiff must also serve summonses requiring the attendance of witnesses, subpœnas as they are called; the mode of service is prescribed in the 48th sec. of the D.C. Act, viz.: a copy of the subpœna must be served either personally or at the witnesses usual place of abode. We refer to what has been before set down as to the meaning of the term "place of abode"; the copy of subpœna should be left with some *grown person*, an inmate of the defendant's place of abode. No time is fixed either by the Statutes or Rules within which the service of subpœnas is to be made; therefore, the principles of practice in the Supe-

rior Courts are to be followed, and if a witness be served a reasonable time before the actual hearing it is sufficient; but the Bailiff's duty on service of subpœna is simply to use due diligence in effecting service as early as possible. The subpœna should be accompanied with payment or tender of the witnesses' expenses according to the Tables which will appear in the Appendix, and when the Bailiff is furnished with the money to tender the witness, the amount tendered, as well as the day when service made, should be noted.

Subpœnas to witnesses may be served by any one who can read and write, but the fees for service do not attach, unless subpœnas are served by the Bailiffs, or those acting under their authority.

U. C. REPORTS.

GENERAL AND MUNICIPAL LAW.

CROFT v. THE TOWN COUNCIL OF PETERBOROUGH.

(Trinity Term, 19 Vic.)

Municipal corporation—Notice of action.

The defendants, as a municipal corporation deriving their power under the statute 12 Vic., cap. 81, having by resolution authorized the raising and levelling of a street within their jurisdiction, which, when done, injuriously affected the plaintiff's property.

Held, that a by-law should have been passed to sanction the act complained of.

Held, also, that if the defendants were within the statute 14 & 15 Vic., cap. 54, and had pleaded the general issue "per statute," they would have been entitled to notice of action. McLean, J., *dissentiente*.

[5 C. P. R., 141.]

Writ issued 17th March, 1851; declaration, 17th March, 1855, amended.

First count recites that plaintiff was possessed of a house, shop, and tenement, abutting on Hunter-street, in the town of Peterboro', in which said house he with his family resided, and carried on the business of a saloon and eating-house; yet defendants, well knowing, and contriving to injure him, &c., on, &c., and on divers days, &c., wrongfully and injuriously raised the said street, upon which the said tenement of the plaintiff abutted as aforesaid, and the side-walk upon which the tenement next adjoining the said tenement of the plaintiff abutted, several feet, to wit, six feet higher than the same had theretofore been or ought to have been, or to be, and had thence hitherto continued the said street and side-walk so wrongfully and injuriously raised as aforesaid, by means whereof, at divers times and seasons of the year, to wit, in the spring, autumn and winter, and during and after rain and thaw, the said house, shop and tenement of the plaintiff hath been, and becomes overflowed with water, which ran and flowed, and runs and flows from the said street and side-walk; and by reason of the same having been so wrongfully and injuriously raised as aforesaid, into, through and upon the said house, shop and tenement of the plaintiff, and remained, and remains in and about and under the same, and became and becomes stagnant, offensive and injurious, whereby, &c.; laying special damage, loss of customers, &c., sickness of family, &c.

Second count states that plaintiff before and at, &c., was possessed of another messuage, house and tenement, abutting on Hunter-street, in the said town of Peterboro', in which said house plaintiff and his family resided and reside, and in which shop plaintiff carried on his business of a saloon and eating-house, &c.

That before and at, &c., defendants were engaged in raising the said street (called Hunter-street) opposite plaintiff's said house and shop, to wit, six feet higher than before; and thereupon it became and was the duty of defendants, in so raising the said street, to make and place a sufficient and proper drain or culvert, or to adopt some other sufficient means to carry off and away from plaintiff's said house and shop the water which would otherwise flow from the said street, when so raised, into the said house and shop, so that the same might not be damaged, or plaintiff injured thereby; and that although defendants did raise the said street opposite to the plaintiff's said house and shop, several, to wit, six feet higher than before, yet defendants, not regarding their duty in that behalf, but contriving and intending, &c., to injure the plaintiff, &c., did not make or place any drain or culvert, or adopt any other sufficient means to carry the said water off and away from the said house and shop of plaintiff, according to their duty, and have so kept and continued the same, &c., thence hitherto; by means whereof, at divers seasons, &c., to wit, in the spring, autumn, and winter, and during and after rain and thaw, the said house and shop of plaintiff have been overflowed with water, which flowed from the said street, so raised as aforesaid, and for want of such drain or culvert, or other sufficient means, &c., to carry off and away the said waters from said house and shop, and which water remained and remains in and about and under the same, and becomes stagnant, offensive and injurious, and the plaintiff thereby deprived of the use and enjoyment thereof, and hath lost great gains, &c., and himself and family rendered sick, &c.

Pleas to first count.—First. Not guilty of the said supposed grievances, &c.

Second. Not guilty of raising the said street.

Third. Not guilty of raising the said side-walk.

Fourth. Plaintiff not possessed.

Fifth. As to so much of the declaration as relates to raising the said street, &c., that defendants were incorporated under the Upper Canada Municipal Corporations Act, with the corporate powers and authorities conferred upon defendants by the said acts, and that they were thereby (amongst other things) authorised and empowered to level, pitch, raise, lower and improve any existing street or highway within the jurisdiction of defendants. And that the said street was and is within the town of Peterboro', and within their jurisdiction, and became, and was before, and at the said time when, &c., in some parts thereof, and near and in front of the said house and tenement of the plaintiff, where the same abutted thereon, as in the declaration alleged, uneven, hollow and lower than, and beneath what the surface or level of the said parts of the said street ought to be, and lower and beneath what the surface or grade of the said parts of the said street was determined to be by the said defendants. And that defendants, being such body corporate as aforesaid, and the said street so being within their jurisdiction as aforesaid, and so becoming and being in some parts thereof, and near and in front of the said house and tenement of plaintiff abutting thereon, uneven, hollow, and lower, and beneath what the surface or level of the said part of the said street ought to be, and lower and beneath what the said surface or grade of the said part of the said street was determined to be by the said defendants as aforesaid, it became and was the duty of the said defendants, under the said hereinbefore mentioned acts, to level, raise and improve the said parts of the said street, and to make the surface thereof uniform and level throughout, or as near so as might be, for the more safe, commodious and convenient passing and repassing, and the communicating thereby of the inhabitants within the jurisdiction of defendants, &c.; wherefore defendants, so being such body corporate, in order to improve the said street, and make the surface thereof uniform and level throughout, or as near as might be, as thereinafter in that plea mentioned, did after the

passing of the above mentioned acts, and at the said time when, &c., cause to be raised, and raised the said street near and in front of the said house and tenement of the plaintiff, where it abutted upon the said street, as in the said declaration mentioned, and still do keep raised the said street as aforesaid, as they lawfully might—they, the said defendants, then doing as little damage as might be in that behalf, and no further or other damage or injury to the said plaintiff than was necessary, or which by proper diligence and care might be avoided in the execution thereof, for the purpose aforesaid, which are the same supposed grievances in the introductory part of the said plea mentioned: verification.

Replication—Similiter to 1st, 2nd, 3rd and 4th pleas. To 5th plea, that defendants at the said time when, &c., of their own wrong, and without the cause by them in their said last plea alleged, did commit the grievances in the introductory part of that plea alleged, in manner and form as the plaintiff hath above thereof complained against the defendants: to the country and similiter.

Plea to second count—Not guilty. Similiter and issues.

This case was tried before Mr. Justice Burns, when it appeared in evidence that the Municipality of Peterboro' was petitioned to raise the level of Hunter-street, but not expressly at plaintiff's premises, and that a resolution was accordingly passed, under which it was raised three or four feet, and paid for by defendants, but no formal by-law was passed for the purpose. That there were remonstrances and petitions against raising the street from other inhabitants, but they were disregarded, and no drains were made for carrying off the water—although the drains and channels might have been constructed.

The work was done in 1852, and the side-walk raised in 1853. There was much evidence given on the one hand to show that what was done was necessary, beneficial to, and an improvement of the public road; and on the other, that it was injurious, and caused damage to the property of the plaintiff, and of which he was possessed as a tenant for years. Also, evidence to show that the side-walk at one Ward's was raised by him as his own act, though with the assent of defendants, and a dam made, which caused the water to be turned towards the plaintiff more than naturally. Also, that without the street being raised the water would flow to the plaintiff's premises, naturally passing round the corner of a street called Water-street, and running down Hunter-street. But it was likewise in evidence, that irrespective of what Ward had done, the effect of the raising the street was to throw the water upon plaintiff's premises and into his house and cellar more than would naturally flow there, and that the flood-water did him material damage, especially when the snow melted, or in heavy rains. It also obstructed the access to plaintiff's house, whereby he lost customers, &c. The weight of evidence was, that the work was an improvement to the street as a public highway, but that it caused more water to flow upon the plaintiff's premises, and was otherwise injurious, and a damage to him.

There was, however, some evidence that Hudson, who owned the premises occupied by plaintiff, was in possession when the street was raised in 1852; but it was not clear. At that time Hudson was a member of the municipal council, and in favor of raising the street. At the close of the case leave was reserved to the defendants to move a nonsuit on any legal objections that might be urged; also, to plaintiff to amend the declaration if necessary.

It was then left to the jury to decide:

1. Whether the raising of Hunter-street was a public general benefit.

2. Whether the defendants had constructed proper drains to carry off the water from the plaintiff's premises.

3. Whether the work which the defendants had constructed injured the plaintiff.

4. What damages the plaintiff should recover if the action is maintainable.

The jury found for the plaintiff, and answered the first and third in the affirmative—the second in the negative, and assessed damages in plaintiff's favor at £40.

In the following term (Easter Term, 1855) *Weller* obtained a rule on the defendants to show cause why the postea should not be delivered to the plaintiff. *A. Crooks*, for defendants, showed cause during the same term, and contended that the second count, which had been added since the last trial, was not proved, and that it turned on the first count, under which the work was shown to be a public improvement, and not negligently executed: that the fifth plea put in issue merely the right: that the plaintiff did not reply the want of a by-law, but traversed the plea by the replication of *de injuria;* and that the issues raised did not require proof of a by-law to support the plea. He referred to P. S. 12 Vic., cap. 81, secs. 52, 60, 192, 193. As to the difference between a by-law and a resolution—Dunston v. The Imperial Gas Light & Coke Company, 3 B. & Ad., 125; The Mayor of Lyme Regis v. Henley, 1 Scott, 29, S. C., 1 Bing. N. S, 222; Parnaby v. Lancaster Canal Co., 11 A. & E. 223, 230.

Weller, in reply, referred to 12 Vic., cap. 81, secs. 60 and 195, and contended that the defendants derived their powers under the statute, and that the authority claimed under the fifth plea was not thereby conferred, the only power being to make by-laws for raising streets, and not to raise streets at discretion without any by-law. Also, that negligence was proved and found, and that with reasonable and due care much of the injury caused to the plaintiff might have been avoided. A question arose with the court, whether the defendants were entitled to notice of action, and the action outlawed; and if so, whether such ground of defence could be taken under pleas of not guilty simply, not adding "per statute," which had been added to the former pleas but omitted in the last.

Crooks, for defendants, referred to Angel & Ames on Corporations, 645, and note; *Ib.* 99; Grant on Corporations, 154.

MACAULAY, C.J.—Referring to what I said upon the occasion of setting aside the nonsuit, it is to be observed that the pleadings having been altered since that rule was made absolute, the case must be disposed of upon the issues as they appear on the present record.

The first count and the pleas under it are the same as formerly, except that the dates of the declaration and pleas are altered, and the three first pleas are not noted to have been pleaded "per statute," as they were in the first instance.

Referring then to what I said when the nonsuit was set aside, I think this ground of action may be readily disposed of on these pleadings.

The plea of not guilty (not per statute) denies and puts in issue only the wrongful act alleged, and not its wrongfulness. The evidence clearly established the wrongful act alleged, and its injurious consequences to the plaintiff's damage. I think therefore the plaintiff is entitled to the verdict on the first issue to the first count—so also (as being proved) the second, third and fourth. As to the fifth issue, I think it must be taken that the jury in what they answered to the court meant to find all the material facts alleged in the fifth plea in the defendant's favor—namely, that defendants were incorporated and empowered as alleged: that the street was within the town of Peterboro' and within their jurisdiction, and became, and was in some parts thereof, and near and in front of plaintiff's house and premises, where the same abutted thereon, uneven, hollow, and lower than and beneath what the surface or level of the said parts of the said street ought to be (and lower and beneath what the said surface or grade of the said parts of the said street was determined to be by said defendants); wherefore (being their duty) the defendants, in order to improve the said street, and to make the surface thereof uniform and level throughout, as near as

might be, caused it to be raised near and in front of plaintiff's house, &c., and still kept it so raised, doing no unnecessary damage. Excess is not replied, but the material allegations of the plea only traversed.

The plea does not allege the passing of a by-law determining the opinion of the defendants as to the state of the road, or their resolution to raise it; nor is the plea demurred to for not stating it; nor is the want of a by-law replied, or any excess, wrongful neglect, or *mala fides* imputed to the defendants by way of replication.

It is, however, contended that the determination of the defendants as to the state of the road and to raise it are material facts in issue, and should be proved by a by-law. The defendants do not justify themselves upon such a ground; they seem to me merely to show the state of the road, and their determination that it was in such a state, and then submit that it was their duty to raise it.

The sufficiency of the plea, as a legal defence, viewed in this light, is not now the question; and on the former occasion I expressed my impression that the replication of *de injuria* to this plea did not require proof by the defendants of a formal by-law under the statute to establish the facts alleged. What they say respecting the state of the road was proved to be the fact, and all the other allegations were proved.

Then, as to the second count, it seems to be grounded on the same fact; but, instead of charging what the first count contains as done wrongfully, the second count, without imputing wrongfulness in raising the road, alleges negligence in the execution of the work. To this the defendants plead not guilty, thereby denying the breach of duty or wrongful act alleged. Now the breach of duty or wrongful act alleged is, that the defendants raised the street in a careless and negligent manner—that is to say, raised a solid line of road, without making any drains or culverts, or adopting any other sufficient means to carry off and away from the plaintiff's house the water which would otherwise flow, and did flow from the street, so raised, into his house and shop, &c., as it was their duty to have done. There was evidence of the want of precaution alleged, and of the consequences, and the jury found that the defendants had not constructed proper drains to carry off the water from the plaintiff's premises, for the want whereof the plaintiff was damnified. On this count and plea, therefore, the plaintiff seems entitled to a verdict,—Farrell v. The Mayor, &c., of London (12 U.C.Q.B.R., 343.)

With respect to the question mainly argued, I entertain a strong impression that a by-law ought to have been passed to sanction the acts complained of. If what was done could be regarded as necessary to maintain and keep the road in proper repair, and therefore incumbent upon the defendants, as a duty cast upon them by the statute 13 & 14 Vic., cap. 15, I have no doubt it could be justified without a by-law; but if the defendants possess no implied powers (Kirk v. Nowell, 1 T. R. 124) but must derive and trace all their powers from the statutes, and the facts do not make a case within the 13 & 14 Vic., cap. 15—and the 12 Vic., cap. 81, sec. 60, No. 1, and other sections formerly mentioned, only authorize the municipality to make by-laws for (among other things) raising any road or street, without in substantive terms conferring upon them power so to do—I am unable to point out where the legal authority for doing it exists, or whence it is derived. It is obvious that many acts, under by-laws, authorized by that subsection, (60, No. 1) must infringe upon private rights, and that others might infringe on both public and private rights, and the legislature apparently intended that such steps should not be taken (otherwise than as positively enjoined by other statutes) without the deliberate and formal sanction and direction of the municiplity, authorizing it under a formal by-law, authenticated by the seal of the corporation. Loose proceedings without such observance, entailing injury either upon the public or individuals, were intended to be prevented.

Raising a long line of a public street in a town is not one of those oft-repeated little things, the frequency and exigencies of which supersede the necessity of formal proceedings; but when serious injury may be thereby inflicted on persons having property, and living in houses abutting on such street, it becomes a very grave matter, and the protection of both the public easement and the contiguous properties seems to demand that the powers conferred should be exercised in strict accordance with the statute, and I see no particular difficulty or inconvenience in conforming thereto. It is easy pass a by-law authorizing the survey and improvement of any number of specified streets or portions thereof, or to pass such by-law, formed on previous surveys, plans and estimates therein referred to, and the omission may materially affect the responsibility of the municipality, its officers, servants or contractors in the execution of the work; for in my present impression, if that be done by the corporation without a by-law which no statute authorizes or directs otherwise than through the medium of a by-law, and damage be occasioned to private individuals in respect of their property, I do not see how a court of law can hold it nevertheless justifiable, however great the damage may be. There is, no doubt, much force in the argument, that when treated as wrong-doers, in a civil action, by reason of something done to a highway, which a by-law might have authorized and directed to be done, and which being done, was a public improvement, and not a public nuisance, the want of a by-law will not make them wrong-doers, in having done informally what might, by the observance of due form, have been done lawfully.

The case of The King v. The Commissioners of Sewers for Pagham, Sussex, (8 B. & C. 355) is relevant to this argument. In that case Bayley, J., said, if a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur, damage to himself, and a wrong committed by another; whence it would be contended, that though without formal authority, it was not wrongful to improve the street: wherefore an ingredient in the above proposition would be wanting. But to test it, suppose that the informal proceedings resulted, as it possibly might, in creating a public nuisance to the highway or street, instead of a benefit, as well as a private injury, would the municipality be indictable, and if indictable, what defence could they set up, except the *bona fides* of their conduct, though informal, or in other words illegal, and if illegal, then wrongful, and both positions of the proposition would be established? I find in Glover v. North Staffordshire Railway Company, (16 Q. B., 923) and in Lawrence v. The Great Northern Railway Company, (16 Q. B., 643) another test, deemed in that and subsequent cases a satisfactory one, viz.: if what was done caused a damage to the plaintiff, by injuriously affecting his real estate, would the doing it, if the party had no special statutable power, give the owner of the land a right of action? To apply it, would the plaintiff, under the facts in this case have a right of action at common law against private individuals, public officers, or the municipality, for so raising the street, &c., of their own spontaneous accord and discretion, without any special statutable power to do it;—in other words, suppose no act of Parliament had passed, and that had been done which has been done here, would an action have been maintainable? That it would be maintainable against a wrong-doer, I think there can be no doubt;—Regina v. The Eastern Counties Railway Company, (2 Q. B. 347); Lawrence v. The Great Northern Railway Company, (16 Q.B., 643, 654); Glover v. The North Staffordshire Railway Company, (16 Q.B., 923); 15 Law Times, No. 633, 19th of May, 1855, 106-7, House of Lords; Eastham v. The Blackburn Railway Company, (9 Ex. R. 761); McKinnon v. Penson (8 Ex. R. 323); The Inhabitants of the County of Cumberland v. The King, in Error, (3 B. & P., 354.) It may be said that

an act of Parliament did pass, which, irrespective of the special provisions in question, conferred general and comprehensive powers of local government, under which the municipality might act. Still it seems to me to leave the case just where it was; for if so, it is to be asked how are these powers of government to be exercised; and when the same act contains special provisions on this special subject, can it be contended that they are superseded, or may be disregarded, under other sweeping clauses that evidently do not embrace or contemplate them, and which, moreover, consistently therewith only confer the power to make by-laws for the attainment of any of the objects contemplated. Moreover, I still am disposed to think that in acting without a by-law the defendants incur liability under the facts alleged in the second count, though they might not have done so, had all they had authorized to be done, been authorized and required in a by-law. I am further inclined to the opinion, that in reference to the first count they would be liable—if private individuals, doing of their own accord what the defendants did, would be liable, although it was a benefit to the road, as a public easement, and would not be indictable as a common nuisance, either as against the defendants or private volunteers. If the work was done under a by-law, based upon the survey and report of a scientific and competent surveyor, such by-law, and the contract under it, prescribing what was to be done, having thus used due care to proceed correctly, and with as little injury to individuals as might be, I am at present disposed to think the case would come within the rule laid down in Sutton v. Clark, (6 Taunt. 29) and that class of cases, and that the defendants would not be liable for defective arrangements in the work itself, nor for excesses in its execution, though injurious in their effects and consequences to the properties of adjacent landowners. Independently of all this, I may repeat what I observed during the argument, that if the defendants are within the statute, (14 & 15 Vic., cap. 54) and had pleaded the general issue, (per statute) they would have been entitled to notice of action; and the action (if otherwise maintainable) was probably outlawed; wherefore, on one or both of these grounds, they would have been entitled to a verdict under the general issue to both counts, if not generally upon all the issues. But the general issue is not so pleaded to either count, nor was the want of notice objected to, and I cannot find authority for holding the defendants entitled to the benefit of the objection, without pleading the general issue "per statute" or specially denying notice of action, &c., although it has been held otherwise, when the objection arises, on the facts proved in support of the plaintiff's case, and is not quite clear—See Marsh v. Boulton, (4 U.C.R., 354.) The 14 & 15 Vic., cap. 54, sec. 5, seems to contemplate its being done to let in the objection—Shearwood v. Hay, (5 A. & E. 383); Wedge v. Berkeley, (6 A. & E., 663); Davey v. Warne, (14 M. & W., 199); Wagstaffe v. Sharpe, (3 M. & W., 521); Richards v. Easto, (15 M. & W., 244); Hilliard v. Webster, (6 M. & G., 983); Eastham v. The Blackburn Railway Company, (9 Ex. R., 758); Arnold v. Hamel, (9 Ex. R., 404); Davies v. The Mayor, &c., of Swansea, (8 Ex. R., 808, Wadsworth, 375); White v. Clark, (10 U. C. Q. B. R., 490.) The result is that the postea be delivered to the plaintiff, as to the second count; and as to the first, that the verdict be for the defendants on all the issues.

McLEAN, J.—This cause came on to trial before me, at Peterboro', in the spring of 1854, the declaration then containing the first count only; and at that time, on hearing the opening of the plaintiff's counsel, I was of opinion that the action could not be sustained; and the plaintiff, on my expressing that opinion, accepted a nonsuit. The court set aside that nonsuit and granted a new trial. I dissented from the judgment of the court on that occasion and gave my reasons, and though the matters involved in the suit have again been discussed before us, I have not been able to come to any other conclusion than that which I at first adopted. Since the new trial was ordered the plaintiff has added a count to his declaration, alleging that before and at the time of the committing of the last mentioned *grievances* the defendants were engaged in raising Hunter-street, opposite to his house and shop, several feet higher than the same had previously been, and thereupon that it became their duty *in raising* the said street to make a drain or culvert to carry off the water from the plaintiff's premises, which would otherwise flow from the street. In both counts the raising of the street is treated as a *wrongful* act on the part of the defendants; and yet in the second count it is alleged to have been *the duty* of the defendants, *as a corporation* while doing *such wrongful act*, to do something else, in order that the water might not come on to plaintiff's premises. Now if the defendants' act of raising the street was *wrongful, no duty* would result from it, and the second count cannot be sustained. If *rightful*, then the first count is not sustainable.

I am of opinion that the plaintiff is not entitled to recover on either count. On the face of the declaration the plaintiff is proceeding for an act, as unlawful and wrongful, which the defendants have express authority by act of parliament, to do. He does not complain of the mode of doing the act, but of the act itself, as illegal; and the plea sets forth fully the authority of the defendants for doing that act; the finding of the jury virtually establishes that the defendants were not acting in discharge of their duty under the statute, in causing the street to be raised. The plaintiff admits, by bringing this action against them in their corporate character, that in doing what they did they were acting in that capacity.

The making of sewers is a power conferred on the several municipalities; but it must be left to them to judge of the necessity for such sewers, and to decide upon the time and manner of making them, and the expense to be incurred for that purpose. The plaintiff sues in this case, because the defendants did not, when doing a wrongful act, follow it up by doing another act within the scope of their authority, at such time as he considers they ought to have done it. Now the defendants were the persons to decide as to such time; they might not have estimated for the expense of sewers and may not have had the means at their disposal at that particular time to construct the sewer which the plaintiff alleges it was their duty to make; whether they had or not, they are not, as it appears to me from the grounds alleged in the declaration, liable to the payment of damages in this action at the suit of the plaintiff. I think, therefore, the verdict should be set aside and a nonsuit entered.

RICHARDS, J.—According to the finding of the jury, the judgment of the court, as to the first count, should be in favor of the defendants.

As to the second count, whether the municipality has or has not the power to grade or level the streets of the town without a by-law being first passed for that purpose, it seems to me the plaintiff is entitled to recover. The effect of that count is to charge the defendants with doing the act complained of negligently and improperly. The jury having found for the plaintiff, I think the verdict must stand. The case of Farrell v. The Town Council of London (12 U. C. Q. B. R., 343) seems to me to be in accordance with English decisions and to settle the question involved in the second count of the declaration in this cause.

But the more important and difficult question raised on the argument is—can municipal corporations in Upper Canada, in the absence of a by-law authorizing the act complained of, be sued in trespass or case by the party injured, when their servants, by their order, cause the injury in doing certain work that the corporation under the Upper Canada municipal corporations acts are empowered to make a by-law for the performance of?

By Provincial statute 12 Vic., cap. 81, sec. 60, it is provided "that the municipality of each village which shall be or re-

main incorporated under this act, shall, moreover, have power and authority to make by-laws for each or any of the following purposes, that is to say—*Seventhly*, for the opening, constructing, making, levelling, pitching, raising, lowering, gravelling, macadamizing, planking, paving, flagging, repairing, planting, improving, preserving, and maintaining any new or existing highway, road, street, &c., within the jurisdiction of the corporation of such village; and by section 80 the town council of any town shall have all such powers, duties and liabilities within, and in respect of such town as the municipality of any village shall have in respect of such village. If the acts complained of had been done by a private individual, and were not authorized by the corporation, then there is little doubt, I apprehend, but an action would lie against such individual for the damages suffered by the plaintiff.

It is therefore necessary to consider what is the effect of the words just quoted; do they give the corporation power *to do the acts* pointed out, or do they confer on the corporation the authority to make *by-laws* to authorize those acts *to be done*. I think the latter is the proper interpretation to give to the words. In the first place, it is their literal meaning; in the next, it harmonizes with the general principles of law, with regard to acts to be done by such corporations—viz., that the corporation should authorize them to be done by a by-law of the governing body.

If the part of the section referred to were only directory, it would imply that the municipality had the inherent right to do the acts, and that the making of the by-law was only a means of declaring the will of the governing body of the corporation as to how the act should be done. The general doctrine is, that a municipal corporation created by act of parliament only possesses such powers as are conferred either by the act creating it or some other act of the legislature. As the power conferred by the statute on the subject of making, maintaining, draining, &c., roads, is that of making by-laws for those purposes, it seems to follow that it can only be properly conferred or used by or through a by-law.

Then can the defendants justify the act if the same were authorized by a resolution of the council; or, in other words, is a resolution of the council to be considered a by-law, *for the purposes now under consideration? I think not.* The 198th section provides that all by-laws made by any municipal corporation under the authority of that act "shall be authenticated by the seal of the corporation and by the signature of the head thereof, or of *the person presiding at the meeting at which the same shall have been made and passed*, and also by that of the clerk of such corporation;" and any copy written without erasure or interlineation, sealed with the seal of the corporation, and certified to be a true copy by the clerk, and by any member of the corporation for the time being, shall be deemed authentic and received as evidence in all courts in the province, without its being necessary to prove such seal or signature, unless it shall be specially alleged that the same are forged.

It may with much more force be contended that the former part of this section is merely directory, and that a by-law would be valid although wanting either the seal of the corporation, the signature of the clerk, or the certificate of the head of the corporation or the person presiding at the meeting at which it *was passed*, and that the mode referred to is only one of the modes of authenticating the by-law, which might be authenticated in some other manner. I do not think it would be safe to lay that down as a rule. The language of the clause is very explicit as to the mode of authenticating the by-law; and when it requires the signature of the head of the corporation or the signature of the person presiding at the meeting at which the *same was passed*, it seems to imply that authenticating of the by-law shall take place at or about the time of the passing thereof, and this authenticating is something different from merely verifying it, so that it may be received in evidence in courts of justice, the mode of doing which is also pointed out in the same section. I therefore come to the conclusion, that in order to justify the acts complained of in the declaration in this cause, even if all such acts can be justified, it is necessary that they should have been done under the authority of a by-law of the governing body of the corporation, such a by-law being distinct from a mere order or resolution, and to constitute a by-law it must be *authenticated* in the manner pointed out in the 198th section of the statute before quoted.

If the act complained of could be said to have arisen from the proper exercising of the power maintaining and keeping in repair the highway, as the corporation are authorized and required to do pursuant to the statute 14 & 15 Vic., cap. 54, then of course they would not be liable in this action, as the injury would have arisen from the performance of a duty cast upon them by the legislature.

Judgment for the plaintiff on the second count, and for the defendants on the first count.

In Re Hawke and the Municipality of Wellesley.

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

(Hilary Term, 19 Vic.)

Sale of town hall—By-law for levying rate.

The municipality of a township have authority to dispose of the town hall and the site on which it stands, when they think that another situation would be more convenient.

The by-law in this case provided that any money above the proceeds of the old hall, required for the erection of the new one, should be levied on the ratable property in the township, but it did not fix the amount or the rate to be levied, or contain the necessary recitals and provisions, and this part of the by-law was therefore held bad.

[13 Q. B. R. 636.]

On the 28th of April, 1855, the Municipality passed a by-law to authorise the sale of the township hall in the village of Hawkesville, which provided—1st, That the said township hall be sold by public auction to the highest bidder, and the proceeds applied to the building of another township hall, on the south-east angle of Lot No. 12, in the seventh concession of the western section of the township of Wellesley, that being a more central situation.

2nd. That the proposed hall shall be erected and finished within the present year; and that any money required over and above the proceeds arising from the sale of the present hall shall be levied on the ratable property in the township of Wellesley; one half of the sum required to be levied and collected in the present year, and the other half in the year 1856.

3rd. That Mr. R. R. of No. 11, in the first concession, Mr. John Yeager and William Hastings, be commissioners to draw plans and specifications, and to superintend the building of the said hall, and that they be empowered to draw upon the treasurer for the amount required.

M. C. Cameron moved to quash this by-law, for the following reasons, among others: That it does not fix the amount to be raised and levied for the erection of the new hall, and puts no limit to the cost of the building, and is in this respect vague and uncertain; also, because it does not fix the amount of rate in the pound to be levied; also, because it authorises a debt to be incurred and the levying of a rate to discharge it, without containing the recitals or provisoes required by the statutes in such cases; also, because it authorises the persons named in it to draw upon the treasurer to an unlimited amount, which is impolitic and illegal.

Read showed cause, and cited Sells and the Municipality of St. Thomas, 3 C. P., 240.

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

It does not appear to us that there can be any doubt as to the authority of the Municipality to dispose of the town hall and the site on which it stands, when they think that a new

town hall in another situation would be more convenient for the public. The 12 Vic., cap. 18, sec. 31, seems to give them that power, and without any restriction upon the exercise of their discretion.

The first section therefore of the by-law is unexceptionable; but the second and third sections are in our opinion illegal, for the reasons given in the statement of objections taken by Mr. Cameron; and so much of the by-law must therefore be quashed.

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THE LAW JOURNAL.

JULY, 1856.

OUR HOME-MADE MEDICAL MEN—A MORE RELIABLE EDUCATIONAL TEST.

Perhaps some of our readers may be of opinion that the pages of a *Law Journal* should not be occupied with the discussion of medical matter—strictly such is the case, but we claim permission occasionally to suspend the rule when our sympathies are elicited, and we think that our suggestions may possibly render some service. The learned Professions act and react on each other; one cannot sink in public estimation, without depreciating, to some extent, the value at which the others are held. The Doctors tell us that, individually, they are bad judges of disease in their own persons; we are inclined to think that they are likewise unable to treat skilfully the diseases of their body corporate: and we trust that they will not be offended at our meddling with their case, attempting a diagnosis, and giving our ideas of the treatment which should be adopted. Few persons would be inclined to deny, that the standing of the medical profession in Canada is a low one, that the share it obtains of public confidence is small in comparison with that which it enjoys in the Mother Country. The causes of this are various. The chief cause seems to be the non-existence of any test of qualification for membership, on which the public is willing to depend. In Great Britain it is well known that physicians and surgeons are not licensed to practise without having afforded satisfactory evidence of their fitness.

The Universities and the Colleges of Surgeons are relied on to examine candidates with sufficient strictness, and time has shown that they have merited the trust. The British Universities are of long standing, and their reputations are so well established that it is a matter of but little consideration with their governing bodies what the number of their graduates may be. Not so with us; our Universities are necessarily bran-new and dependant, or assisted as some of them are by government grants, or subjected to government control, and from their very number jostling and competing with each other—the number of graduates they respectively send forth is to them of great importance as increasing their influence and assisting to maintain their position. A degree in medicine from any of our Universities gives the graduate a claim to a license to practise in Canada, and does away with the necessity of his undergoing an examination before the Medical Board in Toronto, in addition to that for the degree which he already passed through in his own school, where he was examined by Professors with whom he was intimately acquainted, and whose chairs derive their support wholly or chiefly from the fees paid by the students, (with the exception of those of the medical school of the University of Toronto, now unfortunately dormant or extinct, which were supported from the university fund.) It is unnecessary to state that the school which will give the greatest facilities for acquiring a qualification to practice, will be the one which will have the greatest number of students. The Professors may be men of the strictest honour, as no doubt they are, but Examiners should be beyond the reach of suspicion,

which they cannot be when the two offices are united. We think that the duties of Universities should be confined to educating; they might as well qualify Barristers as give a title to their graduates in medicine to practise. A proposition to supersede the examinations at Osgoode Hall by examinations at Trinity College, Victoria, or any other College, would very properly meet with the most strenuous opposition from our profession—in fact, would be looked on as absurd: and in what do the cases differ? It is true that in Great Britain a physician may practice on the qualification of his degree; but his M. D. has acquired a value which is not attached to that given here. Our Universities are quite too young to possess the privileges of those of the Mother Country—they should never have been granted them.

The Medical Board of Toronto is composed of thirty-two members, of whom half reside in the city; of the country members, one lives at Perth, another at Kingston, a third at Prescott, a fourth at Cornwall, a fifth at Brockville, and so on. It is not to be supposed that they will leave their homes to come to Toronto, without sufficient remuneration; consequently the examinations are conducted, in nine-tenths of the cases, without the presence of a country member. Of the 16 from the city 12 are Professors or Ex-Professors of the rival schools of Toronto. They examine candidates from the United States, and students from their own schools, whose certificates of study do not meet the requirements for a degree. These gentlemen are no doubt well qualified to examine, and from their engagement in teaching are better qualified than private practitioners can be expected to be; but we think that Teachers should not be Examiners, that the Board should be kept free from even the *suspicion* of partiality, which it cannot be constituted as it is.[1] As we have said before, we imagine these examinations to be the chief ailments of the medical body. They may or may not be a sufficient test of qualification. The public however, has but little confidence in them. As a remedy for this and some other evils, we think that the medical profession should be properly organized. A College or Society of Physicians and Surgeons should be established, composed at first of all licensed practitioners, and admitting to membership all who pass its examinations. Its Council and its Examiners should be elected annually. It should have no connection with the medical schools.

We would have it to be the only corporate body empowered to grant licenses to practise medicine and surgery in Canada, and would therefore annul the right of M.Ds. of future creation to practise on the qualification of their degrees. The Examiners should be fairly remunerated for their services from the college fund, and not by fees from the candidates they may pass. [2] We think that the knowledge that the entrance to the profession was in the keeping of a Society conspicuous to the people, and not in the hands of the Professors of the Medical Schools, and of a few private practitioners, and that it was guarded by an independent corps of Examiners who could have no personal interest in the passing of candidates, would do much to increase the confidence of the public in our home-made medical men.

[1] Examiners occupy a quasi judicial position, and although we have no doubt they perform their duties fairly and impartially, yet the position of Teachers as Examiners of their own pupils, is an embarrassing one, not unattended with peril. We know too with what scepicion the law regards even the possibility of bias on the part of Judges, and where several acted in a proceeding the presence of one who was interested, *though he took no part, and in no degree influenced the decision*, was held by the Superior Courts to vitiate the proceedings.

[2] A mode of remuneration by fees is fraught with evils. We need not repeat the argument against this defective principle, for it is now universally condemned, and we see that remuneration by fixed salary in the Courts of Law and in the Public Departments prevails at the present time.

A system of fees gives the fee gatherer an interest which is objectionable and weakens the value of an act, that might in itself be unimpeachable, by originating suspicions respecting the integrity of the actors.

We believe, therefore, that every sensitive and honourable man would anxiously desire to be relieved of a position calculated, however unfairly, to affect the usefulness of an examining body.

CENSUS AND STATISTICS—A SECOND CLASS OF "CONVENIENT BEASTS OF BURDEN."

By the 16th sec. of the Act 10 & 11 Vic., cap. 14, "Clergymen and Ministers" are required to keep a Register of Baptisms, Marriages and Burials, and transmit the same to the Clerk of the Peace yearly.

The value of reliable statistics cannot be overestimated, and if we can suggest a method, whereby the objects for which the Board of Registration and Statistics was created will be furthered, we will have accomplished all a public writer, in a Legal Periodical, can do towards a good work.

Let us first ask, do the parties mentioned in the clause referred to, comply with the requirements of the Law? We believe it is pretty notorious that they do not; on one ground or another certain gen-

tlemen decline to comply with the directions of the Statute.

Now, the supreme power in a state enacts laws, and they cannot legally be ignored or disobeyed—if they can, the power is not supreme. No law can be permissive in the sense that *every one is to obey it or not, as he likes.* The law binds all: even Foreigners, while resident in this country, are bound by our laws. The law, in a legal point of view, is the sole standard of right and wrong. No doubt by the Divine law—that is, regarded from a religious stand-point—a person may be justified in conscience in disobeying a positive law, if opposed to the law of God. His conduct may be praiseworthy in one sense, but tried by a legal standard, he is wrong. We do not desire to touch on the grounds suggested for non-compliance with the provisions referred to; it is sufficient that they exist, and meet with, at all events, a partial moral support from certain members of the community. It must be admitted that the violation of any one plain law is calculated to weaken the respect due to laws in general; and, therefore, it comes to this—if any law is found to trench so much on conscience as to make its enforcement inexpedient, it should be repealed.

What is the requirement of the provision based on? Why, it assumes that Clergymen and Ministers are cognizant of things of which we know they are very partially informed—burials, for example. And then as respects baptisms, many persons are never baptized at all; and baptisms in this country take place at most uncertain periods of life. Again, certain bodies admit to baptism adults only; others hold to infant baptisms: and, unfortunately, there are persons who do not belong to any religious body at all, with whom neither Clergymen nor Ministers have anything to do. The provision is thus built on an erroneous assumption. What reliable basis, then, is to be found in a registration thus necessarily imperfect?

As we would not be classed amongst those who find fault with things as they are, without suggesting a remedy—who merely cavil and declaim—the following outline of a plan for better attaining the object in view, is submitted:—Some one in the House of Assembly spoke of the County Judges as most *convenient functionaries, beast of burden* on whom all odd jobs and the duty of working out the laws, and matters requiring local administration was thrown. We would indicate another grade of "convenient functionaries," through whom regular and complete information respecting births, deaths and marriages, may be conveniently obtained; we refer to Clerks of Division Courts—and assert that it is impossible to devise any new machinery that can be made more perfect than this one already in existence.

To prove our assertion, the following considerations are submitted:—

First, ground *capability*: Division Court Clerks are men of good standing, necessarily possessed of respectable educational attainments; they are selected with great care, and the very nature of the duties they are constantly engaged in fits them, indeed gives them peculiar aptitude for this very duty.

Second, *Responsibility:* They are officers of Government; that is, they give security to the Crown for the faithful performance of every duty the Legislature may throw upon them; they occupy, therefore, a thoroughly responsible position: and from their character, position in life, and education, there is moral assurance of the right discharge of every imposed trust.

Third, *Local Distribution:* This presents Division Court Clerks as parts of a most perfect ramification, combining all the advantages of decentralization with what is valuable in a central direction and control. Be it remembered, that these officers are not a changing body—the individuals remain always in a particular section of the county, and have a permanent hold of office, they are not removed except for inability or misbehaviour. According to the provisions of law, every county in Upper Canada is separated into local divisions for Court purposes—each division comprehending one or more townships. These divisions are regulated for the convenience of the inhabitants; and the Clerk's office is usually, if not in the geographical centre, in the centre of population in each Division, as near as circumstances will permit. So circumstanced, every man, woman and child is generally known to the Clerk or Bailiff of the Division; the latter is constantly perambulating the Division, and the constant recourse to the Clerk's office, we may

suppose, keeps him *au courant* with such incidents as births, deaths and marriages, (people like to hear and speak of these things, or we would not see the newspapers give them a space); and under the plan we will presently trace out, a most perfect return could be obtained from every part of the county. We must, however, except the cities, when we speak of the officer's personal knowledge of current events; but in other respects, the system, if applied, would be found to work well in cities.

The proposed plan is this:—

1st. Require parties under a moderate penalty—to be recovered through the Division Courts, as the cheapest and most effective tribunal—to notify the Clerk of the Division Court in which they are when the event takes place, of every marriage, birth and death, with necessary particulars, providing distinctly who should be the person to notify—and in the case of strangers, making it incumbent on the parties on whose premises a death occurred, to notify the Clerk.

2nd. Require Clerks to keep a registry in such a form, and with such particulars as the Board might prescribe, and transmit the same half yearly or yearly to the Clerk of the Peace for his county; the registry to be made up from the notices given in; and perhaps the Clerk's personal knowledge, or other reliable sources of information brought to bear, in order to secure completeness; allow the Clerk for this Registry and return so much for the first 50 items, and so much in addition for every 10 or 20 thereafter.

3rd. Make it the duty of each Division Court Bailiff to notify the Clerk of every birth, death or marriage, he may have knowledge of as occurring in the Division, and let proceedings be taken for conviction of parties making default, and give one half the penalty to the Bailiff, the other half in aid of the fee fund.

4th. The Clerk of the Peace to report to the County Judge any Clerk making default in transmitting his returns—fines to be imposed for wilful default or neglect.

5th. As respects Marriages, it might be still, perhaps, required of Ministers, to give an account of them to the Division Court Clerk.

This plan would at once seem sufficient to secure what is necessary, and that without offence to any. No new machinery need be devised, for there is one already in existence completely suitable. The law might be made known by requiring the Statute to be read at the opening of every Division Court for one year after it comes into operation. Forms prepared by the Board of Registration could be conveniently transmitted to the Division Court Clerks through the Clerks of the Peace. With respect to fees, it would of course be palpably unjust to cast this duty on Clerks without adequate payment; and, in a more general point of view, work, to be well done, must be fairly paid for. The expense, after all, would be nothing as compared to the advantage, and the amount might be readily ascertained—the number of Division Court Clerks and the ordinary tables, forming a basis of a calculation.

Is it objected that these compulsory notices to Clerks might be unpalatable to the public? We reply, that matters of public concern should be the paramount consideration, and after the first six months the duty would be known, and would be universally acted on. It may be that with the Statesman and the Lawyer the value of statistics is more perfectly appreciated, but it seems altogether unnecessary in the present day to enter on any labored investigation of the uses and object of reliable statistics.

In these remarks the writer has only a patriotic object in view, and they are respectfully submitted in the hope that they will receive the attention a subject so important demands. The scheme is, no doubt, capable of enlarged application, and of being rendered more perfect in details, indeed an outline of the plan only is set down. If erroneous in principle, what has been said will fall quietly to the ground; if correct, we have faith in its being sifted and taking root.—*Communicated.*

BYE-LAWS.

Municipalities with the very best intentions are frequently plunged in difficulties by reason of defects in the Bye-Laws they pass. Their powers are large, the matters in respect to which they are empowered to make bye-laws extensive and varied. Corporations are creatures of civil polity; they have only such powers as the Legislature has conferred, and these powers must be exercised in the method laid down by the laws. The members of

Corporations, however competent in other matters, are not equal to the task of preparing complicated bye-laws, that require not only an acquaintance with the provisions of the Statutes, but a familiarity with the general principles of Law and the decisions of the Courts. [1]

It can be no matter of surprise, therefore, if County as well as Township Municipalities, will occasionally transgress their powers or omit some necessary matter of form, and the bye-laws they pass turn out to be illegal and inoperative. A prominent feature in the *Law Journal* from the first has been to place before Municipal bodies reliable information, and not only have we presented them with an annotated digest of all the early Municipal and leading cases, but have continued to publish in full all the Reports of the Courts of Common Law relating to Municipal and School matters.

Something additional is said to be required. One friend has suggested to us that a professional man in each County should be appointed to advise the Municipal authorities therein, and to prepare bye-laws as required, or one for the whole of U. C., and that "by union the services of a competent person may be secured without the expense bearing hardly on any quarter."

Another friend has submitted a plan that seems feasible enough, and one which might be attended with considerable benefit. It is that "from every Municipality for which a Bye-Law was prepared by a competent professional man, a copy should be sent for publication to the *Law Journal*, accompanied with a note of the circumstances, or at least the name of the lawyer by whom it was drawn." This, however, so far as we are concerned, could only be carried out by issuing a monthly or quarterly extra, in which those Bye-Laws would appear. Such a plan we would have no objection to adopt if the undertaking met with proper encouragement; a very trifling sum from, say one half of the Municipalities in U. C., would be sufficient to cover the expense. As requested, we submit the matter to to those of our readers whom it may concern.

The other proposition, the appointment of a local or Provincial Counsel for Municipalities, we will probably examine at length hereafter.

[1] Any reader of the *Law Journal* will be able to judge for himself by a reference to the number of bye-laws quashed by the Courts.

GUARDS ABOUT MACHINERY.—PENNIES SAVED, LIVES LOST.

We constantly read in the public journals of accidents to individuals by their coming in contact with mill and other machinery, and neither the number nor dreadful nature of these accidents seems to make people one whit more cautious in going through places where machinery is erected. The Act of 1 Vic., cap. 18, was passed expressly to prevent accidents from this cause, and if its provisions were *properly* carried out the number of casualties would be greatly diminished. The owner of buildings in which machinery is erected, if possessed of right feeling, will, of his own accord, erect proper guards; if he does not, and loss of life or limb is occasioned by his neglect, even coupled with want of caution by another, his conscience must be left ill at ease.

But responsibility lies with the Magistracy also, and if from indolence or wilful neglect, Magistrates in the neighborhood omit to visit a building in which dangerous machinery is employed, and to direct proper and sufficient guards to be erected about it, they fail to comply with the directions of the law, (sec. 3, same Act) and exhibit an unpardonable indifference to the benevolent objects the Statute aims at.

Owners, should they fail to comply with the directions of a Magistrate, are liable to be fined, and failing to pay the fine and costs, to be imprisoned in the common gaol.

We would earnestly urge upon the Magistracy attention to the duty pointed out. Every case of injury by machinery, unless shown not to have arisen for want of guards, is a dark reflection not only on the owner, but on the surrounding Magistracy.

To owners of machinery, without entering on a discussion as to their legal liability, we would just mention a case that was decided in the Court of Queen's Bench, in England, in the month of January last. There is a Statute in force there similar in principle to our own, which requires that mill gearing shall be securely fenced. A shaft in a mill was so placed as not to be where persons were likely to pass, or be employed—in fact, it was such a height above the nearest floor as to present no appearance of liability to accident while the shaft

was in motion; but a person did happen to be injured by the shaft, and brought his action for damages. It was defended on the grounds that fence or guard was unnecessary—the situation of the shaft preventing approach. What did the Judges say to this? They said: "The Legislature have not said that where there shall be danger the machinery shall be fenced, but has declared in the most absolute manner that in all cases mentioned the machinery *shall* be fenced; * * this law has been disobeyed by the defendants. * * * The section says absolutely, '*it shall be fenced.*' To add a qualification to that, *when there is danger*, would be to make a new law. * * * Even before the Statute, if the place was dangerous, there would have been a remedy on the score of negligence: but the very object of the Statute was to make the omission to fence in all cases unlawful"!!—and the plaintiff had judgment in his favour.

Let us give another little piece of information to owners of machinery who, reckless of danger to the public, put up no guards or fence. The Act of Parliament 10 & 11 Vic., cap. 6, gives a right of action to recover damages for the death of any person through wrongful act, *neglect* or *default*. Viewed, therefore, as a mere business precaution, the expense of guards to machinery may in the end prove a wise investment for the owner.

AMERICAN REPRINTS.

We had occasion in the May number to refer to the very great improvement of late years in American Law Publications, (original works and reprints.) There now lie before us four books (noticed on another page) from the establishment of Messrs. T. & J. Johnson, Philadelphia, which present additional evidence of the correctness of our former observations. And if Philadelphia has reason to be proud of the ability and industry of her legal writers, she has no less reason to boast of her Law Publishers. These Books are got up in excellent style, clear, vigorous looking type,—no dim, worn-out look,—no huddled appearance on the pages; and the notes are well disengaged, the English and American being conveniently divided. The manner of manufacture is not second to that of any Law Book we have yet seen published on this Continent, (would that we could with truth except Canadian Books) but Messrs. Johnson & Co.'s is an old established firm, for years exclusively confined to this class of business, and therefore excellence might reasonably be expected. We refer to the last page for a list of some of their more recent publications; their stock is being constantly increased by supplies of old and scarce books, as well as of recent English publications, as their published Catalogues abundantly prove.

CHIEF JUSTICE MACAULAY.

We are very much pleased to learn that the Bar have determined to procure a full size Portrait of Chief Justice Macaulay, to be placed in the Library of Osgoode Hall; and that the Committee named has already taken steps to give every member of the profession an opportunity of becoming a party to the movement: of which, we have no doubt, all the brethren will be so glad to avail themselves as to render it unnecessary to say a word with regard to the claim for co-operation which this matter has upon *them* in particular.

Such men as Chief Justice Macaulay belong to the public, and we are happy to find that he has allowed his standing demurrer to portrait taking to be overruled by the Committee. The surrender of personal feeling to social claims is one of those imperfect obligations which Mr. Macaulay will find authority for at home and here, in the case of many other high ministers of Justice, revered by the Bar and honored by the public for sterling integrity and worth.

A subscription of £1.5s. from members of the Bar, it is said, will enable the Committee to put the work in the charge of the Artist; and subscribers will receive a miniature photograph, or other likeness, of the Chief Justice.

Subscriptions to be sent to John Bell, Esq., Barrister, Toronto, Treasurer of the Fund.

"AND BEARDED LIKE A PARD."

We have heard of some rather telling things said of bearded Barristers, by certain high ministers of Justice. The following from a work on the French Bar will show the feeling in the "country of hairy faces":—

"In 1854 a question was raised, which might seem unimportant, were it not that everything affecting the dignity of Justice is of a serious nature. The tribunal of Ambert ruled that an Advocate who, when in forensic attire, should wear his beard and moustaches, was guilty of a disrespectful act, and in consequence it sentenced some members of that bar to be reprimanded. In Paris, however, the Judges are not so severe as in the Puy de Dôme; but it is considered fantastic to affect an appearance which is not in keeping with the greater number, for a decent and even a good appearance is suitable for an Advocate in Court as well as out."

We have received several notices of non-reception of Nos. of the *Law Journal* from some of our more distant subscribers. The numbers, on issue, are regularly mailed from the Office, and we would request any subscriber who may not receive the *Journal* regularly, to notify us of the same. Irregularity in delivery of Publications is becoming a general complaint; if it were a regulation that the Post-mark should be affixed to newspapers as well as letters on their passage through any Postoffice, a boon would be conferred on the public.

INDEX TO VOL. I.—We have an *elaborate* Index, now in the hands of the printer, to the first volume of this Journal, but fear it may not be ready in time to accompany the present number. Our readers will find that if its issue has been delayed beyond the usual time, the Index will be the more full and complete than that of any similar publication. With the last issue we commenced and will continue in each number a table of Contents for temporary reference.

DIVISION COURTS.

(Reports in relation to.)

ENGLISH CASES.

EX. PHILLIPS v. HEWSTON. *Jan.* 26.

County Courts—Legacy—Jurisdiction—9 & 10 Vic., cap. 95, sec. 65.

A testator by his will gave to H. £100 in trust to pay the same to P. on his attaining the age of 21 years, and in the meantime to invest the money and pay the interest to P.; and he empowered H., if he should think fit, to dispose of the whole or part of the money for the advantage of P. during his minority. At the time of the testator's death P. was an infant. Upon his attaining the age of 21 years he brought an action in the County Court against H. for the recovery of the residue of the £100:

Held, that the £100 was not given as a legacy by the will, but that a trust was thereby created, and that the County Court had no jurisdiction.

This was a motion for a writ of prohibition to stay proceedings in a plaint in the County Court of Lancaster held at Liverpool. The plaint was brought to recover £50, the balance of a sum of £100 claimed as a legacy under a will. It appeared at the trial that the bequest in question was contained in the will of an uncle of the plaintiff, by which the testator, after bequeathing a trifling legacy, left all his estate and effects, consisting of personalty, to the defendant in trust as soon as convenient after his decease to sell his furniture and effects, get in his debts, and stand possessed of the proceeds and of the money so to be collected in trust, to pay to the plaintiff, his nephew, the sum of £100 when he should attain the age of 21 years, and in the meantime to invest the £100 and pay the interest to his nephew; and powers were given to the defendant, who was called "trustee" in the will, to advance either a part or the whole, if he should think fit, for the education or apprenticing of the defendant, or otherwise for his benefit during his infancy. The testator then gave a sum of £50 to each of his two nieces, payable upon their respectively attaining the age of 21 years, and with like powers of disposing of the money for their advancement during infancy. The testator died while the objects of his bounty were respectively infants, and the defendant, before they attained the age of 21 years respectively, had paid a portion of the money, so bequeathed, to their mother for their support. The plaintiff, having come of age, brought this action to recover an alleged residue of £60, and by the particulars he abandoned the residue above £50.

Milward, for the defendant.—The Court will issue a prohibition. Jurisdiction is given to the County Courts in the case of a claim to a distributive share under an intestacy, or of a legacy under a will, by 9 & 10 Vic., cap. 95, sec. 65; but this is a case of trust, and not of a legacy.

Aspland, contra.—A specific sum is given by the will payable at a time certain. It is not the less a legacy because the party to pay it may be also viewed as a trustee. In fact every executor is viewed in equity as a trustee for the payment of legacies. (He cited Stor. Eq. Jur., sec. 540; 1 Wms. Exors., 194; Pears v. Wilson, 6 Exch., 862.)

Milward, in reply, cited *Re* Fuller v. Mackay, 22 L.J.Q.B., 415; W. R. 1852-3, 417.

ALDERSON, B.—I am of opinion that the prohibition should go. This is not simply a case of a legacy. It was necessary in order to effectuate the testator's intentions that a trust should be created, for the *cestuis que trust* are infants, and there are powers to advance during their infancy for their education, &c. This is the case of a real trustee. The merely calling an executor trustee in the will does not prevent County Court entertaining jurisdiction if what is given is a legacy; but we cannot allow the County Court to deal with cases of breach of trust, in which questions of equity arise, for the disposal of which they have no adequate process.

PLATT, B.—The defendant had a discretionary power to make advances, and that is no part of the duty of an executor.

RAMWELL B.—We may consider this case without being at all embarrassed by the case of *Pears v. Wilson*, where the subject matter of the plaint was undoubtedly a legacy. So considered, the plaintiff's cause of complaint only requires to be stated in order to render it clear that it is a breach of trust of which he complains, and that it is not a legacy he seeks to recover: he says that the defendant was intrusted with money which he ought to have invested, and on his attaining 21 years of age to have paid over, and he complains that he did not invest the money, or that, having invested it, he did not pay it over. It is in truth a breach of trust.

Rule absolute for a prohibition.

C.P. ASHCROFT v. FOULKES. *April* 16, 17.

Common Law Procedure Act, 1854, sec. 46—County Court Acts—Costs—Set-off.

If a rule be so drawn up that sufficient materials are not brought before the Court, the Court may, in their discretion, under sec. 46 of the Common Law Procedure Act, 1854, make an order for the production of a document they may deem necessary for the discussion of the rule.

Since the passing of 13 & 14 Vic., cap. 61, if an action be brought for a sum between £20 and £30, and the claim be reduced at the trial by reason of a set-off, the plaintiff is not entitled to his costs, unless there be a certificate, rule, or order for them under that statute.

This cause was tried before the Secondary of London. The plaintiff's claim was £37 odd, but was reduced by a set-off to £4. The Master allowed the plaintiff his costs; and subsequently an order was made by Coleridge, J., for the Master to review his taxation. A rule having been obtained to rescind that order, the rule was drawn up "upon reading the duplicate of an order made by Mr. Justice Coleridge and the two affidavits of William Lewis (as to certain particulars having been made by mistake) and the paper waiting to one of them annexed, it is ordered," &c.

Hawkins, who was instructed to show cause, objected that it was necessary for the party who obtained the rule to bring before the Court materials to show that the order of Coleridge, J., was improperly made, which was not done.

JERVIS, C.J., referred to sec. 46 of the Common Law Procedure Act, 1854, and suggested that the Court would under that section make an order for the production of the Master's allocatur.

Hawkins then showed cause.—Awards v. Rose, 8 Ex. 312; Wallen v. Smith, 3 M. & W. 138; Dixon v. Walker, J. M. & W. 214; and Parker v. Serle, 6 Dowl. P. C., 334, were referred to.

Petersdorff in support of the rule.—Woodhams v. Newman, 7 C. B. 654; s. c. 18 L. J. C. P. 213, was referred to.

Cur. ad. vult.

JERVIS, C.J. (April 17.)—We have considered this case, and think the rule ought to be discharged. This was an application to rescind an order of my brother Coleridge to review the taxation, the Master having allowed the costs where the plaintiff was suing for a sum under £50 and above £20. The claim being reduced by a set-off, he recovered £4 only. Mr. Hawkins contended that the *recovery* was to be the criterion, and we are of that opinion. The first County Court Act made provision for a plaint, and the costs were recovered, and they might be taken away by a suggestion. The 11th section provided that where the party recovered less than £20 (not exceeding) there should be no costs. The 12th section provided that the presiding officer might certify for the costs, and the 12th section gave certain powers to a judge at chambers, or the Court, &c. We think the amount recovered is the criterion, and that if it be under £20, unless there is a certificate, no costs are to be given.

Rule discharged.

Q.B. CHALLINER v. BURGESS. *April 26.*

County Court—Interpleader summons—Want of adjudication.

A claimant of goods seized under a County Court execution, who is summoned by interpleader summons before the County Court, but does not prosecute his claim, may sue in the Superior for the wrongful conversion, unless it appears that there was an adjudication upon the claim in the County Court.

Action for selling, converting and wrongfully depriving the plaintiff of his goods, to wit, certain furniture.

Plea: That one Masters had recovered a judgment in the Cheshire Co. C. against Topham; that defendant was the high-bailiff of the court, and had levied the goods in question on Topham's premises, under an execution upon the judgment; that plaintiff claimed the goods, and an interpleader summons was then obtained, but that plaintiff did not prosecute his claim, but made default, whereupon the goods were sold.

Demurrer to the plea.

Welsby in support of the demurrer.—Sec. 118 of the 9 & 10 Vic., cap. 95, enacts that the officer charged with the Co. C. execution may obtain an interpleader summons, calling the execution-creditor and the claimant before the court; "and the judge shall adjudicate upon such claim and make such order in respect thereof, &c., as to him shall seem fit." This plea is bad, for it does not show any adjudication upon the summons.

H. Lloyd in support of the plea.—When once the claim is brought before the Co. C., no action can be brought in any other court in respect of the goods until the matter has been determined in the Co. C. The plea shows that the matter is still pending in the Co. C., and as no adjudication is set out, for all that appears on the record, the Co. C. may issue a fresh interpleader summons.

By the COURT.—The matter is not *res judicata*, and the plea is no bar to the action.

Judgment for the plaintiff.

MONTHLY REPERTORY.

COMMON LAW.

REG. v. JOHN DAVIS *alias* BUSH AND WILLIAM DAVIES.

C.C.R. *April 26.*

Larceny—Misdelivered letter—Found articles: law as to, inapplicable.

A post letter directed to J. D., containing a postoffice order, was misdelivered to J. D., one of the prisoners. He took it to W. D., the other prisoner, who read it to him. Upon hearing it read, he said the letter and order were not for him. W. D. advised him, notwithstanding, to keep the letter and get the money. Both prisoners accordingly applied at the postoffice and obtained the money.

Held, that a conviction of the prisoners for stealing the order must be set aside.

Semble, that the law of larceny in respect of articles found and appropriated by the finder after he has ascertained what the article is, and the marks of ownership, is inapplicable to a misdelivered post letter.

C.P. REVIS v. SMITH. *April 25, 29.*

Witness,—Swearing to defamatory matter in a judicial proceeding—Belief of witness—Reasonable and probable cause.

No action lies against a person for "falsely and maliciously and without any reasonable or probable cause, swearing to defamatory matter in an affidavit in a Chancery suit, whereby the person defamed is injured, it not appearing that the person making such affidavit did not believe what he so swore to, to be true.

Q.B. PIM v. CAMPBELL. *May 5.*

Agreement—Conditional signature—Postponing operation.

Upon the trial of an action upon a written agreement, evidence is admissible under non-assumpsit to show that the defendant signed the document upon the understanding between the parties that it was not to operate as an agreement until a certain condition had been performed; but in such a case the jury ought to be cautioned to regard with scrupulous suspicion the evidence adduced to prove such an arrangement.

Q.B. WICKENDEN v. WEBSTER. *May 7.*

Lease—Covenant—Not to carry on trade.

A covenant not to convert premises into a shop or public house, or suffer any public trade or business to be carried on therein, but to use the same as a private dwelling-house only, is broken by using them as a school for young ladies.

Q.B. WOOD ET UX. v. BLETCHER. *April 26 & 30.*

Debt—Plea of payment.

Where a man makes a purchase and the article is paid for so instanter, there is no debt incurred, and no occasion for a plea of payment.

EX. DOBSON v. COLLIS. *May 3.*

Contract subject to defeasance—Statute of Frauds, sec. 4.

Although a contract contains a stipulation making it defeasible upon the occurrence of a certain event within a year, it may nevertheless be an agreement not to be performed within a year within the 4th section of the Statute of Funds.

In October, 1854, a verbal agreement was made between A. and B. that A. should serve B. until the 1st Sept., 1855, and for a year thereafter, unless the said employment was determined by three months' notice to be given by either party.

Held, within the fourth section of the Statute of Frauds, and that no action would lie upon it as it was not in writing.

C.C.R. REG. v. MARY ANNE STRIP. *April 26.*

Evidence—Voluntary statement of accused made before a Magistrate upon application for a remand.

A voluntary statement made by a prisoner in the presence of a Magistrate upon an application for a remand, is admissible in evidence though the statement was not taken down in writing, and no caution was given by the Magistrate to the effect prescribed by the 11 and 12 Vic., cap. 42, sec. 18.

C.C.R. REG. v. LEECH. *April 26.*

False pretences—Venue—Jurisdiction.

A letter containing a false pretence was received by the prosecutor through the post in the borough of C., but it was written and posted out of the borough. In consequence of that letter he transmitted through the post to the writer of the first a postoffice order for £20 which was received out of the borough.

Held, that in an indictment against the writer of the first letter for false pretences the venue was well laid in the borough of C.

Q.B. JEWELL ET AL v. STEAD. *May 2.*

Tolls—Local act—Prohibition to erect tolls within three miles of B.—How distance to be measured.

Where by a local Act, Trustees of a turnpike road were prohibited from erecting tolls within three miles of B.:

Held, that the distance was to be measured as the crow flies.

EX. SCOTT v. THE MAYOR, ALDERMEN AND CITIZENS OF MANCHESTER. *April 30.*

Master and servant—Public commissioners—Liability for acts of workmen.

The municipal corporation of M. were empowered by act of Parliament to do all the necessary acts for lighting the borough and to supply the inhabitants with gas at such rates as should be agreed between them and the persons supplied; and they were directed to apply the money received from the gas-works "in paying off the mortgages and annuities secured thereon, and in payment of certain expenses connected with their gas-works, and as to the residue of such monies in and towards the improvement of the township of M."; and they were authorized for a period of 10 years to apply such portion of the residue as they might think fit—not exceeding one moiety thereof towards payment of the annual expenses to be incurred in supplying the inhabitants of the borough with water, and in reduction of the water-rate—while servants of the corporation were fixing a gas-pipe in a public street in M., by their negligence a piece of metal was projected with violence, and struck a passenger, and put out his eye.

Held, that an action was maintainable against the corporation for the damage so occasioned.

C.P. RODGERS v. PARKER. *Jan. 22, May 7.*

Distress—Irregularity—No damage.

The 4th count of the declaration stated that the defendant having distrained certain growing wheat as a distress for rent, and having caused it to be cut and carried away, instead of impounding, appraising and selling it, suffered other persons to carry it away, and convert it to their own uses, whereby, &c. The 6th count was in trover.

It was proved at the trial that the defendant seized plaintiff's growing wheat as a distress for rent, and sold it on the premises in a growing state; that the purchaser cut the wheat and carried it away, and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff. The jury found that the plaintiff sustained no damage by this transaction.

Held, that under these circumstances the Judge properly directed a verdict for the defendant.

EX. TATTON v. WADE. *May 9.*

False representation of credit—Lord Tenterden's Act 9 Geo. cap. 14, sec. 6—Representation partly written, partly oral, —Damages.

C., while negotiating with the plaintiff for the hire of furniture, referred her, as to his credit, to the defendant; and, partly induced by the defendant's false representations in writing, and partly by her subsequent false oral representations, the plaintiff parted with her furniture and suffered loss.

In an action for false representation, the Judge directed the jury that if they were of opinion and believed that the plaintiff was substantially and mainly induced by the written representation, she was entitled to their verdict.

Held, that the direction was right.

EX. LEE v. VESEY. *May 5.*

Distress—Joint warrant executed by one—Distress for rates.

Commissioners for draining a district and restoring and maintaining the navigation of a river, were empowered by Act of Parliament to impose rates and enforce payment by distress. Acting under the Act, they made a warrant addressed to two, authorizing them jointly to distrain, and the distress was made by one only.

Held, (per *Alderson, B.*, and *Bramwell, B.*) that the distress was not not on that account illegal. Per *Pollock, C.B.*, that the making the warrant joint, instead of joint and several, was "a defect or want of form" within the meaning of a section in a Statute providing that the distress should be deemed unlawful, nor the parties making the same trespassers "on account of any defect or want of form in the summons, conviction, warrant of distress, or other proceeding relating thereto.

C.B. AULTON ET AL v. ATKINS. *May 5 & 6.*

Implied covenant—Debt due from partner to the firm.

Declaration in covenant that the defendant and his partner, Leedham, by deed assigned to the plaintiffs all and singular the copartnership stock in trade, fixtures, debts, sum and sums of money, and all other the personal estate, effects, and property whatsoever of the defendant and Leedham; that the defendant was indebted to the copartnership.

First breach: that the defendant had not paid the amount of that debt to the plaintiffs.

Second breach: that the defendant had not transferred to the plaintiffs a bill of Exchange payable to the order of the defendant (being part of the personal estate and effects and property of the copartnership,) and had incapacitated himself from so doing by parting with the possession of it.

Demurrer:

Held, first, that there was no implied covenant by the defendant to pay to the plaintiffs a debt due from himself to the copartnership.

Secondly, (on the authority of *Warde v. Audland*, 16 M. & W., 872) that there being an assignment by deed of the bill of Exchange there was an implied covenant that the defendant would not do anything in derogation of his own deed.

C.C.R. REG. v. ROEBUCK. *May 3.*

False pretences—Misrepresentation of the quality of an article offered as a pledge—Evidence of scienter.

A false and fraudulent statement to a pawnbroker that a chain offered as a pledge is of silver, is indictable under the Statute 7 & 8 Geo. IV., cap. 29; and upon the trial of such an indictment, evidence is admissible of similar misrepresentations made to others about the same time, and of the possession of a considerable number of chains of the same kind.

C.C.R. REG. v. BURGON. *May 3.*

False pretences—False pretences that a house was built upon land offered as security for a loan.

A. applied to B. for a loan upon the security of a piece of land, and falsely and fraudulently represented that a house

was built upon it. B. advanced the money upon A. signing an agreement for a mortgage depositing his lease, and executing a bond as collateral security.

Held, that A. was properly convicted of obtaining money by false pretences.

C.C.R. REG. v. GARDNER. *May* 3.

False pretences—Personation—Obtaining board and lodging

A person who, by falsely representing himself to be another person, induces another to enter into a contract with him for board and lodging, and is supplied accordingly with various articles of food, cannot be indicted for obtaining goods by false pretences—the obtaining of the goods being too remotely connected with the false representation.

EX. COWIE v. STIRLING. *May* 1.

Promissory note—Payee—Sufficiency of designation—Collateral agreement.

The following instrument was sued upon as a promissory note by the plaintiff who at the time of the making of it, and from thence until the commencement of the action, was the secretary of the Indian Laudable and Mutual Assurance Society: "Nine months after date I promise to pay to the Secretary, for the time being, of the Indian Laudable and Mutual Assurance Society, or order, Company's rupees 20,000 with interest at £6 per cent per annum; and I hereby deposit in his hands twenty-two Union Bank Shares, as particularized at foot by way of pledge or security for the due payment of the said sum of Company's rupees 20,000, and in default thereof, hereby authorize the secretary for the time being forthwith, either by private or public sale, absolutely to dispose of the said Bank Shares so deposited with him, and out of the proceeds to reimburse himself the said loan of Company's rupees 20,000, he rendering to me any surplus; and I hereby promise to make good whatever may be wanting over and above the proceeds of such sale to make up the full amount of such loan and interest.

Held, (affirming the judgment of the Q. B.) that the note was made payable to the person, whoever he might be, who at the time of its falling due might be secretary to the Society, and was therefore payable on a contingency and void.

EX. CLAY v. YATES. *May* 3.

Contract—Pleading—Work and materials—Printing—Statute of Frauds—Illegality—Part performance.

Under the count for work and labour, and materials in and about the same provided, the plaintiff is entitled to recover compensation for printing a book and for the paper on which it is printed.

A contract to print 500 copies of a manuscript and supply the paper, is not a contract for the sale of goods, wares, or merchandize, within the 17th section of the Statute of Frauds, (29 Car. 2, cap. 3) and need not therefore be in writing.

A printer was employed to print 500 copies of a book with a dedication: the dedication was not sent to the printer till the book was set up in type. The dedication contained libellous matter, and the printer refused to print it; but he printed off the 500 copies of the book without the dedication.

Held, that he was entitled to recover in respect of the part printed.

Q.B. REVTER v. THE ELECTRIC TELEGRAPH CO'Y. *May* 28.

Corporation—Trading Company—Parol contract in the course of business of the Company, ratified by the comp'y.

Where a trading company, incorporated by charter, have by their acts ratified a parol contract within the scope of their business entered into by their chairman on their behalf by a third party, they cannot afterwards repudiate the contract on the ground that it was not under their corporate seal, or that it was not signed by their directors in pursuance of a provision to that effect in their deed of settlement.

The charter of a telegraph company provided that its telegraph should be open to all persons equally, without favor or preference. The plaintiff collected messages for the company and received a commission from them on the messages collected and sent by him.

Held, that this was a mere remuneration for his services, and was no preference over the public.

Quære, supposing it to be such preference, whether the company could have availed themselves of the objection.

C.P. AULTON v. ATKINS. *May* 5, 6.

Implied covenant.

Declaration: That defendant and L. were copartners in business; and by indenture between defendant and L. of first part, plaintiff of second part, and certain other persons of the third part, defendant and L., assigned unto plaintiff all the copartnership stock in trade, fixtures, debts, sums of money, and all other the personal estate and effects and property of them as such copartners; that at the time of the making of the said indenture, defendant was indebted and accountable to the said copartnership in £240, which was then payable by the defendant to the copartnership. First breach: that defendant made default in paying the same to the plaintiff. Second breach: that at the time of making the indenture a certain bill of exchange payable to the order of the defendant for £120, and then in the possession of the defendant, was, and the right to the money therein specified also was, part of the said personal estate and effects and property of the defendant and L. as such copartners; that defendant made default in transferring the said bill and the right to the said money respectively to plaintiff; and after the making of the indenture, incapacitated himself from so doing, and from conferring on plaintiff any right or title to receive the money specified in the bill, by parting with the possession of the bill in such manner and on such terms as so to incapacitate himself, and thereby defendant prevented plaintiff from acquiring or having any right or title to the said money.

On demurrer—*Held*, as to first breach, that a covenant could not be inferred by defendant to pay plaintiff the debt due from the defendant to the copartnership. As to the second breach, that there was an implied covenant that the defendant would not do anything in derogation of his own deed, and would not transfer the bill to anybody else, &c.

NOTICES OF NEW LAW BOOKS.

SMITH'S LAW OF LANDLORD AND TENANT, *with Notes and Additions, by* FREDERICK PHILIP MAUDE, *of the Inner Temple, Barrister-at-Law; and Notes and References to the American Cases, by* P. P. MORRIS, *of the Philadelphia Bar.*

One occasionally finds in a preface, and the work it introduces, something to remind of the Eastern cry, "In the name of the Prophet, *figs!*"—but in Mr. Morris' very brief preface it is the reverse, there is an utter absence of pretence. He, no doubt, felt that his valuable Notes would of themselves speak loudly in favour of the able and judicious Editor of this very valuable little work. We have always been of opinion that, in this country, the reprints in full of English works with American Cases, were to be preferred when got up by reli-

able publishers, and edited by men of recognized ability; and in this Edition of "Smith's Landlord and Tenant," there is sufficient to prove, at least so far as this work is concerned, the correctness of our position. In several points the Canadian Lawyer will find in the American Notes much valuable learning bearing on circumstances common to the United States and this country, and the American doctrine propounded and illustrated—for example we would refer to the subjects of *Waste* (page 192) and "*Letting on Shares*," (page 91.)

In adopting the Laws of England as the rule of action, we have not tied ourselves down to a rigid unbending application. Law is a progressive science—its principles are necessarily elastic in their application. The Work before us is sufficiently known and appreciated to need no commendation from us. In his Notes, Mr. Morris has very properly kept in view the Author's plan, and has produced an edition enriched by carefully prepared Notes, exhibiting clearly the learning and research of a man fully equal to the task he undertook and has so satisfactorily accomplished.

BYLES ON BILLS OF EXCHANGE, PROMISSORY NOTES, &c.—*Fourth American from Sixth London Edition, with additional Notes, illustrating the Law and Practice in this Country: by* HON. GEORGE SHARSWOOD.

Every one has read "Byles on Bills,"—pithy in composition and admirable in arrangement, it has always been a favorite with us. We welcome Mr. Sharswood's edition of this standard work. We admire his style and his handling of a subject. The Work before us is annotated, evidently with great care—the American Editor has kept principles steadily in view. The notes and text are in admirable keeping—both in a high degree remarkable for judicious condensation. We have run through the whole text by the light of American decisions; the *scattered* rays of leading points Mr. Sharswood has carefully collected. The Work commends itself to the Profession.

ADAM'S EQUITY—*Third American Edition, with the Notes and References to the previous Edition of* J. R. LUDLOW *and* J. M. COLLINS; *and additional Notes and References to recent English and American Decisions: by* HENRY WHARTON, *Counsellor-at-Law.*

This valuable Work is very fully annotated by the American Editor—the Notes and References embody the more important English and American Cases down to the time of publication.

Judging from some of the Notes which we have read, we have no hesitation in saying that great care and judgment has been exercised by the present Editor—for example, we would refer to the Notes at pages 590 and 790.

AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE: *being a translation of the general part of "Thibaut's Systemides Pandekten Rechts," with Notes and Illustrations:—by* NATHANIEL LINDLEY, *of the Middle Temple, Barrister-at-Law.*

This reprint is fairly got up. The Work itself is admitted to be an excellent summary of the principles of the Roman Law. From the Civil Law every system of Jurisprudence has largely drawn, and its principles and maxims are rightly resorted to when positive municipal authority is silent, and general grounds of rational Jurisprudence alone guide to a decision.

To the student who desires to become a *lawyer*, an acquaintance with the principles of Roman Jurisprudence is essential; and the Notes and Dissertations on the text make the Work before us a valuable addition to the Law Literature of England and America.

APPOINTMENTS TO OFFICE, &c.

REGISTRAR.

STURGISS MOORHOUSE CUSHMAN, Esquire, to be Registrar of the County of Prescott, in the room of George D. Read, Esquire.—[Gazetted 28th June, 1856.]

NOTARIES PUBLIC.

THOMAS CHARLESWORTH BRAMLEY, of Toronto, Gentleman, and LAWRENCE HENRY HENDERSON, of Belleville, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—[Gazetted 14th June, 1856.]

HENRY WILLIAM PETERSON, of Guelph, Esquire, Barrister-at-Law, and JOHN MALLOCK, of the city of Ottawa, Esquire, Attorney-at-Law, to be Notaries Public in U.C.—[Gazetted 21st June, 1856.]

JAMES MUIRHEAD, of Brantford, Esquire, to be a Notary Public in U. C. —[Gazetted 28th June, 1856.]

ASSOCIATE CORONERS.

ROBERT BIDDLE, SAMUEL JAKES, and WILLIAM PORTER WETTON, Esquires, to be Associate Coroners for the United Counties of Leeds and Grenville.—[Gazetted 21st June, 1856.]

WILLIAM SUMMER SCOTT, Esquire, M.D., to be an Associate Coroner for the U. C. of Huron & Bruce.—[Gazetted 21st June, 1856.]

ALEXANDER A. BEATON, Esquire, to be an Associate Coroner for the U. C. of Prescott & Russell.—[Gazetted 21st June, 1856.]

THE DIVISION COURT DIRECTORY.

Intended to show the number, limits and extent, of the several Division Courts of Upper Canada, with the names and addresses of the Officers—Clerk and Bailiff,—of each Division Court.†

COUNTY OF SIMCOE.

Judge of the County and Division Courts, JAMES ROBERT GOWAN, Esquire.

First Division Court.—Clerk, Thomas Lloyd.—Barrie P.O.; *Bailiff,* John Creasor.—Barrie P. O.; *Limits*—The townships of Vespra and Innisfil; that portion of the township of Essa lying eastward of the fourth concession of the said township, and that portion of the township of Oro lying westward of the tenth concession of the said township.

Second Division Court.—Clerk, John F. Davies,—Bradford P. O.; *Bailiff,* Thos. D. Taylor—Bradford P.O.; *Limits*—The township of West Gwillimbury.

Third Division Court.—Clerk, Fred. S. Stephens,—Tecumseth P. O.; *Bailiff,* Stephen H. Washburn,—Tecumseth P. O.; *Limits*—Township of Tecumseth.

Fourth Division Court.—Clerk, Andrew Jardine,—Nottawasaga Mills P. O.; *Bailiffs,* Nathaniel Willing, Nottawasaga Mills P. O., and John Jardine, Hurontario P.O.; *Limits*—The townships of Nottawasaga and Sunnidale.

Fifth Division Court.—Clerk, John Craig,—Flos P. O.; *Bailiff,* John Firth,—Flos P.O.; *Limits*—The townships of Flos, Tiny, Tay, and that portion of the township of Medonte lying westward of the eleventh concession of the same township.

Sixth Division Court.—Clerk, Adam Paterson,—Orillia P.O.; *Bailiff,* Jas. Donaldson,—Orillia P. O.; *Limits*—The townships of Orillia (Northern and Southern Division) and Matchedash; all that portion of the township of Oro lying eastward of the ninth concession of the said township: and all that portion of the township of Medonte lying eastward of the tenth concession of the said township.

Seventh Division Court.—Clerk, John Little—Mulmur P.O.; *Bailiff,* John Lawson,—Mulmur P.O.; *Limits*—The townships of Mulmur and Tossorontio, and that portion of the township of Essa which lies westward of the fifth concession of the said township.

Eighth Division Court—Clerk, George McManus,—Mono Mills P. O.; *Bailiff,* Charles Carson,—Mono Mills P. O.; *Limits*—Townships of Mono and Adjala.

† *Vide* observations *ante* page 196, Vol. I., on the utility and necessity of this Directory.